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13 December 2013

To: The Victorian Law Reform Commission

By email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

## **Jury Empanelment Consultation Paper**

Liberty Victoria welcomes the opportunity to make a submission to the Victorian Law Reform Commission in its review of the jury empanelment process. Thank you for the extension of time granted to make this submission.

### **1. Introduction**

Liberty Victoria acknowledges that the Law Reform Commission has been asked to review the process of jury empanelment with regard to: resourcing implications; the representativeness of the jury; the impartiality of the jury; procedural fairness; and the effects on jurors.

Liberty supports the Commission's position in regard to the role and purpose of the jury in criminal trials. In particular, Liberty supports the view that jury trials:

- Safeguard the rights of the accused by limiting the power of the state and the judiciary;
- Ensure that justice is administered in line with community standards; and
- Enable the community to participate directly in the administration of justice, thereby increasing acceptance of outcomes, by both the accused person and the wider community, as well as confidence in the legal system more generally.

Further, Liberty supports the proposition that representativeness and impartiality are two important principles necessary to achieve the above purposes. These principles are both achieved in part through the random selection of jurors from the community, but it must also be acknowledged that the empanelment process contributes to the composition of juries and plays a role in ensuring that juries are both representative and impartial.

The right to a trial by jury is first and foremost the right of the accused person. It exists primarily to protect the rights of the accused and to stand as a bulwark between the power of the state and the rights of the individual. Accordingly, any assessment of whether change is required to the process of empanelling the jury must be approached with this perspective firmly in mind.

It is in this context that Liberty Victoria makes the following submissions –

## **2. Peremptory challenges**

Liberty Victoria strongly supports the retention of peremptory challenges in criminal trials in Victoria and supports the retention of the number of peremptory challenges currently available to accused persons facing trial.

The right to challenge peremptorily prospective jurors is a small but important way in which an accused person can participate directly in the trial and participate in the process that is designed to ensure that the jury is both representative and impartial.

The random selection of the jury pool from the community and the random selection of a jury panel from the pool will not of itself guarantee that an empanelled jury will be an accurate reflection of the composition of the community in terms of age, gender, race, culture, occupation, socio-economic status etc., or that every person, randomly selected, will be an appropriate juror for a particular trial. The empanelment of the jury is the final stage of the process of selection of a jury from the community where a lack of representativeness or problems with individual jurors could become evident.

Peremptory challenges are an efficient way in which an accused person may legitimately remove prospective jurors who –

- Appear to be unfit or physically unable to listen, view, or process the evidence in the trial.
- Clearly do not want to serve on a jury – as may be evident from their behaviour.

- Have displayed some behaviour that suggests they may not be impartial, such as scowling at the accused.
- May be biased, in the opinion of the accused, due to their race, ethnicity, age or occupation. (As noted in the Consultation Paper at 3.51)

In some cases, the random process of selection of jurors may produce a jury that is not balanced in terms of age, gender, race, culture, occupation, socio-economic status, and thus is not a truly representative jury. In such instances, the process of peremptory challenges is an efficient way to redress such imbalances.

It is acknowledged that the current process of peremptory challenges has resourcing implications in the form of providing jury panels of sufficient size to allow for challenges. However, given what is at stake for an accused person in a criminal trial, we submit that it is an appropriate and justified use of resources to provide the accused with this form of participation in the trial process. It is also likely to increase the accused's confidence in the trial process and their acceptance of the outcome.

Reducing the number of peremptory challenges available to accused persons is likely to lead to the increased use of challenges for cause. This would create resourcing implications of its own. Challenges for cause will inevitably involve further inquiry, possibly in the form of questioning of the potential juror, they require the cumbersome and time consuming removal of the jury panel from the court room, and a determination to be made by the trial Judge. Any such process will be more costly, time consuming and intrusive upon jurors than the current process of peremptory challenges.

### **3. Challenges for cause as alternative to peremptory challenges**

Liberty does not support the proposition that challenges for cause be used as an alternative to peremptory challenges.

As stated above, an increase in the use of challenges for cause is likely to be more costly, cumbersome and time consuming. It is likely to be intrusive to a juror who is questioned, it may be an invasion of their sense of privacy and it may be more upsetting.

Further, it would create another set of issues to be litigated within the adversarial environment, which would distract the parties from the real issues in the trial and potentially be open for appellate review.

Currently in Victoria, challenges for cause are rarely used. The process of peremptory challenges is a quick, immediate and efficient process. It requires no preparation and minimal consideration. It is not a distraction from the real issues in the trial. It provides an efficient way in which the accused can participate in the empanelment process

#### **4. Process for challenges**

Liberty submits that there should not be any change to the process by which peremptory challenges are made, except that greater flexibility could be introduced to allow for the legal representative assisting the accused to voice the challenge. In certain circumstances this may be less confronting to jurors who are challenged.

#### **5. Information available to the parties**

Liberty does not submit that there should be more information available to parties about prospective jurors.

It is acknowledged that under the current system, challenges are made with minimal information available. However, the provision of more information is likely to be more intrusive and confronting to prospective jurors. It would create more complexity in the empanelment process and be more costly and time consuming. There is no evidence to suggest that increasing the complexity of the process in this way would be justified by increasing the quality of juries.

#### **6. Calling of the panel by name or number**

Liberty submits that the default position should be empanelment by name, with the provision for empanelment by number where there is cause for doing so.

Whether an accused wishes to exercise a peremptory challenge or a challenge for cause, there is very limited information available about the prospective juror. An accused may know or have a connection with a prospective juror, providing a good basis for challenge, but not realise this due to the lack of identification by name.

#### **7. Conclusion**

In summary, Liberty submits that the right of the accused to exercise peremptory challenges in the empanelment of the jury is an important part of the criminal trial process. It plays an important role in ensuring that juries are representative and

impartial. Any erosion of this right is likely to lead to a decrease in confidence of the accused person in the criminal trial process and its outcomes. It also has the potential to lead to unjust outcomes if inappropriate jurors are not removed during the empanelment process. Further, it is submitted that a decrease in the availability of peremptory challenges may lead to an increase in the use of challenges for cause, which will create greater complexity, be more costly and time consuming, and potentially be more intrusive for prospective jurors.

Thank you for the opportunity to make this submission. Please contact Jane Dixon SC on [REDACTED] or Stewart Bayles on [REDACTED] if we can provide any further information or assistance. This is a public submission and is not confidential.

Yours sincerely

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Jane Dixon SC  
President, Liberty Victoria