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15 November 2013

The Hon. Philip Cummins
Chair, Victorian Law Reform Commission
Level 3, 333 Queen Street
Melbourne Victoria 3000

Dear Justice Cummins,

RE: SUBMISSION – JURY EMPANELMENT CONSULTATION PAPER

Thank you for the opportunity to make this submission to the Victorian Law Reform Commission's (the Commission) review of the jury empanelment process.

I write with a certain level of expertise in jury management practices and a good understanding of the relevant and recent research in this area. However, my sole interest with respect to the Commission's review is the effect upon jurors of the empanelment process and the its cumulative potential to put at risk the integrity of the jury system.

Peremptory challenges

Peremptory challenges, as they currently operate, should not be retained.

Criminal trials

In criminal trials as I understand it, the argument in favor of peremptory challenges is that the accused has some control, albeit a very small amount, over the process. It may also contribute to the accused person's acceptance of, and confidence in, the justice system.

I do not think that these two purposes, speculative and immeasurable as they are, outweigh the citizen's responsibility and right to serve on a jury. Nor do these stated purposes justify the current practice, where the *decision* to challenge is based on an *assumption* informed by v*ery limited information*. In fact, you could reasonably argue that the peremptory challenge process is as likely to work in favor of the accused as it is to have a perverse affect on the composition of the jury (i.e. the accused is as likely to correctly assume a particular juror is biased as he or she is to incorrectly assume that another is not).

As noted in the Commission's discussion paper, research suggests that peremptory challenges have little or no impact on the outcome of a trial and I see no evidence that peremptory challenges serve the accused purposes; they only serve to confuse, discriminate and otherwise offend citizens who have both a right and civic responsibility to serve on a jury. As such, I worry that peremptory challenges have a negative impact on those who are challenged, often leaving them to question "what is it about me that makes me unfit for jury service?" They and those remaining in the jury panel who witness the challenge may reasonably ask, "does the jury represent the community from which we came?" These questions, taken back into their communities and discussed with family and friends, may contribute in a cumulative way to the deterioration of community confidence the jury system.

The accused person's right to challenge for cause must be retained. It may benefit from a change to the *Juries Act 2000* (the Act) that provides further and better guidance on the

process and criteria for challenge for cause. As well, the Scottish model of challenge by consent may be a useful alternative to the existing peremptory challenge regime.

All this being written, should peremptory challenges be retained, I would strongly advocate for the abolishment of the ritual by which they are acted out in court. That is, the requirement that citizens be paraded before the accused is undignified, archaic and unnecessary.

Civil trials

The process for challenging jurors in civil proceedings is less likely to have a negative impact on citizens, as there is a lesser degree of individual scrutiny and public exclusion (ie: the juror is not required to participate in the ritual of walking past an accused and sometimes being challenged seconds before taking a seat in the jury box). However, there is still a certain degree of assessment, with barristers turning around in their chairs and eying the prospective jurors akin to 'fashions on the field' at an Oaks Day race meeting.

With the parties not directly involved in this process, peremptory challenges are even more unnecessary in civil trials as they are in criminal trials.

As stated earlier, a legislatively enhanced challenge for cause regime, coupled with a Scottish model of challenge by consent, may be a suitable alternative.

Calling the panel by number or name

The panel should be called in all instances by number.

In Victoria, a judge may call a jury panel by name or by number. There is no legislative requirement to choose one approach over the other; it is entirely at the trial judge's discretion.

The practice of current judges is mixed. Some judges call the panel by name but for exceptional circumstances; others empanel by number almost exclusively; and there are some who make a case-by-case decision as to how the panel will be called. To my knowledge, there is no definitive list that describes each individual judge's preferred practice.

It is the very existence of this conflicting practice that has the real potential to concern jurors unnecessarily. That is, it only takes one judge to routinely call the panel by number and another judge to only do so in exceptional circumstances to create a system where citizens are left confused and unnecessarily concerned for their own well-being.

The Act should provide one option to call the panel. If we were to revert to the calling of panels by name on all occasions, so be it. The paradigm of contradiction would be removed and at least in the jurors' collective minds, there would be no reason to speculate as to why the judge chose one form of empanelling process over another.

However when asked, jurors are 3-1 in favor of empanelling by number. As well, results of a recent *Juror Satisfaction Survey* indicated that while waiting times and information (regular updates) are important to non-empanelled people, personal security was the most important aspect of the empanelled jurors' experience. Given this and in the best interest of the citizen, the legislative option should be to call the panel by number.

Additional jurors

The Act should be amended to allow up to 15 jurors in a criminal trial and up to 8 jurors in a civil trial to be part of the deliberations and to arrive at a decision.

Criminal trials

While no doubt arbitrary (that is, I have not seen the data that confirms 12 is the ideal number), I think a jury of 12 citizens is a reasonable starting point for a criminal trial. However, we operate in a system where a criminal trial begins with the expectation that 12 people will deliberate to reach a unanimous verdict, yet on occasion a reduced number of people (11 or 10) can do so but more than 12 cannot.

From my experience, the effect on all jurors when one or more are balloted off prior to deliberations is profound. That is, the impact is not only felt by those who are leaving the group, but those who remain.

I have personally completed the jury discharge process of those balloted off a jury with additional jurors. I can report that the one response I have not yet had from a juror under these circumstances is that of resigned, philosophical indifference. Most are saddened and confused at best or incandescent with rage at worst. A smaller number are genuinely relieved.

Civil trials

In the 20 months that I have been Juries Commissioner, I cannot recall a civil trial that ended with more than 6 jurors. However, the same issues as discussed within the criminal jurisdiction apply and for that reason, I would welcome legislative change to allow up to 8 jurors the opportunity to consider the verdict.

Summary

Most Victorian citizens would have no reason to enter a courtroom. But once summoned for jury service, we ask them take up a very important role in what can be an intimidating environment. I simply do not think we have to make the experience any more daunting than it necessarily has to be.

To that end, I would be pleased to see:

- Peremptory challenges abolished;
- Jury panels called in court by number only; and,
- Legislative amendments to allow more than 12 jurors in a criminal trial and more that 6 jurors in a civil trial deliberate.

I look forward to the Commission's final report to Government in July 2014.

Yours sincerely,

[redacted]

Paul Dore
Juries Commissioner
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