SUBMISSION BY THE VICTORIAN DIRECTOR OF PUBLIC PROSECUTIONS
into the
JURY EMPANELMENT REVIEW
by the
VICTORIAN LAW REFORM COMMISSION
November 2013

The Director of Public Prosecutions for Victoria is pleased to be able to provide a submission to the Victorian Law Reform Commission on the review of the jury empanelment process.

The consultation paper provided a series of questions which are replicated and answered below.

PEREMPTORY CHALLENGES

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

   Yes, peremptory challenges and the right to stand aside play an important role in the jury empanelment process in criminal trials.

2. Is the number of peremptory challenges available to the parties in criminal trials appropriate?

   Yes.

3. Is the number of peremptory challenges available to the parties in civil trials appropriate?

   N/A

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

   No. Although the DPP recognises that there may be a preference to reduce the number of peremptory challenges where there are multiple co-accused on trial, it is the view of the DPP that that number ought not change as the number of co-accused on trial increases. The DPP sees no basis in principle for the current system whereby the number of challenges available to co-accused drops according to the number of accused to be tried.

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

   N/A

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

   No, the number of challenges or the number of times the Crown may stand aside as of right ought not to alter depending on the number of jurors to be empanelled. The rationale behind the peremptory challenge or the right to stand is not furthered by increasing numbers in these circumstances.

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

   There is no need to overhaul the current process.

   However, consideration may be given to altering the Victorian practice that the potential juror walk in front of the accused person in the dock. This process may be intimidating for some jurors. There is no need to maintain this practice if an alternative process that provides an accused person sufficient opportunity to make some degree of evaluation of the juror is provided.

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

   N/A

9. Is the information available to parties about prospective jurors in criminal and civil proceedings appropriate?

   Yes.

10. Should any more or less information be provided to the parties? If so, what kind of information should be added or removed?

    No further information is required.

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

    Yes, the juror stood aside should be taken back into the pool, but never brought back into the panel for the same trial.

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

    No, such prohibitions may be seen to curtail the basis for peremptory challenges such as procedural engagement by the accused.

13. Are challenges for cause an appropriate and adequate alternative to peremptory challenges?

    No, they are utilised for different purposes and should not be treated as alternatives of each other.

14. Does the current law provide sufficient information to the parties upon which to base a challenge for cause? If no, what additional information should be provided?

    YES, this is only intended to be exercised where one of the parties has pre-existing information.

15. Should the *Juries Act 2000* (Vic) specify the criteria upon which challenges for cause can be made?

    No. Challenges for cause are rarely utilised and any legislative prescription of the criteria that underpin a challenge for cause may have the unintended effect of restricting the circumstances that a challenge of cause ought to be available.

16. Should the *Juries Act 2000* (Vic) provide further guidance on the process for challenge for cause?

    Yes, a thorough statutory explanation on the process would be useful and would provide for a consistent approach throughout Victoria.

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

    No.

    In relation to the possible implementation of a procedure that enables parties to question jurors, the DPP is of the view that these:

    - **are 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 a cost/benefit analysis.**

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

    No, this would create an unnecessary complication.

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

    This is provided for in the Common Law and ought to remain there.

CALLING THE PANEL BY NUMBER OR NAME

20. Should judges be required to call the panel:
    a) only by name?
    b) only by number?
    c) either by name or number?

Although the DPP recognises that there may be a preference for the jury to be call by number only, it is the view of the DPP that the mechanism to call the panel ought remain in the discretion of the trial judge. Nonetheless, there is scope to provide better statutory guidance on the procedure for calling the panel.

21. If judges should have a choice to call the panel by name or number:
    a. Should the *Juries Act 2000* (Vic) specify one of these methods as the preferred method? **No, the matter ought to remain in the discretion of the trial judge.**
    b. If yes, which method should be the preferred method? **N/A**

22. If judges depart from the preferred method:
    a) Should they have to provide reasons for doing so?
    b) If yes, what statutory criteria or principles should guide that decision?

N/A

ADDITIONAL JURORS

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

    No, a jury of lesser than 10 would be a jury comprised of too few members. In the view of the DPP a jury of less than 10 members is less desirable than the need to empanel additional jury members.

24. Should the jury consist of all the remaining jurors where additional jurors remain at the time the jury retires to consider its verdict? If yes:
    a. Should this be for all cases, or are there circumstances in which it may not be appropriate?
    b. If it should not be for all cases, what are the factors a court should take into account in deciding whether a jury should consist of all the remaining jurors?

    No, a jury that ultimately retires to consider verdict ought not consist of more than 12 members.

25. Should Victoria adopt the reserve juror model in preference to the additional juror model as a way of avoiding balloting additional jurors?

    No.

    Under a reserve juror model, there is a real risk that reserve jurors may not engage whilst serving as a reserve juror. In the view of the DPP, the risk of non-engagement does not outweigh the detrimental aspects of balloting additional jurors.

    Under current procedure, the foreperson is effectively exempt from being balloted off. However, the foreperson's name in included in the ballot and should it be selected, it is disregarded and another name is balloted. In the view of the DPP, the foreperson's name should be exempt from the ballot procedurally and therefore never included in the ballot.

26. Should judges be able to order discharge of one or more additional jurors by consensus?

    No, the DPP's preferred mechanism to discharge additional jurors is by ballot.

27. Could the provision of more information to juries by the judge during a trial about the possibility of balloting off individual jurors reduce the impact of the balloting process on the jury?

    This is a sensitive issue which ought to be addressed by judicial management rather than statute.