Preamble

The Crime Victims Support Association Inc. ('*CVSA*') is pleased to submit responses to questions tabled in the Commission's consultation paper.

All responses given by the *CVSA* are directed at criminal procedures only in respect of peremptory challenges and the Crown right to stand aside in criminal trials.

The *CVSA* makes no submission in regards to the calling of a jury panel by name or number or the process for balloting off additional jurors when a jury retires to consider its verdict.

Here, the focus of commentary by the *CVSA* relates to peremptory challenges in criminal trials.

Peremptory Challenges – Questions 1 to 19

Q1: Should peremptory challenges and the Crown right to stand aside be retained for criminal and civil trials in Victoria?

R1: Specifically in relation to peremptory challenges in criminal trials, the response is 'no' as the *CVSA* holds a view similar to that expressed by Horan and Goodman-Delahunty,[1] where:

> [t]he fact that a barrister can remove a citizen from his or her seat in the jury box, based on a personal gut reaction, affronts the citizens of this democracy on many levels: it is inconsistent with both the contemporary justice system and generally accepted standards of a modern democratic society. In an age where race and gender equality is vehemently protected by the law, the peremptory challenge process stands in contradiction with the community values at large.
>
> 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. The potential formation of an obviously inappropriate jury is better dealt with by introducing specific legislation that reliance upon peremptory challenges. The introduction of majority verdicts can moderate concerns that a potentially disruptive juror can exert on the jury. In a court system crippled by costs and constantly struggling to provide access to justice for the citizens it serves, the cost savings of abolishing the peremptory challenge process is worthy of note.[2]

Supporting this view, the United Kingdom has successfully abolished the use of peremptory challenges since 1988.[3]

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[1] Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34 *Criminal Law Journal* 167.
[2] Ibid 185.
[3] *Criminal Justice Act 1988* (UK), s 118(1).

In relation to the Crown right to stand aside in its current form in criminal trials, the response is also 'no' as the right is rarely exercised as a matter of policy in Victoria. Consequently, abolition of this procedure would likely have little material effect on the future conduct of criminal trials.[4]

Q2: Is the number of peremptory challenges available to the parties in criminal trials appropriate?
R2: Refer to R1 above.

Q3: Is the number of peremptory challenges available to the parties in civil trials appropriate?
R3: Refer to Preamble above.

Q4: Should the number of challenges for each accused in criminal trials vary depending on how many accused there are in the proceeding?
R4: Refer to R1 above.

Q5: Should the plaintiffs and defendants have an equal total number of challenges in all cases, regardless of how many plaintiffs and defendants there are?
R5: Refer to Preamble above.

Q6: Should the number of challenges for each party in criminal or civil trials vary depending on whether additional jurors are to be empanelled?
R6: Refer to Preamble and R1 above.

Q7: Should there be any changes to the process for challenges during empanelment in criminal trials? If yes, what kind of changes?
R7: Refer to R1 above.

Q8: Should there be any changes to the process for challenges during empanelment in civil trials? If yes, what kind of changes?
R8: Refer to Preamble above.

Q9: Is the information available to parties about prospective jurors in criminal and civil proceedings appropriate?
R9: Subject to views expressed in R1 above and R13 below, the *CVSA* has no firm views on this matter.

Q10: Should any more or less information be provided to the parties? If so, what kind of information should be added or removed?
R10: Subject to views expressed in R1 above and R13 below, the *CVSA* has no firm views on this matter.

Q11: Should the effect of the right to stand aside be the same as for peremptory challenges (permanent removal from the panel)?

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

R11: Refer to R1 above.

Q12: Should the *Juries Act 2000* (Vic) specify restrictions or prohibitions on the way in which peremptory challenges may be used?
R12: Refer to R1 above.

Q13: Are challenges for cause an appropriate and adequate alternative to peremptory challenges?
R13: At the outset, the views of the *CVSA* are clearly set out in R1 above.

However, the *CVSA* acknowledges that there can be circumstances in which the exclusion of a prospective juror from jury service is justified or even necessary.

In order of application and before being sworn, the exclusion of a prospective juror from jury service should follow:

1. Challenges by consent akin to what is practiced in Scotland.[5] However, contrary to the Scottish practice, a substantiated reason for the challenge should be provided and accepted by the trial judge.
2. Challenge for cause on grounds a prospective juror might not be impartial where 'any challenge for cause would be confined to showing that a juror was "not impartial"'.[6] The hearing for a challenge should be a voir dire process without the prospective juror in question and jury panel being present.
3. A judicial discretion to discharge or stand aside a prospective juror. The *CVSA* endorses the view of the Consultation Paper in that whilst there might be grounds for a trial judge to exclude a prospective juror, 'it would be inappropriate and undesirable for the trial judge to be involved in standing aside a prospective juror except in the most exceptional circumstances.

Q14: 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?
R14: Subject to views expressed in R1, R9, R10 and R13 above, the *CVSA* has no firm views on this matter.

Q15: Should the *Juries Act 2000* (Vic) specify the criteria upon which challenges for cause can be made?
R15: Yes.

Q16: Should the *Juries Act 2000* (Vic) provide further guidance on the process for challenge for cause?
R16: Yes.

Q17: Should the judge or the parties have the ability to question prospective jurors to determine their impartiality in certain circumstances?

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[5] *Criminal Procedure (Scotland) Act 1975* (Scot) c 21, s 130(3A).
[6] *Murphy v R* (1989) 167 CLR 94, 102 (Mason CJ and Toohey J).

R17: Subject to views expressed in R1 and R13 above, a trial judge only should have the ability to question prospective jurors to determine their impartiality in certain circumstances.

Q18: Should parties have the ability to challenge a prospective juror by consent?
R18: Yes.

Q19: Should the Juries Act 2000 (Vic) specify that the trial judge has the discretion to discharge or stand aside prospective jurors in exceptional circumstances?
R19: Subject to R13 above, yes.

End of Submission.