

2 December 2013

Nicole Schlesinger
Team Leader, VLRC Jury Empanelment Reference
Victorian Law Reform Commission
3/333 Queen St
Melbourne VIC 3000

By email: law.reform@lawreform.vic.gov.au

Dear Ms Schlesinger

Victorian Law Reform Commission Jury Empanelment Reference

Thank you for the opportunity to provide a submission to the Victorian Law Reform Commission (**VLRC**) in its review of three aspects of the jury empanelment process in Victoria: the peremptory challenge process, the calling of the jury panel by name or number, and the use of additional jurors in trials as a precaution against juror attrition.

The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) is an independent statutory body with functions and responsibilities under the *Equal Opportunity Act 2010*, the *Racial and Religious Tolerance Act 2001* and the *Charter of Human Rights and Responsibilities Act 2006*. The vision of the VEOHRC is a community where every person values, understands and respects human rights and equal opportunity.

This submission addresses the human rights and equal opportunity issues raised in relation to the peremptory challenge process and the jury panel calling process and sets out the human rights framework the VLRC must take into account in its consideration of whether procedural, legislative or administrative changes should be made to those processes.

1. Peremptory challenges

A peremptory challenge is a challenge by a party to a prospective juror during the final stage of jury selection that results in their exclusion from the jury panel. No reason needs to be provided for a challenge.

In Victoria, in accordance with Part 6 of the *Juries Act 2000* which sets out the procedure governing jury selection, an accused is allowed four to six peremptory challenges in a criminal trial (depending on how many accused are arraigned on trial) and three in a civil trial. The Crown does not have a right to peremptorily challenge, however it does have a right to 'stand aside' jurors in criminal trials.

humanrightscormission.vic.gov.au

Enquiry Line 1300 292 153

3/204 Lygon Street Carlton Vic 3053

Telephone 1300 891 848 Fax 1300 891 858 TTY 1300 289 621 Interpreters 1300 152 494

Email information@veohrc.vic.gov.au

Unlike an accused's peremptory right to challenge, the right to stand aside must be exercised consistently with the role of the prosecution in the conduct of the trial to only exclude persons where necessary in the interests of justice and fairness. This is recognised in the Director of Public Prosecution's (**DPP**) Policy on Juries which specifies criteria for their use and relevantly prohibits the discriminatory use of stand asides, stating: *'The Crown should never use its right to stand aside on the basis of generic factors such as age, sex, race, physical appearance or occupation.'*¹ This policy is consistent with the DPP's human rights obligations as a public authority under the Charter.²

Peremptory challenges based on stereotypes

The consultation paper identifies that *'defence practitioners consulted by the Commission said that they use peremptory challenges to try and ensure an impartial jury'* [3.84]. As recognised in the Crown's guidelines, they can be used to seek a jury receptive of the defence case. An assessment of how a prospective juror will respond in a case generally falls within one of three categories: whether the prospective juror knows a party or witness; the demeanour of the prospective juror; and characteristics of a prospective juror.

The VEOHRC is concerned by the use of the characteristics of a prospective juror as a basis for a peremptory challenge. In Victoria, the only information on which to base a challenge is a prospective juror's name, occupation and physical appearance. From a person's name and appearance their gender, age range and racial or ethnic background may be ascertainable. As the VLRC identifies: *'Assessments about impartiality based on these characteristics are necessarily based on assumptions and stereotypes'* [3.88]. Stereotypes identified in the consultation paper include:

- Gender stereotypes: It is not uncommon for a prospective juror to be challenged off a jury determining a sex offence case, based on the stereotype that a young woman will be more sympathetic to the victim. Nor is it uncommon for women to be challenged off a jury in criminal trials more generally. The consultation paper identifies a gender imbalance on juries in criminal trials and concludes that the underrepresentation of women in criminal trials *'is primarily the result of the peremptory challenge process'*.³
- Stereotypes based on a person's racial or ethnic background: The Law Reform Commission heard that peremptory challenges of prospective jurors who share a common ethnic background with the victim (based on an assumption they will be overly sympathetic to the victim), or in some cases the accused (based on an assumption that they will judge the accused more harshly).

A further characteristic that may be ascertainable from a person's appearance is a disability. The consultation paper identifies that peremptory challenges may be made against prospective jurors *'who appear to have a sensory or other disability that would impede their ability to listen, view or process the evidence in the trial'* [3.51]. Although the eligibility requirements for jury selection in the *Juries Act 2000* provide that a person who *'has a physical disability that renders the person incapable of performing the duties of jury service'* is ineligible to serve on a jury (sch 2, cl 3(a)), eligibility based on capacity is

¹ Director of Public Prosecutions (Vic), *Director's Policy No 6: Juries* (25 February 2010), [6.3.3].

² See Director of Public Prosecutions (Vic), *Director's Policy No 13: Human Rights* (25 May 2011), [13.5.1].

³ See consultation paper at [3.67]-[3.75], where it identifies that gender analysis of 2012-13 data provided by the Juries Commissioner's Office shows that 67 per cent of peremptory challenges in criminal trials were to females, however final jury composition was 44 per cent female. Similarly the 2011-12 data shows that 68 per cent of challenges were to women, however final jury composition was again 44 per cent female.

distinct to excluding a person on the basis that they appear to have a disability that would impair their ability as a juror.

Even though it is widely recognised that this exercise is an arbitrary and subjective one 'dependent upon guesswork and dubious mythology as to those who might best respond to the case of the prosecution or defence'⁴, the VLRC's research identifies that reliance on jurors' characteristics nevertheless occurs.

Human rights and equal opportunity concerns

The Equal Opportunity Act

The Equal Opportunity Act protects the right to equality and aims to eliminate discrimination to the greatest possible extent. It makes discrimination, sexual harassment and victimisation unlawful in many areas of public life, including employment, education, accommodation and the provision of goods and services. In public life more generally, Victoria's equal opportunity legislation has been described as '*a bulwark of Victorian civic life, providing a foundation for our society as it has developed and matured*',⁵ and has itself developed over time to reflect the values and the diversity of the community it is designed to protect. On the introduction of the Equal Opportunity Act into Parliament in 2010, it was stated that:

*'Everyone wants to be included in the economic prosperity we have worked hard together to achieve, as well as the community we have built together – one that values diversity, that values opportunity, that values the contribution that every member of our rich and varied society can make, if given the chance to make it.'*⁶

While jury empanelment is not an area of public life in which discrimination is unlawful under the Equal Opportunity Act, the Act sets important standards for civic life that Victoria's justice system – including the process of jury empanelment – should respect and promote.

International Conventions

The discriminatory nature of stereotyping on the basis of gender and disability and its harmful effects are expressly recognised in the *Convention on the Elimination of Discrimination Against Women (CEDAW)*⁷ and the *Convention on the Rights of People with Disabilities (CRPD)*⁸ (both of which Australia is a party to). Each call for stereotypes to be combated in all areas of life. Article 5 of CEDAW requires countries to address and change social and cultural patterns that reinforce the stereotyping of women. Similarly, Article 8 of the CRPD requires countries to combat stereotypes and prejudices relating to persons with disabilities in all areas of life.

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. While in some circumstances a physical disability may render a person incapable of serving on a jury, whether a person is capable of jury service is more properly

⁴ New South Wales Law Reform Commission, *Jury Selection*, Report No 117 (2007), [10.28].

⁵ Second Reading Speech, Equal Opportunity Bill, Assemble (10 March 2010), 783 (Rob Hulls, MP, Attorney-General).

⁶ *Ibid.*

⁷ Opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). See Article

⁸ Opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

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),⁹ 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.

The use of peremptory challenges based on stereotypes assumed from a person's attributes or a combination of attributes – such as their gender, race, age or physical disability (for example blindness or deafness) – is discriminatory in that it is unfavourable treatment of a person with an attribute because of that attribute.

The Charter of Human Rights and Responsibilities

The Charter recognises that all people are born free and equal in dignity and rights. It is founded on the principles that human rights are essential in a community that is fair, just and inclusive, that human rights belong to all people without discrimination, and must be exercised in a way that respects the human rights of others.

In addition to the direct duties the Charter places on Parliament (requiring statements of compatibility with human rights to be prepared for all bills introduced to Parliament), on courts (to interpret statutory provisions so far as is possible in a way that is compatible with human rights) and on public authorities (to act in a way that is compatible with human rights), the human rights enshrined in the Charter should be respected and promoted in all Victorian government processes, not least those adopted in the context of the justice system.

The use of peremptory challenges based on attribute stereotypes is also inconsistent with the right to equality in section 8 of the Charter, which protects the right to recognition and equality before the law, including the right to enjoy human rights without discrimination and equal and effective protection against discrimination.

The Racial and Religious Tolerance Act

The Racial and Religious Tolerance Act further promotes these values of the right of all people to participate equally in society and recognises the cultural diversity and diverse ethnic, Indigenous and religious backgrounds of the people of Victoria. In support of racial and religious tolerance, the Act makes racial and religious vilification against the law, making unlawful behaviour that incites or encourages hatred, serious contempt, revulsion or severe ridicule against another person or group of people because of their race or religion.

A peremptory challenge process that allows for people to be excluded from participating in the justice system because of assumptions drawn about their capacity to serve or be impartial on the basis of any of these attributes, is clearly inconsistent with the standards of equality and dignity enshrined in the Equal Opportunity Act, the Charter and the Racial and Religious Tolerance Act. As expressed by Horan and Goodman-Delahunty,¹⁰ *“in an age where race and gender equality is vehemently protected by the law, the peremptory challenge process stands in contradiction with community values at large.”*

⁹ See *Juries Act 2000*, sch 2, cl 3(a): 'A person who has a physical disability that renders the person incapable of performing the duties of jury service' are ineligible to serve as jurors.

¹⁰ Referred to in the consultation paper at fn 86: Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34 *Criminal Law Journal* 167, 185.

Recognising diversity

The consultation paper identifies representativeness and impartiality as the two important principles underpinning jury trials and adopts the definition of representativeness in the context of jury trials as meaning *'an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status (etc)'* [2.7].

A peremptory challenge process that excludes segments of our diverse community from participating on the basis of discriminatory assumptions does not support the recognition of Victoria's diversity that our human rights framework seeks to protect and promote. It also undermines the fundamental aim to achieve a representative jury. As highlighted by the New Zealand Law Reform Commission, the representative nature of juries is achieved when all persons who are eligible to serve on juries have an equal opportunity to do so regardless of their age, gender, race or ethnic origins.¹¹

Ensuring a fair trial and the perception of a fair trial

Allowing peremptory challenges to exclude people from juries without explanation may impact on the fairness of the trial in other ways. For example, as identified by the NSW Law Reform Commission, *'it leaves open the possibility that a jury may, on some occasions, appear to have been selected on a discriminatory basis, giving rise to a potential question as to whether the jury's decision in that case has been influenced by reason of some form of bias. This is regardless of whether the right to peremptory challenge is in fact exercised in a discriminatory fashion.'*¹²

Peremptory challenges: conclusion and recommendations

The VEOHRC is critical of a process that encourages assumptions to be made as to a person's ability to undertake the important civic obligation of jury service – which is increasingly being conceived of as one of the important 'rights and responsibilities of citizenship' [3.111] – on the basis of discriminatory stereotypes, especially where those assumptions result in a person being excluded, or a perception that they are excluded, because of their gender, disability, race or other attribute.

We are of the view that the use of peremptory challenges to exclude prospective jurors based solely on their gender, race, age, disability or other protected attribute that might be ascertainable from their appearance (for example, their religion) should be prohibited. As outlined above, such challenges are inconsistent with Victoria's human rights and equal opportunity framework.

The VEOHRC recognises that the overriding priority in jury trials and the jury empanelment processes must be the provision of a fair trial. Section 24 of the Charter enshrines the right to a fair hearing, protecting *'the right of a person charged with a criminal offence or a party to a civil proceeding to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'*. The arguments in support of peremptory challenges are that they are necessary to ensure a fair trial for the accused ([3.98]-[3.110]), because they allow for an accused in a criminal trial to have confidence that they have received a fair trial (increasing confidence in the criminal justice system more broadly) and contribute to ensuring an impartial jury by removing jurors who

¹¹ Law Commission of New Zealand, *Juries in Criminal Trials*, Report No 69 (2001), 56.

¹² NSW Law Reform Commission, *Jury Selection*, Report No 117 (2007) [10.30].

may 'have biases or preconceived notions that influence their ability to fairly judge the evidence in the case' [3.83].

However it is unclear that the current peremptory challenge process is the only means, or – to the extent it relies on stereotypes - an effective means, by which the fairness of jury trials can be achieved and how fairness could not be achieved through processes that prohibit the discriminatory exclusion of people from juries. For example, fairness may be achieved through the use of challenges for cause and challenges by consent, where parties can only exclude a person from jury service for a stated and justifiable reason rather than on the basis of 'speculation or stereotyping'.

Although the United States has a distinct peremptory challenge process (where the parties receive extensive information on prospective jurors and can submit questions to potential jurors about their values and beliefs before exercising peremptory challenges), its process is notable in its prohibition of discriminatory challenges. The consultation paper identifies that in the United States, the exercise of peremptory challenges to exclude jurors on the basis of their race or gender has been found to violate the equal protection clause in the Fourteenth Amendment to the US Constitution and is prohibited on that basis. In *Batson v Kentucky* (1986), the US Supreme Court ruled that prospective jurors could not be removed from a jury solely on the basis of membership in a "cognizable racial group" and *J.E.B v Alabama* (1994) extended this prohibition to challenges based on a juror's gender.

In the United Kingdom peremptory challenges have been abolished altogether.

It is difficult to justify a process that allows and encourages discrimination when there is little evidence that the process is essential to the purpose of ensuring a fair trial to the accused by ensuring a representative and impartial jury, particularly where there is evidence that the process may in fact go against the aims to ensure representativeness and impartiality.

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.

If the VLRC considers that peremptory challenges are meaningless unless they can be exercised to exclude people on such a basis, their retention in criminal and civil trials is difficult to justify.

Process for peremptory challenges in criminal trials

Following the calling of the panel in criminal trials, a prospective juror is required to stand and walk in front of the accused and towards the jury box when their name or number is called. The consultation paper identifies that many jurors surveyed found this 'parading' process upsetting, humiliating, stressful and uncomfortable. It also undermines the equal opportunity of jurors to participate on the jury by supporting a challenge process that is based on assumptions derived from a juror's appearance.

The process is inconsistent with the principles of dignity and equality enshrined in the Charter. Given the discomfort that some jurors feel with this process, the 'parade', which presumably provides the parties with time to assess on the basis of the person's appearance their ability to judge the accused fairly, should not be retained without clear and persuasive justification.

2. Calling of the panel and identification of jurors

Regarding the VLRC's consideration of whether the jury panel should be called by name and occupation or by number, the VEOHRC is of the view that a process by which prospective jurors are called by number is more respectful of the privacy of jurors.

A process by which prospective jurors are called by number is also potentially more supportive of prospective jurors' equality rights, since it removes the possibility of a peremptory challenge based on a generic characteristic that might be derived from a person's name and not their appearance (such as their nationality, ethnicity or cultural background (as explained at [4.35])).

In Victoria, the current practice is that a trial judge may direct that the jury panel be called by number rather than name if there are concerns about calling out names in open court. This practice of calling of jurors by number is legitimately criticised as potentially prejudicing the accused, by giving the impression that there are some security concerns where a number is used. This risk of prejudice is heightened where different methods of calling are adopted on a case by case basis, giving the impression that the calling of the jurors in a particular way reflects on the guilt or otherwise of the accused. Such a risk can be avoided, along with any potential unfairness to the accused, by having a consistent process in all trials, namely calling all jurors in all trials by number.

If the VLRC would like further information or would like to discuss this submission, please feel free to contact Gudrun Dewey, Senior Legal Adviser, [REDACTED].

Yours sincerely

Kate Jenkins
Commissioner