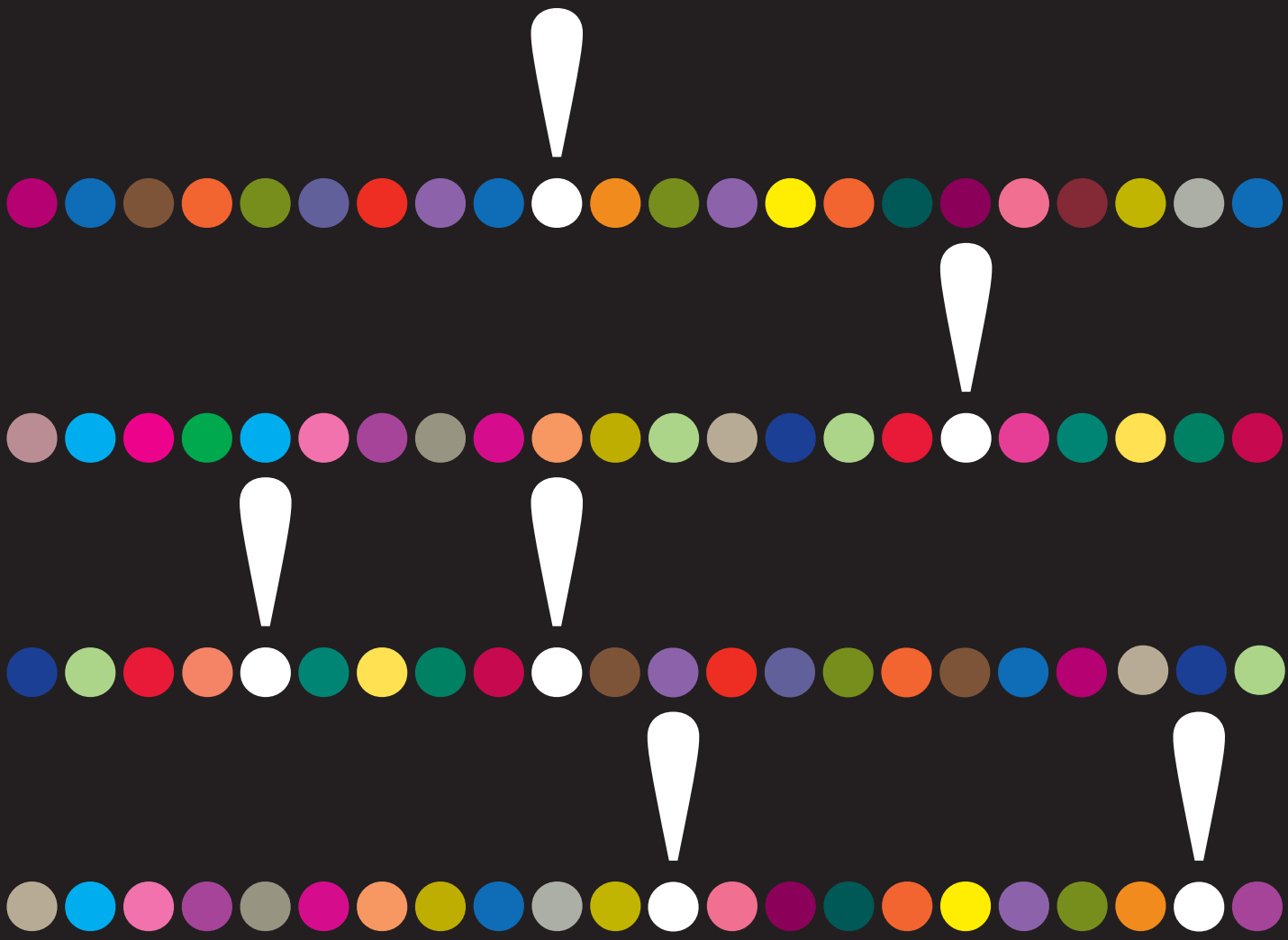
Jury Empanelment

REPORT MAY 2014

Victorian Law Reform Commission



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Preface

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 was 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 was asked in particular to consider its effect on jurors.

This reference has provided an important opportunity to consider the long history of jury empanelment processes, and whether these processes remain relevant in a diverse, modern Victorian society. The core tension informing this review was between the right to trial before a fair, impartial jury, and the undesirability of empanelment processes being used to facilitate stereotyping and unjustified discrimination. The balloting off of additional jurors also squarely raised the issue of juror welfare, and the effect jury processes can have on individuals.

Few comparable reviews have considered these issues so deeply, or obtained the level of community input apparent in this report. I am confident the Commission's recommendations if implemented will enhance Victoria's jury trial system.

I wish to thank the many people who gave their time and expertise to assist the Commission during the reference. I acknowledge the substantial contribution of the judiciary and express my warm appreciation of it. I extend particular thanks to the Juries Commissioner, Paul Dore, and his staff, who provided significant support during the Commission's formal consultations. I warmly thank also members of the advisory committee: Professor Jonathan Clough, Peter Kidd SC, Peter Morrissey SC, Leighton Gwynn, Peta Murphy, Katherine Rynne, Robert Stary and Andrea Tsalamandris.

I would like to thank my fellow Commissioners who comprised the Division which I chaired. They were the Hon. Frank Vincent AO, the Hon. David Jones AM, Saul Holt QC and Bruce Gardner PSM. Their contribution and expertise were invaluable to this review.

Finally, I am grateful for the hard work of the jury empanelment team, led by Dr Nicole Schlesinger, and supported by policy and research officer, Martin Wimpole.

For over two decades as a judge of the Supreme Court of Victoria, I sat with juries. We are very fortunate to have honourable, responsible and committed citizens who participate centrally in the justice system, often in the most demanding circumstances.

I commend the report to you.

The Hon. Philip Cummins
Chair, Victorian Law Reform Commission

May 2014

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*. 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 6 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.
Additional jurors	One or more extra jurors appointed, usually for longer trials, in case a juror has to be discharged due to illness or other unforeseen circumstance.
Associate (to a judge)	A senior assistant to a judge. The associate conducts some of the formal processes of the jury empanelment on behalf of the judge.
Ballot	The random selection of prospective jurors by drawing cards out of a box.
Ballot off a juror	The random selection of a jury member (or members) to leave the jury. The ballot is conducted at the time the jury is required to retire to deliver its verdict, if there are excess jurors at that stage in the trial process.
Calling of the panel	A roll call of the jury panel (either by the juror's name or by juror number) to ensure that all members of the jury panel are present in Court.
Challenge for cause	A challenge made by a party to a prospective juror to exclude them from the jury. A challenge for cause requires the party to provide a reason for the challenge. The judge must determine whether that reason is sufficient to justify the exclusion of that prospective juror.
Crown	A representative of the Victorian or Commonwealth Director 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 and is independent of government. The Victorian Director of Public Prosecutions (DPP (Vic)) is responsible for offences under Victorian law, and the Commonwealth Director of Public Prosecutions (CDPP) is responsible for offences under federal law.
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.
Foreperson	The juror selected by the jury to be their spokesperson.
Indictable offences	Serious crimes which attract higher maximum penalties, usually triable before a judge and a jury.
Judicial direction/jury direction	Instructions provided by the judge to the jury. These directions guide the conduct of jurors and provide instructions on how they should decide the case.
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 guilt or otherwise in criminal matters and findings of fault and damages 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 in court. 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 the JCO 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'.
Procedural fairness	The requirement that legal proceedings are conducted in a manner that is fair. In particular, procedural fairness requires that parties have the opportunity to be heard, and have their disputes determined by an impartial decision maker.
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.
Tipstaff	An assistant to a judge. The tipstaff conducts some of the formal court processes, and looks after the jury during the trial.
Victorian Parliament 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, now the Law Reform, Drugs and Crime Prevention Committee since June 2013.
Voir dire	A process used in jury selection in the United States where individual prospective jurors are questioned by the parties before being selected.

Executive summary

Introduction

This report considers three distinct aspects of the jury system in Victoria:

- the use of peremptory challenges and the Crown right to stand aside jurors in criminal trials
- the identification of jurors by name or number in court
- the additional juror system, in particular the balloting off of excess jurors at the time the jury is required to retire to consider its verdict.

The review covers both criminal and civil jury trials.

A particular focus of the review has been the effect of these processes on jurors.

The jury system and the purpose of jury trials

Jury trials are a central feature of the justice system in Victoria. The principal governing legislation is the *Juries Act 2000* (Vic) (the Juries Act). Jury trials are held for indictable criminal matters and for civil proceedings in certain circumstances.

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
- 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.

Participation in jury service is increasingly being viewed as a right of citizens in a democratic society.

There were 584 Supreme and County Court jury trials in 2012–13 in Melbourne and regional Victoria.

Most Victorians who are on the electoral roll are eligible and liable for jury service. People engaged in certain types of work (broadly justice-related work) are not eligible to serve on juries. In addition, people who have been convicted of specified serious offences are disqualified from jury service for a period of time.

Prospective jurors are selected randomly from the electoral roll to form a jury pool and then randomly allocated to trials using a balloting system to form a jury panel.

The jury of 12 in a criminal trial and six in a civil trial is selected from the jury panel. This process, known as the 'empanelment', is set out in Chapter 2.

Peremptory challenges and the Crown right to stand aside

Once a panel of prospective jurors has been allocated to a trial, peremptory challenges and the Crown right to stand jurors aside in criminal trials (stand asides) are available to the parties as a means of excluding prospective jurors from the jury. No explanation is required for the basis of the challenge.

The stated purpose of these mechanisms is to secure an impartial jury so the accused in criminal trials and plaintiff and defendant in civil trials have a fair trial.

However, peremptory challenges and stand asides are not the only mechanisms available to achieve impartiality. Impartiality is also promoted by a range of jury selection and trial processes and practices, including random selection, the excuse process and judicial directions on impartiality.

The use of peremptory challenges and stand asides

The Crown right to stand aside in criminal trials is infrequently used in Victoria, and the Victorian and Commonwealth Directors of Public Prosecutions have developed strict guidelines limiting the way in which it may be used. Only 76 stand asides were used in Victoria in 2012–13.

In criminal trials, the accused has six peremptory challenges and in civil trials each party has three peremptory challenges. Data from the Juries Commissioner's Office (JCO) for 2012–13 shows that there was an average of five peremptory challenges per criminal trial. Parties routinely use all three of their peremptory challenges in civil jury trials.

The basis of the exercise of peremptory challenges

There are no guidelines around the exercise of peremptory challenges. Criminal defence practitioners and civil law practitioners told the Commission that they advise their clients to exercise their challenges to achieve a number of aims:

- To exclude prospective jurors who appear unable to fulfil their function, because, for example, they cannot hear very well.
- To exclude prospective jurors who demonstrate from their demeanour that they may not be impartial—for example, by glaring at the accused person, or exclaiming in shock when the charges are read out.
- To exclude prospective jurors they assume may not be impartial because of a certain characteristic such as the prospective juror's occupation, age or gender.

The potential for peremptory challenges to impact on representativeness

The Commission considers that, depending on the strategy adopted, the exercise of six peremptory challenges to exclude prospective jurors with certain characteristics has the potential to impact on the representativeness of a jury.

For example, if the defence in a sex offence matter adopts a strategy of using all six of its peremptory challenges to exclude women because it is assumed that women may be sympathetic to a female victim, then the jury is likely to have a much-reduced representation of women. Scenario 1 in Chapter 3 at [3.103] illustrates this point.

The effectiveness of peremptory challenges in achieving an impartial jury

Studies on the link between characteristics and verdict preference do not support the use of characteristics as an effective or reliable indicator of sympathy or bias in jurors. The Commission does not support the use of peremptory challenges to exclude people with certain characteristics on the basis of assumptions about how groups with those characteristics may decide a case.

The Commission, however, accepts that it may be appropriate to use peremptory challenges (or stand asides) to exclude a prospective juror who has displayed behaviour that may indicate bias, who is known to one of the parties or who appears unable to fulfil the task of a juror.

Peremptory challenges and procedural fairness

The Commission accepts that the availability of peremptory challenges in criminal matters provides an accused with some involvement in the trial process and may contribute to a perception that they have been given a fair trial. This perception is independent of the effectiveness of peremptory challenges in actually achieving an impartial jury.

The Commission also accepts that for both criminal and civil trials, peremptory challenges provide an expedient and relatively non-invasive means for excluding jurors who may be perceived to be biased, or are unable or unwilling to serve.

The Commission, however, does not consider that procedural fairness requires a certain number of peremptory challenges to be available to an accused or to parties in a civil trial. Many jurisdictions have fewer peremptory challenges than Victoria and peremptory challenges have been abolished altogether in the United Kingdom.

The Commission has recommended that the number of peremptory challenges available in both criminal and civil trials be reduced, but not abolished.

This recommendation aims to balance the need for an expeditious process for excluding jurors who are not impartial or are unwilling or unable to serve, with the potential for challenges to be used to exclude prospective jurors based solely on their personal characteristics (such as their gender, age, race or occupation), or to skew the representativeness of a jury. Retaining peremptory challenges but reducing the number available also preserves the benefit provided to the accused by allowing them some involvement in the trial.

While the Commission has expressed a view about the desirability of using peremptory challenges for particular purposes, it does not recommend that guidance be provided on the exercise of peremptory challenges. Such guidance would not be practical or enforceable.

The peremptory challenge process

The Commission has also examined the peremptory challenge process used in Victoria. A feature of the challenge process in criminal trials peculiar to Victoria is the practice of requiring prospective jurors to parade past the accused person on their way to the jury box.

It appears that the purpose of this practice is to allow the accused to see the prospective juror so he or she can decide whether to challenge the prospective juror.

While many jurors consulted by the Commission indicated that they understood and supported the right of the accused to peremptorily challenge, many also felt uncomfortable about the parade process.

The Commission considers that the purpose of the parade can be achieved in a manner that is less confronting and intimidating for jurors and has made some recommendations to achieve this.

Identifying prospective jurors in court by name or number

Victoria is the only Australian jurisdiction to provide trial judges with an unfettered discretion about whether to identify prospective jurors in court by name or number. In Queensland and Tasmania, the judge has a discretion to identify prospective jurors by number where there are 'security or other reasons'.

In New South Wales, Western Australia and South Australia, there is no judicial discretion and prospective jurors are identified in court by number only (although in Western Australia and South Australia parties have access to a list containing the name, occupation and address of jurors).

Individual trial judges in Victoria exercise their discretion in different ways. Some judges always empanel using one mode, whereas others will vary the mode depending on the nature of the trial. This means that whether prospective jurors are identified in court by name or number depends on the practice of the individual trial judge.

The lack of consistent practice has led to concerns that the use of numbers in criminal trials may give prospective jurors the impression that the accused is particularly dangerous and therefore protective measures such as juror anonymity are warranted.

Defence practitioners have generally expressed the view that it is preferable to identify prospective jurors by name for this reason. Some defence practitioners and civil law practitioners also argue that name may provide some information on which to base peremptory challenges, particularly where the trial involves ethnic or religious issues.

The Commission does not consider a person's name to be a reliable indicator of their ethnicity or religion. Further, as noted above, the Commission does not support the use of peremptory challenges that rely on characteristic-based assumptions, in this case a prospective juror's ethnicity or religion.

The Commission has weighed the views of judges and practitioners who support the use of name or the continuation of a judicial discretion to use name against the strong preference of jurors and prospective jurors to be identified in court by number only to preserve their security and privacy.

In recommending that prospective jurors be identified by number only, the Commission also notes the benefits of consistency of practice across all jury trials.

Additional jurors

The additional juror system

The Juries Act provides that up to three additional jurors may be empanelled in criminal trials and two additional jurors may be empanelled in civil trials.

The purpose of empanelling additional jurors is to provide a buffer against juror attrition. It is not uncommon for jurors to be discharged during the course of a trial for illness or family reasons. The rate of discharge of jurors increases for long trials.

The Juries Act allows judges to order trials to continue with as few as 10 jurors in criminal trials and as few as five in civil trials. This is not ideal, however, as it may be seen to detract from the legitimacy of verdicts. Consequently, judges are reluctant to use these provisions unless absolutely necessary.

Empanelling additional jurors therefore acts as an additional safeguard against trials being aborted due to excessive juror attrition. Aborted trials are very costly to both the parties and the community.

Where more than 12 jurors in criminal trials and six jurors in civil trials remain at the time that the jury is required to retire to consider its verdict, a ballot is held to reduce the number of jurors to 12 or six.

A total of 56 additional jurors were empanelled in 2012–13. About a third of those were balloted off.

The effect of balloting off on jurors

Information gathered by the Commission indicates that the balloting-off process has a significant and often very negative impact on many balloted-off jurors and the remaining jury.

Many balloted-off jurors are frustrated at not being able to complete their task as jurors and angry that they have spent significant amounts of energy and time as jurors without being able to participate in deliberations and the verdict.

Most of those who remained on the jury after a ballot felt sorry for the balloted-off juror. Some remaining jury members also commented that the ballot impacted negatively on the dynamic of the jury and on deliberations.

Not balloting off

The Commission considers that balloting off should be abolished, effectively allowing an enlarged jury in instances where additional jurors remain when the jury retires to consider its verdict.

This is because of the adverse impact on both balloted-off jurors and the remaining jury. All of the judges consulted by the Commission strongly supported the abolition of balloting off because of its negative effects on individual jurors and the jury as a whole.

There is no information available about how effectively an enlarged jury would operate, as (with the exception of Scotland), no other similar jurisdiction has juries of more than 12 jurors. A concern is that it may be more difficult for larger juries to achieve unanimity—a requirement for Commonwealth offences and some state offences—and therefore for the prosecution to convict in such cases. In such cases, acquittal also requires unanimity.

Studies on the impact of jury size comparing juries of six to juries of 12 suggest that it is likely to be more difficult for larger juries to achieve consensus. However, research on how jurors deliberate and make decisions, and the experience of the courts, also demonstrate that the strength and cogency of evidence is an important factor influencing the ability of juries to achieve unanimity. Therefore, while jury size may be relevant to achieving unanimity, it is not the only factor, and consequently should not outweigh the known negative effect of balloting off on jurors.

Majority verdicts

Majority verdicts may be accepted as a verdict for most Victorian criminal offences and in all civil trials.

If balloting off is abolished, the definition of 'majority verdict' will need to be amended. The Commission considers that the way in which 'majority verdict' is defined is integrally connected to the rationale used for allowing majority verdicts. In Victoria, the rationale used to support the introduction of majority verdicts was to prevent a single 'rogue juror' from derailing an otherwise unanimous verdict. The Commission's recommendation, therefore, is dependent on the applicability of that rationale to a jury of more than 12 jurors (for criminal trials) or more than six jurors (for civil trials). The Commission recommends that a majority verdict should be defined as the agreement of all jurors except one for both criminal and civil trials.

Recommendations

Peremptory challenges and the Crown right to stand aside

Challenge for cause

1 The *Juries Act 2000* (Vic) should specify:

- the grounds on which a challenge for cause can be founded
- the process for conducting a challenge for cause.

Peremptory challenges and stand asides should be retained

2 Peremptory challenges and the Crown right to stand aside should be retained for criminal jury trials.

Peremptory challenges should be retained for civil jury trials.

Reducing the number of challenges available

Criminal trials

3 The number of peremptory challenges available to a single accused in a criminal trial should be reduced from six to three.

4 Where there is more than one accused, each accused should be entitled to exercise two peremptory challenges.

5 The number of stand asides available to the Crown in a criminal trial should be equal to the total number of peremptory challenges available to all the accused persons for that trial.

Civil trials

6 The number of peremptory challenges available to each separately represented party in a civil jury trial should be reduced from three to two.

7 Where there are multiple separately represented plaintiffs or defendants who do not consent to join in their peremptory challenges, adjustments to the number of challenges should be made to ensure that the plaintiff/s have an equal total number of challenges to the total number available to the defendant/s, or as close to an equal number as is possible in the circumstances. To achieve this, where necessary the number of challenges available to the plaintiff/s or defendant/s should be increased to match the number available to their opponents.

The effect of the Crown right to stand aside

8 A prospective juror who is stood aside by the Crown should be permanently removed from the ballot for that trial.

Peremptory challenge process

Criminal trials

9 Prospective jurors should not be required to parade in front of the accused. Judicial officers should ensure that the accused and their legal representatives have the opportunity to see prospective jurors as their names are balloted, and have a reasonable period of time in which to exercise their challenges.

10 Prior to the empanelment, the accused should be given the option as to whether they wish to exercise their challenges personally or through their legal representatives.

Civil trials

11 Judicial officers should direct barristers and solicitors to sit facing the panel so they do not need to turn around each time a prospective juror is balloted.

Calling of the panel by name or number

Name or number

12 Prospective jurors should be identified in court by number only.

Calling of the panel

13 If Recommendation 12 is adopted, the Juries Act should be amended to provide that the panel should always be called in court.

Additional jurors

Balloting off or enlarged jury

14 Section 48 of the *Juries Act 2000* (Vic) should be repealed.

Guidance on the empanelment of additional jurors

15 To regularise the empanelment of additional jurors there should be statutory criteria guiding the discretion to empanel additional jurors. These should include:

- the length of the trial
- the nature of the trial
- any other factor that may impact on juror attrition.

The definition of 'majority verdict'

16 A 'majority verdict' should be defined as the agreement of all jurors except one for both criminal and civil trials.

Introduction

1. Introduction

Referral to the Commission

1.1 In February 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, and
- the process for balloting off additional jurors when the jury retires to consider its verdict.

1.2 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.

1.3 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 page vii.

1.4 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.[1]
- To consider the issue of social media and jury deliberations.[2]

1 The Victorian Parliament Law Reform Committee comprehensively reviewed these issues in 1996 and 1997 and its recommendations were largely adopted by the Victorian government when it enacted the *Juries Act 2000* (Vic). See: 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 Victorian Parliament 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_communiques/2012_communiques.html>.

Other relevant reviews

1.5 There have been a number of reviews of jury selection and empanelment processes in other jurisdictions that have considered the issues in the terms of reference. Jury selection and other aspects of jury service have been reviewed by:

- the Northern Territory Law Reform Committee[3]
- the Queensland Law Reform Commission[4]
- the Law Reform Commission of Western Australia[5]
- the New South Wales Law Reform Commission[6]
- the Law Commission of New Zealand[7]
- the Law Reform Commission of Ireland.[8]

1.6 The Commission has considered these reports in reviewing the issues raised by the terms of reference.

1.7 The Commission has also considered the Victorian Parliament Law Reform Committee's 1996–97 reports on jury service in Victoria where they are relevant to the terms of reference.[9]

Advisory committee

1.8 The Commission established an advisory committee comprising individuals with expertise in matters relevant to this reference. The role of the committee was to provide ongoing advice to the Commission on issues raised by the terms of reference. Members of the advisory committee did not sit as representatives of any entity or organisation. A list of advisory committee members is attached as **Appendix A** to this report.

Preliminary meetings

1.9 The Commission organised a number of preliminary meetings in July and August 2013 with key stakeholders including the Juries Commissioner's Office, legal practitioners, jury researchers and judges to gather information about jury empanelment processes. These meetings assisted the Commission with the preparation of its consultation paper, but did not form part of the Commission's formal consultation process.

Consultation paper

1.10 The Commission released its jury empanelment consultation paper (consultation paper) in October 2013.[10] The consultation paper provided information about the current jury empanelment processes, how they operate and the issues identified with them. The consultation paper also asked a series of questions related to the terms of reference. These questions formed the basis for formal consultations and submissions.

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).
9 See above n 1.
10 Victorian Law Reform Commission, *Jury Empanelment*, Consultation Paper No 18 (2013).

Formal consultation process

1.11 Throughout October and November 2013, the Commission conducted formal face-to-face and telephone consultations with a range of experts and stakeholders, including jurors. A full list of formal consultations is attached as **Appendix B** to this report.

Expert and stakeholder consultations

1.12 The experts and stakeholders the Commission consulted included:

- judges of the Supreme Court of Victoria and County Court of Victoria
- the Victorian Director of Public Prosecutions
- the Melbourne office of the Commonwealth Director of Public Prosecutions
- the Juries Commissioner and Juries Commissioner's Office (JCO) staff
- Victorian regional court administrators
- jury administrators in other Australian jurisdictions and New Zealand
- Law Institute of Victoria members
- a family member of a victim of crime.

Juror consultations

1.13 A particular focus of the Commission's consultation process was obtaining the views and experiences of people who had participated in the jury empanelment process.

1.14 To achieve this, the Commission conducted seven consultations in Shepparton, Geelong, Bendigo and Morwell with 42 people who had recently participated in a jury empanelment. The Commission also observed eight jury empanelments (four in Melbourne and four in regional centres).

VLRC juror survey

1.15 To obtain the views of more individuals who had been involved in jury empanelments in Victoria, the Commission developed an online juror survey using an online survey tool, Survey Monkey. The Victorian Law Reform Commission juror survey (VLRC juror survey) was also available in printed form. See **Appendix H**.

1.16 The survey was aimed at jurors who had attended empanelments—both those who had been selected for a jury and those who had not been selected. The survey specified that jurors must not disclose any information about jury deliberations (as this is an offence under the Juries Act[11]), but rather sought information and views on the processes relevant to the terms of reference.

1.17 The survey was available through a link on the Commission's website between October and mid-November 2013. JCO and court staff in Melbourne and in the regions also distributed paper copies of the survey during that period.

1.18 There were 381 responses to the survey—241 from metropolitan Melbourne and 127 from regional Victoria.[12]

11 *Juries Act 2000* (Vic) s 78(2).
12 Thirteen survey respondents did not identify whether the trial was in Melbourne or regional Victoria.

Phone consultation with additional jurors

1.19 The Juries Commissioner also wrote to jurors who had served on juries within the last six months on which more than 12 (for criminal trials) or six (for civil trials) jurors had been empanelled, alerting them to the Commission's review and inviting them to contact the Commission. As with the survey, the information sent with the letter specified that jurors must not disclose any information about jury deliberations.

1.20 The Commission spoke over the phone to five jurors who responded to this letter.[13] This process assisted the Commission to hear the views of jurors who had been balloted off and those who had remained on juries on which more than the regular number of jurors had been empanelled.

1.21 The Commission is extremely grateful to the Juries Commissioner, Paul Dore, Senior Deputy Juries Commissioner, Melanie McClure and Juries Commissioner's Office and court staff in Melbourne and the regions for their assistance in informing jurors about the review and in distributing the VLRC juror survey. The Commission would not have been able to conduct such extensive consultation with jurors without this help.

Submissions

1.22 The Commission received a total of 18 written submissions, nine from organisations or statutory officers and nine from individuals. Two submissions from individuals were confidential and not referred to in this report, in line with the Commission's submissions policy.[14] The Commission has withheld the names of five jurors who made submissions, pursuant to section 65 of the *Juries Act 2000* (Vic).

1.23 The organisations and statutory officers that made submissions were:

- Victoria Legal Aid
- Victorian Director of Public Prosecutions
- Criminal Bar Association
- Common Law Bar Association
- Juries Commissioner
- Victorian Equal Opportunity and Human Rights Commission
- Liberty Victoria
- Ethnic Communities' Council of Victoria
- Crime Victims Support Association Inc.

1.24 A full list of submissions is attached as **Appendix C** to this report. With the exception of the confidential submissions, the submissions may be viewed on the Commission's website.[15]

1.25 These submissions, together with the Commission's formal consultations, have informed the Commission's final report and its recommendations.

13 Additional jurors are discussed in Chapter 5.
14 <http://www.lawreform.vic.gov.au/about-us/policies/submissions-policy>.
15 Victorian Law Reform Commission, Jury empanelment: received submissions (4 April 2014) <http://www.lawreform.vic.gov.au/projects/jury-empanelment/submissions/jury-empanelment-received-submissions>.

2

Jury trials in Victoria

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.

2.3 Lastly, there is a discussion of the jury selection and empanelment processes and 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, principally:

- safeguarding the rights of the accused by limiting the power of the state
- ensuring justice is administered in line with the community's standards, rather than just those of judges, who may not be considered representative of the broader community[2]
- 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* 5.

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 members of the accused's own community on the jury.[5] However, for the purposes of this report, the Commission adopts the definition used by the Victorian Parliament Law Reform Committee in its 1996–97 review of jury service in Victoria. In that report representativeness was defined as:

> an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc).[6]

2.8 To achieve representativeness, the jury selection and empanelment process uses random selection. However, there are rules and processes 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 processes 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 exercise their functions 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 Rights[8] and Victoria's Charter of Human Rights and Responsibilities[9] both provide 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 prospective jurors who may not be impartial or who are unable to serve,[11] and the various categories of challenge that are available and discussed in Chapter 3.

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 (27 May 2004); 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, a person can be excused if they care for dependants and alternative care is not reasonably available during the proposed period of jury service: *Juries Act 2000* (Vic) s 8(3)(h). More women are likely to apply to be excused under this category than men: see Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2012.* Cat. No. 4430.0 (2013).

8 *International Covenant on Civil and Political Rights*, opened for signature 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).

The availability of jury trials in Australia

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.[12]

2.14 Jury trials are available in the Federal Court for the offences of engaging in cartel conduct,[13] although to date no jury trials for these offences have been held in the Federal Court.[14]

2.15 The *Federal Court of Australia Act 1976* (Cth) also preserves the power of that Court to order civil jury trials.[15] A Federal Court jury trial was ordered for a defamation matter in 2009,[16] but the matter settled before the trial commenced.[17] To date there have been no other civil jury trials ordered by the Federal Court.[18]

2.16 Two criminal jury trials have been conducted by the High Court, although the most recent of these occurred in 1942.[19]

Criminal trials

2.17 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.

2.18 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 the accused has elected to be tried by judge alone without a jury.[20] As noted at [1.4], the Commission was not asked to consider whether juries are desirable, or to consider alternatives to jury trials.

2.19 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. With the exception of the cartel offences noted at [2.14], jury trials for federal offences are heard in state and territory courts. In trials for federal offences in state courts, state procedural laws (including the *Juries Act 2000* (Vic)) will be applied, so long as they are not inconsistent with section 80 of the Constitution or Commonwealth laws.[21] In particular, state laws regarding juries will not be applied if they are inconsistent with the 'essential features' of a trial by jury that are protected by section 80 of the Constitution.[22]

12 The exceptions are South Australia and the Australian Capital Territory. Both these jurisdictions have abolished civil jury trials.
13 *Competition and Consumer Act 2010* (Cth) ss 44ZZRF, 44ZZRG.
14 Consultation 36 (Deputy district registrar, Victoria Registry, Federal Court of Australia).
15 *Federal Court of Australia Act 1976* (Cth) s 40. The law applicable to the empanelment of juries for such trials is the law governing civil jury trials in the state or territory in which the trial is held: s 41.
16 *Ra v Nationwide News* (2009) 182 FCR 148.
17 Justice Steven Rares, 'The Jury in Defamation Trials' (2010) 33 *Australian Bar Review* 93, 95.
18 Consultation 36 (Deputy district registrar, Victoria Registry, Federal Court of Australia).
19 *The King v Porter* (1936) 55 CLR 182; *The King v Brewer* (1942) 66 CLR 535. See further The Hon. Michael Black, 'The Introduction of Juries in the Federal Court of Australia' (2007) 90 *Reform* 14, 15.
20 *Criminal Procedure Act 1986* (NSW) s 132; *Juries Act 1927* (SA) s 7; *Criminal Code 2010* (WA) ss 651A–C; *Supreme Court Act 1933* (ACT) s 68B.
21 *Judiciary Act 1903* (Cth) s 68.
22 See *Cheatle v The Queen* (1993) 177 CLR 541; *Brownlee v The Queen* (2001) 207 CLR 278; *Wu v The Queen* (1999) 199 CLR 99. A summary of these essential features is provided in Justice Kirby's judgment in *Ng v The Queen* (2003) 217 CLR 521, 533.

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic) matters

2.20 Juries are also used in procedures under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA). The CMIA applies where a question is raised about the fitness of a person accused of an indictable criminal offence to stand trial because of disordered or impaired mental processes or where a defence of mental impairment is raised. The CMIA provides for investigation into the unfitness of an accused, and a process to be followed where the accused has been found unfit.

2.21 Under the CMIA, a jury is required:

- to determine the question of unfitness to stand trial in an investigation presided over by a judge[23]
- where there is a special hearing[24]
- where a defence of mental impairment is raised.[25]

Civil trials

2.22 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.[26]

2.23 In Victoria, jury trials are available as of right on application by the plaintiff or defendant in civil proceedings for which a common law remedy is sought.[27] 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.[28]

2.24 However, even where a plaintiff or defendant requests a trial by jury, the court may still order the trial to be by judge alone.[29] Further, the court may order that some questions of fact be determined by a jury and others by judge alone.[30]

2.25 Civil jury trials are held significantly more often in Victoria than in other Australian jurisdictions.[31]

23 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) ss 7(3), 8(2). The Victorian Parliament Law Reform Committee recommended that the requirement for a jury to determine unfitness be amended to allow this determination to be made by the trial judge: Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability* (2013) 228, recommendation 28. This question is currently being considered by the Commission in its review of the CMIA. The terms of reference, consultation and submissions to the CMIA review are available at <http://www.lawreform.vic.gov.au/all-projects/all-current-projects>.

24 A special hearing is a modified trial of a person who has been found unfit to stand trial. It is conducted as closely as possible to a criminal trial (CMIA s 16). Once an accused person is found to be unfit to stand trial, a judge must determine whether the person is likely to become fit to stand trial within 12 months (CMIA s 11(4)). If the judge determines that the person is not likely to become fit within 12 months, or if the person remains unfit after a period of adjournment, a special hearing is conducted before a jury (CMIA ss 12(5), 14(2)) to determine whether the person is not guilty of the offence because of a mental impairment, or committed the offence (CMIA s 17).

25 If the defence is raised in the course of the trial, the jury hearing the trial will decide whether the defence is made out (CMIA s 22(2)). If the defence is raised prior to the trial and is contested, the matter proceeds to trial by jury in the usual way (CMIA s 21(4)(b)). The jury then decides whether the defence of mental impairment is made out or not.

26 LexisNexis, *Halsbury's Laws of Australia* (at 7 March 2013) 325 Practice and Procedure, '6 Trial' [325–8000]. Jury trials for civil matters are not available in South Australia or the Australian Capital Territory.

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

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

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

30 Ibid r 47.04.

31 Supreme Court of Queensland, *Annual Report 2012–13* (2013) 34; District Court of Queensland, *Annual Report 2012–13* (2013) 13; Consultations 24 (Assistant sheriff, manager jury and court administration, NSW); 6 (Jury and security coordinator, Supreme Court, Hobart, Tasmania); 35 (Manager, jury services, Western Australia).

The number of jury trials in Victoria

2.26 Jury trials make up a very small proportion of court cases in Victoria.[32] There were a total of 584 Supreme and County Court jury trials in 2012–13. Of those, 501 were criminal matters and 83 were civil matters. 448 jury trials were held in Melbourne and 136 were held in regional Victoria.[33]

2.27 A total of 6446 jurors were empanelled—4958 in Melbourne and 1488 in the regions.[34]

The law regulating jury trials in Australia

2.28 The jury selection and empanelment process is regulated by state and territory law,[35] although the *Federal Court of Australia Act 1976* (Cth) now provides for jury trials in the Federal Court for the federal cartel offences noted at [2.14].[36]

2.29 While there are many similarities between the laws, there are also some differences. For example, while all Australian jurisdictions allow peremptory challenges, the number of challenges that can be made is not consistent.[37]

The law regulating jury trials in Victoria

2.30 Juries in Victoria are regulated by 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.

2.31 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).

2.32 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 (this does not occur in regional areas where the whole jury pool constitutes the jury panel. See [2.52])
- selection of the jury from the jury panel.

2.33 The Commission's review is primarily[38] concerned with processes that occur as part of the fifth step. The steps are illustrated in **Figure 1** below.

32 The vast majority of criminal court cases are heard summarily in the Magistrates' Courts and most civil matters are determined without a jury.
33 Supreme Court of Victoria, *Annual Report 2012–13* (2013) 63.
34 Ibid.
35 *Juries Act 2000* (Vic); *Jury Act 1977* (NSW); *Jury Act 1995* (Qld); *Juries Act 2003* (Tas); *Juries Act 1927* (SA); *Criminal Procedure Act 2004* (WA) pt 4, div 6; *Juries Act 1957* (WA); *Juries Act 1967* (ACT); *Juries Act 1963* (NT). Investigations and special hearings under the CMIA are regulated by the *Juries Act 2000* (Vic) with some minor modifications: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 11(2), 16.
36 *Federal Court of Australia Act 1976* (Cth) pt III, div 1A, sub-div D.
37 See Chapter 3 and **Appendices D** and **E.**
38 The decision to empanel additional jurors does form part of the empanelment process. The balloting off 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

2.34 Victoria has 14 jury districts, one in Melbourne and a jury district for each circuit town.[39] The jury districts are assigned by the Governor in Council by order published in the *Victoria Government Gazette*.[40]

2.35 The Victorian jury districts are Bairnsdale, Ballarat, Bendigo, Geelong, Hamilton, Horsham, Latrobe Valley, Melbourne, Mildura, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga.[41]

2.36 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 process. This becomes the jury roll for the district until a new jury roll is prepared.[42]

2.37 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.

2.38 Certain categories of people are ineligible for jury service, including lawyers, public servants involved in the administration of the justice system and holders of certain public offices.[43] Others are disqualified from jury service (usually for a limited period of time) as a result of findings of guilt or convictions in relation to certain serious offences, because they are on bail or remand or are undischarged bankrupts.[44] 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.[45]

Determination of liability for jury service

2.39 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.[46] 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.[47]

2.40 Based on the responses to the questionnaire, the JCO makes an assessment of the person's eligibility and qualification to serve on a jury.[48] Information from the jury questionnaire is entered by the JCO into the Jury Information Management System (JIMS) or automatically uploaded from JQOS into JIMS.

2.41 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.[49] The jury list contains the name, address, date of birth and, if known, occupation of the prospective jurors.[50]

2.42 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 a disqualifying offence in Victoria or another jurisdiction.[51] The JCO must then remove any disqualified people from the jury list.[52]

39 *Juries Act 2000* (Vic) s 18(1).
40 Ibid ss 18(2), (3).
41 Victoria, *Victoria Government Gazette*, No G 12, 20 March 2003, 44 and Victoria, *Victoria Government Gazette*, No S 232, 5 September 2006, 1.
42 *Juries Act 2000* (Vic) s 19(4).
43 Ibid sch 2.
44 Ibid sch 1.
45 These issues were last considered in Victoria in 1996 as part of the review of jury service: Victorian Parliament Law Reform Committee, above n 6. The current categories of eligibility and qualification in the Juries Act are based on the recommendations of that review.
46 *Juries Act 2000* (Vic) s 20. It is an offence to fail to complete and return the questionnaire without reasonable excuse: s 67.
47 Supreme Court of Victoria, *Annual Report 2012–13* (2013), 63.
48 *Juries Act 2000* (Vic) s 21.
49 Ibid s 25.
50 Ibid s 25(3).
51 Ibid ss 26(1)–(2). The list of disqualifying offences is at sch 1.
52 Ibid s 26(3).

Summons

2.43 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.[53]

2.44 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.[54] 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

2.45 Prospective jurors are required to report to the JCO on the day listed in the summons. On reporting, the JCO confirms the person's identity. The person then becomes part of the jury pool.

2.46 A jury pool supervisor checks that everyone who has been issued with a summons is present.[55] 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,[56] an address by a jury pool supervisor and a DVD on the jury empanelment process, *We the Jury*.

2.47 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.

2.48 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 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.

2.49 The process then differs depending on whether the trial is being held in Melbourne or a regional area.

2.50 In Melbourne, where multiple trials are held on the same day, a large jury pool is summonsed for a particular day, and various groups of jurors known as a 'jury panel', are selected from the jury pool to be prospective jurors for the different trials.

2.51 To generate the jury panels from the jury pool, a jury pool supervisor randomly selects the required number of ballot cards from the ballot box.[57] 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.[58]

2.52 Jury panels are not used in the regions, as jury trials are rarely held concurrently.[59] Consequently, in the regions, the entire jury pool that attends in response to the summons constitutes the jury panel.

53 Ibid s 27(2)(c).
54 The first opportunity is at the questionnaire stage.
55 Failure to attend for jury service without reasonable excuse is an offence: *Juries Act 2000* (Vic) s 71.
56 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 >.
57 *Juries Act 2000* (Vic) s 30.
58 For discussion on how the size of the panel is determined, see Chapter 3.
59 Although larger regional courts such as Geelong and Morwell have the capacity to conduct multiple higher court jury trials concurrently, juries for these trials are not necessarily empanelled on the same day.

Selection from the jury panel

2.53 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.

2.54 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.[60]

2.55 On direction of the judge, the judge's associate then calls out the name or number of the panel members. The panel members must indicate their attendance by saying 'Present'. Some judges request that panel members indicate whether they wish to be excused at this time by saying 'Excuse' instead of 'Present'. The judge's associate must record the attendance.[61]

2.56 The judge then determines the applications from the people who wish to be excused.[62] Applications to be excused may be made in writing or orally, depending on the process preferred by the judge.[63] A person who is excused must return to the jury pool and may be selected or allocated to a different jury panel.[64] If the person is not excused, they are returned to the jury panel and are liable to be selected for the jury.

Criminal trials

2.57 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.[65]

2.58 Prospective jurors are then selected from the ballot box one at a time. As their name or number and occupation is called out,[66] the prospective juror stands and walks towards the jury box. In Victoria, the practice is almost invariably to require prospective jurors to walk in front of the accused on their way to the jury box.

2.59 The accused may peremptorily challenge six prospective jurors and the prosecution may stand aside six prospective jurors.[67] This is done by calling out 'Challenge' or 'Stand aside' before the prospective juror takes his or her place in the jury box.[68] If a person is peremptorily challenged, they are permanently excluded from the jury. If a person is stood aside, they return to their seat but remain part of the panel.[69] Peremptory challenges and stand asides are discussed in detail in Chapter 3.

2.60 Prospective jurors who are not challenged proceed to the jury box. When the required number of jurors (usually 12) is in the jury box, they are sworn or affirmed as the jury.[70]

60 *Juries Act 2000* (Vic) s 32(1).
61 Ibid s 31(1). This process known as the 'calling of the panel' is discussed in Chapter 4.
62 Ibid ss 32(2), (3).
63 The excuse process is discussed in Chapter 6.
64 *Juries Act 2000* (Vic) s 32(4).
65 *Criminal Procedure Act 2009* (Vic) ss 215(1), 217.
66 *Juries Act 2000* (Vic) s 36.
67 Ibid ss 38, 39. The number of peremptory challenges for each accused decreases where there are multiple accused persons. Similarly, the number of stand asides available to the prosecution is calibrated to take into account multiple accused persons.
68 Ibid ss 38(2), 39(2).
69 Ibid s 38(3).
70 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.

Civil trials

2.61 In civil trials, 12 cards (or more where there are multiple plaintiffs or defendants)[71] are drawn from the ballot box. The names or numbers and occupations of those drawn are called[72] and the prospective jurors stand so that the lawyers for the parties can identify who they are.

2.62 The plaintiff's legal practitioner and then the defendant's legal practitioner each strike three names for each plaintiff or defendant from the list.[73] This is done in writing. The names or numbers of the remaining jurors (usually six)[74] are then called out and, once sworn or affirmed, constitute the jury.

The importance of following the empanelment process

2.63 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.

2.64 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',[75] or if there has been a substantial miscarriage of justice for any other reason.[76]

2.65 While not every procedural irregularity will result in such an outcome (as not all irregularities will result in a substantial miscarriage of justice),[77] courts have held that an appeal must be allowed where the procedural irregularity results in the jury being unlawfully constituted.[78]

2.66 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 has been sworn in.[79]

2.67 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.

71 This is to take into account the increase in the number of peremptory challenges where there are multiple plaintiffs or defendants. See Chapter 3.
72 *Juries Act 2000* (Vic) s 33.
73 If there are multiple plaintiffs or defendants and each is separately represented and do not consent to pooling their challenges: *Juries Act 2000* (Vic) s 35(4)(b). If multiple plaintiffs or defendants are represented by the same legal practitioner or if they consent to join their challenges, each opposing party has a total of three challenges: *Juries Act 2000* (Vic) ss 35(3), 35(4)(a).
74 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.
75 *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. The High Court's decision was applied by the Victorian Court of Appeal in *Andelman v The Queen* [2013] VSCA 25 (25 February 2013) and *Baini v The Queen* [2013] VSCA 157 (27 June 2013).
76 *Criminal Procedure Act 2009* (Vic) s 276(1)(c).
77 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: Transcript of Proceedings, *Caruso v The Queen* [2013] HCA Trans 103 (10 May 2013).
78 *R v Hall* [1971] VR 293, 298–99; *Wilde v The Queen* (1988) 164 CLR 365, 373.
79 This was the case in *R v Panozzo; R v Iaria* (2003) 8 VR 548.

3

Peremptory challenges and the Crown right to stand aside

3. Peremptory challenges and the Crown right to stand aside

Introduction

3.1 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.

3.2 Peremptory challenges result in the immediate, permanent exclusion of the challenged person from selection on that jury.[1] A prospective juror who is stood aside is not permanently excluded from the jury panel, and if selected again, the Crown must challenge that juror for cause if they wish them to be excluded.[2]

3.3 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.

3.4 The Commission's consultation paper asked a number of questions addressing the following broad categories:

- Should peremptory challenges be retained?
- Are there viable alternatives to peremptory challenges?
- If peremptory challenges are retained:
  - Is the number of challenges appropriate?
  - Should there be restrictions on the use of peremptory challenges?
  - Is the process for peremptory challenges appropriate?

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

2 *Juries Act 2000* (Vic) ss 38(3)–(4). Section 38 states that a stood aside juror continues to be a member of the panel and is liable to be selected again. However, the provision does not specify whether the card of a stood aside juror must be immediately returned to the ballot box after they have been stood aside or whether stood aside jurors are only liable to be balloted again if the remainder of the panel has been exhausted. This is in contrast to stand aside provisions in other jurisdictions (*Juries Act 2003* (Tas) s 34(3); *Juries Act 1967* (ACT) s 33; *Federal Court of Australia Act 1976* (Cth) s 23DZA; *Juries Act 1981* (NZ) s 27(1)) and the stand aside provision under the previous *Juries Act 1967* (Vic) s 33 that specify that a stood-aside juror is only liable to be re-selected after the panel is exhausted.

3.5 This chapter describes the current law and practice of peremptory challenges and stand asides in Victoria and other comparable jurisdictions. The chapter then sets out the key issues raised by the terms of reference in relation to peremptory challenges and stand asides. Finally, the Commission's conclusions and recommendations for reform in this area are set out.

The purpose of peremptory challenges and stand asides

Peremptory challenges

3.6 The stated function of peremptory challenges is to provide a safeguard to ensure the jury is impartial and the trial is fair.[3] They provide a way for parties to quickly and expediently remove prospective jurors they know or believe may not be impartial.

3.7 The Commission was informed during consultations that peremptory challenges are used for other related purposes, namely:

- To provide an expedient means of removing prospective jurors who appear to be unable or unwilling[4] to serve—for example, a prospective juror who appears to have a disability which makes them incapable of fulfilling the duties of jury service.[5]
- To allow the accused in a criminal trial to have some say in who tries them, thereby improving their confidence in the process.
- To allow parties to influence the composition of a jury so that it is more likely to be receptive to their case.

3.8 The Commission discusses each of these purposes in more detail later in this chapter.

Stand asides

3.9 The Crown right to stand aside has a different purpose than peremptory challenges in Victoria—namely, to ensure that the trial is fair and is conducted according to law.[6]

3.10 The Victorian Director of Public Prosecutions (DPP (Vic)) has published detailed guidelines on the exercise of the right to stand aside, which limit the circumstances in which it can be exercised.[7] These 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 2000* (Vic) (Juries Act) to avoid the trial being fundamentally flawed in such a way as to cause the trial to miscarry.[8]

3.11 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 prospective juror is obviously hostile to the process, or the prospective juror is otherwise incapable of discharging their duty due to a disability or some other reason.[9] However, the Crown must not be seen to select a jury favourable to the Crown and stand asides should never be based on generic factors such as age, gender, race, physical appearance or occupation.[10]

3 *Johns v The Queen* (1979) 141 CLR 409, 428 (Gibbs J). See also Mark Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) 48.
4 The Commission notes that jury service in Victoria is not voluntary: *Juries Act 2000* (Vic) s 5(1). However, unwillingness to serve is considered by parties to be undesirable as it may indicate the juror is not willing to bring their full commitment to the task.
5 See *Juries Act 2000* (Vic) sch 2, cl 3.
6 See Director's guidelines referred to at [3.10]. However, aside from these guidelines, there is nothing restricting the use of stand asides. See *Katsuno v The Queen* (1999) 199 CLR 40, 58 (Gaudron, Gummow and Callinan JJ).
7 Director of Public Prosecutions, *Director's Policy No 6: Juries* (21 February 2014).
8 Ibid 6.
9 Ibid.
10 Ibid.

3.12 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.[11]

3.13 The Commonwealth Director of Public Prosecutions (CDPP)[12] has published similar guidelines on the use of stand asides, which emphasise that 'it is not the function of the prosecutor to seek to achieve a jury that will favour the prosecution. The primary duty of the prosecutor is to be fair.'[13]

3.14 The guidelines also state:

> If a prosecutor has information concerning a potential juror that suggests he or she may unduly favour the prosecution the prosecutor should either challenge or stand aside the potential juror or make the information available to the defence. There is no corresponding obligation on the defence.[14]

3.15 As with the DPP (Vic) guidelines, the CDPP guidelines state that decisions to challenge must not be based on gender, race, religion or age.[15] Although the practice of jury vetting is prohibited,[16] both the DPP (Vic) guidelines and the CDPP guidelines state that it may be appropriate to stand aside a juror who is known to have a prior conviction, even if that conviction does not disqualify him or her from jury service.[17]

3.16 The CDPP guidelines also state that one of the aims of the prosecutor should be to select a jury that is 'generally representative of the community'.[18] This suggests that there may be a role for the prosecution to stand aside prospective jurors with certain characteristics to 'even up' the representativeness of particular juries in response to a defence strategy or where the ballot does not result in a representative jury. However, the Melbourne office of the CDPP told the Commission that it does not use stand asides in this way.[19]

Current law

The number of challenges available in Victoria

Victorian criminal trials

3.17 In Victorian criminal trials (which usually have 12 jurors),[20] an accused is entitled to peremptorily challenge up to six prospective jurors[21] and the Crown is entitled to stand aside up to six prospective jurors.[22]

11 Ibid.
12 The CDPP prosecutes Commonwealth offences (for example, drug trafficking offences and social security fraud) nationwide. Its guidelines apply to those prosecutions nationally. However, Commonwealth offences are prosecuted according to the criminal procedure rules of the jurisdiction in which the offence was committed: Consultation 14 (Acting deputy director and professional development officer, Commonwealth Director of Public Prosecutions, Melbourne Office).
13 Commonwealth Director of Public Prosecutions, *Guidelines and Directions Manual: Jury Issues* (10 September 2012) 1.
14 Ibid.
15 Ibid.
16 Since the High Court's ruling in *Katsuno v The Queen* (1999) 199 CLR 40, Victorian prosecutors are prohibited from the practice of obtaining a list of the prior convictions of jury panel members, and using this list to inform their stand asides.
17 See Director of Public Prosecutions, above n 7, 8; Commonwealth Director of Public Prosecutions, above n 13, 2. People convicted of certain offences are also disqualified from jury service, usually for a limited period of time. See *Juries Act 2000* (Vic) sch 1.
18 Commonwealth Director of Public Prosecutions, above n 13, 1.
19 Consultation 14 (Acting deputy director and professional development officer, Commonwealth Director of Public Prosecutions, Melbourne Office).
20 *Juries Act 2000* (Vic) s 22(2). Up to three additional jurors may be empanelled in some criminal trials: s 23(a). Additional jurors are discussed in more detail in Chapter 5.
21 Ibid s 39(1)(a).
22 Ibid s 38(1)(a).

3.18 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,[23] and up to four peremptory challenges each where there are three or more accused.[24] Similarly, there are up to 10 stand asides where there are two accused,[25] and four stand asides for each accused where there are three or more accused.[26] Victoria is the only Australian jurisdiction where this kind of reduction occurs.[27]

Victorian civil trials

3.19 In Victorian civil trials (which usually have six jurors),[28] parties are entitled to challenge three prospective jurors.[29] 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.[30] For example, in a trial involving one plaintiff and two defendants (who each have different lawyers), the plaintiff would be able to challenge three prospective jurors, and each defendant would similarly be entitled to challenge three prospective jurors.

3.20 The Commission was advised that proceedings with multiple separately represented defendants are common, while proceedings with separately represented plaintiffs are rare.

Other forms of challenge

3.21 There are two other forms of challenge available to parties during the jury empanelment process: challenge for cause and challenge to the array.

Challenge for cause

3.22 Parties may challenge an unlimited number of individual prospective jurors 'for cause'.[31] This is a different type of challenge that requires the party to provide a reason to the trial judge as to why the prospective juror should not be part of the jury. Challenges for cause are very rare in Victoria. Challenge for cause is discussed in more detail at [3.201]–[3.216].

Challenge to the array

3.23 Parties have a common law right to challenge the entire panel. This is known as a 'challenge to the array'. A challenge to the array requires the party to establish that there has been bias on the part of the Juries Commissioner or the pool supervisor or some other default in respect of the constitution of the panel.[32] This form of challenge is also rare.

23 Ibid s 39(1)(b).
24 Ibid s 39(1)(c).
25 Ibid s 38(1)(b).
26 Ibid s 38(1)(c).
27 See **Appendix D**.
28 *Juries Act 2000* (Vic) s 22(1). One or two additional jurors may be empanelled in some civil trials: s 23(b). Additional jurors are discussed in more detail in Chapter 5.
29 Ibid ss 35(1).
30 Ibid ss 35(3), (4). Separately represented parties have the right to three challenges each, but they may consent to join their challenges.
31 Ibid ss 34, 37.
32 *R v Grant* [1972] VR 423. In this case the defendants argued that the panel should be discharged because it was not representative of the community as it did not contain any labourers (both defendants were labourers) or anyone who was Aboriginal (one of the defendants was Aboriginal). The Court dismissed this application finding that 'unless it is shown that this is a result of some deliberate contriving of the sheriff, it does not appear to me that this constitutes a ground for setting aside the panel' (McInerney J at 425). This approach was affirmed in *R v Badenoch* [2004] VSCA 95 (27 May 2004), [66]–[72] where the Aboriginal defendant unsuccessfully argued that the jury panel should be discharged because it was unrepresentative of the Mildura community (it did not contain anyone who was Aboriginal).

Challenges in other jurisdictions

3.24 Peremptory challenges and stand asides exist in one form or another in all Australian jurisdictions and most other common law jurisdictions for both criminal and civil jury trials.

3.25 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.

3.26 **Appendices D** and **E** set out the number and nature of peremptory challenges and stand asides in each Australian jurisdiction and New Zealand.

3.27 The trend in Victoria and other jurisdictions[33] has been to reduce the number of challenges available over time.[34] At the same time, there has been a countervailing trend to expand the pool of citizens available for jury selection.[35]

3.28 In Victoria, the number of peremptory challenges available in criminal proceedings was reduced from 20 in 1857[36] to 15 in 1876,[37] to eight in 1928,[38] to six in 1993.[39] The reductions to the numbers available where there are multiple accused were also introduced in 1993.[40]

3.29 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 the ground that challenges, particularly where multiple accused are involved, can 'lead to distortions in the representative nature of the jury'.[41]

3.30 Peremptory challenges have been abolished progressively in the United Kingdom over the past 25 years, as they were considered unnecessary and open to abuse. In 1988, England and Wales was the first jurisdiction to abolish peremptory challenges.[42] 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.[43]

33 Most recently in Western Australia, where the number of peremptory challenges available in criminal jury trials was reduced from five to three in 2011: see *Juries Legislation Amendment Act 2011* (WA) s 4. This occurred despite the recommendation of the Law Reform Commission that no change be made: Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors: Final Report*, Report No 99 (2010) 24. An earlier reduction had been made in 2000, when the number of peremptory challenges available was reduced from eight to five: *Jury Amendment Act 2000* (WA) s 9. The number of challenges was also reduced in New Zealand in 2008, where the number was reduced from six to four: *Juries Amendment Act 2008* (NZ) s 17. Again, this occurred despite an earlier report by the Law Commission of New Zealand which recommended that no change be made: Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001) 91. Prior to these reductions, significant reductions were made in New South Wales, where the number of peremptory challenges available was reduced from eight (and 20 in murder trials) to three in 1987: *Jury (Amendment) Act 1987* (NSW) sch 1, cl 5. This followed the recommendations of the New South Wales Law Reform Commission's report into juries in criminal trials: New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48 (1986) 50–51 [4.58].

34 In contrast to criminal proceedings, the number of peremptory challenges in Victorian civil proceedings has remained essentially unchanged since 1857. See *An Act for Regulating Juries* (1857, Vic).

35 The Hon. Michael Kirby, 'Delivering Justice in a Democracy III—The Jury of the Future' (1998) 17 *Australian Bar Review* 113, 118. The *Juries Act 2000* (Vic) is one example of the trend to expand the eligible pool. It adopted the recommendations of the Law Reform Committee's review of service: See Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report: Volume 1* (1996).

36 *An Act for Regulating Juries* (1857, Vic).

37 *Juries Act 1876* (Vic) s 64. Twenty challenges were still available for capital offences.

38 *Juries Act 1928* (Vic) s 68. Twenty challenges were still available for capital offences. Capital punishment was abolished in Victoria in 1975: *Crimes (Capital Offences) Act 1975* (Vic).

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

40 Ibid.

41 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157 (Sidney Plowman). This second rationale is similar to the rationale for the abolition of peremptory challenges in the United Kingdom, referred to at [3.30].

42 *Criminal Justice Act 1988* (UK) c 33, s 118. Prior to 1988, the right of accused to peremptory challenges had eroded over time, reducing from 25 to 12 in 1925, seven in 1949, three in 1977, before abolition in 1988.

43 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: David Riley and Julie Vennard, 'The Use of Peremptory Challenge and Stand By of Jurors and their Relationship to Trial Outcome' [1988] *Criminal Law Review* 731, 736–8.

3.31 A 1993 Royal Commission study found that the reintroduction of peremptory challenges was favoured by 56 per cent of defence barristers in England and Wales, but opposed by 56 per cent of prosecution barristers and 82 per cent of judges.[44] Peremptory challenges were considered again by Lord Justice Auld's review of the criminal courts in England and Wales in 2001. That review found there were 'very few proposals for change as to jury challenge' and, as a result, did not recommend the reintroduction of peremptory challenges.[45]

3.32 Parties in England and Wales can still challenge a prospective juror for cause,[46] and the Crown has retained its right to stand aside prospective jurors.[47]

3.33 Scotland abolished peremptory challenges in 1995.[48] However, a prospective juror may be removed without cause with the consent of both parties in Scotland.[49]

3.34 Northern Ireland abolished peremptory challenges in 2007[50] as part of a series of broader reforms replacing the use of non-jury Diplock courts.[51]

The information available to the parties

3.35 Parties use the information they have about a prospective juror to inform decisions about whether or not they should be challenged.

3.36 In Victoria, very limited information about prospective jurors is available. For both criminal and civil trials in Victoria, this information is limited to the prospective juror's:

- name (if the judge chooses to identify the prospective jurors by name rather than number—see Chapter 4)
- current occupation[52]
- physical appearance and demeanour.[53]

3.37 From a prospective juror's physical appearance, their gender and age-range are usually apparent, and certain assumptions might also be made about their ethnicity and socio-economic status.

3.38 There are differences in the type of information available to parties in other Australian jurisdictions and the time at which the information is available. These are set out in **Appendix F**. In some jurisdictions the address[54] or suburb[55] is available to the parties and in all jurisdictions except Victoria and New South Wales, parties are able to view a list of prospective jurors with this information prior to or at the time of empanelment. In New South Wales, jurors are identified by number only[56] and parties have nothing more than physical appearance on which to base challenges.

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44 United Kingdom, Royal Commission on Criminal Justice, *Crown Court Study* (1993) 174–5.
45 Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 163.
46 *Juries Act 1974* (UK) c 23, s 12.
47 This is known as the Crown right of 'stand by' in England and Wales. Guidelines published by the Attorney General at the time peremptory challenges were abolished restrict the Crown right of stand by. See Attorney General's Office, *Jury vetting: right of stand by guidelines* (30 November 2012) <https://www.gov.uk/jury-vetting-right-of-stand-by-guidelines--2#guidelines>.
48 *Criminal Justice (Scotland) Act 1995* (Scot) c 20, s 8. In abolishing peremptory challenges the Scottish Home Office expressed the view that '[t]he Government's view is that [peremptory challenges] are unnecessary and, being open to abuse, should be abolished.' See The Scottish Office Home and Health Department, *Firm and Fair: Improving the Delivery of Justice in Scotland* (1994) 17.
49 *Criminal Procedure (Scotland) Act 1975* (Scot) c 21, s 130(3A). See further [3.226].
50 *Justice and Security (Northern Ireland) Act 2007* (NI) c 6, s 13.
51 The background to these reforms was a consultation paper prepared by the Northern Ireland Office: Northern Ireland Office, *Replacement Arrangements for the Diplock Court System: A consultation paper* (2006). In proposing the removal of peremptory challenges, the consultation paper stated (at 7): 'Although it is difficult to obtain specific evidence in this regard, it is widely perceived that the polarised nature of society within Northern Ireland is such that some jurors may be unduly influenced by their political and religious backgrounds in reaching a verdict. In this context, it is considered that abolition of peremptory challenge should limit the defendant's ability to 'pack a jury' and thereby reduce the risk of perverse verdicts.'
52 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 in accordance with 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 by the trial judge what they are studying. In the rare event that two prospective jurors share the same name and occupation, their dates of birth are read out to distinguish between them: *Juries Act 2000* (Vic) s 31(2).
53 This is evident from the process for empanelment in both criminal and civil trials. See [3.40]–[3.51].
54 Consultations 35 (Manager, jury services, Western Australia); 6 (Jury and security coordinator, Supreme Court, Hobart, Tasmania).
55 *Jury Act 1995* (Qld) s 29(2); Supreme Court of South Australia, *Criminal Practice Directions 2007*, 1 December 2013, [7.1].
56 *Jury Act 1977* (NSW) s 29(4).

3.39 A very different approach is taken in the United States, where lawyers ask questions about the prospective juror, either by submitting questions to the court for the judge to ask, or questioning the prospective juror directly.[57] This process is known as a 'voir dire'. The aim of the questions is usually to determine the biases, prejudices and views of prospective jurors. For example, in a case involving possession or sale of illegal drugs, prospective jurors might be questioned about whether they have strong personal views or experiences that relate to the charges.[58] The answers to these questions then inform lawyers' decisions in exercising their party's peremptory challenges.

The peremptory challenge and stand aside process

3.40 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.

Criminal trials in Victoria

3.41 Following the calling of the panel, the arraignment, introductory remarks from the trial judge and the hearing of excuses, the associate to the trial judge draws a card with the name or number and occupation of the prospective juror from the ballot box.[59] The name or number[60] and occupation of the prospective juror is called out.[61]

3.42 The prospective juror must then stand and walk in front of the accused and then towards the jury box. Depending on the architecture of the courtroom, this may involve the prospective juror taking a circuitous route to the jury box. This process is commonly referred to as the 'parade'.

3.43 Although the parade is standard practice in Victoria, it is not specifically provided for in the Juries Act, and is not the practice in any other Australian jurisdiction. The Commission is aware of at least one Victorian judge who does not require prospective jurors to parade in front of the accused in this way. This judge instead requires the prospective juror to simply turn and face the accused if balloted.

3.44 If the accused (usually assisted by a lawyer)[62] says 'Challenge' or the Crown says 'Stand aside' before the prospective juror sits down in the jury box,[63] the prospective juror must resume his or her seat with the rest of the panel in the body of the court. In Victoria, challenges must be voiced by the accused unless there is a 'very good reason' to depart from this 'usual practice'.[64]

3.45 If challenged, the prospective juror cannot be recalled for that trial and his or her ballot card is set aside.[65]

3.46 If stood aside, the prospective juror remains part of the jury panel.[66] If the stood aside juror is selected again, and the Crown wishes to exclude the person from the jury, they must challenge for cause.[67]

3.47 The jury is selected once all the jurors are seated in the jury box.[68]

57 Matthew Lippman, *Criminal Procedure* (SAGE, 2010) 555.
58 Consultation 34 (US jury researchers).
59 *Juries Act 2000* (Vic) ss 31, 32, 36.
60 Calling of the panel by name or number is discussed in Chapter 4.
61 *Juries Act 2000* (Vic) s 36(1). In the rare event that two balloted jurors share a name and occupation, their date of birth is read out.
62 The court must permit a legal practitioner to assist the accused on application by them: *Juries Act 2000* (Vic) s 39(3).
63 Ibid s 39(2).
64 *R v Sonnet* (2010) 30 VR 519, 549 [106]. An exception this rule is where a 'special hearing' is being conducted under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) following a finding that the accused is not fit to stand trial. The accused's legal representative may exercise the accused's right to challenge jurors in such cases: s 16(2)(b).
65 The juror does, however, return to the jury pool, and may be empanelled for a different trial: *Juries Regulations 2011* (Vic) reg 9(1).
66 Above n 2.
67 *Juries Act 2000* (Vic) s 38(4). The historical development of the stand aside process was discussed in *R v Katsuno* (1998) 4 VR 414, 425–6. 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 without having to show cause. That interpretation led to the modern notion of the Crown having a right to stand aside jurors without showing cause. See also: John F McEldowney, '"Stand By For The Crown": An Historical Analysis' [1979] *Criminal Law Review* 272.
68 *Juries Act 2000* (Vic) s 36(2).

Civil trials in Victoria

3.48 Following the calling of the panel, introductory remarks from the trial judge and the hearing of excuses, the associate to the trial judge draws the cards for prospective jurors from the ballot box.[69] In a typical civil proceeding with six jurors, one plaintiff and one defendant, 12 names or numbers are drawn to allow for three challenges for each party. If there are more than two separately represented parties, three additional names or numbers for each additional party will be drawn to allow all separately represented parties to exercise their three challenges.[70]

3.49 The associate calls out the name or number and occupation of each prospective juror selected.[71] 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. The barristers, who sit facing the judge, usually turn to look at each prospective juror as they stand.

3.50 A list of the prospective jurors is then provided to the parties. First the plaintiff's lawyers and then the defendant's lawyers strike three names from the list, leaving six jurors (or more if additional jurors are empanelled). This is done in writing. Unlike criminal trials, where the accused voices the challenge, the parties themselves are usually not directly involved in the challenge process.

3.51 The names or numbers of the six jurors who remain on the list are then called. Those jurors proceed to the jury box and are the jury for the trial.[72]

Processes in other jurisdictions

3.52 Other jurisdictions in Australia and New Zealand do not require prospective jurors to parade in front of the accused in criminal trials.[73] In these jurisdictions, balloted jurors simply walk directly towards the jury box, without necessarily passing in front of the accused.

3.53 The requirement in Victoria that the accused 'voice' the challenges is also not present in other comparable jurisdictions. In these jurisdictions, lawyers representing the parties generally voice challenges unless the accused is self-represented.

3.54 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 (New South Wales and Tasmania)
- striking out names from a jury list prior to the issuing of a summons (Western Australian civil trials).

69 Ibid ss 31–33.
70 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).
71 *Juries Act 2000* (Vic) s 33(1)(a). In the rare event that two balloted jurors share a name and occupation, their date of birth is read out.
72 Ibid s 33(2).
73 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.

Challenging out of the jury box

3.55 In New South Wales, for both criminal and civil trials, a full jury is balloted and seated in the jury box before any challenges are exercised. Once in the jury box, the prospective jurors' numbers are called a second time and they are required to stand. At this point, the parties have the opportunity to challenge the prospective jurors. Challenged jurors then exit the jury box.[74] Once all the jurors have been called, further prospective jurors are balloted to take the place of the challenged jurors. If parties have any challenges remaining, the new prospective jurors' numbers are called and the parties have the opportunity to challenge those new prospective jurors. The process continues until all challenges are exhausted, or the parties do not wish to exercise any more challenges.[75] A similar process is used in Tasmania.[76]

Striking prospective jurors from a jury list, prior to issuing of the summons

3.56 For civil jury trials in Western Australia, prior to the issuing of summonses, each party may strike out up to six names from a randomly generated list of 32 names.[77] Six names are then drawn at random from the remaining 20 and those six individuals are summonsed as jurors for the trial.[78]

3.57 Although these laws are still in force, there has not been a civil jury trial in Western Australia since 1995.[79]

Other notable differences in practice

3.58 The Commission's survey of in-court empanelment processes across Australia and New Zealand has revealed a number of other notable differences between jurisdictions:

- There is no calling of the panel in other Australian jurisdictions and New Zealand.[80]
- The jury panel sits outside the courtroom in the Tasmanian Supreme Court in Hobart, and prospective jurors only enter the courtroom if their name or number is called over a public address system.[81]
- In New Zealand, only prospective jurors who are balloted might seek to be excused. There is no excuse process prior to the ballot.[82]
- In South Australia, prospective jurors are inducted and sworn in for a month at the beginning of their service. They are not sworn in again for each trial in which they participate.[83]

3.59 It is evident that the requirements and practices of jury empanelment vary widely across Australia and New Zealand. Later in this chapter, the Commission considers the Victorian process, and whether there is a need to change any aspects of this process.[84]

74 Challenges must be made after the juror is called to be sworn and before they are sworn: *Jury Act 1977* (NSW) s 45(1).
75 Consultation 24 (Assistant sheriff, manager jury and court administration, NSW).
76 *Juries Act 2003* (Tas) ss 29(8), (9). Consultation 6 (Jury and security coordinator, Supreme Court, Hobart, Tasmania).
77 *Juries Act 1957* (WA) ss 29(2B), 29(2D), 29(2E).
78 Ibid s 29(2G).
79 Consultation 35 (Manager, jury services, Western Australia).
80 The calling of the panel is discussed in more detail in Chapter 4.
81 Consultation 6 (Jury and security coordinator, Supreme Court, Hobart, Tasmania).
82 Consultation 11 (Court registry officer, Wellington High Court, New Zealand).
83 Consultation 17 (Acting jury manager, South Australia). See also *Juries Act 1927* (SA) s 33, sch 6.
84 See [3.261]–[3.269]; [3.287]–[3.299].

The use of peremptory challenges and stand asides

Peremptory challenges

3.60 An average of five prospective jurors were challenged per criminal trial in 2012–13. Figures for 2011–12 were similar: 5.2 prospective jurors were challenged per criminal trial in that year.

3.61 Although statistics are not available for the use of challenges in civil trials, each party in a civil matter routinely exercises all of their three challenges as a result of the way in which the challenge process works in civil trials.[85]

3.62 Criminal defence practitioners advised that their primary purpose in exercising peremptory challenges is to remove individuals who they or their client considers may undermine their client's prospects of a fair trial.[86]

3.63 This includes prospective jurors who:

- should have sought to excuse themselves from the panel, for example, because they know the accused or another party,[87] or who appear to have a sensory or other disability that would impede their ability to listen, view or process the evidence in the trial[88]
- 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, because of assumptions based on characteristics known to the defence such as name, occupation, gender, age and ethnic background.[89]

3.64 Civil law practitioners consulted by the Commission shared some of the same concerns as criminal practitioners, but noted that their primary focus in challenging is usually to ensure the jury will be receptive to their client's case. For example, in a workplace injury matter, business or human resource managers might be seen as less sympathetic to the plaintiff, while prospective jurors with an obvious trade union affiliation might be seen by a defendant employer to be hostile to their case.

Crown right to stand aside

3.65 Stand asides are used far less frequently in criminal trials than peremptory challenges. The JCO advised that in 2012–13 only 76 stand asides were made, compared with 2405 challenges.

3.66 As outlined at [3.9]–[3.16] above, the policy of both the Victorian and Commonwealth Directors of Public Prosecutions is to only use stand asides to ensure the jury is impartial, balanced and complies with the requirements of the Juries Act. The strategic use of stand asides to achieve a jury that is more receptive to the prosecution case is prohibited, as is the use of stand asides based on the age, gender or race of the prospective juror. These prosecution policies go a long way to explaining the significant disparity between the use of peremptory challenges and stand asides.

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85 See [3.50].

86 See, eg, Submissions 10 (Victoria Legal Aid); 16 (Criminal Bar Association).

87 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.

88 People with a physical disability 'that renders the person incapable of performing the duties of jury service' are ineligible to serve as jurors; see *Juries Act 2000* (Vic) 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). This 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.

89 These last three characteristics may be known from the person's appearance.

3.67 Some defence practitioners consulted felt that prosecutors were often too sparing in their exercise of stand asides. Both defence practitioners and prosecutors explained that informal agreements are sometimes made for the prosecution to stand aside a prospective juror who is known to the defence, or a prospective juror who clearly shows they do not wish to be on the jury. This is done so the accused does not have to 'waste' a peremptory challenge for this purpose. However, there appears to be no consistent practice, and the discretion to make such agreements rests with the individual prosecutor.

3.68 Statistics from other Australian jurisdictions were not readily available, but anecdotal evidence from jury administrators in other states suggests that the Crown exercises its challenges more sparingly in Victoria than in some other Australian jurisdictions.[90]

3.69 One explanation for this could be more flexible prosecution policies in other states. For example, the Queensland Director of Public Prosecutions guidelines simply state that:

> Selection of a jury is within the general discretion of the prosecutor. However, no attempt should be made to select a jury that is unrepresentative as to race, age, sex, economic or social background.[91]

3.70 There may also be state-specific cultural practices among prosecutors that influence the use of challenges.

Resourcing implications

3.71 The cost of peremptory challenges, particularly when compared to the overall cost of jury trials, is not significant.

3.72 The most significant resourcing implication arising from peremptory challenges and stand asides is the increase in the jury panel size they necessitate. The most significant portion of this cost is borne by Victorian employers, rather than the Victorian government.

3.73 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.

3.74 Standard panel sizes for 12-person juries[92] are as follows:

- 20–25 persons in civil panels[93]
- 30–33 persons in criminal panels.[94]

3.75 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)[95] should not be attributed to peremptory challenges and stand asides, but rather to the likely number of applications for excuse.

90 Consultations 10 (Deputy sheriff, Queensland); 6 (Jury and security coordinator, Supreme Court, Hobart, Tasmania); 24 (Assistant sheriff, manager jury and court administration, NSW).
91 Office of the Director of Public Prosecutions (Queensland), *Director's Guidelines* (April 2013) 45.
92 Additional jurors are often empanelled for longer trials. This is discussed in Chapter 5.
93 The average size of a civil panel is 29. This figure accounts for larger panels required for longer and complex trials.
94 The average size of a criminal panel is 39. This figure accounts for larger panels required for longer or complex trials.
95 Legal practitioners consulted by the Commission said that while knowledge of a party or a witness is 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.

3.76 The panel size in turn determines the pool size required. Peremptory challenges add to the cost of the empanelment process by 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.[96]

3.77 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 for the first day is approximately $46 per person. This comprises the $40 jury service fee paid to the pool member, and approximately $6 in administrative costs to the JCO.

3.78 In most cases, this $46 cost to government is likely to be significantly less than the cost incurred by a prospective juror's employer through the requirement that they pay the balance of their staff member's salary,[97] and lose their productivity for at least one day.

3.79 The peremptory challenge process also lengthens the time needed for empanelment, which adds to cost. However, in most cases this is a matter of minutes, and is insignificant compared with the time taken for excuses and the judge's initial address to the panel.

3.80 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*,[98] which involved 12 people accused of terrorist offences, required over 1000 prospective jurors to attend over two days, in part to deal with the combined total of 96 peremptory challenges and stand asides available to the parties.[99] However, empanelments of this scale are rare.

The representativeness of the jury

3.81 In this section, the Commission considers the impact of peremptory challenges on the representativeness of the jury. The impact of stand asides is not considered, as they are so infrequently used.[100]

3.82 The section first discusses the concept and importance of representativeness and how representativeness is achieved in the jury system. The actual and potential effect of peremptory challenges on representativeness is then examined. Lastly, the section considers the basis of challenges, including the views of prospective jurors on why they had been challenged.

What is jury representativeness?

3.83 The notion of 'trial by one's peers' is fundamental to the development of the jury system. Historically, jurors were drawn from a very narrow band of society, specifically male property owners.[101] However, in modern jury trials the notion of 'representativeness' of the community has become the guiding principle. This was reflected in the second reading for the Juries Act, where the Attorney-General stated that:

> A jury must be representative of the community if a person is to be tried by his or her peers.[102]

96 *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).
97 *Juries Act 2000* (Vic) s 52(2).
98 (2009) 222 FLR 433.
99 In practice, the accused exercised 44 out of a possible 48 peremptory challenges, and the Crown exercised one stand aside: Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34 *Criminal Law Journal* 167, 167.
100 See [3.65].
101 Colin Davies and Christopher Edwards, '"A Jury of Peers": A Comparative Analysis' (2004) 68 *Journal of Criminal Law* 150, 152.
102 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 December 1999, 1246 (Rob Hulls, Attorney-General)

3.84 As the Victorian Parliament Law Reform Committee acknowledged in its 1996 report, it would be 'logically and administratively impossible' to ensure that individual juries are representative of the whole community.[103] The Commission endorses the Committee's view that jury representativeness might best be understood as meaning 'an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc)'.[104]

The importance of representativeness

3.85 Together with impartiality, representativeness of the community is one of the key goals and benefits of jury trials. The importance of representativeness is reflected in the purposes of the Juries Act, one of which is to '[make] juries more representative of the community'.[105]

3.86 The representative nature of juries contributes to the legitimacy of their decisions, and lends credibility to the justice system as whole.[106] As Mark Findlay notes:

> An essential consideration regarding the link between juries and justice legitimacy is community participation … it is better for democratic governance that jurors sit in the courtroom, rather than it remain the exclusive domain of legal professionals.[107]

3.87 Further, representativeness contributes to impartiality by bringing a diversity of views to the examination of the issues in the case. This diversity is said to balance individual biases.[108]

3.88 A related benefit of representativeness is civic participation. Studies have shown that a positive experience of jury duty enhances citizens' faith, not only in the criminal justice system, but also in government more broadly. The studies also suggest that the benefits of participation may go beyond the individual to family and friends.[109]

How representativeness is achieved

3.89 The main way that the jury system seeks to achieve representativeness is by random selection.[110] Prospective jurors are selected randomly from the electoral roll, and balloted randomly from the jury pool and jury panel.

3.90 However, a number of the jury selection rules and processes prior to empanelment reduce the representativeness of the jury pool compared with society in general by interfering with the random nature of the selection.[111] For example:

- Not all Victorian citizens are on the electoral roll,[112] and certain groups may be under-represented.[113] Those who are not on the electoral roll, or who are of no fixed address, will not receive a questionnaire.
- Certain groups such as lawyers and people with certain disabilities are ineligible to serve on juries,[114] while others are disqualified from jury service (usually for a limited period of time) as a result of being convicted of serious offences.[115]

103 Victorian Parliament Law Reform Committee, above n 35, 20.
104 Ibid 7.
105 *Juries Act 2000* (Vic) s 1(b).
106 Horan and Goodman-Delahunty, above n 99, 173.
107 Mark Findlay, 'Juries Reborn' (2007) 90 *Reform* 9, 10.
108 Findlay, above n 3, 7.
109 Horan and Goodman-Delahunty, above n 99, 182.
110 *Juries Act 2000* (Vic) s 4.
111 See Chapter 2.
112 According to statistics published by the Victorian Electoral Commission, at 30 June 2013 there were 3,662,927 Victorians enrolled to vote, representing 92.78% of the eligible population: Victorian Electoral Commission, *Annual Report 2012–13* (2013). Australian citizens are required to be on the electoral role: *Commonwealth Electoral Act 1918* (Cth) s 101(4).
113 Victorian Electoral Commission studies have indicated that Aboriginal Victorian and Victorians from certain culturally and linguistically diverse communities face barriers to enrolment not experienced by the general population. See Victorian Electoral Commission, *Aboriginal Research Report* (2012); Victorian Electoral Commission, *Barriers to enrolment and voting, and electronic voting, among Arabic-speaking and Turkish communities* (2012); Victorian Electoral Commission, *Barriers to Enrolment within the Chinese and Vietnamese Communities* (2009).
114 *Juries Act 2000* (Vic) sch 2.
115 Ibid sch 1.

- Some individuals seek an exemption from jury service as a result of personal circumstances such as advanced age, ill health, residing far from the nearest court, financial hardship caused by jury service,[116] being a primary carer or student during working hours.[117]
- For longer trials, the Juries Commissioner may also excuse people who are unavailable to sit on a trial due to the likely length of the trial.[118]

3.91 These processes operate to filter the random sample of the population so that the jury pool that attends for jury service is already less than representative of the Victorian community.

The effect of peremptory challenges on representativeness

3.92 Some practitioners and organisations argued that the number of peremptory challenges and stand asides available is not sufficient to substantially impact on the representativeness of juries.

3.93 For example, in defending the current number of peremptory challenges, Victoria Legal Aid argued that:

> the availability of six peremptory challenges does not substantially alter the representativeness of the jury or undermine the randomised selection process.[119]

3.94 This view was also expressed by a number of practitioners the Commission consulted.

3.95 However, the Commission considers that the six peremptory challenges currently available to the accused in Victoria can and do impact on representativeness. This is illustrated by the data on the average gender composition of juries set out below.

3.96 The Commission further illustrates the potential for peremptory challenges to impact on gender representativeness in individual cases through two scenarios. These demonstrate the potential for six peremptory challenges and three peremptory challenges respectively, to alter the gender composition of a jury in a criminal trial.

The composition of Victorian juries

3.97 Empirical studies suggest that Victorian juries are roughly representative of the Victorian community in relation to age and occupation.[120] However, these studies and JCO data also show that women are under-represented on Victorian criminal juries.[121] This under-representation can be directly attributed to peremptory challenges, and is not replicated in civil juries.

3.98 Women make up an average of 52 per cent of jury panels following excuses. This means they should be represented at a rate of 6.24 women to 5.76 men on a jury of 12.

3.99 However, JCO data shows that women make up on average only 44 per cent of jurors on criminal trials, or 5.28 women on a jury of 12.

3.100 The JCO data also shows that the rate of challenges to women at criminal trial empanelments is double that of challenges to men. For every man challenged, two women are challenged. This pattern was consistent over 2011–12 and 2012–13.

116 In particular those who are self-employed, independent contractors, casual workers, or work in a small business. See Jury Questionnaire, Part E.
117 *Juries Act 2000* (Vic) s 8(3)
118 Ibid s 29(4B).
119 Submission 10 (Victoria Legal Aid).
120 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 42–3.
121 Ibid.

The potential impact of peremptory challenges

3.101 The above data on the gender composition of juries shows that on average across Victoria, women are under-represented on criminal trial juries. However, it is possible that the under-representation of women could be more exaggerated in individual trials.

3.102 Scenario 1 shows the potential for six peremptory challenges targeted to exclude women to alter the gender composition of the jury. Scenario 2 shows the potential for three peremptory challenges targeted to exclude women to alter the gender composition of the jury.

3.103 Both scenarios assume that the panel is 52 per cent women and 48 per cent men (which is the average panel composition)[122] and that the Crown does not exercise any stand asides (which is the usual practice).[123]

Scenario 1: Using six peremptory challenges to exclude women

The defence strategy is to use all of its six peremptory challenges to challenge women who are balloted from the panel for the jury.

Eighteen people are selected from the panel (to take into account six challenges for a jury of 12). Of these, 9.36 will be women and 8.64 will be men.

As a result of exercising all of the peremptory challenges to exclude women, the jury will be comprised of 3.36 women (9.36 women minus six women) and 8.64 men, or 28 per cent women and 72 per cent men.

Scenario 2: Using three peremptory challenges to exclude women

In this scenario, the accused has only three peremptory challenges. As in Scenario 1, the defence strategy is to use all of the peremptory challenges to challenge women who are balloted from the panel for the jury.

Fifteen people are selected from the panel (to take into account three challenges for a jury of 12). Of these 7.8 will be women and 7.2 will be men.

As a result of exercising all of the peremptory challenges to exclude women, the jury will be comprised of 4.8 women (7.8 women minus three women) and 7.2 men, or 40 per cent women and 60 per cent men.

3.104 These scenarios demonstrate that using six available peremptory challenges to exclude women can significantly skew the gender composition of a jury in any particular case, whereas using three available peremptory challenges to exclude women has a less significant impact.

The use of peremptory challenges to balance the composition of the jury

3.105 Some criminal law practitioners argued that peremptory challenges may be used to balance the representation on the jury where an over-representation of prospective jurors with certain characteristics are balloted from the panel.[124]

3.106 The Commission observed an empanelment where, of the 17 prospective jurors drawn from the ballot for the jury, 13 were women and only four were men. Despite the accused using five challenges, all of which were to women,[125] eight of the final 12 jurors selected were women. However, the Commission also observed criminal jury empanelments with the opposite outcome—where women were challenged disproportionately, and the final jury was composed largely of men.

122 See [3.98].
123 See [3.65].
124 Submission 15 (Liberty Victoria). Consultation 32 (Law Institute of Victoria members, Melbourne, Victoria).
125 The Commission does not suggest that the strategy was to target women in this case. It is possible that the peremptory challenges could have been exercised on another basis.

3.107 The Commission acknowledges that peremptory challenges can be, and probably are, used to balance the composition of the jury in some instances. However, this does not negate the potential for peremptory challenges to significantly skew representation of groups with certain characteristics if used in the way described in the scenarios.

The basis of challenges

3.108 The Commission asked defence practitioners and civil law practitioners what they based their peremptory challenges on. The Commission also asked prospective jurors what they thought the basis of the challenge to them was. Some submissions from jurors and prospective jurors also stated their views on the basis of challenges they had observed.[126]

3.109 Defence practitioners and civil law practitioners told the Commission that they mainly used occupation as a basis for the exercise of peremptory challenges. This accorded with the views of jurors and prospective jurors expressed in consultations and through the juror survey (see **Table 1** at [3.116]).

3.110 In addition, the Common Law Bar Association submitted that more accurate information should be required about prospective jurors' occupation to enable challenges to be used more effectively:

> Prospective jurors should be required to provide meaningful descriptions of their occupation or former occupation. Generic descriptions such as 'public servant', 'academic' or 'retired' should be avoided as they do not assist the parties to make an informed decision with respect to a peremptory challenge.[127]

3.111 A submission by a personal injury lawyer also expressed concern that 'the occupation is sometimes so generic as to be virtually meaningless'.[128]

3.112 Defence practitioners consulted by the Commission stated that teachers and nurses were routinely challenged.

3.113 Other examples of common stereotypes influencing the use of peremptory challenges in criminal trials are:

- Young women, counsellors, social workers and nurses may be more sympathetic to victims in sexual offence cases.
- White-collar professionals may be less sympathetic to the accused in an assault or affray case than tradespeople.
- Professionals with relevant expertise may disregard expert evidence in certain cases—for example, an accountant in a complex fraud case, or a doctor in a case where medical evidence is at issue.

3.114 Examples of common stereotypes influencing the use of peremptory challenges in civil trials are:

- Human resource professionals and managers are less likely to be sympathetic to the plaintiff in a work injury matter.
- Doctors may be sympathetic to a defendant doctor in a medical negligence matter.
- Those in lower-paid professions may make lower compensation awards than those in higher-paid professions.

126 Submissions 1 (Name withheld pursuant to the Juries Act); 3 (Name withheld pursuant to the Juries Act).
127 Submission 17 (Common Law Bar Association).
128 Submission 18 (Peter Burt).

3.115 In responses to the VLRC juror survey, roughly half of the jurors who had been peremptorily challenged in criminal and civil trials cited their occupation as the likely basis for the challenge. Almost 20 per cent of the 72 survey respondents who had been challenged in criminal trials considered the challenge was based on their gender. However, none of the 22 respondents for civil trials considered gender had been the basis for the challenge against them. A significant proportion of respondents for civil and criminal trials stated that they did not know the basis of the challenge against them.

3.116 The survey data is set out in **Table 1** below:

Table 1: Perceived basis for peremptory challenges[129]

Perceived basis for peremptory challenge[129]	Criminal trials	Civil trials
Occupation	38 (52.8%)	10 (45.5%)
Gender	14 (19.4%)	0
Age	13 (18.1%)	1 (4.5%)
Appearance	6 (8.3%)	0
Race	0	0
Don't know	23 (31.9%)	11 (50%)

Impartiality of the jury

3.117 Impartiality is the other core principle underpinning Victoria's system of trial by jury. The right to trial before an impartial jury is a component of the broader right to a hearing free from bias, which exists both at common law[130] and under Victoria's Charter of Human Rights and Responsibilities.[131]

3.118 Defence practitioners argue that peremptory challenges are 'one of the fundamental safeguards against a jury that is, or is perceived to be, biased or unfairly constituted'.[132] Many practitioners considered that there were circumstances in which peremptory challenges safeguarded the impartiality of the jury in a way that no other available mechanism could.

3.119 However, peremptory challenges are not the only mechanisms available to achieve impartiality.

Other means of promoting impartiality

3.120 Impartiality is also promoted by a range of jury selection and trial processes and practices. These include:

- Random selection of prospective jurors from the electoral roll and during the jury empanelment process.[133]
- The excuse process, which allows prospective jurors who may not be impartial to apply to be excused from particular trials[134] (for example, where prospective jurors know one of the parties, or may have been involved in an incident similar to the one at trial).
- Challenge for cause and challenge to the array.[135]

129 Jurors were able to select more than one basis on which they believed they had been challenged.
130 *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488.
131 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.
132 Submission 10 (Victoria Legal Aid). See also Submissions 17 (Common Law Bar Association); 16 (Criminal Bar Association); 15 (Liberty Victoria).
133 *Juries Act 2000* (Vic) s 4.
134 Ibid s 32.
135 See [3.22]–[3.23].

- The common law discretion judges have to exclude a prospective juror.[136]
- Crown stand asides.[137]
- The fact that a jury involves group decision-making, not individual decision-making, which is likely to have the effect of diluting individual biases.[138]
- The fact that jurors swear an oath or make an affirmation that they will 'faithfully and impartially try the issues' and 'give a true verdict according to the evidence'.[139]
- The direction given by the judge to the jury that they must only take into account the evidence presented at trial, and must disregard any preconceptions they may have.[140] This direction is backed up by the prohibition on jurors accessing information about the case or the parties other than through the evidence presented at trial.[141]

3.121 Peremptory challenges are therefore just one of several mechanisms used to achieve an impartial jury.

Use of challenges to achieve an impartial jury

3.122 Jury deliberations in Victoria are confidential, and there are no studies that demonstrate the effectiveness of peremptory challenges in achieving an impartial jury.

Peremptory challenges based on the characteristics of the prospective juror

3.123 Some practitioners acknowledged that they use peremptory challenges to exclude prospective jurors they believe will not be impartial because they have a particular characteristic. Examples of this kind of challenge are noted at [3.113]–[3.114].

3.124 Equal opportunity and human rights law prohibits discrimination based on certain characteristics (such as gender, race, age and disability) in many areas of public life. One of the principles that underpin these laws is that a person's characteristics are not a fair or effective way to judge that person's abilities.

3.125 While jury selection is not directly covered by these laws,[142] the same argument about the use of prospective juror characteristics to determine suitability for a jury was made in submissions from the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and the Juries Commissioner.[143]

3.126 For example, VEOHRC's submission stated that:

> A person's capacity to serve on a jury or ability to be impartial cannot be discerned from a person's gender, race, age, disability or physical feature, and a process that accepts the misconception that it can, only serves to promote inaccurate and often prejudicial stereotypes.[144]

3.127 VEOHRC further submitted that, to the extent that peremptory challenges rely on stereotypes and assumptions, 'it is unclear that the current peremptory challenge process is… an effective means, by which the fairness of jury trials can be achieved'.[145]

3.128 Similarly, many judges consulted also considered reliance on stereotypes about people with certain characteristics to be unscientific and ineffectual in determining whether a

136 See [3.231]–[3.232].
137 See [3.9]–[3.16].
138 See [3.87].
139 *Juries Act 2000* (Vic) sch 3.
140 See Judicial College of Victoria, *Victorian Criminal Charge Book*, [1.5.2].
141 *Juries Act 2000* (Vic) s 78A.
142 Section 6(2)(b) of the *Charter of the Human Rights and Responsibilities Act 2006* (Vic) excludes courts from the operation of the Charter where they are acting in a judicial capacity. Jury selection is also not covered by the *Equal Opportunity Act 2010* (Vic). The Commission notes, however, that the Victorian Parliament Law Reform Committee report on jury service suggested that peremptory challenges may amount to a breach of the *Racial Discrimination Act 1977* (Cth): Victorian Parliament Law Reform Committee, *Jury Service in Victoria: Final Report Volume 3: Report on Research Projects* (1997) 183 [3.159].
143 Submissions 14 (Victorian Equal Opportunity and Human Rights Commission); 13 (Juries Commissioner).
144 Submission 14 (Victorian Equal Opportunity and Human Rights Commission).
145 Ibid.

prospective juror was suitable for a jury. One County Court judge questioned whether the law should continue to facilitate the exclusion of prospective jurors on bases which would amount to prohibited discrimination in other spheres of life.[146]

3.129 Jury researcher Jacqueline Horan has reviewed the literature on studies of the link between juror characteristics and verdict preference.[147] Taken as a whole, these studies do not demonstrate a direct link between juror characteristic and verdict preference. Many studies indicate no link at all between juror characteristics and verdict preference. Any correlation that individual studies suggest is highly specific, for example, to the nature of the case (such as where a defence of 'battered woman syndrome' is advanced) or to the strength of the evidence. Some studies, however, do indicate a connection between a juror's values and attitudes and verdict preference. The absence of a link between characteristic and verdict preference and the presence of a link between values and attitude and verdict preference highlight that a juror's characteristics are not an effective indicator of their values and attitudes. As the jury selection system does not provide practitioners with information about jurors' values and attitudes, Horan concludes that 'it is safe to say that the challenges made by Australian barristers are guesswork'.[148]

3.130 In addition, the notion that an 'impartial' jury can be achieved by removing individuals with perceived biases might also be questioned. A key justification for the 'representative' jury is the idea that individual biases may be evened out through diversity of views and backgrounds contained within the jury as a whole.[149] As British jury researcher Cheryl Thomas has stated, '[j]uror-level research can rightly be criticised for not taking into account the importance of group decision-making by juries.'[150]

Peremptory challenges based on the demeanour of the prospective juror

3.131 In defending the use of peremptory challenges to achieve an impartial jury, defence practitioners placed particular emphasis on the use of peremptory challenges to exclude prospective jurors who 'present as being potentially partial or biased against the accused.'[151] Examples of this included prospective jurors glaring at the accused, or prospective jurors who displayed obvious distress when the charges were read out.

3.132 Most judges the Commission consulted also considered that it was legitimate to exclude prospective jurors who display behaviour suggesting bias. For example, one Supreme Court judge said that, even though she considered that there was little merit in the stereotypes and mythology that inform characteristic-based challenges, the use of peremptory challenges in these circumstances justified their availability.[152]

3.133 Judges and practitioners consulted by the Commission did not consider challenge for cause to be sufficient to exclude prospective jurors whose mere demeanour suggested bias.[153] Consequently, without the availability of peremptory challenges, there was a concern that there would be no way to exclude such people from a jury and that this would undermine the confidence of participants in the system.

146 Consultation 22 (Judges of the County Court of Victoria).
147 Horan, above n 120, 29–42.
148 Ibid 40.
149 See [3.87].
150 Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010) 14.
151 Submission 16 (Criminal Bar Association).
152 Consultation 13 (Judges of the Supreme Court of Victoria).
153 Challenge for cause as an alternative to peremptory challenges is discussed in more detail at [3.207]–[3.216].

An impartial jury or a receptive jury?

3.134 Although both criminal defence and civil law practitioners said they use challenges to remove prospective jurors who are known or believed not to be impartial, they also acknowledged that they use challenges to achieve a jury that is receptive to their client's case.

3.135 The Commission considers that an impartial jury is qualitatively different from a receptive jury. In the Commission's view a receptive jury is one that is considered more likely to decide in favour of a particular party.

3.136 This distinction is acknowledged in the DPP (Vic)'s policy, where achieving a 'receptive' jury is described as a legitimate goal for the accused, in contrast to the prosecution's more limited role in securing an impartial jury.[154]

3.137 To the extent that using peremptory challenges to achieve a receptive jury is effective, the parties' competing strategies are likely to cancel each other out to some extent in civil trials, where both the plaintiff and defendant exercise their challenges in the same manner.[155]

3.138 However, in criminal trials, where the Crown's exercise of stand asides is very limited,[156] the impact of the use of peremptory challenges to achieve a receptive jury is likely to be greater.[157]

3.139 A relative of a victim of crime consulted by the Commission expressed particular concern about this. She argued that far from ensuring an impartial jury, peremptory challenges may turn a representative, impartially selected sample of the community into a group which is more likely to be biased in favour of the accused.[158] In her view, this is not fair. Some jurors consulted by the Commission expressed a similar view, as have some jury researchers.[159]

Procedural fairness

3.140 The common law requirement of procedural fairness is concerned with the fairness of the process through which a criminal or civil matter is determined. Although the exact content of procedural fairness depends on the individual circumstances of the case, in general, it has two main aspects:[160]

- The hearing rule—the right of a party to be heard before a competent tribunal.
- The bias rule—the right of a party to have that matter determined by a decision maker who is free from bias and is seen to be unbiased.

3.141 This section discusses whether peremptory challenges are an essential component of procedural fairness in a jury trial. It then discusses the benefits of procedural engagement by the parties through peremptory challenges. Finally, it discusses the role of peremptory challenges in ensuring the competence of the jury through the removal of jurors who are unwilling or unable to perform the task.

154 Director of Public Prosecutions, above n 7, 6.
155 Although it has been argued that there is unfairness to the plaintiff in jury trials involving multiple, separately represented defendants. See [3.160]–[3.161].
156 See [3.9]–[3.16].
157 See also [3.103], where the Commission considers the potential effect of peremptory challenges on the demographic composition of a jury.
158 Consultation 29 (Family member of victim of crime, Melbourne, Victoria).
159 Horan and Goodman-Delahunty, above n 99.
160 These rights are similar to s 24, *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides that parties to a criminal or civil proceeding have the right to have the matter determined by a 'competent, independent and impartial court or tribunal after a fair and public hearing'.

The requirements of procedural fairness

3.142 As noted at [3.140], procedural fairness requires that a party have the opportunity to be heard by a competent and fair tribunal. Peremptory challenges are one way this can be achieved.

3.143 Further, so long as peremptory challenges are part of the jury empanelment process under legislation, a failure to allow an accused to exercise his or her peremptory challenges is a procedural error significant enough to amount to an appealable error.[161]

3.144 However, this does not mean that peremptory challenges are, in and of themselves, required for procedural fairness. It has been recognised that aspects of the jury empanelment system can be modified or abolished by Parliament.[162]

3.145 As noted at [3.30]–[3.34], Parliament abolished peremptory challenges in England and Wales in 1988, and subsequently in Scotland (1995) and Northern Ireland (2007). Although the abolition was criticised by some practitioners at the time,[163] a major review of criminal courts in England and Wales conducted in 2001 did not recommend reintroduction.[164]

Involvement of the accused in criminal trials

3.146 Defence practitioners consulted by the Commission considered that one of the most important purposes of peremptory challenges is to involve the accused in the trial. For example, Victoria Legal Aid argued that 'peremptory challenges provide a critical opportunity for accused people to be directly involved in their trial'.[165]

3.147 It was argued that involving the accused through the exercise of peremptory challenges improved their acceptance of and confidence in the process, the outcome of the trial and even the criminal justice system more broadly. For example, the Criminal Bar Association stated that the peremptory challenges process 'significantly contributes to the accused's sense of involvement with and confidence in the process'.[166]

3.148 In consultations with judges and defence practitioners, the comfort that peremptory challenges provide to the accused emerged as one of the most important arguments in favour of their retention.[167] Several practitioners emphasised that the decision to challenge is one of the only forms of control the accused has in a trial process that is otherwise quite disempowering.

3.149 Many of these practitioners acknowledged that this control may be somewhat illusory, as challenges based on stereotypes or the idiosyncratic personal preferences of the accused are unscientific, and therefore unlikely to achieve their intended goal. Further, it was noted that common assumptions, for example, that persons accused of sexual offences should challenge young women, could in fact be detrimental to the accused, as the jury may form negative views about the accused on the basis of such a strategy.[168]

3.150 Nonetheless, giving the accused the opportunity to challenge jurors—regardless of the effectiveness of those challenges—was seen by judges and defence practitioners consulted by the Commission as important in itself because it provides the accused with a level of active participation, and therefore contributes to the accused's perception that the process has been fair.

161 *Johns v The Queen* (1979) 141 CLR 409, 428–9 (Gibbs J). See also *R v Panozzo; R v Iaria* (2003) 8 VR 548, 555–56 [29]–[30] (Vincent JA).
162 *Ronen v The Queen* (2004) 211 FLR 320, 329–33 [50]–[68] (Ipp JA).
163 See, eg, Gobert, above n 43, 528; Ian Kawaley, 'Abolishing the Peremptory Challenge' (1988) 85(2) *Law Society's Gazette* 22.
164 Lord Justice Auld, above n 45.
165 Submission 10 (Victoria Legal Aid).
166 Submission 16 (Criminal Bar Association). Similarly, stakeholders involved in the Australian Institute of Criminology's study of juror satisfaction said that increasing the defendant's confidence in the process was an important justification for peremptory challenges: Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Report No 87 (2008) 83.
167 This was the primary rationale advanced by both Supreme Court judges (Consultation 13 (Judges of the Supreme Court of Victoria)) and the Criminal Bar Association (Submission 16 (Criminal Bar Association)).
168 Consultation 13 (Judges of the Supreme Court of Victoria). See also Horan, above n 120, 30.

3.151 The New Zealand Law Commission's 2001 review of juries in criminal trials found the involvement of the accused was an important justification for the retention of peremptory challenges:

> 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 will sit in judgment on him. If that measure were lost, the accused would be likely to feel a considerable degree of injustice upon conviction.[169]

3.152 Many prospective jurors the Commission consulted placed value on the right of the accused to participate in the peremptory challenge process. Some saw this right as connected to the accused's entitlement to the presumption of innocence. Several made statements to the effect that, 'If I were on trial, I would want to have this right.' There were also some prospective jurors who felt strongly that the accused should not have this right; that the accused should be tried by a random sample of the community.

3.153 In contrast, the Queensland Law Reform Commission considered the involvement of the parties the 'least persuasive' argument in favour of peremptory challenges. It noted that it is very often the parties' lawyers who make the strategic decisions about peremptory challenges, rather than the parties themselves.[170]

3.154 A number of practitioners the Commission consulted rejected the idea that the accused was purely the mouthpiece for their lawyer, and stated that while they provided advice on exercising challenges to their clients, they always emphasised to their clients that the decision to challenge was ultimately their own.[171]

3.155 It is possible that the culture of client involvement in decisions about challenges is stronger in Victorian criminal trials because of the requirement that the accused voice the challenge, which does not exist in other jurisdictions.[172]

Views of victims

3.156 While acknowledging that peremptory challenges can provide comfort to the accused, some prospective jurors and individuals questioned whether this value should be placed above other values, such as non-discrimination and rationality in the jury selection process.

3.157 For example, the Crime Victims Support Association Inc. quoted the view (expressed by jury researchers Jacqueline Horan and Jane Goodman-Delahunty) that:

> The benefit of enhanced perceptions of justice through the participation of the defendant in the jury empanelment process is now outweighed by the community ridicule that such a superficial, biased and embarrassing process brings to the justice system.[173]

3.158 A family member of a victim of crime consulted by the Commission expressed the view that the peremptory challenges process is one-sided, as the accused is afforded the 'luxury' of involvement in peremptory challenges, while victims are not.[174]

169 Law Commission of New Zealand, above n 33, 89 [229].
170 Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) 314 [10.112].
171 Consultation 32 (Law Institute of Victoria members, Melbourne, Victoria): Victorian Law Reform Commission, *Jury Empanelment*, Consultation Paper No 18 (2013) 29.
172 See [3.53].
173 Submission 8 (Crime Victims Support Association Inc.), quoting Horan and Goodman-Delahunty, above n 99, 185.
174 Consultation 29 (Family member of victim of crime, Melbourne, Victoria). Victims are not involved in decisions about how the Crown should exercise its stand aside because the prosecution represents the state, not the victim. Consequently, victims and their supporters do not usually attend the jury empanelment process.

Procedural fairness considerations in civil trials

3.159 Procedural fairness considerations featured less prominently in consultations concerning civil jury trials. This is likely because, in civil jury trials, the parties are usually not directly involved in the empanelment process. While plaintiffs are often present at the empanelment (defendants typically are not), peremptory challenges are decided and made by the parties' barristers and solicitors without their input.

3.160 The main concern raised by plaintiff practitioners was that in cases involving one plaintiff and multiple, separately represented defendants, there is an imbalance in the number of challenges available to the opposing sides.[175] The Common Law Bar Association's submission stated that:

> The availability of 3 challenges per party might be seen as somewhat unfair to plaintiffs if there are several defendants as the challenges will be likely to give greater representation to those jurors thought likely to favour the defendant position.[176]

3.161 This issue was also acknowledged by judges consulted by the Commission.[177] Defendant practitioners noted that the interests of separately represented defendants can in some cases be quite hostile to one another. In such cases, each defendant's challenges may be based on different considerations. However, it was also acknowledged that separately represented defendants sometimes 'gang up' on the plaintiff in the exercise of challenges, and use them in a manner which they perceive to be disadvantageous to the plaintiff's case. To the extent that peremptory challenges do provide parties with a strategic advantage,[178] this is arguably unfair to the plaintiff in such cases.

Removal of prospective jurors who are unwilling or unable to serve on a jury

3.162 Using peremptory challenges to remove prospective jurors who are unwilling or unable to serve effectively on a jury contributes to procedural fairness, as such prospective jurors, while not necessarily biased, may pose a threat to a fair trial in contravention of the hearing rule explained at [3.140].[179]

3.163 Both criminal and civil law practitioners stated that they use peremptory challenges to exclude prospective jurors who clearly do not want to serve on the jury, as they considered an unwilling juror less likely to do the 'work' necessary to properly determine the facts in question. At the empanelment stage, this unwillingness might be apparent from their demeanour, or the fact that they have unsuccessfully sought to be excused by the trial judge. The DPP (Vic)'s policy also acknowledges the potential of such jurors to undermine the integrity of the jury.[180]

3.164 Other groups considered potentially damaging to the prospects of a fair trial were prospective jurors who are not capable of performing the role due to an impairment or difficulty with the English language.[181] These groups are ineligible for jury service, but the Juries Commissioner's Office relies on prospective jurors with such impediments to jury service identifying themselves.

175 For example, in a medical negligence matter, the plaintiff's treating doctor and the hospital at which the negligence allegedly occurred will often be separately represented. Under the *Juries Act 2000* (Vic) s 35(4), if the doctor and hospital do not consent to join their challenges, the result is that the plaintiff has three peremptory challenges and the defendants have a total of six challenges.
176 Submission 17 (Common Law Bar Association).
177 Consultations 22 (Judges of the County Court of Victoria); 13 (Judges of the Supreme Court of Victoria).
178 See [3.134]–[3.139].
179 The Commission notes that jury service in Victoria is not voluntary. See above n 4.
180 Director of Public Prosecutions, above n 7, 6.
181 *Juries Act 2000* (Vic) sch 2, cl 3.

3.165 Both legal practitioners and judges told the Commission that people in these categories do sometimes end up on jury panels. For example, it sometimes becomes apparent during the empanelment or the trial that a prospective juror has a hearing impairment which makes them unable to hear the evidence.[182] During its observations of empanelments, the Commission also noticed that, following the judge's instruction, prospective jurors sometimes identify themselves as having inadequate hearing.

3.166 VEOHRC expressed concern about the use of peremptory challenges to exclude prospective jurors based on perceived inability to perform the role:

> whether a person is capable of jury service is more properly addressed in the eligibility process (and an assessment of whether reasonable adjustments may be required to enable a person to fulfil the duties of a juror), and is not an assessment that can be made by the parties in the challenge process solely on the basis of a person's appearance.[183]

The effect of peremptory challenges on jurors

3.167 There is an increasing understanding of jury service as a right as well as a civic duty.[184] Both the Juries Commissioner and VEOHRC submitted that excluding prospective jurors through peremptory challenges impinged on this right.

3.168 VEOHRC expressed concern about the exclusion of certain categories of people from jury participation on discriminatory grounds.[185] The Juries Commissioner expressed similar concerns that peremptory challenges 'serve to confuse, discriminate and otherwise offend citizens who have both a right and a civic responsibility to serve on a jury'.[186]

3.169 To better understand the experiences and views of those who had participated in jury empanelments, the Commission undertook a number of consultations across Victoria with people who had been involved in jury empanelment. The Commission also conducted a paper-based and online survey.[187]

Understanding of the purpose of peremptory challenges

3.170 The survey and the Commission's consultations revealed a high level of understanding of the purpose of peremptory challenges.

3.171 A large majority of survey respondents (78.8 per cent of those who participated in criminal empanelments and 84.8 per cent of those who participated in civil empanelments) said that they understood why peremptory challenges exist.

3.172 Most of the explanations provided by respondents fell into the following broad categories:

- to ensure impartiality
- to ensure the appearance of impartiality
- to exclude prospective jurors who may not be sympathetic to the parties
- to balance the jury so it is representative.

3.173 A possible explanation for the high level of understanding of the purpose of peremptory challenges among jurors and prospective jurors is the induction process—in particular the induction video—which was considered clear and informative.

182 The Commission notes that recently, in Western Australia, a juror was allowed to participate in the jury selection process with the assistance of an Auslan interpreter: Western Australian Association of the Deaf (Media Release, 15 January 2014). <http://www.vicdeaf.com.au/news.asp?aid=661&t=first-deaf-auslan-user-summoned-for-jury-duty>. See also New South Wales Law Reform Commission, above n 88.
183 Submission 14 (Victorian Equal Opportunity and Human Rights Commission).
184 Horan and Goodman-Delahunty, above n 99, 184.
185 Submission 14 (Victorian Equal Opportunity and Human Rights Commission).
186 Submission 13 (Juries Commissioner).
187 The consultation and survey methodology is set out in detail in Chapter 1. The VLRC Juror Survey is attached as **Appendix H** to this report.

3.174 Though many participants described the peremptory process as intimidating, they generally considered that given what was at stake for the accused, the process was necessary and justified.

Reactions of people who were challenged

3.175 Prospective jurors who were challenged were asked to tick a box to indicate the option that best described how they felt about being challenged. The options were 'relieved', 'didn't mind', 'disappointed/frustrated', 'embarrassed' or 'upset/angry'.

3.176 Nearly 60 per cent of respondents challenged in criminal trials were either relieved (15.3 per cent) or didn't mind being challenged (44.4 per cent).

3.177 Around 40 per cent of respondents challenged in criminal trials were disappointed/frustrated (29.2 per cent), embarrassed (5.6 per cent) or upset/angry (5.6 per cent).

3.178 More than 90 per cent of those who were challenged in civil trials responded that they were relieved or did not mind.

The challenge process

3.179 The consultation discussion and survey questions on the challenge process focussed particularly on the requirement to parade in front of the accused (in criminal trials) and to stand to be identified (in civil trials).

3.180 Both prospective jurors who had been challenged or who were selected for the jury (that is, individuals who had experienced the process) and prospective jurors who were on the panel but were not selected (that is, individuals who observed the process only) were asked for their views about the process.

3.181 Respondents to the survey were able to write free text answers to the questions. The Commission identified themes from the responses and categorised them. Some responses fell into more than one category.

Criminal trials

3.182 There were 148 respondents who had experienced the parade process and 138 respondents who had observed the parade process.

3.183 Around half of those who had either experienced or observed the challenge process for a criminal trial were unconcerned about the parade or considered that, while it may be uncomfortable for the prospective juror, it is justified. For example, one respondent who had experienced the parade said:

> [I felt] quite uneasy, but I understand the need for it.

3.184 Another respondent who had observed the parade said:

> [it is] daunting, however, at this stage the accused is innocent.

3.185 However, around 45 per cent of jurors who had experienced the parade indicated that they felt intimidated or nervous or that they were on display. Some of these reactions were very strong. For example, respondents in this group said:

> I felt like I was being judged.
>
> [I felt] embarrassed, exposed, humiliated.
>
> I felt the process was undignified and intimidating.

3.186 In consultations, some participants said they were anxious about the parade, but most accepted it as a necessary component of the challenge procedure, as they generally felt it was important to allow the accused to see them. However, when presented with the alternative of simply standing and facing the accused,[188] rather than parading, all participants preferred this alternative.[189]

Civil trials

3.187 The Commission did not have the opportunity to consult with any prospective jurors who had attended empanelments for civil trials. Consequently, the information below is based solely on the juror survey.

3.188 There were 26 respondents who had experienced the process of having to stand to be identified and 33 respondents who had observed the process, but had not been selected in the ballot.

3.189 Fewer respondents who had attended an empanelment for a civil trial expressed concern or discomfort about the challenge process.

3.190 Around 60 per cent of respondents who had experienced the process were unconcerned about it. Around 66 per cent of prospective jurors who had observed the process were unconcerned about it.

3.191 Around 23 per cent of jurors who had experienced the process gave responses that were categorised as feeling nervous, uncomfortable, or on display.

3.192 Fewer prospective jurors who had observed the process thought that the process was uncomfortable or intimidating (15 per cent). However, of these, nearly two-thirds accepted the process, despite considering it uncomfortable.

3.193 The critical comments about the civil challenge process were generally less forceful than for the criminal process. For example:

> [it] seems demeaning like you are being judged or that you have done something wrong.
>
> [I] understand why it is currently done, but it seemed a little bit judgemental and intimidating for the people standing while barristers look them up & down/make notes.

Should peremptory challenges be retained?

3.194 A majority of consultation participants thought peremptory challenges should be retained, while a minority strongly objected to them. These objections tended to be based more on an objection to the accused having the right to influence the composition of the jury, rather than the effect of the process on prospective jurors. Those who held this view argued that the jury should be composed of a random sampling of society, and 'tampering' with this sample was unjust. Some participants also thought that the use of stereotypes as a basis for challenges was foolish or discriminatory, and should not be facilitated through peremptory challenges.

3.195 Survey responses for those who participated in jury empanelments also showed greater support for retaining peremptory challenges. For criminal trials, 49 per cent favoured retaining peremptory challenges, while 37.9 per cent thought they should be abolished.[190]

3.196 Support for peremptory challenges in civil trials was even stronger, with 52.5 per cent in favour and only 23.7 per cent against.[191]

188 See [3.43].
189 Consultations 12 (Prospective jurors post-empanelment, Geelong, Victoria); 20 (Prospective jurors post-empanelment, Morwell, Victoria).
190 13.1% were unsure.
191 23.7% were unsure.

Conclusions drawn from the Commission's consultations and survey

3.197 While consultation and survey results were mixed, a number of themes emerged:

- There was a high degree of understanding about why peremptory challenges exist.
- There were more people in favour of retaining peremptory challenges than abolishing them.
- Many jurors and prospective jurors do not like the 'parading' in front of the accused in criminal trials, but many also recognise the right of the accused to see them as important and fair to the accused.
- Fewer concerns were expressed about the process for civil jury empanelments.

3.198 The Commission observed that those who disagreed with peremptory challenges tended to hold this view strongly, but broadly speaking, peremptory challenges have qualified support among those who have participated in the empanelment process.

Alternatives to peremptory challenges and restrictions on use

3.199 In reviewing the purpose and adequacy of peremptory challenges, the Commission has considered various other ways of excluding biased prospective jurors or prospective jurors who are unwilling or unable to serve—some of which already exist in legislation or common law, or are adopted informally in practice. These alternatives are:

- challenge for cause
- pre-trial questioning of prospective jurors
- challenges by consent
- judicial discretion to discharge jurors
- restrictions on the use of peremptory challenges.

3.200 Each of these alternatives and safeguards is discussed below.

Challenge for cause

3.201 An unlimited number of challenges for cause are available to parties in criminal and civil jury empanelments in Victoria.[192] Yet despite this, challenges for cause are very rarely used. The most likely explanation for this is the ready availability of peremptory challenges. There is also a very limited understanding among practitioners as to grounds and process for challenge for cause.

The grounds for challenge for cause

3.202 The grounds for challenge for cause are not set out in the Victorian Juries Act. Grounds are specified in the *Jury Act 1995* (Qld) and the *Criminal Procedure Act 2004* (WA). The grounds specified in those Acts are that the person is not qualified for jury service or the person is not impartial.[193]

192 *Juries Act 2000* (Vic) ss 34, 37.
193 *Jury Act 1995* (Qld) s 43(2); *Criminal Procedure Act 2004* (WA) s 104(5). The South Australian *Juries Act 1927* (SA) 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'.

3.203 In *Murphy v The Queen*,[194] 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*[195] relied on by the trial judge, which provided that the grounds for challenge for cause were:

> 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.[196]

Challenge for cause in practice

3.204 A challenge for cause is determined by the trial judge.[197] The jury panel is usually excluded from the hearing of the challenge to avoid any prejudice, but this does not always occur.

3.205 The Juries Act does not specify the process for challenges for cause in any detail. The Commission's consultations revealed confusion among practitioners about how the process worked.

3.206 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.[198] Second, if the judge is satisfied there are proper grounds to challenge the prospective 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 these answers may further permit the examination or cross-examination of the person on oath.[199] After considering the evidence and submissions of the parties, the judge must uphold or dismiss the challenge.[200]

Challenge for cause as an alternative to peremptory challenges

3.207 Some individuals and academics have argued that challenge for cause should be used in place of peremptory challenges, as challenges for cause are a reasoned, justified, and transparent method of jury selection.[201] Many jurors and prospective jurors consulted also felt that if they were to be excluded from a jury, a reason should be provided to justify this.

3.208 However, practitioners and judges consulted by the Commission did not consider that challenge for cause could adequately replace the function of peremptory challenges. In particular, challenge for cause would not allow defendants to exclude prospective jurors based on 'gut feeling'. For example, an accused would no longer be able to exclude a prospective juror because they thought the prospective juror had given them a 'dirty look'.[202] This is because of the difficulty in establishing cause, given the very limited information about prospective jurors available to parties.

3.209 The DPP (Vic) submitted that challenges for cause are designed to be used where one of the parties has pre-existing information about a prospective juror, and they therefore have a different purpose to peremptory challenges. Accordingly, challenges for cause and peremptory challenges should not be treated as alternatives to each other.[203]

194 *Murphy v The Queen* (1989) 167 CLR 94, 101–104.
195 Ray Watson and Howard Purnell, *Criminal Law in New South Wales* (Law Book Company, 1981) 802.
196 Cited by Mason CJ and Toohey J at (1989) 167 CLR 94, 102.
197 *Juries Act 2000* (Vic) s 40(1).
198 *Jury Act 1995* (Qld) s 43(3).
199 Ibid s 43(4).
200 Ibid s 43(6).
201 See, eg, Les A McCrimmon, 'Challenging a Potential Juror for Cause: Resuscitation or Requiem' (2000) 23(1) *University of New South Wales Law Journal* 127.
202 Consultation 13 (Judges of the Supreme Court of Victoria).
203 Submission 12 (Victorian Director of Public Prosecutions).

3.210 Other obstacles to the use of challenge for cause were identified as:

- A lack of understanding of the process and grounds for challenge for cause.
- The time, cost, and logistical complexities involved in hearing a challenge for cause.[204]
- The potential embarrassment to prospective jurors of a challenge for cause hearing.[205]

3.211 The expediency of peremptory challenges compared with challenges for cause was cited by the Law Reform Commission of Western Australia,[206] Queensland Law Reform Commission,[207] Law Commission of New Zealand[208] and the Law Reform Commission of Ireland[209] as a reason to retain them.

3.212 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'.[210] The Law Commission of New Zealand 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 prospective juror's unsuitability.[211]

3.213 However, it is noteworthy that in recommending the abolition of peremptory challenges in Scotland, the Scottish government found that:

> Experience since peremptory challenge was abolished in England and Wales suggests that abolition would not result in a significant rise in challenge on cause shown.[212]

3.214 Nonetheless, the Commission does not believe that the availability of challenge for cause provides an appropriate alternative to peremptory challenges. The Commission accepts the arguments of practitioners and judges that challenge for cause:

- is unlikely to provide a remedy in certain circumstances where a prospective juror's behaviour or demeanour indicates that they may be biased
- is a more time consuming, and therefore costly process
- is a more invasive, and potentially more upsetting process for the juror than a peremptory challenge, particular where the basis for the challenge is concern about the juror's ability to perform the role.

3.215 The Commission does, however, consider that challenges for cause have an important function where pre-existing information indicates that a prospective juror is not impartial, or is ineligible to serve. Challenge for cause also provides an additional safeguard in the event a party exhausts all their peremptory challenges, and the party has grounds on which to base a challenge.

3.216 Given the lack of understanding of the grounds and process for challenge for cause apparent from the Commission's consultations, there would be benefit in providing legislative guidance, similar to that in the *Jury Act 1995* (Qld),[213] to assist practitioners and judicial officers in making a challenge for cause.

204 Submissions 16 (Criminal Bar Association); 15 (Liberty Victoria).
205 Ibid.
206 Law Reform Commission of Western Australia, above n 33, 22–23.
207 Queensland Law Reform Commission, above n 170, 314 [10.111].
208 Law Commission of New Zealand, above n 33, 87–89 [225], [229].
209 Law Reform Commission of Ireland, *Jury Service*, Report No 107 (2013) 41 [3.37].
210 Law Reform Commission of Western Australia, above n 33, 23.
211 Law Commission of New Zealand, above n 33, 88–89 [226], [229]; Law Reform Commission of Ireland, above n 209, 41 [3.37].
212 The Scottish Office Home and Health Department, *Firm and Fair: Improving the Delivery of Justice in Scotland* (1994) 17 [3.9]. Similarly, the 2001 Auld Report found that the Roskill Committee, which recommended the abolition of peremptory challenges, had correctly forecast that English and Welsh judges would reject attempts by parties to expand the use of challenge for cause so that it became a 'fishing expedition': Lord Justice Auld, above n 45, 163.
213 See *Jury Act 1995* (Qld) s 43.

Recommendation

1 The *Juries Act 2000* (Vic) should specify:

- the grounds on which a challenge for cause can be founded
- the process for conducting a challenge for cause.

Pre-trial questioning of jurors in special circumstances

3.217 Pre-trial questioning of jurors is conducted extensively in the United States through the 'voir dire' process.[214] As noted at [3.39], the purpose of this pre-trial questioning is to identify possible prejudice or bias in prospective jurors. 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 for people selected to serve as jurors to be questioned when the court reaches the final stage of the jury selection process.[215] This occurs after the jury has been sworn in (following the exercise of any peremptory challenges), but before the panel is discharged.[216] The questions are put by the judge in a manner decided by the judge.[217] Once the answers are received, the judge may allow the parties to cross-examine the juror under oath to determine whether they are impartial.[218] Parties may then elect to challenge the juror for cause, which the judge must uphold or dismiss.[219]

3.218 Pre-trial questioning has only been used twice in Queensland—first by the Supreme Court of Queensland in 2013 in the matter of *R v Patel (No 4),*[220] and then again in the District Court trial of the same defendant later that year. The Queensland deputy sheriff has advised that while administratively workable, the questioning process in these trials was resource intensive and somewhat burdensome for jurors.[221]

3.219 There was little support for the adoption of a 'pre-trial questioning' mechanism in Victoria similar to that in the Queensland *Jury Act 1995*, which as noted above, may involve counsel cross-examining potential jurors. While one submission supported the introduction of pre-trial questioning of jurors for civil jury trials,[222] there was generally significant anxiety about moving towards an 'American' model of jury empanelment. The DPP (Vic), for example, argued that such an approach is:

> potentially embarrassing for jurors… will create a new lawyer-based jurisprudence… will inevitably require jury directions (jury directions are already complex and need not be made more so) and… fail[s] a cost/benefit analysis.[223]

3.220 The Commission agrees with the submission of the DPP (Vic). There is a vast United States jurisprudence on the interrogation of jurors by counsel.[224] That method is time-consuming and intrusive. The Commission considers it would add no benefit to Victorian jurisprudence on jury selection and if adopted would significantly change the Victorian culture on jury selection.

214 See generally Joel Lieberman and Bruce Sales, *Scientific Jury Selection* (American Psychological Association, 2007).
215 *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.
216 Ibid ss 45, 47(1).
217 Ibid s 47(4).
218 Ibid s 47(5).
219 Ibid ss 43(6)–(8).
220 (2013) 2 Qd R 544.
221 Consultation 10 (Deputy sheriff, Queensland).
222 Submission 18 (Peter Burt).
223 Submission 12 (Victorian Director of Public Prosecutions).
224 Lieberman and Sales, above n 214, 211–236.

3.221 While more limited in scope, the Commission considers that the excuse process under section 32 of the Juries Act already provides an adequate means for the identification and excusal of prospective jurors who are not able to fairly try the issues in the case. The Juries Act requires judges to inform jurors in all cases of:

- the type of case or charges to be heard
- the name/s of the parties
- the names of the principal witnesses, and
- the estimated length of the trial.[225]

3.222 The judge must also inform the jury panel of 'any other information that the court thinks relevant'.[226] This can often include further background information about the case.

3.223 Based on this information, the judge will then call on panel members to provide any reasons why they should be excused from jury service because they will be unable to consider the case impartially, or any other reason why they are unable to serve.[227] The potential juror gives evidence in response to questions by the trial judge. Counsel are not permitted to cross-examine potential jurors.

3.224 This process might lead a judge to excuse prospective jurors if they have personal knowledge of the parties or particular familiarity with relevant witnesses, or where they have been personally involved in an incident similar to the one at trial and therefore do not believe they can approach the case impartially. In high-profile cases, where there has been substantial pre-trial publicity of the accused or a witness is publicly well known, the judge usually asks the jury panel whether, as a result of what they have heard about the case, there is any juror who feels that they cannot consider the case impartially. However, in asking this, judges usually explain to jurors that they will be guided and given directions by the judge throughout the trial on how they are to perform the jury function impartially and decide solely on the evidence admitted at trial.

3.225 The Commission considers that the Victorian procedure provides an adequate safeguard to the impartiality of the jury (together with the other safeguards outlined at [3.120]). It is also a less time-consuming and costly process, and is significantly less invasive for prospective jurors. Accordingly, the Commission does not consider that it is necessary or desirable to allow pre-trial questioning of jurors in Victoria, either as an exception along the lines of the Queensland *Jury Act 1995*, or more generally as in the United States voir dire process.

Challenges by consent

3.226 Challenges by consent[228] exist in Scotland as an alternative to peremptory challenges, which were abolished in 1995.[229] 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.[230]

3.227 A similar process exists in New Zealand, where a party may apply to the judge to 'stand by' a prospective juror with the consent of the other party. Judges may also direct a prospective juror to stand by on their own motion.[231] However, in New Zealand parties are provided in advance with a list containing the prospective juror's name, occupation, address and date of birth, which allows them to confer on potential challenges prior to the empanelment.[232]

225 *Juries Act 2000* (Vic) s 32(1).
226 Ibid s 32(1)(e).
227 Ibid ss 32(2)–(3).
228 *Criminal Procedure (Scotland) Act 1975* (Scot) c 21, s 130(3A).
229 *Criminal Justice (Scotland) Act 1995* (Scot) c 20, s 8.
230 *Criminal Procedure (Scotland) Act 1975* (Scot) c 21, s 130(3A).
231 *Juries Act 1981* (NZ) s 27.
232 Consultation 11 (Court registry officer, Wellington High Court, New Zealand).

3.228 In Victoria, the current empanelment process provides very limited opportunity for challenges to be made by consent, as parties have no information about prospective jurors prior to the calling of the panel. However, as noted at [3.67], defence practitioners told the Commission that they sometimes ask the Crown to exercise its right to stand aside where one of the prospective jurors is known to them or their client, and the Crown sometimes does so. They might also ask the Crown to stand aside a prospective juror who appears to be unable or unwilling to perform the task (for example, if the prospective juror has unsuccessfully sought to be excused). This is, in effect, a challenge by consent.

3.229 Although some individuals felt that providing a formal challenge by consent might be a useful option, most considered it unnecessary, as they considered the current informal system to be adequate. For example, the DPP (Vic) submitted that such an approach 'would create an unnecessary complication'.[233]

3.230 The Commission agrees with the DPP (Vic) that formal challenges by consent should not be introduced as they would add little to current practice and may create unnecessary complexity.

Judicial discretion to exclude prospective jurors

3.231 Trial judges have an inherent common law power to discharge[234] or stand aside[235] a prospective juror from a panel on the basis that he or she is not able to properly perform his or her duties.

3.232 The Commission does not consider that it is necessary to codify this element of the common law. This discretion is valuable but rarely used, and there appears to be no compelling need for it to be specified in the Juries Act.

Safeguarding the representativeness of the jury

3.233 In the consultation paper, the Commission considered two ways of minimising the impact of peremptory challenges on the representativeness of the jury that exist in other jurisdictions:

- legislative prohibitions on challenges based on discriminatory grounds such as race or gender
- a judicial discretion to discharge an unrepresentative jury.

Prohibition on discriminatory challenges

3.234 The use of peremptory challenges on certain discriminatory grounds is prohibited by law in the United States.[236] VEOHRC argued that similar prohibitions should be introduced if peremptory challenges were to be retained in Victoria:

> At a minimum, the exercise of peremptory challenges should be subject to criteria – such as those in the DPP's guidelines – prohibiting their exercise purely on age, gender, religious, racial, cultural or other similar grounds that would be discriminatory in any other context.[237]

3.235 The DPP (Vic) disagreed, arguing that 'such prohibitions may be seen to curtail the basis for peremptory challenges such as procedural engagement by the accused'.[238]

233 Submission 12 (Victorian Director of Public Prosecutions).
234 See *R v Cullen* [1951] VLR 335.
235 See *R v Searle* [1993] 2 VR 367.
236 See *Batson v. Kentucky*, 46 US 79 (1986); *J.E.B. v. Alabama*, 511 US 127 (1994). In 2009, North Carolina introduced the *Racial Justice Act* (NC Gen Stat ch 15A § 101), which enabled those sentenced to death to challenge their sentences by showing that racial bias played a major role in the sentence. This included evidence of racial bias in jury selection. The *Racial Justice Act* was repealed in June 2013.
237 Submission 14 (Victorian Equal Opportunity and Human Rights Commission).
238 Submission 12 (Victorian Director of Public Prosecutions).

3.236 While the Commission agrees with VEOHRC that challenges based on discriminatory characteristics are generally undesirable (and largely ineffectual), if peremptory challenges are to be retained, the Commission does not consider that prohibitions on such conduct are practical or enforceable. Peremptory challenges, by definition, do not require further rationale or explanation, so to require this would fundamentally change their character, and make them more akin to challenges for cause. Review of peremptory challenges on these grounds is also likely to prove difficult and time-consuming.[239]

3.237 The Commission considers that a more effective means of reducing discrimination caused by peremptory challenges is to reduce the number of challenges available to the parties. This is considered at [3.249]–[3.279].

Judicial discretion to discharge an unrepresentative jury

3.238 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.[240] However, jury administrators in these states were not aware of any instances of the exercise of this power.[241]

3.239 Concern was expressed by both judges and practitioners about such a proposal in Victoria. It was argued that this was unnecessary, and requires the exercise of an almost impossible discretion for judges in determining whether the composition of the jury 'is or appears to be unfair'.

3.240 Given the concerns expressed and the apparent lack of use of this discretion in other comparable jurisdictions, the Commission does not consider the introduction of a similar power to be desirable in Victoria.

The Commission's conclusions

3.241 Below the Commission outlines its conclusions and recommendations for reform in relation to peremptory challenges and stand asides. In summary, the Commission recommends that peremptory challenges and stand asides be retained in criminal trials, but the number available be reduced to minimise the potential for jury manipulation, and to bring Victoria into line with New South Wales, Western Australia and South Australia.

3.242 The Commission also recommends reducing the number of peremptory challenges in civil trials, and adjustments to prevent unfairness to plaintiffs in multi-defendant proceedings. Finally, the Commission recommends minor procedural changes to minimise any negative effects the peremptory challenge process may have on prospective jurors.

Peremptory challenges and stand asides should be retained

3.243 The Commission considers that peremptory challenges should be retained in criminal and civil trials, as they serve the important functions of enhancing parties' confidence in the jury, and providing a safeguard in the event other processes have failed to remove prospective jurors who are biased or who appear to be unwilling or unable to serve. The Crown right to stand aside jurors in criminal trials should also be retained, as it is an important safeguard to ensuring a competent and impartial jury.

239 This appears to be the experience in the United States. See Carol Chase and Colleen Graffy, 'A Challenge for Cause against Peremptory Challenges in Criminal Proceedings' (1997) 19 *Loyola of Los Angeles International and Comparative Law Review* 507, 516.
240 *Jury Act 1977* (NSW) s 47A; *Jury Act 1995* (Qld) s 48(1).
241 Consultations 24 (Assistant sheriff, manager jury and court administration, NSW); 10 (Deputy sheriff, Queensland).

Criminal trials

3.244 As discussed at [3.144]–[3.145], the Commission does not consider peremptory challenges to be an essential component of the accused's right to a fair trial. There is a variety of other mechanisms in the jury selection process, and criminal procedure more generally, which ensure this occurs. Criminal jury trials in the United Kingdom have been successfully run for decades without peremptory challenges, and the 2001 Auld Report into the criminal courts of England and Wales declined to recommend the reintroduction of peremptory challenges.[242]

3.245 Nonetheless, the Commission considers that there is a continuing important role for peremptory challenges in Victoria. In particular, there is value in the accused having the opportunity to participate in the jury selection process, and remove individuals they are particularly uncomfortable with. This participation can enhance the accused's confidence in the trial process and the outcome. A majority of prospective jurors consulted by the Commission understood this rationale and supported it.[243]

3.246 Peremptory challenges and stand asides also provide a quick and efficient means of removing prospective jurors who are obviously not impartial or otherwise appear unwilling or unable to serve on a jury, avoiding the delay, cost and potential further embarrassment associated with a challenge for cause. To this end, peremptory challenges and stand asides act as an additional safeguard in the event that other processes such as exemptions and excuses have failed to exclude such persons.

Civil trials

3.247 The Commission also considers that peremptory challenges should be retained in civil jury trials. As with criminal trials, peremptory challenges provide a quick and efficient means for parties to remove prospective jurors who are known or appear to be biased in some way, or appear to be unwilling or unable to serve. However, unlike criminal trials, there is usually no active participation by the parties in civil jury empanelments, so the argument that peremptory challenges provide 'comfort' to the parties is less pertinent in civil jury trials.

3.248 Feedback from the VLRC juror survey indicates that people who had been part of civil jury empanelments were less negatively impacted by the process than those who participated in criminal jury empanelments.[244] The available evidence also suggests that Victorian civil juries are broadly representative of the community,[245] and have more balanced gender composition than Victorian criminal juries.[246]

Recommendation

2 Peremptory challenges and the Crown right to stand aside should be retained for criminal jury trials.

Peremptory challenges should be retained for civil jury trials.

242 Lord Justice Auld, above n 45, 163.
243 See [3.170]–[3.174].
244 See [3.189]–[3.193].
245 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, 198.
246 See [3.97].

Reducing the number of challenges available

Criminal trials

3.249 Despite concluding that peremptory challenges should be retained, the Commission considers that there are a number of negative aspects to peremptory challenges, chiefly:

- They have the potential to reduce the representativeness of juries.
- They can be unscientific, and facilitate discriminatory, stereotype-based judgments.
- They infringe on the ability of citizens to participate on a jury.

3.250 The Commission accepts that in some cases practitioners use peremptory challenges to address an imbalance in the composition of the jury (for example, if a disproportionate number of men or women are balloted). However, consultations, data from the JCO[247] and the Commission's own observations reveal that more often than not the opposite is the case: peremptory challenges tend to diminish the representativeness of juries.

3.251 The Commission considers that peremptory challenges, when based on a characteristic of the prospective juror, are a highly questionable means to achieve an impartial jury. There is no evidence that a person's name, appearance or occupation is a useful predictor of their capacity to fulfil the functions of a juror properly or how they will approach a particular case.[248]

3.252 To the extent that these characteristics are an effective guide, many practitioners consulted also openly acknowledged that they are often used to achieve a jury that is more receptive to their client's case, rather than achieve an impartial jury. In these circumstances, peremptory challenges may be better understood as a concession afforded to the accused given that their liberty is at stake, rather than as fundamental to the assurance of an impartial jury.

3.253 Because the Commission considers that the law should not actively facilitate a party's capacity to distort the composition of juries, it recommends that the number of peremptory challenges be reduced to minimise the use of challenges in this way. The Commission considers that the benefits of peremptory challenges outlined at [3.245]–[3.246] can be achieved by providing the accused with three challenges, while the current six challenges are excessive for these purposes, and allow for the more negative uses outlined at [3.251]–[3.252]. The significantly greater distorting potential that six challenges can have on the gender composition of the jury is illustrated by the scenarios at [3.101]–[3.104].

3.254 New South Wales, South Australia and Western Australia all provide three peremptory challenges to the accused in criminal trials, which demonstrates that criminal jury trials can operate effectively with this reduced number of peremptory challenges. The Commission considers that three peremptory challenges would still allow for their use as a safeguard where other processes such as exemptions and excuses do not exclude people who are not impartial, or who are unwilling or unable to serve, but would minimise the opportunity to use peremptory challenges to distort the representativeness of the jury.

3.255 The Commission considers that reducing the number of peremptory challenges available would be more effective than any attempt to prohibit stereotype-based challenges through regulation.[249]

247 See [3.97]–[3.100].
248 See [3.129].
249 See further [3.234]–[3.237].

3.256 A reduction, rather than the abolition, of peremptory challenges addresses the Criminal Bar Association's concern about 'throwing the baby out with the bathwater'[250]—that is, it would maintain the benefits of peremptory challenges most important to the conduct of a jury trial, while minimising their more negative aspects.

3.257 The Commission considers the current approach of further reducing the number of peremptory challenges in proceedings involving multiple accused should be continued. In proceedings involving two or more accused, the number of challenges can quickly multiply. The combined effect of these challenges can have a significantly distorting effect on the composition of the jury.

3.258 The DPP (Vic) opposed the current reductions in its submission, arguing they 'have no basis in principle'.[251] The Commission disagrees, and considers the initial rationale for these reductions—to reduce 'distortions in the representative nature of juries'[252]—remains relevant.[253] A minimum of two challenges for each accused in multi-accused proceedings still provides the opportunity for each accused to exclude the prospective jurors they are least comfortable with. At the same time, it reduces the multiplier effect in multi-accused proceedings. This is important because it means that multiple accused would not have significantly greater scope to shape the composition of the jury because they are being tried together rather than separately.

3.259 In the interests of fairness, the Commission also considers it appropriate that the number of Crown stand asides be reduced to match the total number of peremptory challenges available to all the accused in that trial.

3.260 Finally, although the Commission notes that reducing the number of peremptory challenges is likely to result in a small cost-saving to government, these savings are likely to be insignificant when compared with the overall cost of jury trials in Victoria. Cost has therefore not been a significant consideration informing the Commission's recommendations.

Recommendations

3 The number of peremptory challenges available to a single accused in a criminal trial should be reduced from six to three.

4 Where there is more than one accused, each accused should be entitled to exercise two peremptory challenges.

5 The number of stand asides available to the Crown in a criminal trial should be equal to the total number of peremptory challenges available to all the accused persons for that trial.

250 Submission 16 (Criminal Bar Association).
251 Submission 12 (Victorian Director of Public Prosecutions).
252 Victoria, *Parliamentary Debates,* Legislative Assembly, 20 October 1993, 1157 (Sidney Plowman).
253 For example, should no further reductions be made, a trial involving four accused would lead a total of 12 challenges (three each). If the strategy of the defence is to exclude all women from the trial, then on average, 12 challenges would ensure this was fairly likely to succeed. If each accused only had two challenges, as the Commission is proposing, then the combined eight challenges available to the accused would be very unlikely to exclude all the women, with one or two likely to remain.

3.261 As adoption of the above recommendations will result in the accused having less opportunity to challenge prospective jurors, there is arguably a greater risk that prospective jurors who cause particular concern to the accused will be selected onto the jury. The Commission has therefore carefully considered the option of allowing the accused to exercise their challenges after a complete jury has been balloted—as is currently the case in New South Wales and Tasmania (see [3.55]).

3.262 The main advantage of this practice is that the accused has the opportunity to see the entire jury before exercising their challenges. The accused is therefore arguably better placed to identify jurors of particular concern to them.[254]

3.263 It could also make the experience less stressful for the accused, as they would have significantly more time to consider whether they should challenge a juror.

3.264 Similarly, it gives the accused's lawyers additional time to confer with the prosecution about whether any of the balloted jurors should be stood aside.

3.265 However, several disadvantages of this approach have also been identified. Supreme Court judges consulted by the Commission considered that it would likely be more stressful and cumbersome for an already seated juror to be challenged, and required to exit the jury box past the other balloted jurors.[255] A New South Wales jury administrator also acknowledged that the process can be awkward for the remaining jurors, as it requires them to shuffle over to allow the challenged juror past and create space for their replacement.[256] These issues were identified by the Tasmanian Department of Justice in its 1998 review of jury selection, which stated:

> It has been suggested that the administrative practice whereby a person can be seated in the jury box before being challenged is embarrassing to a potential juror and administratively time consuming as people shuffle backwards and forwards in the jury box. This could be overcome by challenges prior to a person reaching the jury box and adopting the practice from other jurisdictions that all jurors are sworn in together.[257]

3.266 The requirement that challenged jurors stand and exit the jury box past other seated jurors may prove particularly difficult for jurors with physical impairments. Older courtrooms with less accessible jury boxes (such as those in the Victorian Supreme Court and Bendigo) may pose particular problems.

3.267 If the alternative approach were to be adopted, the Commission considers that it would be necessary to allow the parties to exercise any unused challenges on further balloted jurors.[258] Otherwise the parties would lose the opportunity to 'save' a challenge in the event that a particularly inappropriate replacement was balloted. However, while necessary, this could also make the empanelment process more complicated and time-consuming, as it may require multiple stages of balloting before all the parties' challenges are exercised.

3.268 The Commission is also concerned that balloting out of the box may facilitate some of the more negative, stereotype-based uses of peremptory challenges identified at [3.251]–[3.252] because it focuses attention on the demographic composition of the jury as whole, rather than on concerns about the individual juror.

254 A County Court judge consulted by the Commission identified this as one of the advantages of the New South Wales empanelment process: Consultation 22 (Judges of the County Court of Victoria).
255 Consultation 13 (Judges of the Supreme Court of Victoria).
256 Consultation 24 (Assistant sheriff, manager jury and court administration, NSW).
257 Tasmanian Government, *Issues Paper: Review of Jury Act 1899* (1999) 25–6. However, the practice of challenging jurors prior to reaching the jury box (as in Victoria) was not adopted in the *Juries Act 2003* (Tas).
258 For example, if the accused exercised two of their three challenges initially, they would be able exercise their remaining challenge on one of the two jurors balloted to replace them.

3.269 Having weighed the advantages and disadvantages of balloting out of the jury box, the Commission considers that the greater juror inconvenience caused by the New South Wales and Tasmanian process is not justified. Even with a reduced number of challenges, the current process provides adequate opportunity for the accused to exercise the most important functions of peremptory challenges identified at [3.245]–[3.246]. There was also little support for substantial change to the empanelment process during consultations. Below (at [3.287]–[3.296]) the Commission proposes minor procedural changes to the current process to improve the experience of jurors and parties.

Civil trials

3.270 The Commission considers that the number of peremptory challenges available to parties in civil trials should be reduced from three to two.

3.271 As with criminal trials, a reduction will minimise the opportunity for parties to exercise challenges based on assumptions and stereotypes about people with certain characteristics.

3.272 The primary basis for exercising peremptory challenges in civil trials appears to be the prospective juror's occupation.[259] It could be argued that this is not as personal a characteristic as gender, race or age and therefore is not as offensive. Further, it could be argued that as occupation is a choice, instead of an immutable characteristic, it is more reflective of a prospective juror's values and attitudes and therefore a better indicator of how that prospective juror may decide.[260]

3.273 However, as the Common Law Bar Association has noted, the occupational categories used for the purposes of jury empanelment are fairly broad and non-specific.[261] There is scope for significant variation in the type of work that such categories describe. The Commission's consultations also revealed that the way in which practitioners use occupation in the exercise of challenges is not founded on a strong evidence base, but is instead largely informed by legal folklore.[262]

3.274 Further, the Commission considers it undesirable that certain occupational groups, such as teachers and nurses, are perceived to be routinely excluded from jury service, as it undermines confidence in the jury system.

3.275 Although a reduction from three to two is numerically small, it represents a third of the total challenges available. The effect of such a reduction becomes more significant in multi-defendant proceedings, which are relatively common in personal injury trials. In such cases, a reduction would limit the multiplier effect where peremptory challenges are provided to each separately represented party.[263]

3.276 The Commission is also concerned about the unequal number of challenges available to plaintiffs and defendants in proceedings involving multiple, separately represented parties. This can occur where separately represented plaintiffs or defendants do not consent to join together in their peremptory challenges, and so are provided with three challenges each.[264] As noted at [3.161], this creates the potential for separately represented parties (usually defendants) with similar interests to strategically combine their additional challenges in a way that they perceive will be disadvantageous to the opposing side.

259 See [3.109]–[3.116].
260 Horan, above n 120, 36.
261 Submission 17 (Common Law Bar Association). See also Submission 18 (Peter Burt). 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 in accordance with the Australian and New Zealand Standard Classification of Occupation Guidelines.
262 See also Horan, above n 120, 36.
263 See [3.19].
264 *Juries Act 2000* (Vic) s 35(4).

3.277 The Commission acknowledges that this does not happen in every case, and separately represented parties' interests are not always aligned. However, the Commission agrees with the Common Law Bar Association that, in such cases, the current position may create a perception of unfairness to the single party.[265]

3.278 The Commission therefore recommends that in multi-defendant proceedings, the number of challenges available to the single party be increased to match the total number available to the opposing side.

3.279 For example, in a proceeding involving one plaintiff and three separately represented defendants (who do not consent to join in their peremptory challenges), the plaintiff would have six challenges, and the defendants would have two each, a total of six for the defendants, and 12 overall.

Recommendations

6 The number of peremptory challenges available to each separately represented party in a civil jury trial should be reduced from three to two.

7 Where there are multiple separately represented plaintiffs or defendants who do not consent to join in their peremptory challenges, adjustments to the number of challenges should be made to ensure that the plaintiff/s have an equal total number of challenges to the total number available to the defendant/s, or as close to an equal number as is possible in the circumstances. To achieve this, where necessary the number of challenges available to the plaintiff/s or defendant/s should be increased to match the number available to their opponents.

3.280 Recommendations 6 and 7 should be adopted together, as without the decrease in the number of challenges available to each party (Recommendation 6), Recommendation 7 would result in a significant increase in the total number of challenges in multi-party civil jury trials.

3.281 To illustrate, if the number of peremptory challenges per party is not reduced from three to two, in the example at [3.279], the plaintiff would have nine challenges and each of the defendants would have three challenges—a total of 18 challenges (nine for each side). The Commission considers that 18 peremptory challenges would be excessive for a six-person civil jury, for reasons similar to those outlined at [3.253].

The effect of the Crown right to stand aside

3.282 While the Commission accepts that the role of the Crown in standing aside prospective jurors is qualitatively different to the role of the defendant in exercising peremptory challenges,[266] it is nonetheless of the view that a prospective juror who is stood aside should be permanently excluded from the jury in the same way that a peremptorily challenged juror is.

265 See [3.160].
266 See [3.9]–[3.16]. See also Victorian Parliament Law Reform Committee, above n 35, 138–143.

3.283 In Victoria, Crown stand asides were temporarily replaced by Crown peremptory challenges in 1994.[267] However, Crown stand asides were reintroduced in place of Crown peremptory challenges when the current Juries Act came into effect in 2001. In explaining this reversal, the Second Reading Speech for the Juries Act stated:

> It 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.[268]

3.284 This was consistent with the recommendation of the Victorian Parliament Law Reform Committee's 1996 report into jury service in Victoria, which found that it was important that the distinct role of the Crown be made clear.[269] The Committee also noted that the liability of stood-aside jurors to be re-balloted was important where the remainder of the panel had been exhausted (through challenges and excuses) and there would otherwise be insufficient panel members available to form a jury.[270]

3.285 While the Commission agrees with the Committee's finding that it is important to distinguish the role of the Crown and the accused in exercising challenges, it does not agree that stood-aside jurors should remain part of the jury panel. There is no evidence that the Crown is misusing its right to stand aside prospective jurors, and the proposal to make the effect of stand asides the same as peremptory challenges was universally supported in consultations and submissions. The current process with regard to stand asides unnecessarily complicates empanelments, and is confusing to both prospective jurors and practitioners. It also has the potential to result in the empanelment of inappropriate jurors if a stood-aside juror is balloted again, and the Crown is unwilling or unable to challenge that juror for cause. Concerns about exhausting the panel are better addressed by the JCO ensuring that there are always sufficient panel members to allow for excuses and challenges.[271]

3.286 Although the effect should be the same, the Commission considers that the terminology of 'stand asides' should be retained, as it is familiar to practitioners, and highlights the distinct role of the Crown in the jury selection process. If Crown challenges were to be reclassified as 'peremptory challenges', the Commission is concerned that this distinct role may be eroded over time.

Recommendation

8 A prospective juror who is stood aside by the Crown should be permanently removed from the ballot for that trial.

The peremptory challenge process

3.287 Although there is a variety of different ways in which a jury can be empanelled (see [3.52]–[3.59]), the Commission does not consider that there is a need for substantial changes to be made to the way in which juries are empanelled in Victoria. For example, as discussed at [3.261]–[3.269], the Commission is not proposing that the approach of challenging prospective jurors out of the jury box should be implemented in criminal trials. Minor procedural changes are desirable, however, to ensure that juries are empanelled efficiently, and with minimal stress for those involved.

267 *Juries (Amendment) Act 1993* (Vic) s 6.
268 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 December 1999, 1247 (Rob Hulls, Attorney-General).
269 Victorian Parliament Law Reform Committee, above n 35, 138–142.
270 Ibid 141–2.
271 See also the discussion at above n 2.

Criminal trials

3.288 Two uniquely Victorian requirements were criticised in consultations and submissions:

- the requirement that prospective jurors 'parade' in front of the accused on the way to the jury box.
- the requirement that the accused themselves voice challenges, with little flexibility to delegate this role to their lawyers.

The parade

3.289 The parade was criticised as unnecessary, archaic and demeaning by most judges and lawyers the Commission spoke to. Submissions provided by the Juries Commissioner, the Ethnic Communities' Council of Victoria, DPP (Vic) and VEOHRC supported its abolition.[272]

3.290 The VLRC juror survey shows that it provokes strongly negative reactions in some jurors and prospective jurors. Such strong reactions may extend beyond the individual to family and friends, and influence views of the criminal justice system.

3.291 While it is reasonable and necessary for the accused to have the opportunity to see the prospective jurors, the parade is an unnecessarily intimidating way to achieve this. It is a practice that appears to have persisted in Victoria largely through tradition. Juries are successfully empanelled in all other Australian jurisdictions without this requirement.

3.292 An alternative approach, already taken by at least one Victorian County Court judge consulted by the Commission, is to have the balloted juror stand and face the accused before walking towards the jury box.

Who voices the challenge

3.293 As noted at [3.245], the Commission considers that involving the accused in the jury selection is one of the most important roles of peremptory challenges. One of the ways this is achieved is through the accused voicing the challenges aloud in the courtroom. In Victoria, lawyers may only voice challenges on behalf of the accused in limited circumstances.[273]

3.294 However, some concern was expressed in consultations and submissions that it was not always appropriate for the accused to voice challenges themselves. Victoria Legal Aid described the concern as follows:

> [W]e… advocate for a more flexible approach to the way in which peremptory challenges can be made. Currently, the accused is required to voice challenges in open court. Many accused suffer from mental and physical health problems that impede their ability to voice a challenge. This can be a very stressful and intimidating task for those accused who are vulnerable or whose verbal presentation may act to prejudice them in the eyes of prospective jurors.[274]

3.295 The Commission agrees that a more flexible approach is desirable. While an accused may wish to exercise their challenges themselves, they should also have the right to delegate this role to their lawyers. The routine use of lawyers to voice challenges in other Australian jurisdictions suggests that this can be done without undermining the empanelment process.

3.296 The Commission notes the concern of some practitioners that there is benefit to the accused in participating in the challenge process, and therefore recommends that the default position be that the accused voice the challenge, unless they exercise their right to delegate.

272 By contrast, some of the lawyers interviewed in the Australian Institute of Criminology's 2008 report into juror satisfaction in Australia described the process as 'embarrassing but necessary': Australian Institute of Criminology, above n 166, 82–3.
273 See [3.44].
274 Submission 10 (Victoria Legal Aid).

Recommendations

9 Prospective jurors should not be required to parade in front of the accused. Judicial officers should ensure that the accused and their legal representatives have the opportunity to see prospective jurors as their names are balloted, and have a reasonable period of time in which to exercise their challenges.

10 Prior to the empanelment, the accused should be given the option as to whether they wish to exercise their challenges personally or through their legal representatives.

Civil trials

3.297 Few concerns were expressed in relation to the civil jury empanelment process in consultations, through the juror survey and in submissions.

3.298 The most commonly raised issue was that the practice of barristers turning around to look as each prospective juror is balloted can be unnecessarily intimidating. The Common Law Bar Association acknowledged this concern, stating: [275]

> It might be thought less intrusive… if counsel are permitted to face the pool throughout the selection process to moderate any juror discomfort based on a feeling that he or she is being scrutinized unduly.

3.299 The Commission agrees that it is preferable for barristers to sit facing the jury pool in civil empanelments to improve prospective jurors' experience of the empanelment process.

Recommendation

11 Judicial officers should direct barristers and solicitors to sit facing the panel so they do not need to turn around each time a prospective juror is balloted.

275 Submission 17 (Common Law Bar Association).

4

Calling of the panel by name or number

4. Calling of the panel by name or number

Introduction

4.1 As discussed in Chapter 2, prospective jurors from the jury pool are balloted onto particular trials to form jury panels.[1] In the regions, often the entire jury pool makes up the jury panel.

4.2 After the panel has proceeded to the courtroom, the judge directs the names or numbers of all prospective jurors to be called out.[2] This process is referred to as the 'calling of the panel'. The calling of the panel is effectively a roll call to check that all prospective jurors who were balloted to the panel are in attendance and that there are no prospective jurors or others on the panel who are not meant to be there.

4.3 No other Australian jurisdictions require the panel to be called out prior to the ballot to select the members of the jury. In all other jurisdictions, only the names or numbers of jurors who are balloted to be on the jury are called out in court, rather than those of the entire jury panel.

4.4 This chapter first discusses the identification of jurors by name or number in court and then discusses the process of calling the panel.

Current law on the identification of jurors by name or number

4.5 Currently, in Victoria, 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'.[3]

4.6 As there are no criteria to guide the court as to when it may be appropriate to call the jury panel by number rather than name, the decision is entirely within the discretion of the judge.

4.7 Victoria is the only jurisdiction in Australia that enables the court to decide whether to identify prospective jurors in court by name or number without providing any criteria to guide the court's decision.

4.8 In Queensland and Tasmania, the court has the discretion to identify jurors by number if the judge considers that, 'for security or other reasons, the persons' names should not be read out in open court'.[4]

1 *Juries Act 2000* (Vic) s 30.
2 Ibid s 31.
3 Ibid s 31(3).
4 *Jury Act 1995* (Qld) s 51; *Juries Act 2003* (Tas) s 29(8). The Federal Court also provides that jurors may identified by number 'to protect the security of a juror or potential juror': *Federal Court of Australia Act 1976* (Cth) s 23EB.

4.9 In five jurisdictions, courts do not have a choice. In New South Wales, Western Australia and South Australia, prospective jurors are always identified in court by number.[5] In the Australian Capital Territory and the Northern Territory, prospective jurors are always identified in court by name.[6]

The development of the law in Victoria

4.10 Prior to the enactment of the *Juries Act 2000* (Vic), the *Juries Act 1967* (Vic) provided for the identification of jurors by name only.[7] The *Juries Act 2000* (Vic) originally adopted the formulation used in Queensland (and later Tasmania), namely that prospective jurors should be identified by name unless the court considered 'for security or other reasons, the persons' names should not be read out in open court'.[8]

2002 amendment

4.11 An amendment to the Juries Act in 2002 made the calling of the panel in court discretionary, rather than mandatory.[9] Pursuant to this amendment, the calling of the panel is only required if directed by the judge. The rationale for this amendment was to address the security concerns of jurors about the repeated calling of their names in court.[10]

4.12 The Commission understands, however, from its own observations of jury empanelments and from the Juries Commissioner that the panel is always called in court, either by name or number.[11] Consequently, it would seem that the 2002 amendment has not achieved the purpose it was intended to address.

4.13 Further discussion on calling the panel is at [4.87]–[4.95] below.

2006 amendment

4.14 An amendment to the Juries Act in 2006 (2006 amendment) removed reference to 'security or other reasons', and instead provided that the court can direct that numbers be used to identify prospective jurors if it 'considers names should not be read out in open court'.[12]

4.15 The Explanatory Memorandum for the amendment indicates that, like the 2002 amendment, it was introduced in response to the concerns of jurors about their privacy and security. The Explanatory Memorandum states:

> The amendment will promote the use of [number to identify jurors] 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.[13]

5 *Jury Act 1977* (NSW) ss 48–49; *Juries Act 1957* (WA) ss 36–36A. The way in which jurors are to be identified is not specified in the *Juries Act 1927* (SA). However, in practice jurors are always identified by number in court: Consultation 17 (Acting jury manager, South Australia). The provision for identifying jurors by number only in the courtroom was introduced by these three jurisdictions in response to a report by the South Australian sheriff on juror harassment in 2002: Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 52–53. It is noted that in Western Australia and South Australia while jurors are only publicly identified by number, parties have access to the name, occupation and address of the jurors. See **Appendix F**.

6 *Juries Act 1967* (ACT) s 31; *Juries Act 1963* (NT) ss 37, 39.

7 *Juries Act 1967* (Vic) s 32.

8 *Juries Act 2000* (Vic) as enacted.

9 *Juries (Amendment) Act 2002* (Vic) s 6.

10 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 May 2002, 1326 (Rob Hulls, Attorney-General).

11 The issue of the judicial discretion to direct the panel to be called in court and to direct it to be called by name or number is not addressed in the Bench notes of the Judicial College of Victoria's Criminal Charge Book.

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

13 Explanatory Memorandum, Justice Legislation (Further Amendment) Bill 2006, 14.

4.16 While the Explanatory Memorandum states that the amendment seeks to place number as a juror identifier on an equal footing with name, the Commission does not consider it achieves this aim, as the statutory formulation appears to favour name as the default.

4.17 It is also possible that the amendment was intended to address the lack of clarity around when it may be appropriate to use number rather than name to identify prospective jurors and whether it was necessary to make out a security concern to justify use of numbers.

4.18 A number of cases on the application of the provision highlight the different ways in which judges had interpreted the proviso that name be used except for 'security or other reasons'.

4.19 In *R v Strawhorn*[14] the Crown applied for prospective jurors to be identified by number on the grounds that jurors may be concerned about their security because the case involved evidence about high-profile gangland members and their activities. In making the order, the Court did not make findings on the security risk to jurors, but rather considered there was 'good reason' to empanel by number.[15]

4.20 Similarly, in *R v Juric–Ruling (Calling of Jury Panel by Numbers)*[16] the Court did not make a definitive finding about juror security, but directed that jurors be identified by number to guard against juror intimidation. The Court also remarked that it considered identifying jurors by number would 'aid juror concentration'.[17]

4.21 In *R v Goldman*[18] the Crown applied for an order that jurors be identified by number on the grounds there was a risk of attempted interference with the jury, as the accused had previously intimidated a prosecution witness. In granting the order, the court found that there was a risk of jury interference and that the witness intimidation could lead jurors to be concerned about their safety.

4.22 In *DPP v Ivanovic*[19] 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.'[20]

4.23 These cases demonstrate that prior to the 2006 amendment some judges (and some lawyers) considered there was a need to make out a security concern in order to justify calling the panel by number, while other judges did not consider that was necessary, relying instead on 'other reasons' to justify their decision.

Current practice

Use of name or number

4.24 According to the Juries Commissioner, the practice of current judges in relation to the identification of prospective jurors in court is mixed. Some identify prospective jurors by name in all but exceptional circumstances, while some identify prospective jurors almost exclusively by number. Others make the decision on a case-by-case basis.[21]

4.25 The VLRC juror survey, observations of empanelments, and consultations with judges confirm that the practice is mixed.

14 [2006] VSC 251 (21 June 2006).
15 Ibid [12].
16 (Unreported, Supreme Court of Victoria, Nettle J, 12 August 2003).
17 Ibid [12].
18 [2004] VSC 166 (5 March 2004).
19 [2003] VSC 388 (15 September 2003).
20 Ibid [6].
21 Submission 13 (Juries Commissioner).

4.26 The data from the juror survey shows that prospective jurors were identified by name in 65 per cent of trials attended by respondents, and by number in 26 per cent of trials attended by respondents.[22] This data may not, however, reflect the actual rate of the different modes of identifying prospective jurors. The way in which the survey was distributed meant there were likely to have been multiple respondents from the same panel, which, given the size of the survey, could skew the results.[23] Nonetheless, even if the rate of use of the different modes is not accurate, the survey still demonstrates a variation in practice among judges.

4.27 Three of the four Supreme Court judges and one County Court judge consulted by the Commission said they empanel by name as the default, but may empanel by number if they consider the nature of the case warrants calling by number. One County Court judge who practises in both the civil and criminal jurisdictions said that she empanels by number in criminal trials, but sometimes empanels by name in civil trials.

4.28 One Supreme Court judge and four of the five County Court judges the Commission consulted said that they had previously empanelled by name, as that had always been the practice, but now empanel exclusively by number.

Reasons for using name

4.29 The rationales favouring use of name advanced by the judges the Commission consulted were:

- It is important that the accused perceives the trial to be fair and prospective jurors' names may provide the accused with information about ethnicity that they may consider necessary to ensure an impartial jury. This rationale may have greater salience in certain types of trials in which ethnicity or religion may be an issue.
- The information available to the accused about prospective jurors is minimal compared with information that was previously available.[24] As the level of information previously available did not create a problem for jurors, the identification of jurors by name should not be a source of concern.

4.30 One judge commented that she initially resisted using numbers, as she did not think it was polite to refer to people by number. The Commission notes that politeness was also used as a rationale by the Supreme Court of Queensland in *R v Patel (No 4)* for using name to identify jurors.[25]

4.31 An argument put forward in favour of using name by some defence practitioners the Commission consulted was that using prospective jurors' names can help a party, lawyer or judge to identify if they know the prospective juror.[26] Knowledge of a party, lawyer or judge may make the prospective juror unsuitable, as they may not be impartial.

4.32 The judges consulted by the Commission did not consider this argument particularly compelling as a justification for using name to identify prospective jurors. Some judges described practices they have adopted to assist prospective jurors to identify parties and counsel in order to alleviate this problem, such as requiring counsel to stand and face the jury panel, or providing the panel with a written list that includes the names of the lawyers and parties.

4.33 The Commission notes that such practices may assist prospective jurors to identify whether they know a party or a lawyer, but will not help parties and lawyers to identify whether they know prospective jurors.

22 Nine per cent of respondents could not remember whether prospective jurors were identified by name or number.
23 See Chapter 1 for further details of the methodology used for the VLRC juror survey.
24 Previously, the names, occupations and addresses of jurors were available to parties in civil trials. For criminal trials, the addresses of jurors were only available if the court so directed: *Juries Act 1967* (Vic) s 31. As noted at Chapter 3, n 16, information about prior convictions was also available to the prosecution until 1999.
25 *R v Patel (No 4)* (2013) 2 Qd R 544, 555 [42].
26 Victorian Law Reform Commission, *Jury Empanelment*, Consultation Paper No 18 (2013) [4.32]–[4.34].

Reasons for using number

4.34 The judges who use name as a default said that the types of cases in which they consider it may be appropriate to use number are those where there is a perceived security risk, such as the trial of a high-profile accused.

4.35 The judges who always empanel by number said that they had changed their practice in response to reports from the Juries Commissioner that number is the strong preference of jurors and prospective jurors.

4.36 One judge explained that using number helps alleviate any concerns jurors may have about their privacy and security and helps them to concentrate on the task at hand.

4.37 One judge commented that since adopting number, she has noticed a significant drop in the number of excuse applications.

Cultural change

4.38 A few judges the Commission consulted noted that resistance to identifying jurors by number was diminishing both among judges and the profession. Some judges recounted that barristers regularly used to oppose the use of number to identify jurors, but that now only a handful of older barristers raise this as an issue.

Issues associated with the current law

Criminal trials

Prejudice to the accused

4.39 As noted at [4.7], there are no criteria in the Juries Act to guide the use of the judicial discretion to empanel by name or number. Consequently, judges adopt a variety of approaches according to their personal preference or understanding of when it is appropriate to empanel by number.

4.40 The use of number in some cases and not others may give prospective jurors the impression that there is something about the particular case that warrants extra security measures, such as juror anonymity.[27]

4.41 For example, the Criminal Bar Association submitted that:

> Empanelment by number risks creating a paradigm of potential prejudice against an accused person in the mind of jurors that is both undesirable and unnecessary particularly given the presumption of innocence. The message conveyed to potential jurors by empanelment by number flies in the face of the presumption of innocence. This may be compounded in situations where you have jurors empanelled by number who have previously sat on a jury where empanelment was by name.[28]

4.42 The Juries Commissioner expressed a similar concern:

> It only takes one judge to routinely call the panel by number and another judge to do so only in exceptional circumstances to create a system where citizens are left confused and unnecessarily concerned for their own security.[29]

27 This argument was the basis of a number of applications by the defence to have the panel called by name. See, for example, *DPP v Ivanovic* [2003] VSC 388 (15 September 2003) [3]; *R v Goldman* [2004] VSC 166 (5 March 2004) [10].
28 Submission 16 (Criminal Bar Association).
29 Submission 13 (Juries Commissioner).

4.43 This problem was illustrated by the discharge of a jury in a murder trial in the Supreme Court in 2013. 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 prejudicial towards the accused.[30]

4.44 Judges had different views about whether a consistent practice in relation to the mode of empanelling was important. All the Supreme Court judges the Commission consulted were in favour of retaining the judicial discretion to decide whether to empanel by name or number. Consistency of practice was not considered to be of primary importance by these judges.

4.45 Similarly, the Victorian Director of Public Prosecutions (DPP Vic)[31] and Victoria Legal Aid[32] favoured retaining judicial discretion to call the panel by name or number, although Victoria Legal Aid submitted that judges should be required to give practitioners oral reasons prior to the trial for a decision to empanel by number.

4.46 In contrast, one County Court judge who has always empanelled by name considered consistency to be more important than his own personal preference for empanelling by name. In that judge's view, it would be preferable to have a consistent mode of empanelment to avoid concerns that number was used only because there was a security issue.

4.47 Some judges the Commission consulted explained that to reduce the likelihood of prospective jurors forming this impression, they tell the jury panel that they will be identified by number, that using number is routine, and that no special significance should be attached to the practice.[33]

4.48 However, the Commission observed some empanelments where the panel was called by number where no comment was made by the judge about the process. Data from the juror survey also shows that not all judges address the panel when identifying prospective jurors by number. Respondents who were empanelled by number were asked whether the judge had made any comments about the practice. Thirty-one out of the 80 respondents to this question (39 per cent) responded that the judge had not made any comments.[34]

Security of jurors

4.49 A key concern about the use of name is that jurors are able to be easily identified and found through their name. This was one of the main concerns of jurors and prospective jurors favouring the use of number. These views are set out in more detail at [4.62]–[4.77].

4.50 The Commission asked the court staff and JCO staff it consulted whether they were aware of any incidents of juror harassment. None of these staff was aware of any incidents of harassment. However, one juror from a regional area reported that she had been harassed by a family member of an accused on whose jury she had served. In that case, the panel had been identified by name.

4.51 A few judges the Commission consulted did not consider that there had to be a justification for any juror concerns about security. Rather, these judges considered that using number was an effective way of avoiding the issue arising at all.[35]

30 Transcript of Proceedings, *R v Xypolitos* (Supreme Court, Curtain J, 14 August 2013) 511–516.
31 Submission 12 (Victorian Director of Public Prosecutions).
32 Submission 10 (Victoria Legal Aid).
33 See also *DPP v Dupas (Ruling No 5)* [2007] VSC 256 (6 July 2007) [2] where the Court stated 'I say to each panel that [calling by number] is the modern way of doing it; that it has nothing to do with the particular case and is the way we do it generally.'
34 Thirty-nine per cent responded that the judge had made a comment about empanelling by number and 22% did not remember.
35 See [4.36]. Also *DPP v Dupas (Ruling No 5)* [2007] VSC 256 (6 July 2007) [3] where the Court noted that 'a jury that feels confident is a good jury for an accused; and a jury feels more confident with numbers than with names. I think it is better for everyone, including an accused, that a jury feels confident.'

4.52 The protection of jury members from threats or intimidation has been identified as central to the institution of trial by jury. As the Court in *Ronen v The Queen* stated:

> It is self-evident that the institution of trial by jury requires the protection of jury members from threats and intimidation. It would be a disaster for the institution if jurors were to be susceptible to intimidation that could influence their findings. For the jury to remain 'the community's guarantee of sound administration of criminal justice', it must be protected from outside intimidatory influences.[36]

Privacy of jurors

4.53 Distinct from the security of jurors, privacy was also identified as a reason for supporting the use of number to publicly identify jurors and prospective jurors. Even if there are no concerns about security, many jurors and prospective jurors considered that their details, including their names should only be available on a 'need to know' basis.

4.54 Privacy was acknowledged as a separate concern in the Second Reading Speech debate on the 2002 amendment to the Juries Act that made the calling of the panel discretionary instead of mandatory.[37]

4.55 Speaking in support of the amendment, the Hon. Peter Katsambanis MLC said:

> In this day and age we place more store on a person's individual privacy and the privacy of their name and particularly their residential address. Many jurors have made the comment to me and to other members of Parliament that they feel as though what they consider to be private information is made public in a way that may in some cases not be in their own best interests. We want jurors to feel safe and secure and to know that their privacy will be protected. We want to encourage more people to serve on juries.[38]

The use of name as a basis for exercising peremptory challenges

4.56 The primary argument advanced by defence practitioners and judges who use name as the default mode of identifying prospective jurors is that a prospective juror's name may provide the accused with information relevant to the decision to challenge.[39] For example, the Criminal Bar Association submitted that:

> The use of name is particularly important when matters of ethnicity or religion are issues at trial.[40]

4.57 This argument was used by defence lawyers to argue against applications to call the panel by number in a number of cases.[41] It was also used (unsuccessfully) in *Ronen v The Queen*[42] to challenge the provision for calling the panel by number only in the *Jury Act 1977* (NSW) on the grounds that it was contrary to the right to jury trial in section 80 of the Constitution.

36 *Ronen v The Queen* (2004) 211 FLR 320 [95].
37 See [4.11].
38 Victoria, *Parliamentary Debates*, Legislative Council, 8 October 2002, 222 (Peter Katsambanis).
39 Victorian Law Reform Commission, above n 26, 46; Submission 16 (Criminal Bar Association). This view was also expressed by Victorian stakeholders in the Australian Institute of Criminology's study on juror satisfaction: Australian Institute of Criminology, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Report No 87 (2008) 83.
40 Submission 16 (Criminal Bar Association).
41 *R v Juric – Ruling (Calling of Jury Panel by Numbers)* (Unreported, Supreme Court of Victoria, Nettle J, 12 August 2003); *R v Goldman* [2004] VSC 166 (5 March 2004).
42 (2004) 211 FLR 320.

Civil trials

4.58 Most of the above arguments in relation to criminal trials do not apply to civil trials. As the Common Law Bar Association noted in its submission:

> While there may be a perception of risk to personal safety on the part of jurors in criminal cases involving serious violence, this perception is very unlikely to arise in a civil case.[43]

4.59 However, the arguments in relation to the use of number to protect the privacy of prospective jurors apply to both criminal and civil trials, as does the argument in relation to the use of name as a basis for peremptory challenges.

4.60 The Common Law Bar Association supported the current position that allows the judge the discretion to decide how to identify prospective jurors. While it does not specifically address the use of name as a basis for peremptory challenges, the Common Law Bar Association's submission states:

> To continue to provide a sense that persons with possible predispositions might be excluded by peremptory challenges at least the current information is desirable.[44]

4.61 There was a range of views among the civil law practitioners that the Commission consulted. Most supported identifying prospective jurors by name.[45] However, one practitioner told the Commission that she never relies on name as a basis for peremptory challenges and does not consider that prospective jurors' names are required.[46]

The effects on jurors

Jurors' preferences in criminal and civil trials

Consultations with jurors

4.62 The Commission consulted with 42 jurors and prospective jurors from regional areas who had attended empanelments. Almost all of these expressed a preference for being identified in court by number. The reasons given for preferring number were:

- There is no reason for the accused or parties to know your name.
- It is very easy for someone to find out where you live from your name, particularly in regional areas.

4.63 When asked whether it could be valid for name to be used to identify a person's ethnicity, a few people responded that a person's appearance is as good an indication of ethnicity as name, and therefore name is not required for this purpose.

4.64 A number of jurors and prospective jurors consulted also considered that occupation should not be read out, while others considered that occupation may be valid information on which to base a challenge.

The VLRC juror survey

4.65 The VLRC juror survey asked whether respondents would prefer to be identified in court by name or number. Of the 367 respondents who answered this question, 308 had attended an empanelment for a criminal trial and 59 had attended an empanelment for a civil trial.

4.66 **Table 2** sets out the data for criminal trials for both Melbourne and the regions. **Table 3** sets out the data for civil trials.

43 Submission 17 (Common Law Bar Association).
44 Ibid.
45 Victorian Law Reform Commission, above n 26, 46 [4.30].
46 Consultation 32 (Law Institute of Victoria members, Melbourne, Victoria).

Table 2: Preference for name or number in criminal trials

	Melbourne	Regions	Total
Name	27 (14.2%)	21 (17.8%)	48 (15.6%)
Number	145 (76.3%)	75 (63.6%)	220 (71.4%)
No preference	18 (9.5%)	22 (18.6%)	40 (13%)
TOTAL	**190**	**118**	**308**

Table 3: Preference for name or number in civil trials

	Melbourne	Regions	Total
Name	10 (19.6%)	1 (12.5%)	11 (18.6%)
Number	34 (66.7%)	6 (75%)	40 (67.8%)
No preference	7 (13.7%)	1 (12.5%)	8 (13.6%)
TOTAL	**51**	**8**	**59**

4.67 There is no significant difference in preference based on the type of trial respondents attended. Respondents attending both criminal and civil trials showed a clear preference for empanelment by number (71.4 per cent for criminal trials and 67.8 per cent for civil trials) over empanelment by name (15.6 per cent for criminal trials and 18.6 per cent for civil trials).

4.68 Respondents were also asked to explain their preference. The main reasons given by respondents who preferred to be empanelled by number were:

- number preserves privacy/anonymity
- number enhances juror security
- number avoids assumptions being made about ethnic background.

4.69 The main reasons given by respondents who preferred to be empanelled by name were that:

- name is more personal
- name is more polite.

Submissions

4.70 Two public submissions from individuals addressed the question of the mode of identifying prospective jurors. One submission supported using number only,[47] while the other supported judicial discretion.[48] The submitter who supported judicial discretion said that he had no problem with being called by name and that he considered security concerns related to being identified by name were remote.[49]

4.71 The Juries Commissioner, the Ethnic Communities' Council of Victoria and the Victorian Equal Opportunity and Human Rights Commission all supported identifying jurors by number only.[50]

47 Submission 6 (Name withheld).
48 Submission 7 (Name withheld pursuant to the Juries Act).
49 Ibid.
50 Submissions 13 (Juries Commissioner); 11 (Ethnic Communities' Council of Victoria); 14 (Victorian Equal Opportunity and Human Rights Commission).

Juries Commissioner's Office juror satisfaction survey

4.72 The Juries Commissioner's office (JCO) conducted a juror satisfaction survey in 2013 (JCO survey).[51] Over 1900 jurors and prospective jurors responded to the JCO survey. The survey asked whether respondents preferred to be empanelled by name or number.

4.73 For 2013, across Victoria 73.8 per cent of respondents preferred to be empanelled by number, 17 per cent by name and 9.3 per cent didn't know. These figures are similar to the results from the VLRC juror survey.

4.74 However, a regional breakdown of responses to the JCO survey shows a significant difference between Melbourne and the regions. Only 54.3 per cent of regional respondents prefer to be empanelled by number compared with 78.4 per cent of Melbourne-based respondents. A significant minority (31.9 per cent) of regional respondents preferred to be empanelled by name.

4.75 The sizeable discrepancy in preference between Melbourne and the regions shown by the JCO survey is not consistent with the VLRC juror survey findings, and is not consistent with the views of jurors and prospective jurors in the regions the Commission attended and conducted consultations.

Consultations with JCO and court staff

4.76 The Commission consulted with 13 JCO and court staff—the Juries Commissioner, four regional senior registrars and regional and Melbourne-based jury keepers.

4.77 The view of most of the JCO and court staff consulted was that they consider that jurors and prospective jurors generally prefer to be empanelled by number. One senior registrar commented that as jury duty is being imposed on citizens, jurors' preferences should take precedence over those of defence practitioners.

The Commission's conclusions

Name or number

4.78 The Commission considers that the discretion of the court to decide to identify prospective jurors by name or number, and the variation in judges' practices, have a number of disadvantages. Of serious concern is the potential for the varying use of the discretion to prejudice the accused in criminal trials.

4.79 The Commission also notes that the vast majority of jurors and prospective jurors prefer to be identified by number only for security and privacy reasons.

4.80 In contrast, the Commission considers that the use of name as a proxy for ethnicity, and subsequently the possible basis for the exercise of peremptory challenges, is both inappropriate and inherently unreliable. Names are no longer a useful indicator of a person's ethnic background.

4.81 The Criminal Bar Association submitted that identifying prospective jurors by number may inherently prejudice the accused and that this effect is compounded where prospective jurors are aware of the different modes of empanelment.[52]

51 Juries Commissioner's Office, *2013 Victorian Juror Satisfaction Survey Results* (2013) <https://www.courts.vic.gov.au/jury-service/victorian-juror-satisfaction-survey-results>. The JCO survey was also conducted in 2011 but the 2011 survey is not discussed in this paper as it was conducted in Melbourne only and so is not comparable to the VLRC juror survey.

52 See [4.41].

4.82 The Commission agrees that there is a potential for prejudice where a jury is empanelled by number and prospective jurors are aware of the different modes of empanelment. However, the Commission does not consider that empanelling by number is inherently prejudicial to the accused.

4.83 Three Australian states identify jurors by number only in court. The jury administrators the Commission consulted were not aware of any ongoing issues associated with this practice.

4.84 The Commission considers that it is significant that a number of judges reported moving to empanelment by number only in recent years in response to feedback from jurors, and that the rate of challenge by defence practitioners to the decision to empanel by number has reduced significantly over time.[53] This suggests there is a gradual increase in acceptance of empanelment by number by both judges and the practitioners.

4.85 Finally, the Commission does not consider the use of names as a prompt for recognising a prospective juror (and therefore challenging or standing them aside on the grounds of impartiality) to be a compelling reason to retain the discretion to identify prospective jurors by name. The Commission did not receive evidence that belated recognition of a juror by a party or judge has caused a significant problem for courts. In fact, only one instance of this was brought to the Commission's attention.

4.86 For the above reasons the Commission recommends prospective jurors be identified in court by number only.

Recommendation

12 Prospective jurors should be identified in court by number only.

Calling of the panel

4.87 As noted at [4.11]–[4.12], while the Juries Act currently provides the judge with a discretion to call the panel or not, in practice, as far as the Commission is aware, the panel is always called.

4.88 This means that all prospective jurors are identified in court, not just those who are balloted to be on the jury as in other Australian states.

4.89 It is unclear whether calling the panel is a conscious exercise of judicial discretion or whether it is a result of a cultural practice that has developed in Victoria.

4.90 The Commission understands that the object of calling the panel is to confirm the attendance of all panel members and to ensure prospective jurors or others who are not on the panel cannot be selected for the jury.

4.91 The Juries Commissioner has advised that, in Melbourne, the identification cards of prospective jurors are scanned as they are called for the panel and the number of prospective jurors counted. Prospective jurors are then escorted to the court by a tipstaff and a juries officer from the JCO. The panel is counted again before entering court.

4.92 This administrative process means that it is likely that all prospective jurors who were selected for the panel will be present in the courtroom, arguably removing the need to call the panel.

53 See [4.38].

4.93 However, as the calling of the panel does not take much time and may have the benefit of allowing prospective jurors to settle in to the unfamiliar environment of the courtroom, the Commission does not consider it should be removed if prospective jurors are identified by number.

4.94 If prospective jurors are identified by number, the objective of the 2002 amendment that established a discretion as to whether to call the panel or not[54] becomes redundant.

4.95 The Commission therefore recommends that if prospective jurors are to be identified by number, the panel should continue to be called in court and that the calling of the panel be mandatory.

Recommendation

13 If Recommendation 12 is adopted, the Juries Act should be amended to provide that the panel should always be called in court.

54 See [4.11]–[4.12].

Additional jurors

5. Additional jurors

Introduction

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 current law and use of additional jurors, the law in other jurisdictions and alternatives to empanelling additional jurors.

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, possible alternative processes to minimise the effect on jurors and the option of not balloting off.

Current law and process

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 personally and financially—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 current Juries Act applies the additional juror provision to both civil and criminal trials and removes the requirement that empanelling additional jurors could only occur where the court considers the trial will last three months or more. This effectively leaves the decision to empanel additional jurors to the court's discretion.

1 *Juries (Amendment) Act 1990* (Vic) s 6.
2 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 September 1990, 515–516 (Jim Kennan).

5.9 Section 48 of the Juries Act requires a ballot to be held to reduce the number of jurors to 12 for criminal cases or six for civil cases if there are additional jurors remaining when the jury is required to retire to consider its verdict. The foreperson may not be balloted off, although they are included in the ballot.[3]

Other Australian jurisdictions

5.10 All Australian jurisdictions make provision for either additional or reserve jurors for criminal trials, although the numbers vary significantly. Victoria,[4] New South Wales,[5] South Australia,[6] Western Australia[7] and the Australian Capital Territory[8] make provision for additional jurors, whereas Tasmania,[9] Queensland[10] and the Northern Territory[11] make provision for reserve jurors. Victoria,[12] Tasmania[13] and Queensland[14] also make provision for additional or reserve jurors for civil trials. **Appendix G** shows the relevant provisions in each jurisdiction.

5.11 The distinction between additional and reserve jurors is that reserve jurors know from the beginning that they may be removed if there are extra jurors remaining at the end of the trial, whereas under the additional juror system, all jurors are equal in status until the ballot.[15]

Alternatives to empanelling additional jurors

5.12 The consultation paper discussed two alternatives for avoiding the need to empanel additional jurors. These were:

- Gaining a better understanding of juror attrition, including juror illness and trial duration estimates.
- Continuing trials with a reduced jury.

Gaining a better understanding of juror attrition

5.13 There was agreement that gaining a better understanding of juror attrition and more accurate trial duration estimates would be useful in minimising the need to empanel additional jurors. However, all of the judges and the legal practitioners that the Commission consulted considered that this of itself was not sufficient to prevent trials being aborted due to juror attrition and that the additional juror system is required as an extra safeguard.

3 *Juries Act 2000* (Vic) s 48(2). The Victorian Director of Public Prosecutions submitted that as the foreperson is effectively exempt from being balloted off, their name should not be included in the ballot: Submission 12 (Victorian Director of Public Prosecutions).
4 *Juries Act 2000* (Vic) s 23.
5 *Jury Act 1977* (NSW) s 19(2).
6 *Juries Act 1927* (SA) s 6A.
7 *Juries Act 1957* (WA) s 18.
8 *Juries Act 1967* (ACT) s 31A.
9 *Juries Act 2003* (Tas) s 26.
10 *Jury Act 1995* (Qld) s 34.
11 *Juries Act 1963* (NT) s 37A.
12 *Juries Act 2000* (Vic) s 23.
13 *Juries Act 2003* (Tas) s 26.
14 *Jury Act 1995* (Qld) s 34.
15 However, as noted at [5.9], the foreperson is excluded from being balloted off in Victoria.

5.14 Based on preliminary consultations, the consultation paper concluded that trial duration estimates are generally accurate.[16] However, some County Court judges did not agree with this assessment.[17] One judge cited an example of a trial that had run five weeks over its estimated duration. These judges commented that trial duration estimates may be inaccurate due to:[18]

- the failure to take counsels' addresses and judicial directions (called 'charges') into account (it was also noted that charges have generally become longer in response to the high rate of successful appeals)[19]
- the nature and complexity of trials, particularly sex offence trials
- the use of technology—pre-recorded evidence can take some time to hear and technical hitches sometimes occur.[20]

5.15 One County Court judge commented that trial management processes are often not sufficient to deal effectively with factors that affect the duration of trials.

5.16 One juror mentioned that the trial he had been on had run significantly over time as there had been an eight-day adjournment because the accused was sick.[21]

5.17 One civil law practitioner also commented that it is often difficult to provide an accurate assessment of trial duration at the stage at which such estimates are required, as there is often insufficient information available at that time.[22]

5.18 It is clear that there is a range of reasons that trials run over time, many of which are not within the court's control. Consequently, while trial management processes can always be improved,[23] there will always be circumstances that lead to trials lasting longer than estimated.

Continuing trial with a reduced jury

5.19 The Juries Act allows trials to continue with a reduced jury (10 jurors for criminal trials and five for civil trials).[24] New South Wales[25] and England and Wales[26] allow trials to continue with fewer jurors. However, neither the current Juries Act provision for continuing trials with a reduced jury or further reducing the minimum number of jurors was considered sufficient or appropriate by the judges consulted to deal with juror attrition in all circumstances.

5.20 A number of judges consulted by the Commission noted that though they will order the continuation of a trial with a reduced jury in appropriate circumstances—for example, if the trial is significantly progressed—they are reluctant to do this without the agreement of the parties.

16 Victorian Law Reform Commission, *Jury Empanelment*, Consultation Paper No 18 (2013) 54–55.
17 Consultation 22 (Judges of the County Court of Victoria).
18 Ibid.
19 This was identified as a factor in the Commission's Jury Directions review: Victorian Law Reform Commission, *Jury Directions: Final Report*, Report No 17 (2009) 17 [2.43]–[2.45].
20 The complexity of trials and the volume of evidence generated through the use of technology have been identified by the County Court as factors leading to longer trials: County Court of Victoria *Annual Report 2012–13* (2013) 6.
21 Consultation 31 (Additional Juror E).
22 Consultation 32 (Law Institute of Victoria members, Melbourne, Victoria).
23 See, for example, the 24 Hours Initial Directions Hearing pilot program initiated in the County Court in 2011–12, aimed at obtaining a realistic assessment of the prospects of the case proceeding to trial, the key issues in dispute and the trial duration: County Court of Victoria *Annual Report 2011–12* (2012) 1.
24 *Juries Act 2000* (Vic) s 44.
25 In New South Wales, a criminal trial can continue with fewer than 10 jurors with the consent of the parties, 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, 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): *Jury Act 1977* (NSW) ss 22(a)(iii), 53C.
26 *Juries Act 1974* (UK) s 16(1).

5.21 The legal practitioners consulted by the Commission considered that continuing a trial with a reduced jury was not ideal. Victoria Legal Aid and the Victorian Director of Public Prosecutions (DPP (Vic)) did not support the option of enabling the continuation of trials with fewer than 10 jurors.[27]

5.22 Victoria Legal Aid explained its reasoning for this position as follows:

> VLA believes that reducing a jury to less than ten as explored in the consultation paper would result in the integrity of a verdict being compromised, or at least give the impression of such to an accused and the community. The fewer jurors that are present the less representative the jury becomes and the more susceptible it becomes to bias or undue influence from more dominant jurors. This can compromise the quality of discussions and negatively affect the decision making process. Given the fundamental role of a jury to an accused's trial (and often personal liberty) it would be unacceptable to allow a jury of less than ten to proceed to deliberations.[28]

Factors influencing the decision to empanel additional jurors

5.23 There are no criteria guiding the empanelment of additional jurors in Victoria, unlike in New South Wales, where a court may only empanel additional jurors if the court expects a trial to last for more than three months.[29] This raises the potential for different practices among trial judges.

5.24 The Juries Commissioner advised that the Juries Commissioner's Office (JCO) generally encourages courts to consider empanelling additional jurors for trials expected to last for more than three weeks.[30]

5.25 However, the judges consulted by the Commission commented that while case duration is important, it is not the only factor judges consider when deciding whether to empanel additional jurors. Other factors mentioned were:

- the time of year—for example, whether it is 'flu season', or the proximity of the trial to holidays
- the nature of the trial—for example, if evidence is likely to be particularly harrowing
- the impact on jurors of being balloted off. This is discussed further below at [5.43]–[5.51].

5.26 A JCO staff member consulted by the Commission commented that she was aware of one County Court judge who routinely empanels additional jurors even in relatively short cases, as a result of his experience of losing a number of juries to attrition.

5.27 This evidence demonstrates that judges take a range of factors into account in deciding whether to empanel additional jurors.

27 Submissions 10 (Victoria Legal Aid); 12 (Victorian Director of Public Prosecutions).
28 Submission 10 (Victoria Legal Aid).
29 *Jury Act 1977* (NSW) s 19(3). Ireland's recently enacted additional juror provisions similarly provide that additional jurors can only be empanelled for criminal trials expected to last more than two months and if the selection of additional jurors is an appropriate means of ensuring there will be sufficient jurors available to give a verdict: *Juries Act 1976* (Ireland) s 15A.
30 Discussion with Juries Commissioner, 23 July 2013.

Rate of empanelment of additional jurors

Victoria

5.28 **Table 4** shows the number of additional jurors empanelled in Victoria in 2011–12 and 2012–13.

Table 4: Number of additional jurors empanelled in Victoria

	2011–12	2012–13
Melbourne	42	52
Regions	9	4
Total	51	56

5.29 Additional jurors were empanelled in a small minority (five per cent)[31] of Victorian jury trials in 2012–13. A total of 56 additional jurors were empanelled in 2012–13, 52 in Melbourne and four in the regions.

5.30 The rate of empanelment is similar to 2011–12 where 51 additional jurors were empanelled in Victoria—42 in Melbourne and nine in the regions—four per cent of Victorian jury trials (five per cent of trials in Melbourne and four per cent in the regions).[32]

5.31 The JCO advised that all of the additional jurors in 2011–12 and 2012–13 were empanelled for criminal trials.

5.32 However, two respondents to the Commission's survey said they had been empanelled on a jury for a civil trial where more than six jurors had been empanelled. The anomaly between the JCO data and the Commission's survey data about the type of trial on which additional jurors were empanelled could be explained in one case by the date of the trial (it was earlier than 2011). Alternatively, the anomaly could be an error in the survey response or in data entry by the Commission.

Other jurisdictions

5.33 Jury administrators in most other Australian jurisdictions told the Commission that the empanelment of additional or reserve jurors is rare, and only occurs for lengthy trials.

5.34 Western Australia, however, routinely empanels additional jurors, even for short trials. The Commission was advised that additional jurors were empanelled in 80 per cent of trials in Western Australia between January and October 2013.[33]

5.35 In the United States, alternate jurors are also frequently empanelled, even for quite short trials.[34]

31 Six per cent of trials in Melbourne and two per cent in the regions.
32 Data provided by JCO.
33 Consultation 35 (Manager, jury services, Western Australia).
34 Consultation 34 (US jury researchers).

Rate of balloting off of additional jurors

Victoria

5.36 In Victoria, additional jurors were balloted off in around a third of cases in which additional jurors were empanelled: 34 per cent (19 jurors) in 2012–13 and 39 per cent (20 jurors) in 2011–12.

Other jurisdictions

5.37 While exact figures were not available, the Commission was advised that the rate of balloting off in both Western Australia and the United States where additional jurors are routinely empanelled was quite high.[35]

Effect of balloting off on jurors

Data sources

5.38 The Commission gathered information on the effects of balloting off on jurors from a number of different data sources—jurors, judges, the Juries Commissioner and court staff involved in discharging additional jurors.

Jurors

5.39 The Commission gathered the views of jurors about the balloting off process using the following methods:

- face-to-face consultation
- phone consultation
- submissions
- the VLRC juror survey.

5.40 From the above methods, the Commission obtained the views of 60 jurors who had been on juries on which additional jurors had been empanelled (two had served on civil trials[36] and the remaining 58 on criminal trials). They included:

- six balloted-off jurors (all of whom had served on criminal trials)
- 31 jurors who had remained on the jury following a ballot.[37]

Judges

5.41 As judges order the ballot and discharge balloted-off jurors, they have close involvement with the ballot system. The judges the Commission spoke to had strong views about the effects of the balloting-off process on jurors.

Juries Commissioner and court staff

5.42 In addition to jurors serving on a jury of more than 12, the Commission also spoke with the Juries Commissioner and court staff who are involved in the discharge of additional jurors. The Juries Commissioner's submission also contains comments about the balloting off of additional jurors.[38]

35 Consultations 35 (Manager, jury services, Western Australia); 34 (US jury researchers).
36 See [5.32].
37 The remaining 23 jurors had served on juries for which no balloting off had been required, as one or more jurors had been discharged during the course of the trial.
38 Submission 13 (Juries Commissioner).

The effects on balloted-off jurors

5.43 Balloted-off jurors had a mixture of responses to being balloted off. Based on the Commission's data, most feel very disappointed and frustrated at not being able to deliberate and return the verdict.

5.44 For example, feelings of disappointment by balloted-off jurors who responded to the VLRC juror survey were expressed in the following way:

> I felt as if I had died, having no input to the final decisions.
>
> Extremely disappointed. Dissatisfied that after a large & conscientious investment of time & energy I may as well not have been there. Angry about the time lost & an opportunity missed in my career while away from work.
>
> I felt empty. Having been part of the process from the beginning, and taking my responsibilities seriously, I would have liked to be part of final decision making process.
>
> I had a strong preference to see it through, particularly after a long case. Was disappointed to be balloted off.

5.45 The Juries Commissioner, who has personally debriefed balloted-off jurors, described their reactions as 'sad and confused at best or incandescent with rage at worst'.[39]

5.46 One regional JCO jury keeper who had observed the balloting off of an additional juror told the Commission that the balloted-off juror had sat on the steps of the courthouse for the entire duration of the jury's deliberation so that he could still feel like he was a part of the process.[40]

5.47 All the judges the Commission consulted said that in their experience jurors who are balloted off feel terrible, as they have invested significant amounts of time and effort in the trial.

5.48 Some balloted-off jurors described mixed emotions of frustration and relief. For example, a balloted-off juror who responded to the VLRC juror survey said '[I felt] relieved and frustrated. I wanted to stay but the trial had run over by 5 weeks and I had commitments at work.'

5.49 Another balloted-off juror who responded to the VLRC juror survey said he was very disappointed, but also added he was 'content to have borne some civic responsibility while marginally relieved to be absolved of the responsibility of deliberation'.

5.50 A balloted-off juror the Commission spoke with over the phone also described her feelings as 'mixed'. On the one hand, she had spent three weeks thinking about the case, so she felt that it had been a waste of time. On the other hand, she felt relieved that she did not have the responsibility for making a decision that could send a person to jail.

5.51 The Juries Commissioner's submission states that 'a smaller number [of balloted-off jurors] are genuinely relieved'.[41]

39 Ibid.
40 Consultation 5 (Senior registrar and jury keeper, Geelong Law Courts, Victoria).
41 Submission 13 (Juries Commissioner).

The effects on the remaining jury

5.52 The VLRC juror survey asked remaining jury members how they felt about a jury member being balloted off.

5.53 The dominant theme of the comments was that remaining jury members felt sorry for the balloted-off juror or jurors and considered that their time had been wasted. For example, remaining jury members described feeling:

> Clearly sorry for the jury member. Having had to sit through approximately four weeks of a court proceeding and then not being able to be involved in the deliberation is bordering on being cruel.
>
> Dismay that these people had attended court for a period of many weeks, investing their time and concentration, only to be dismissed. They were denied the opportunity to have input into the deliberation process, which apart from determining the innocence or guilt of the accused, provides a forum for discussion and debriefing for the members of the jury panel.
>
> Disappointed for them to have gone so far and not completed the process of a juror.

5.54 A number of remaining jury members also commented on the loss of the balloted-off members' input into deliberations:

> One of these jury members was pivotal in a lot of the organisation and information gathering and sharing. It felt like we lost two supporters at a time of the journey we needed everyone around.
>
> [D]isappointed in losing contributors to earlier discussion.

5.55 Another theme arising from the comments of remaining jurors was the effect of the ballot on the dynamic of the jury. For example:

> The immediate removal of the evicted jurors, while understandable, was a bit of a wrench. We had been supporting one another through a fairly emotional experience so it was difficult to have the two jurors removed.
>
> It added a great deal more stress to everyone in that jury.
>
> I felt somewhat disappointed as you do form a relationship with all the jurors.

5.56 A number of judges the Commission consulted expressed concern about the impact of the ballot on the remaining jury at a crucial time when the jury needed to concentrate. These judges considered that the ballot, and the timing of the ballot, had a destabilising effect on the remaining jury and distracted them from deliberations. The ballot was described by one judge as a bad start to a tense process.[42]

5.57 Recognising that a particular individual may be central to the jury's deliberations, one judge consulted by the Commission said that if balloting remains, he may adopt the practice of advising the jury during the course of the trial that they can nominate a new foreperson[43] if they wish to avoid the possibility of a particular person being balloted off.

5.58 The comments of a few remaining jury members indicate that they accepted the balloting off process and were not particularly upset about it. For example:

> I was foreman, so was not in the mix. So unaffected.
>
> As we were informed of the process at the start I did not have any feelings.
>
> We were forewarned by the judge that this would happen.

42 Consultation 22 (Judges of the County Court of Victoria).
43 The foreperson of the jury cannot be balloted off: *Juries Act 2000* (Vic) s 48(2).

Alternatives to balloting off

Not balloting off

5.59 The consultation paper asked for views about the option of not balloting off additional jurors—that is, having an enlarged jury of up to 15 jurors in criminal trials and up to eight jurors in civil trials if additional jurors remain when the jury is required to retire to deliberate and return the verdict.

5.60 This option was strongly supported by all of the judges consulted by the Commission on the basis that balloting off had such negative effects on individual jurors and the jury as a whole.

5.61 It was also supported by some jurors who had been on juries on which additional jurors had been empanelled. For example, a respondent to the VLRC juror survey said:

> Jurors who have made sacrifices to uphold the law should not be arbitrarily removed because 12 is a magic number. Fourteen can deliberate and make just as good a decision as 12. For arguments sake so could 10. As long as the jury number is greater than eight there should be a broad enough range of expertise and views to determine the facts of the case. The courts should be less hung up on tradition about this. What evidence is there that shows that 12 is the optimum number?

5.62 In a similar vein, a submission from a member of a jury on which more than 12 jurors had been empanelled stated:

> It is my opinion that faith would be better kept in jury trials were no juror removed from the final deliberations who did not wish to be… I do not believe that a jury of some 13 people would be any more difficult in conference than 12.[44]

5.63 Of the organisations and statutory officers that made submissions to the reference, Victoria Legal Aid[45] and the Juries Commissioner[46] supported the option of an enlarged jury. The DPP (Vic) and the Criminal Bar Association did not support this option.[47]

5.64 The Commission considers the key questions that arise in relation to this option are:

- Would a jury of more than 12 jurors for criminal trials function effectively?[48]
- How would an enlarged jury operate where either a unanimous verdict[49] or a majority verdict is required?
- Is inconsistency of jury size across the legal system a problem?

Would a jury of more than 12 jurors function effectively?

5.65 It is difficult to assess whether a jury of more than 12 jurors would function effectively, as there is little evidence to draw on. The Commission has considered the Scottish system (which is the only similar legal system to allow for a criminal jury of more than 12 jurors), case law on jury size and jury size studies.

44 Submissions 7 (Name withheld pursuant to the Juries Act). Two other individuals who made submissions also supported retaining additional jurors: 5 (Name withheld pursuant to the Juries Act); 6 (Name withheld).
45 Submission 10 (Victoria Legal Aid).
46 Submission 13 (Juries Commissioner).
47 Submissions 12 (Victorian Director of Public Prosecutions); 16 (Criminal Bar Association).
48 The Commission considers this question does not apply to civil juries as there are a number of jurisdictions that provide for civil juries of more than six jurors and consequently the effects of a jury of more than six jurors for civil trials are known. For example, *Jury Act 1977* (NSW) s 20(2) allows for juries of 12 jurors on application in Supreme Court civil trials, *Juries Act 2003* (Tas) s 25(1)(a) provides for civil juries of seven jurors, *Juries Act 1981* (NZ) s 17 provides for civil juries of 12 jurors. A number of American states also provide for civil juries of more than six jurors: United States Department of Justice, *State Court Organization, 2011* (2013) 10.
49 This is relevant to criminal trials only as there is no requirement for unanimity for civil trial verdicts.

The Scottish system

5.66 Criminal juries in Scotland are made up of 15 jurors and more than 12 jurors may deliberate and return a verdict. However, crucially, a guilty verdict can be delivered by a simple majority (that is, eight jurors).[50]

5.67 The Commission was unable to find any data on the rate of unanimous versus majority verdicts in criminal trials in Scotland and has been informed that none exists.[51] Therefore, the Scottish criminal jury system cannot be used as a source of information about how a jury of more than 12 jurors may function at the deliberation and verdict stage, particularly where unanimity is required.[52]

5.68 Jury size was reviewed, along with other aspects of juries in criminal trials, by the Scottish Government in 2008–2009.[53] The overriding rationale for the review was cost.[54] The review and submissions did not compare the functioning of a jury of 15 jurors with a jury of fewer than 15 jurors in any detail.[55] The review ultimately expressed support for retaining a jury size of 15 for reasons including:

- there is less likely to be juror intimidation
- a larger jury is less likely to be unbalanced by individual prejudices
- a larger jury is more likely to include a mix of gender, ethnicity, experience and social awareness.[56]

Case law on jury size

5.69 Despite the widespread acceptance of the importance of a jury of 12 in criminal trials in Australia, it has been accepted that deviating from this number does not breach the essential characteristics of a jury trial.

5.70 Challenges have been made to the application of both the provisions for continuation of trial with a reduced jury[57] and additional juror provisions in state laws to trials for federal offences, on the grounds that such provisions breach the requirement in section 80 of the Constitution for a trial by jury for federal offences.[58]

5.71 The arguments advanced in challenging the reduced jury provisions included that 12 jurors are required to meet the requirements of a valid trial by jury in section 80.

5.72 The High Court rejected this argument and instead, following the United States,[59] adopted a functional approach. The functional approach considers the purpose of jury trials and the features of jury trials that are required to meet those purposes. The key features of jury trials identified as necessary to meet the core purposes of a jury trial were that the group is large enough:

- to promote group deliberation
- for a cross-section of community opinion to be expressed and shared among the jurors and to reflect, in a general way, the views of minorities in the community
- to guard against the force of personality of one or more jurors.[60]

50 There is currently a Bill in Parliament to amend the majority to 10 where there are 15 or 14 jurors, to nine where there are 13 jurors and to eight where there are 12 jurors: Criminal Justice (Scotland) Bill (Scot), clause 70.
51 Email exchange with Scottish jury researcher, 16 January 2014. This is despite the fact that the *Criminal Procedure Act (Scotland) 1995* (Scot) s 100(2) requires the foreman to advise if the jury is not unanimous in their verdict so the relevant entry may be made in the record.
52 See [5.81]–[5.88] for discussion on unanimous verdicts.
53 Scottish Government, *The Modern Scottish Jury in Criminal Trials: Consultation Paper* (2008); Scottish Government, *The Modern Scottish Jury in Criminal Trials: Next Steps* (2009).
54 Scottish Government, *The Modern Scottish Jury in Criminal Trials: Consultation Paper* (2008) 23–24.
55 Scottish Government, *The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses* (2009) 30–34.
56 Scottish Government, *The Modern Scottish Jury in Criminal Trials: Next Steps* (2009) 4.
57 *Brownlee v The Queen* (2001) 207 CLR 278; *Wu v The Queen* (1999) 199 CLR 99.
58 See Chapter 2.
59 *Williams v Florida* (1970) 399 US 78.
60 *Brownlee v The Queen* (2001) 207 CLR 278, 303 (Gaudron, Gummow and Hayne JJ) and 330 (Kirby J).

5.73 The functional approach was endorsed in a later case of *Ng v The Queen*[61] in response to a challenge to the application of the additional juror provisions to a trial for a federal offence. As Justice Kirby noted:

> If fewer than twelve jurors is acknowledged as conformable to the constitutional "jury", the validity of a provision allowing for more than twelve, so as to ensure that the function of the jury is fulfilled, becomes difficult to resist. Once a criterion is adopted by reference to considerations of community representativity and effective deliberations, legislative measures aimed at ensuring the retention of those qualities become constitutionally permissible.[62]

5.74 These cases show that provisions allowing for both a reduced jury and additional jurors conform with the essential features of a jury trial. It is important to note, however, that the cases on additional jurors deal with an enlarged jury up until the point that the jury retires to consider its verdict. They do not deal with an enlarged jury for the purposes of deliberation and verdict.[63]

Jury size studies

5.75 In response to a series of American Supreme Court cases on the constitutionality of juries of fewer than 12 jurors, a number of empirical studies on the effects of jury size were undertaken in the 1970s through to the 1990s.[64]

5.76 These studies are limited to the examination of the functioning of 12-person juries versus six-person juries. In its review of jury size, the Scottish government expressed reservations about applying the jury size research findings to a larger jury size of 15.[65] Nonetheless, it is possible that at least some of the findings are applicable to juries of more than 12 jurors.

5.77 While there have been criticisms of the methodologies used in some of the jury size studies, the following factors have been identified as relevant to jury decision-making processes:

- Larger juries are more likely to be representative, and contain representation from minorities
- Larger juries spend more time in deliberation, but have a higher quality of deliberation because of the wider diversity of opinions
- Larger juries have better recall of probative evidence, as the cumulative process of memory recall improves with larger group size
- Larger juries are less likely to reach consensus.[66]

5.78 These findings suggest that there are both positive and negative aspects to larger juries.

61 *Ng v The Queen* (2003) 217 CLR 521.
62 Ibid 536.
63 Justice Kirby noted the limitation of the reasoning to enlarged juries before deliberation and verdict in *Ng v The Queen* (2003) 217 CLR 521, 537 [49]: 'the logical extension of the principle adopted in *Brownlee* ... results in the conclusion that the reference in s 80 to a 'jury', and to the procedure of trial by a jury, does not forbid the enlargement of jury numbers. At least this is so in relation to the time before the retirement of the jury to consider their verdict . . .'
64 Michael Saks and Mollie Weighner Marti, 'A Meta-Analysis of the Effects of Jury Size' (1997) 21 *Law and Human Behavior* 451, 452.
65 Scottish Government, above n 54, 24.
66 Saks and Weighner Marti, above n 64, 465. This study reviewed 17 empirical studies that examined the difference between 12- and six-person juries. See also National Center for State Courts, *Does Jury Size Matter?: A Review of the Literature* (2004).

How would an enlarged jury operate where a verdict requiring unanimity or a majority verdict is required?

5.79 The Juries Act allows a court to accept a majority verdict in relation to most types of criminal offences.[67] Verdicts in relation to murder, treason or certain drug trafficking offences and all offences under federal law must be unanimous.[68] Courts may also accept a majority verdict in civil trials.[69] There is no requirement for unanimity in relation to verdicts in civil trials.

5.80 Not balloting off additional jurors has implications for the requirement for a unanimous verdict in some criminal trials and for the definition of 'majority verdict' for both criminal and civil trials.

Criminal trial verdicts requiring unanimity

5.81 If a jury consisted of up to 15 jurors, the agreement of all 15 jurors would be required for verdicts requiring unanimity.[70]

5.82 The case law on jury size does not identify the ability to reach a consensus as a functional requirement of a jury.[71] However, as studies of jury size suggest that consensus is more difficult in larger groups, the Commission considers this a relevant factor in assessing the option of an enlarged jury, particularly in relation to verdicts requiring unanimity.

5.83 As noted at [5.77], studies of the effect of jury size suggest that larger juries are less likely to reach consensus than smaller groups. This finding is based on the theory of conformity and persuasion in small groups. According to this theory, a minority of one is more likely to acquiesce to the majority view than a larger minority (which is more likely to occur in a larger group).[72]

5.84 Applying the theory to 12-person and six-person juries, the studies suggest that a minority of two in a jury of 12 is more likely to hold steadfast than a minority of one in a jury of six, who is more likely to conform with the majority.

5.85 From this it could be argued that, as the burden of proof in criminal cases lies with the prosecution, the prosecution's task in convincing more than 12 jurors of the guilt of an accused for offences requiring a unanimous verdict could be more difficult if juries are larger. The Acting Commonwealth Deputy Director of Public Prosecutions, Melbourne Office stated that he did not support the option of an enlarged jury because of this.[73] The DPP (Vic) also does not support the option of an enlarged jury.[74]

5.86 While there is no burden of proof on an accused to prove innocence, the same argument could be made in relation to acquittals, as acquittals also must be unanimous where the verdict for an offence must be unanimous.

5.87 However, research on juries that fail to reach a verdict[75] also identifies the strength of the evidence as an important factor in determining whether a jury will reach a verdict or not. The research, and the experience of the courts, indicates that a significant percentage of cases where juries failed to reach a verdict occurred where the evidence was considered ambiguous.[76]

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67 *Juries Act 2000* (Vic) s 46.
68 Ibid s 46(4).
69 Ibid s 47.
70 See [5.79].
71 See [5.69]–[5.74].
72 National Center for State Courts, above n 66, 6.
73 Consultation 14 (Acting deputy director and professional development officer, Commonwealth Director of Public Prosecutions, Melbourne Office)
74 Submission 12 (Victorian Director of Public Prosecutions).
75 Often referred to as 'hung juries'.
76 Harry Kalven Jr and Hans Zeisel, *The American Jury* (University of Chicago Press, 1966), cited in Valerie Hans (ed), *The Jury System: Contemporary Scholarship* (Ashgate Publishing Company, 2006) 34. A similar finding arose from a subsequent American study conducted in 2002 by the National Center for State Courts: National Center for State Courts, *Are Hung Juries a Problem?* (2002), cited in Valerie Hans: at 44. See also New South Wales Law Reform Commission, *Majority Verdicts*, Report No 111 (2005) 35–37 [2.41]–[2.46].

5.88 Therefore, while the non-conformity effect suggests that minorities are more likely to hold out in larger groups (and therefore unanimity may be more difficult to achieve), whether there will be a minority view present in the first place is likely to depend on the strength of the evidence—a factor that is independent of jury size.

Majority verdicts

5.89 The option of a jury of more than 12 jurors in a criminal trial or more than six jurors in a civil trial also raises the issue of how to define a majority verdict.

5.90 Under the Juries Act, a majority verdict in a criminal trial is defined as a verdict agreed by all jury members but one. The definition also applies to instances where the jury is reduced because of the discharge of one or more jurors, so that a majority may consist of 10 jurors where the jury has been reduced to 11 and nine jurors where the jury has been reduced to 10.[77] Majority verdicts in criminal trials have been available in Victoria since 1994.[78]

5.91 The Juries Act also allows the court to accept majority verdicts in civil trials.[79] A majority verdict in a civil trial is similarly defined as a verdict agreed by all jury members but one and also applies to instances where the jury is reduced because of the discharge of a juror, so that a majority may consist of four jurors where the jury has been reduced to five.[80]

5.92 Different jurisdictions have adopted different ways of defining 'majority verdict'. The main ways are:

- the current Victorian model—that is, the agreement of all jurors but one, regardless of the size of the jury[81]
- different definitions of 'majority' according to the size of the jury—that is, allowance for two dissenters where the jury consists of 12 jurors, but one dissenter where there is a reduced jury of 11 or 10[82]
- specifying a set number of jurors who must agree for a majority.[83]

5.93 The Commission considers that the definitions of majority verdicts are integrally connected to the rationales underlying them.

5.94 According to the Second Reading Speech for the amendment that introduced the majority verdict provisions, the current Victorian provisions for criminal trials were introduced to allow verdicts to be entered in trials where 'a single determined juror holds out doggedly and for peculiar or improper reasons against the common view of the remaining 11'.[84] This type of juror is commonly referred to as a 'rogue juror'. The possible existence of a rogue juror who may derail the trial process is used as a key argument to support majority verdicts.[85] Those jurisdictions that rely on this rationale have adopted a definition of majority as all jurors but one.[86]

5.95 The Commission notes that majority verdict provisions justified by reference to the rogue juror argument do not aim simply to make it easier for a jury to achieve unanimity but rather to prevent a rogue juror from derailing an otherwise unanimous verdict.

77 Pursuant to *Juries Act 2000* (Vic) s 44(3).
78 *Juries (Amendment) Act 1993* (Vic) s 7.
79 *Juries Act 2000* (Vic) s 47. This was introduced in 2002: *Juries (Amendment) Act 2002* (Vic) s 7.
80 Pursuant to *Juries Act 2000* (Vic) s 44(2).
81 This model has been adopted by the following jurisdictions for criminal trials: *Jury Act 1977* (NSW) s 55F(3); *Jury Act 1995* (Qld) s 59A; *Juries Act 1981* (NZ) s 29C.
82 This model is used in the following jurisdictions for criminal trials: *Juries Act 1927* (SA) s 57(4)(a); *Juries Act 1974* (UK) s 17; *Juries Act 2003* (Tas) ss 3 (definition of 'majority verdict'), 43.
83 This definition is used for the jurisdictions that do not allow trial with reduced jury for criminal trials, namely Northern Territory and Western Australia (*Criminal Code* (NT) s 368; *Criminal Procedure Act 2004* (WA) s 114(3)). In these jurisdictions, a majority verdict is defined as a verdict agreed by 10 jurors.
84 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157 (Sidney Plowman).
85 New South Wales Law Reform Commission, above n 76, 48 [3.22]; Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001) 167 [435]. The 'rogue juror' rationale was used to support the introduction of majority verdicts in NSW: New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 April 2006, 22160 (Bob Debus, Attorney-General); and Queensland: Queensland, *Parliamentary Debates*, 11 September 2008, 2783 (Kerry Shine, Attorney-General).
86 Above n 81.

5.96 In contrast, other jurisdictions have articulated different rationales to support the introduction of majority verdicts. For example, majority verdicts were introduced in England and Wales in 1967[87] (where a majority of 10 is allowed where the jury consists of 12 jurors) to prevent jurors being bribed or intimidated by one of the parties or their supporters into agreeing with the majority.[88] This was also apparently the rationale used in South Australia (where majority verdicts were introduced in 1927)[89] and Tasmania (where majority verdicts were introduced in 1936).[90]

5.97 Further rationales for majority verdicts are that they allow a more 'honest' verdict by alleviating pressure on jurors to achieve conformity, they avoid 'compromise verdicts' (where jurors are persuaded to agree with the majority because of bullying, or exhaustion, or where jurors barter their agreement on one charge for securing their preferred outcome on another), and that they produce cost savings, as deliberations are quicker and easier.[91]

5.98 Another notable difference between jurisdictions in relation to majority verdicts is the amount of time that a jury is required to deliberate before a majority verdict may be accepted. In Australia, the range is between two and eight hours for criminal trials[92] and between three and six hours for civil trials.[93]

5.99 While the differences in minimum deliberation times indicate that the time requirements are somewhat arbitrary,[94] the rationale for the time requirements is that a minimum time will promote full and proper deliberation, including listening to and considering the minority view.[95]

Is inconsistency of jury size across the legal system a problem?

5.100 Were the option of not balloting off additional jurors adopted, jury sizes could be inconsistent. For example, in criminal trials where up to 15 jurors may be empanelled, the jury could be made up of 15 jurors, or less, if fewer were empanelled, or if there had been juror attrition during the trial.

5.101 Similarly, in civil trials where up to two additional jurors may be empanelled, the jury could be made up of eight or fewer jurors.

5.102 The Criminal Bar Association expressed concern about this proposition:

> The clear concern is that not balloting off jurors prior to verdict will give rise to substantial inequalities of justice where verdicts may be delivered by different numbers of jurors in different trials.[96]

5.103 The Commission notes that the current system already allows for verdicts to be delivered by juries of different sizes in cases where juries fall below 12 in criminal trials or six in civil trials after a decision has been made to continue a trial with a reduced jury. In other words, allowing for a jury of more than 12 or six would not create the potential for inconsistency of jury size (as this already exists). However, it would allow for a potentially wider variation in jury size (between 10 and 15 for criminal trials and between five and eight for civil trials).

87 *Criminal Justice Act 1967* (UK) s 13(1). This provision was re-enacted in the *Juries Act 1974* (UK) s 17.
88 Sally Lloyd-Bostock and Cheryl Thomas, 'The Continuing Decline of the English Jury' in Neil Vidmar (ed), *World Jury Systems* (Oxford University Press, 2000) 53, 86; Law Commission of New Zealand, above n 85, 159 [415], 164 [425].
89 *Juries Act 1927* (SA) s 57.
90 *Jury Act 1936* (Tas) s 48. See Alex Castles, 'Now and Then' (1992) 66 *Australian Law Journal* 290, 290–291.
91 New South Wales Law Reform Commission, above n 76, 48 [3.23], 50–51 [3.31]–[3.32].
92 Tasmania requires two hours, Western Australia requires three hours, South Australia requires four hours, Victoria requires six hours and NSW and Queensland require eight hours. Northern Territory and the ACT do not provide for majority verdicts for criminal trials.
93 Victoria, Tasmania and Western Australia require three hours, New South Wales requires four hours and the Northern Territory and Queensland require six hours. ACT and South Australia do not have civil jury trials.
94 See also Law Commission of New Zealand, above n 85, 168 [439].
95 New Zealand Law Commission, *Preliminary Paper: Juries in Criminal Trials: Part Two*, Report No PP32 (1999) 47 [194], 48 [198].
96 Submission 16 (Criminal Bar Association).

Discharge by consensus among jurors or by request

5.104 Another alternative to balloting off discussed in the consultation paper was allowing one or more jurors to be discharged by consensus or on request. This alternative would involve a judge discharging one or more additional jurors who agreed or requested to be discharged prior to the verdict, so that there were no more than 12 jurors.

5.105 Few submissions expressed an opinion on this option. One submission that supported this option stated:

> Any juror in a jury over twelve should be allowed to submit his/her name for consideration for exclusion before the jury of twelve considers the verdict. If someone chooses to leave then a ballot should not be necessary.[97]

5.106 The DPP (Vic) did not support this option.[98]

5.107 There is evidence that judges have refused to discharge where the jury or individual jury members requested this as an alternative to balloting. One County Court judge consulted by the Commission described a case in which the jury approached her and asked whether either all jury members could remain on the jury or, alternatively, whether they could agree among themselves who should be discharged. She responded that she was required to follow the law and so held the ballot to discharge two additional jurors.[99]

5.108 A jury member consulted by the Commission stated that in the trial she served on, one juror had an interstate commitment on the day of the ballot. That person asked the judge whether he could be discharged. The judge refused and instead adjourned the trial until the juror returned and then conducted the ballot.[100]

5.109 The Commission considers that there are a number of issues associated with discharging by consensus or on request as an alternative to balloting. As noted in the consultation paper, discharge by consensus would only work where a juror wanted to leave. Difficulties would arise where more jurors wanted to leave than were required to leave (for example, if there were 13 jurors and two wanted to leave).

5.110 A further issue identified in the consultation paper was the possibility of pressure being applied to an unpopular jury member to 'agree' to leave. A defence practitioner consulted by the Commission expressed this concern about the option of discharge by consensus, stating that if such a process was adopted 'the bossy ones will stay'.[101]

All jurors stay, but only 12 vote

5.111 Two jurors who had been on a jury on which more than 12 jurors had been empanelled suggested that if there are more than 12 jurors remaining when the jury retires to consider its verdict, all jurors should remain on the jury, but only 12 jurors vote.[102]

5.112 A taskforce reviewing California's jury system in 1996 made a similar recommendation to mitigate the negative effect on alternate jurors of not being able to participate in deliberations and deliver the verdict in cases they had served on.

5.113 The recommendation was that alternate jurors in civil cases who remained at the end of the trial be permitted to observe deliberations, but not participate.[103]

97 Submission 6 (Name withheld).
98 Submission 12 (Victorian Director of Public Prosecutions).
99 Consultation 22 (Judges of the County Court of Victoria).
100 Consultation 2 (Prospective jurors and jurors, Shepparton, Victoria).
101 Consultation 32 (Law Institute of Victoria members, Melbourne, Victoria).
102 Consultations 23 (Additional juror B); 28 (Additional juror D).
103 Roy Wonder et al, *Final Report of the Blue Ribbon Commission on Jury System Improvement* (1996) recommendation 5.10. This recommendation was never implemented: Judicial Council of California, *Task Force on Jury System Improvements Final Report* (2003, 2004) 75.

5.114 Alternate jurors—used in the United States—are similar to reserve jurors (and different from additional jurors—see [5.11]) in that they know in advance that they are the alternate. Consequently, in contrast to the current Victorian system, for such a reform, no ballot would be required at the end of the trial to identify the jurors who are to deliberate and vote and those alternate jurors who do not.

5.115 Unless the current Victorian system of additional jurors is replaced with a system of reserve jurors,[104] this option does not solve the problem associated with the ballot, as a ballot would still be required to identify the 12 jurors who would vote.

Reserve jurors

5.116 The consultation paper also discussed the option of adopting a reserve juror system instead of the additional juror system to avoid balloting off. As noted at [5.11], the distinction between reserve jurors and additional jurors is that reserve jurors know from the time they are selected that they will not deliberate and return the verdict should there be excess jurors when the jury retires to consider the verdict.

5.117 As noted at [5.10], Tasmania, Queensland and the Northern Territory have adopted the reserve juror system. The Tasmanian and Queensland jury administrators the Commission consulted indicated that the reserve juror system works well in their states.[105] Both stated that reserve jurors appear to be as engaged as other jurors. The Tasmanian jury administrator stated that nine out of ten reserve jurors do not have a problem with being discharged, whereas the Queensland jury administrator said that discharged reserves are often quite disappointed.

5.118 The overwhelming majority of judges, JCO staff and Victorian court staff consulted by the Commission did not support the reserve juror system as they considered there is a risk that the reserves will not fully engage with the proceedings. One County Court judge supported the reserve juror system over the additional juror system, were the option of an enlarged jury (his preferred option) not adopted. That judge preferred the reserve system on the grounds that it did not unduly raise jurors' expectations.[106]

Improving the balloting off process

5.119 If the balloting off process remains, then the options for minimising the impact of the ballot are restricted to improving the balloting process. The next section discusses possible improvements to the balloting off process.

Judicial address

5.120 The consultation paper discussed improving the management of jurors' expectations through judicial address.

5.121 The Judicial College of Victoria's Criminal Charge Book contains Bench Notes to guide judges in relation to certain criminal procedures. However, there are no Bench Notes on empanelling additional jurors and on balloting off additional jurors.

5.122 The reactions of some jurors who were on juries where more than 12 jurors were empanelled to the balloting off process suggest that knowledge of the process can help manage expectations.[107]

104 See [5.116]–[5.118].
105 Consultations 6 (Jury and security coordinator, Supreme Court, Hobart, Tasmania); 10 (Deputy sheriff, Queensland).
106 Consultation 33 (Judge of the County Court of Victoria).
107 See [5.58].

Allowing jurors to say goodbye

5.123 There is no regulated process for discharging a juror who has been balloted off. Based on the information from the Commission's consultations, the practice seems to be that once the ballot has been conducted in court, the balloted off juror exits the courtroom through the public entrance and is usually escorted to the jury pool room to complete the administrative side of the discharge.

5.124 The Juries Commissioner advised that he or his deputy personally offer debriefing for balloted-off jurors in Melbourne. Balloted-off jurors also have access to the counselling services contracted to the JCO to provide confidential counselling and support to jury members.

5.125 A balloted-off juror the Commission spoke to said that she had found being escorted quite confronting and did not know why she was being escorted.[108]

5.126 Some judges the Commission consulted described different practices they had adopted to discharging additional jurors. For example, one judge said that she asked the discharged jurors to wait outside the courtroom until she had finished addressing the jury. She then called the discharged jurors back in to thank them again for their service.[109]

5.127 A number of jurors who had been empanelled on juries of more than 12, said that they thought the process of discharging balloted-off jurors could be improved. While all jurors said that the judge on their trial had done their best to acknowledge the balloted-off juror's contribution and service, a number of jurors thought the balloted-off juror should be given the opportunity to say goodbye to the other jury members, rather than having to leave immediately.

5.128 A JCO staff member told the Commission she was aware of one judge who offered this opportunity to balloted-off jurors.[110]

Access to information about verdict and sentence

5.129 As discussed above, one of the main frustrations expressed by balloted-off jurors was not being able to complete the task they had started. Information about the verdict and sentence in the case may alleviate these feelings.

5.130 The JCO advised the Commission that it is their practice to provide balloted-off jurors with a phone number they can call to find out the verdict and sentence in the case they had served on.

5.131 It is unclear to the Commission whether this practice is consistent across Victoria. One balloted-off juror told the Commission she had been advised that she would receive a letter with a number to call to find out the verdict and sentence in the trial she had served on. However, she had not received the letter and when she called, she was told that she could not have access to the information.

108 Consultation 27 (Additional juror C).
109 Consultation 22 (Judges of the County Court of Victoria).
110 Consultation 30 (Juries Commissioner's Office staff, Melbourne, Victoria).

The Commission's conclusions

Balloting off or enlarged jury

5.132 This issue proved to be the most challenging of the reference and there was a divergence of views among the Commissioners. While there are clear arguments in favour of retaining balloting off, the majority of the Commission is of the view that section 48 of the Juries Act, which provides for the balloting off of additional jurors prior to the jury retiring to consider its verdict in criminal and civil trials, should be repealed.

5.133 The overwhelming input received by both the judiciary and the Juries Commissioner is that jurors find the balloting off process alienating, upsetting and unjustified. This is especially so for, but not limited to, balloted-off jurors.

5.134 As noted above at [5.45], the Juries Commissioner described the reactions of balloted-off jurors as being 'sad and confused at best or incandescent with rage at worst'. The Commission considers that the views of the judiciary and the Juries Commissioner on the effects on jurors of the balloting-off process carry particular weight, as they are in a unique position to be aware of those effects.

5.135 The very adverse reaction of jurors to being balloted off is rational and understandable. Jurors have given up their time and made a considerable effort to perform their civic duty. It can be argued that jurors may be subjected to a number of stresses during a trial (for example, listening to traumatic evidence, or where a jury is discharged before verdict), and that being balloted off is just one of the stresses that the justice system imposes on them. However, while those other stresses are often unavoidable, the unnecessary and unjustified stress to jurors caused by the ballot should not occur.

5.136 A further issue associated with balloting off that was not raised in consultations, but to which the Commission draws attention, is the influence of the views of the balloted-off jurors on the deliberations and verdict.

5.137 At the commencement of the trial, jurors are routinely instructed by the trial judge not to discuss the case with any persons except each other and that when they discuss the case during the trial, to do so together and in the privacy of their jury room, where their discussions are and remain confidential to them.

5.138 The balloting-off process involves an artificial distinction between those discussions and the deliberation which occurs after the jury has received instructions and retires to consider its verdict. Judges do not routinely direct continuing juries to ignore the views previously expressed by the now balloted-off jurors. Even if such directions were given, they would be difficult to comply with. Consequently, the deliberations of the continuing jury are effectively unregulated with regard to views previously expressed by the balloted-off jurors.

5.139 It is unrealistic to expect the remaining jury members to ignore the views expressed by the balloted-off jurors during discussion often over weeks and sometimes over months. In light of this, the balloting off of jurors prior to deliberations must be questioned. Although the discharge of jurors due to illness or other reason also raises this concern, discharges of this type are unavoidable and do not necessarily occur immediately before the jury retires to consider a verdict as balloting off additional jurors does.

5.140 The Commission does not consider the other factors in favour of retaining balloting off outweigh the negative effect on jurors.

5.141 The Commission has considered whether improvements to the balloting off process as discussed at [5.120]–[5.131] would be a satisfactory alternative to abolishing balloting off.

5.142 The majority of the Commission considers that such improvements would not significantly reduce the negative impact on balloted-off jurors. As the former Juries Commissioner noted, better expectation management would not make much of a difference as it is not the element of surprise that frustrates balloted-off jurors, but the fact that they have become invested in their role, and that the group dynamic is disrupted.[111]

5.143 The Commission understands the concerns raised by the DPP (Vic) and the Commonwealth Office of Public Prosecutions about the possible increased difficulty in persuading a jury of more than 12 of an accused's guilt. However, as noted at [5.87]–[5.88] achieving unanimity does not appear to solely depend on jury size.

5.144 Therefore, the Commission considers that these concerns are speculative and should not outweigh the known impact of the balloting-off process on jurors.

5.145 Studies of jury size suggest that larger juries may require more time to deliberate, adding to the costs of trials. However, as each individual trial and jury will be different, there is no reliable way of identifying how much more time will be required and therefore of calculating additional cost.

5.146 The Commission does not consider that the argument raised by the Criminal Bar Association that not balloting off will introduce an inconsistency is compelling. The law already allows for verdicts by juries of fewer than 12 (for criminal trials) and six (for civil trials).

5.147 The Commission further notes that the current rate of balloting off jurors is low (a total of 19 jurors in 2012–13). While the effect of abolishing balloting off on the rate of empanelment of additional jurors is not known, based on current data it is likely that the rate of enlarged juries will also be low. Further, the Commission considers that its recommendation that legislative guidance be developed to regularise the practice of empanelling additional jurors[112] will minimise the over-empanelment of additional jurors.

5.148 On balance, given the emphasis of the terms of reference on the effects on jurors and the lack of evidence that allowing more than 12 jurors to deliberate and reach a verdict will have adverse consequences, the Commission recommends abolishing balloting off pursuant to section 48 of the Juries Act.

5.149 The Commission acknowledges that, if its recommendation is adopted, Victoria would be the first Australian jurisdiction to allow juries of more than 12 to deliberate and return a verdict in criminal trials.

Guidance on the empanelment of additional jurors

5.150 The Commission considers that there is scope for further guidance about factors to take into consideration in deciding whether additional jurors should be empanelled so as to reduce the incidence of enlarged juries.

5.151 These guidelines should highlight factors to take into account when exercising the discretion to empanel additional jurors, but should not be as rigid as the New South Wales and Irish guidelines that only allow additional jurors to be empanelled when it is expected that a trial duration will go beyond a set period (three months in New South Wales and two months in Ireland).[113]

111 Victorian Law Reform Commission, above n 16, 59 [5.75].
112 See Recommendation 15.
113 See [5.23].

Recommendations

14 Section 48 of the *Juries Act 2000* (Vic) should be repealed.

15 To regularise the empanelment of additional jurors there should be statutory criteria guiding the discretion to empanel additional jurors. These should include:

- the length of the trial
- the nature of the trial
- any other factor that may impact on juror attrition.

Amendment to the definition of 'majority verdict'

5.152 If section 48 of the Juries Act is repealed, the majority verdict provisions would need to be amended.

5.153 As noted at [5.93], the Commission considers that the way in which a majority is defined depends on the rationale used to support majority verdicts.

5.154 The current rationale for majority verdicts in Victoria is to prevent a 'rogue juror' from derailing an otherwise unanimous verdict.[114] Unless this rationale is not considered applicable to a larger jury, then 'majority' should continue to be defined as the agreement of all jurors but one, regardless of the size of the jury for both criminal and civil trials.

Recommendation

16 A 'majority verdict' should be defined as the agreement of all jurors except one for both criminal and civil trials.

114 See [5.94]

6

Other issues

6. Other issues

Introduction

6.1 This chapter discusses a number of issues related to the jury system that were raised with the Commission in the course of this reference, but are outside the terms of reference.

6.2 While the Commission has not made recommendations in relation to these issues, it considers it important to raise the issues as part of a general examination of the jury empanelment process.

6.3 The issues discussed in this chapter are:

- issues particular to the regions
- the excuse process
- the return of discharged jurors to the jury pool.

Issues particular to the regions

6.4 As outlined in Chapter 1, the Commission visited four regional centres—Shepparton, Bendigo, Geelong and Morwell—to observe jury empanelments. The Commission also spoke to court staff and jury keepers in these regions.

Court buildings

6.5 The Commission observed that the older court buildings in Shepparton and Bendigo pose some difficulties for jury trials.

6.6 The jury pool rooms in both of these regions are small and do not comfortably accommodate a large number of prospective jurors. Jury pools are often quite large in regional areas, to account for the possibility that there will be an increased number of excuses based on knowledge of a party or witness.

6.7 In Bendigo, on the day the Commission attended, the jury induction was held in the foyer of the courtroom to accommodate the large jury pool. The design of the building meant that it was difficult to hear the induction.[1]

6.8 In Shepparton, on the day the Commission attended, around 80 prospective jurors were in the jury pool. Approximately 15 prospective jurors were required to stand in the courtroom for over an hour during the empanelment process because there were not enough seats.

1 The Commission is aware that plans have been approved to upgrade justice facilities in Bendigo, including providing an additional courtroom and enhanced court facilities: Attorney-General (Vic), 'Builder named for Bendigo court precinct development' (Media Release, 20 December 2013) <http://www.premier.vic.gov.au/media-centre/media-releases/8806-builder-named-for-bendigo-court-precinct-development.html>.

6.9 The Commission observed that the acoustics were particularly poor in the Shepparton court. This was mentioned by the judge in the context of excuses and a few people did apply to be excused on the grounds that they could not hear well in the courtroom.[2]

6.10 The Commission was told that in some of the smaller regions, inductions are conducted outside, as there are inadequate facilities.

Increased attendance for jury service

6.11 Another issue raised by court staff was the fact that in the regions, prospective jurors are more likely to be summoned to attend for jury service several times, as there is a smaller population to draw on.

6.12 The court staff the Commission spoke to were keenly aware of this issue and emphasised the importance of providing good service to and reducing the burdens on prospective jurors in regional areas. One senior registrar noted that word travels quickly in the regions, and one person's bad experience may influence the way others view jury service.[3]

Delays associated with the discharge of juries

6.13 In the regions, a jury pool is summoned for a period of three days during the visit of the circuit. The jury pool is generally discharged once the jury is selected and sworn in. If the jury is discharged on the first or second day, generally the trial will be delayed until a new pool attends on the fourth day because of the difficulty of calling in more prospective jurors outside of the three-day cycle.

6.14 Where only one courtroom is available for jury trials (as is the case in most regional areas), delays can have a flow-on effect because trials cannot be scheduled concurrently.

Excuses

6.15 In Chapter 2, the Commission outlined the various stages at which a person who is randomly selected may seek to be excused from jury service. The final opportunity occurs during the jury empanelment process. It is at this point that the trial judge must advise the panel of:

- the type of case or charges to be heard
- the name/s of the parties
- the names of the principal witnesses
- the estimated length of the trial.[4]

6.16 The judge must also advise the panel of 'any other information that the court thinks relevant',[5] which often includes further background information about the case.

6.17 Based on this information, panel members are then called on to seek to be excused from jury service on the grounds that they consider they may be unable to consider the case impartially, or are unable to serve for any other reason.[6]

6.18 Panel members are also given another opportunity at this stage to seek excusal on grounds they might have advised the Juries Commissioner's Office of earlier, such as medical grounds, pre-booked travel commitments, or serious financial hardship arising from having to attend for jury service.

2 Funding for the redevelopment of the Shepparton court complex was also recently announced by the government: Attorney-General (Vic) and Deputy Premier (Vic), 'New court complex for Shepparton' (Media Release, 1 May 2014) <http://www.premier.vic.gov.au/media-centre/media-releases/9788-new-court-complex-for-shepparton.html>.
3 Consultation 3 (Senior registrar, registrar and jury keeper, Shepparton Law Courts, Victoria).
4 *Juries Act 2000* (Vic) s 32(1).
5 Ibid s 32(1)(e).
6 Ibid ss 32(2)–(3).

6.19 Typical grounds for excusal at this stage might be:

- The prospective juror knows a party, lawyer or a key witness involved in the trial.
- The prospective juror has a personal connection to that particular case.
- The circumstances of the case are such that the prospective juror does not believe they can decide the issues impartially (for example, the case may involve culpable driving, and the prospective juror has lost a family member in similar circumstances).

6.20 An average of 4.6 prospective jurors are excused during each jury empanelment in Victoria. This number can increase significantly in regional trials (where the parties or witnesses may be known to many panel members), in long trials, in particularly unpleasant cases, and in cases of high notoriety.

6.21 As the Commission notes in Chapter 3, the opportunity for prospective jurors to seek excusal at this stage is an important way in which the impartiality of the jury is protected.[7]

Process for excuses in Victoria

6.22 Beyond specifying what information must be provided to prospective jurors, the *Juries Act 2000* (Vic) (Juries Act) does not provide any detail about the excuse process. The Commission's consultations and observations revealed that a variety of different methods are used by judges.

6.23 As noted at [6.15], the judge is required to provide certain information to the jury so that they can decide whether to seek to be excused. Some judges provide this information in writing—for example, by providing the panel with a written list of witnesses. Others prefer to read out the names of key witnesses.

6.24 The Commission also observed and was told about a range of processes for taking excuses, including by:

- sworn oral application
- unsworn oral application
- written application signed by the prospective juror
- unsigned written application.

6.25 Some judges adopt a standard procedure for all trials, whereas others vary their practice depending on the nature of the case. For example, a judge may typically take excuses by swearing in prospective jurors to provide an oral excuse application, but allow written excuses for cases involving sensitive issues such as sexual abuse.

6.26 Sometimes a prospective juror's written or oral excuse application can lead to further questioning by the trial judge. The trial judge may also confer with the parties to see if they have any concerns about the prospective juror participating on the jury.

Issues arising from the Commission's consultations and observations

6.27 Judges consulted by the Commission felt that a flexible approach to hearing excuses was important to cater for different cases and circumstances. Some of the judges consulted by the Commission were interested in the excuse-taking practices of other judicial officers, and considered that there would be benefit in greater collaboration within and across the courts in this area.[8]

7 [3.120].
8 Consultation 22 (Judges of the County Court of Victoria).

6.28 In its observations, the Commission also noted the varying approaches of judicial officers in granting excuses. While jury service is not voluntary,[9] judges have a broad discretion to grant excuses.[10] Some judges took a fairly hard line with prospective jurors and emphasised the importance of jury service, whereas others excused most or all of the prospective jurors who applied without further questioning them.

6.29 As noted in Chapter 3, many practitioners consulted stated they would be likely to challenge a prospective juror who had unsuccessfully sought to be excused, as such prospective jurors are generally considered to be unwilling to serve and therefore may not bring their full commitment to the task.[11]

6.30 One practice the Commission observed that may be of benefit in empanelments generally, was to provide a second opportunity for panel members to seek excusal immediately following the determination of excuse applications. This gives more timid prospective jurors, or prospective jurors who did not immediately appreciate that they should seek to be excused, another chance to do so. In making this suggestion, the Commission notes that the empanelment process can seem quite foreign to prospective jurors, many of whom have never before been inside a courtroom.

The return of discharged jurors to the jury pool

6.31 The *Juries Regulations 2011* (Vic) provide that a discharged jury must be returned to the jury pool.[12] It is likely that this regulation was introduced to promote the efficient use of jurors.[13]

6.32 However, there is no bar on discharged jury members being selected for a panel for the same trial.

6.33 The Victorian Director of Public Prosecutions expressed concern about this given the possibility of the discharged jury being exposed to prejudicial information[14] and the Director's Policy on Juries identifies this situation as one where it would be appropriate to stand aside a prospective juror who was balloted for the jury.[15]

6.34 The Commission considers this issue should be reviewed by the government in consultation with the Juries Commissioner and the legal profession.

9 *Juries Act 2000* (Vic) s 5(1).
10 Ibid s 32(3).
11 See [3.163].
12 *Juries Regulations 2011* (Vic) reg 9(2).
13 This is one of the stated objectives of the *Juries Regulations 2011* (Vic). See reg 1(a).
14 Submission 12 (Victorian Director of Public Prosecutions).
15 Director of Public Prosecutions, *Director's Policy No 6: Juries* (21 February 2014) 7.

Conclusion

The participation of the community in the criminal justice system is a hallmark of Victorian justice. The Commission is pleased to have had the opportunity of considering, and making constructive proposals on, how to improve the system of citizens participating in the criminal justice system; and in turn considering, and making constructive proposals on, how to respect and support the experience of the public in participating in that system. The Commission commends this report to you.

A

Appendices

Appendices

Appendix A: Advisory committee members

1	Professor Jonathan Clough, jury researcher, Monash Law School
2	Mr Leighton Gwynn, criminal law barrister
3	Mr Peter Kidd SC, senior Crown prosecutor
4	Mr Peter Morrissey SC, criminal law barrister
5	Ms Peta Murphy, senior public defender, Victoria Legal Aid
6	Ms Katherine Rynne, senior registrar Loddon Mallee, Magistrates' Court of Victoria
7	Mr Robert Stary, principal, Robert Stary Lawyers
8	Ms Andrea Tsalamandris, partner, Adviceline Injury Lawyers

Appendix B: Consultations

Discussions about the questions raised in the consultation paper were held with the people and organisations listed below.

1	Prospective jurors post-empanelment, Shepparton, Victoria	7 October 2013
2	Prospective jurors and jurors, Shepparton, Victoria	7 October 2013
3	Senior registrar, registrar and jury keeper, Shepparton Law Courts, Victoria	8 October 2013
4	Prospective jurors, Geelong, Victoria	14 October 2013
5	Senior registrar and jury keeper, Geelong Law Courts, Victoria	14 October 2013
6	Jury and security coordinator, Supreme Court, Hobart, Tasmania	18 October 2013
7	Prospective jurors post-empanelment, Bendigo, Victoria	22 October 2013
8	Prospective jurors and jurors, Bendigo, Victoria	22 October 2013
9	Senior registrar, Loddon Mallee and jury keeper, Bendigo, Victoria	22 October 2013
10	Deputy sheriff, Queensland	24 October 2013
11	Court registry officer, Wellington High Court, New Zealand	25 October 2013
12	Prospective jurors post-empanelment, Geelong, Victoria	28 October 2013
13	Judges of the Supreme Court of Victoria	29 October 2013
14	Acting deputy director and professional development officer, Commonwealth Director of Public Prosecutions, Melbourne Office	29 October 2013
15	Juries Commissioner and Juries Commissioner's Office staff member, Melbourne, Victoria	29 October 2013
16	Director of Public Prosecutions, Crown Prosecutor and Office of Public Prosecutions staff member, Melbourne, Victoria	30 October 2013
17	Acting jury manager, South Australia	1 November 2013
18	Additional juror A	1 November 2013
19	Senior registrar, Latrobe Valley Law Courts, Victoria	6 November 2013
20	Prospective jurors post-empanelment, Morwell, Victoria	6 November 2013
21	Acting chief executive officer and program manager, Judicial College of Victoria	7 November 2013
22	Judges of the County Court of Victoria	7 November 2013
23	Additional juror B	7 November 2013
24	Assistant sheriff, manager jury and court administration, NSW	8 November 2013
25	Judge of the County Court of Victoria	11 November 2013

26	Jury manager, Centralised District and Combined High Court, New Zealand	12 November 2013
27	Additional juror C	13 November 2013
28	Additional juror D	13 November 2013
29	Family member of victim of crime, Melbourne, Victoria	14 November 2013
30	Juries Commissioner's Office staff, Melbourne, Victoria	14 November 2013
31	Additional juror E	15 November 2013
32	Law Institute of Victoria members, Melbourne, Victoria	18 November 2013
33	Judge of the County Court of Victoria	19 November 2013
34	US jury researchers	20 November 2013
35	Manager, jury services, Western Australia	21 November 2013
36	Deputy district registrar, Victoria Registry, Federal Court of Australia	11 December 2013

Appendix C: Submissions

1	Name withheld pursuant to s 65 of the *Juries Act 2000* (Vic)
2	Name withheld pursuant to s 65 of the *Juries Act 2000* (Vic)
3	Name withheld pursuant to s 65 of the *Juries Act 2000* (Vic)
4	Confidential
5	Name withheld pursuant to s 65 of the *Juries Act 2000* (Vic)
6	Name withheld
7	Name withheld pursuant to s 65 of the *Juries Act 2000* (Vic)
8	Crime Victims Support Association Inc.
9	Confidential
10	Victoria Legal Aid
11	Ethnic Communities' Council of Victoria
12	Victorian Director of Public Prosecutions
13	Juries Commissioner
14	Victorian Equal Opportunity and Human Rights Commission
15	Liberty Victoria
16	Criminal Bar Association
17	Common Law Bar Association
18	Peter Burt

Appendix D: 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	6 where 1 accused. 5 each where 2 accused. 4 each where 3 or more accused.	8 for each accused.	3 for each accused. Additional peremptory challenges can be made with agreement of all parties.	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.	3 for each accused. Additional peremptory challenges can be made with agreement of all parties.	6 for each accused. Up to 12 for capital offences.	
Number of Crown stand asides	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.	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	Federal Court of Australia	New Zealand
	8 for each accused.	3 for each accused.	6 for each accused.	3 for each accused.	4 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.	N/A—Crown has right to stand aside only.	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.	4	Unlimited, but requires consent of an accused. Also available to an accused with the consent of the Crown.
	1 per party where 1 or 2 reserve jurors. 2 per party where 3 reserve jurors.	None.	1 plus any unused challenges.	None.	1 for each accused. 1 extra Crown stand aside.	N/A—additional jurors are not appointed in New Zealand.

Appendix E: 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—additional jurors are not appointed for civil trials in New South Wales.	N/A—peremptory challenges are not available for civil trials in the Northern Territory.	

1 The challenges are made from a list of at least 20 potential jurors. The names remaining on the list following the challenges are drawn at random until six jurors are selected.

	Queensland	South Australia	Tasmania	Western Australia	Federal Court of Australia	New Zealand
	Usually 4, maximum of 7.	N/A.	Usually 7, maximum of 9.	6	Same number as the state or territory in which the civil jury trial occurs.	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]	Same number as the state or territory in which the civil jury trial occurs.	4 per party.
	1 per party where 1 or 2 reserve jurors. 2 per party where 3 reserve jurors.	N/A.	None.	N/A—additional jurors are not appointed for civil trials in Western Australia.	Same number as the state or territory in which the civil jury trial occurs.	N/A—additional jurors are not appointed in New Zealand.

Appendix F: Information about jurors available to parties/ Identification of jurors in the courtroom by name or number

Jurisdiction	Victoria	Australian Capital Territory	New South Wales	Northern Territory	
Panel called in court	Yes.	No.	No.	No.	
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.	
Identification of jurors in the courtroom by name or number	Name or number (at discretion of the judge).	Name.	Number.	Name.	

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

	Queensland	South Australia	Tasmania	Western Australia	Federal Court of Australia	New Zealand
	No.	No.	No.	No.	Yes.	No.
	Name, occupation and suburb.	Name, occupation and suburb.	Name, occupation and address.	Name, occupation and address.	Name or number for criminal trials; for civil trials depends on the state or territory in which the trial occurs.	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'.	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.	Called aloud during empanelment for criminal trials; for civil jury trials depends on the state or territory in which the trial occurs.	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 they be called by number only for security or other reasons).	Number.	Name (unless the court directs they be called by number only for security or other reasons).	Number.	Name for criminal trials (unless the court thinks it is necessary to call the panel by number in order to protect the security of a juror or potential juror); for civil trials depends on the state or territory in which the trial occurs.	Name.

Appendix G: 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	3 in criminal trials. 2 in civil trials.	5 in criminal trials. Civil juries abolished in ACT.	3 in criminal trials. None in civil trials.	3 in criminal trials. None in civil trials.	
Conditions for empanelment of additional jurors	None.	If a judge considers it appropriate.	A court may empanel additional jurors if it is satisfied that: • the trial is likely to run for more than 3 months[1] • 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.	

1 Section 19(2)(b) of the *Juries Act 1977* (NSW) also allows for particular kinds of trial to be prescribed by regulations as appropriate for additional jurors, but this has not occurred to date.

	Queensland	South Australia	Tasmania	Western Australia	Federal Court of Australia	New Zealand
	Reserve.	Additional.	Reserve.	Additional.	Additional for criminal trials; depends on the state or territory in which the civil jury trial occurs.	N/A—additional jurors are not appointed in New Zealand.
	3 in criminal trials. 3 in civil trials.	3 in criminal trials. Civil juries abolished in SA.	2 in criminal trials. 2 in civil trials.	6 in criminal trials. None in civil trials.	3 in criminal trials. For civil trials, the number allowed is the same as the state or territory in which the civil jury trial occurs.	N/A.
	None.	If the court thinks there are good reasons for doing so.	None.	None.	None for criminal trials; depends on the state or territory in which the civil jury trial occurs.	N/A.

Appendix H: Juror survey

About this survey

The VLRC has been asked by the government to review certain aspects of the jury empanelment process. The information from the survey will help us to make recommendations to the government about possible changes to improve that process.

This survey is for people who have been to a court room as part of a jury selection process in Victoria. The group of people who attend court for jury selection is called the jury panel. The jury is selected from the jury panel.

You can respond to this survey whether you were selected for the jury or not. The survey is anonymous. It will take 5-10 minutes to complete. Or you can complete it online at **www.lawreform.vic.gov.au**

Please do not include the details of any trial you have served on in this survey. It is an offence for a juror to reveal any information about the deliberations of a trial they have served on.

PART A: BACKGROUND QUESTIONS

You may have been on more than one jury panel. If you have been on more than one jury panel, please only answer this survey in relation to the last jury panel you were on.

A.1 When were you last on a jury panel in Victoria?

- ❑ Within the last year
- ❑ 1 - 3 years ago
- ❑ More than 3 years ago

A.2 Was the trial you attended in Melbourne or elsewhere in Victoria?

- ❑ Melbourne
- ❑ Elsewhere in Victoria

A.3 Was the trial a criminal or civil trial?

- ❑ Criminal trial (for a person accused of a crime) ➔ Go to Part B
- ❑ Civil trial (where a person is suing another person or company for compensation) ➔ Go to Part C

END OF PART A.

PART B: CRIMINAL TRIALS

B.1 **Before the jury is selected, the judge's associate calls the names or numbers and occupations of each person on the jury panel in court to check that everyone is there.**

For the trial you attended, were the people on the jury panel called by name or number?

- ❑ Name → Go to B.3
- ❑ Number → Go to B.2
- ❑ Don't remember → Go to B.3

B.2 **Did the judge make any comment about calling the people on the jury panel by number?**

- ❑ Yes
- ❑ No
- ❑ Don't remember

B.3 **In your view, is it preferable to call the people on the jury panel by number or by name?**

- ❑ Name
- ❑ Number
- ❑ No preference

Reason for your answer:

B.4 **The accused (defence) and the prosecution are allowed to challenge a limited number of people drawn from the ballot box to prevent them from being on the jury.**

Do you understand why there is a challenge process?

- ❑ Yes → Go to B.5
- ❑ No → Go to B.6
- ❑ Not sure → Go to B.6

B.5 **Why do you think challenges to jurors are allowed?**

B.6 Were you chosen from the ballot box in court as a potential juror?

- ❑ Yes → Go to B.7
- ❑ No → Go to B.13

B.7 Were you selected to be on the jury?

- ❑ Yes, I was selected to be on the jury → Go to B.12
- ❑ No, I was challenged → Go to B.8

B.8 Were you challenged by the accused (the defence) or the prosecution?

- ❑ Don't know
- ❑ The accused (defence)
- ❑ The prosecution

B.9 Which of the following best describes how you felt about being challenged? (pick one only)

- ❑ Relieved
- ❑ Didn't mind
- ❑ Disappointed/ frustrated
- ❑ Embarrassed
- ❑ Upset/angry
- ❑ Other (please specify)

B.10 Why do you think you were challenged?

- ❑ Because of my gender
- ❑ Because of my occupation
- ❑ Because of my age
- ❑ Because of my race or ethnicity
- ❑ Because of what I look like
- ❑ Don't know
- ❑ Other (please specify)

B.11 What made you think this was the reason you were challenged?

B.12 How did you feel about having to walk in front of the accused on the way to the jury box?

B.13 Only answer this question if you were NOT chosen from the ballot box as a potential juror.

When a person is selected from the ballot box they have to walk in front of the accused before going towards the jury box.

Having seen this process, what do you think about it?

B.14 Do you think the accused or the prosecution should be allowed to challenge jurors without having to give a reason?

- ❑ Yes
- ❑ No
- ❑ Not sure

B.15 Do you think there should be any changes to the challenge process?

- ❑ Yes
- ❑ No

If yes, what changes should be made?

END OF PART B. PLEASE GO TO PART D.

PART C: CIVIL TRIALS

C.1 Before the jury is selected, the judge's associate calls the names or numbers and occupations of each person on the jury panel in court to check that everyone is there.

For the trial you attended, were the people on the jury panel called out in court by name or number?

- ❑ Name → Go to C.3
- ❑ Number → Go to C.2
- ❑ Don't remember → Go to C.3

C.2 Did the judge make any comment about calling the people on the jury panel by number?

- ❑ Yes
- ❑ No
- ❑ Don't remember

C.3 In your view, is it preferable to call the people on the jury panel by number or by name?

- ❑ By number
- ❑ By name
- ❑ No preference

Reason for your answer

C.4 Both sides are allowed to strike the names of 3 people drawn from the ballot to exclude them from the jury.

Do you understand why this process exists?

- ❑ Yes → Go to C.5
- ❑ No → Go to C.6
- ❑ Not sure → Go to C.6

C.5 Why do you think the process for excluding people exists?

C.6 Were you chosen from the ballot box in court as a potential juror?

- ❑ Yes → Go to C.7
- ❑ No → Go to C.12

C.7 How did you feel about having to stand when your name/number was called?

_____

_____

_____

C.8 Were you selected to be on the jury?

- ❑ Yes, I was selected → Go to C.13
- ❑ No, I was challenged → Go to C.9

C.9 Why do you think you were not selected?

- ❑ Because of my gender
- ❑ Because of my occupation
- ❑ Because of my age
- ❑ Because of my race or ethnicity
- ❑ Because of what I look like
- ❑ Don't know
- ❑ Other (please specify) _____

_____

C.10 What made you think this was the reason you were not selected?

_____

_____

_____

C.11 Which of the following best describes how you felt about not being selected? (pick one only)

- ❑ Relieved
- ❑ Didn't mind
- ❑ Disappointed/ frustrated
- ❑ Embarrassed
- ❑ Upset/angry
- ❑ Other (please specify) _____

_____

C.12 Only answer this question if you were NOT chosen from the ballot box as a potential juror.

When a person's name or number is drawn from the ballot box they have to stand so they can be identified.

Having seen this process, what do you think about it?

C.13 Do you think the lawyers should be allowed to exclude people from the jury whose name or number was selected from the ballot box without having to give a reason?

- ❑ Yes
- ❑ No
- ❑ Not sure

C.14 Do you think there should be any changes to the way juries are selected from the panel?

- ❑ Yes
- ❑ No
- ❑ Not sure

If yes, what changes should be made?

END OF PART C. PLEASE GO TO PART D.

PART D: ADDITIONAL JURORS

D.1 **If you were selected to be on a jury, were there more than 12 jurors (for a criminal trial) or more than 6 jurors (for a civil trial)?**

- ❑ Yes → Go to D.2
- ❑ No → Go to Part E
- ❑ N/A – I wasn't selected to be on the jury → Go to Part E

D.2 **If more than 12 jurors (in criminal trials) or 6 jurors (in civil trials) remain at end of the trial when the jury retires to consider its verdict, a ballot is held to reduce the size of the jury to 12 or 6.**

On the trial you served on, did any jurors have to be balloted off when the jury retired to consider its verdict?

- ❑ Yes
- ❑ No

D.3 **Were you or other jurors balloted off?**

- ❑ I was balloted off → Go to D.4
- ❑ Other juror(s) were balloted off → Go to D.5

D.4 **How did you feel when you were balloted off?**

D.5 **How did you feel when a jury member was balloted off?**

END OF PART D. PLEASE GO TO PART E.

PART E: ABOUT YOU

E.1 What is your gender?

- ❑ Male
- ❑ Female

E.2 What is your age?

- ❑ 18-29
- ❑ 30-39
- ❑ 40-49
- ❑ 50-59
- ❑ 60-69
- ❑ 70+

Thank you for completing this survey. If you would like updates on the jury empanelment project, please write your name and phone number or email address in the box below or visit the VLRC's website: www.lawreform.vic.gov.au

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