
Challenging the peremptory challenge system in Australia

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References to explore reforms on jury selection processes are pending before the Law Reform Commissions in Western Australia and Queensland. The New South Wales Law Reform Commission's 78 recommendations addressing jury selection are being implemented. With so much reform activity in Australia, a thorough consideration of the relevance of the peremptory challenge process in the 21st century is timely. This article reviews peremptory challenge procedures in use in Australian jurisdictions. The authors argue that the rising popularity of empanelling by number and other new conditions under which the jury system operates obviate the need for peremptory challenges in contemporary trials.

INTRODUCTION

I've always found the system to be somewhat curious and a bit quirky in that we get given a very tiny, but sort of vaguely significant piece of information about the jurors before you pick them, and there's a whole mythology that seems to be wrapped around who you pick and who you don't (VIC Lawyer).

The foregoing observation about peremptory challenges was made by a Victorian lawyer in the course of an interview undertaken as part of a 2008 Australian Criminology Research Council study of stakeholder perceptions of the criminal jury system. The authors of this article were part of the research team conducting that study. Interview responses from Australian judges, prosecution and defence counsel and jury administrators revealed that many of the legal professionals most familiar with the peremptory challenge process regarded it as a "curiosity". This finding inspired the authors to further examine whether the peremptory challenge system should remain in Australia.

Curious as it may be, the peremptory challenge process is a prominent, visible and costly phase in the empanelment of a jury. A recent high profile terrorist trial in Victoria illustrates the burden of this process to the community and the courts. In *R v Benbrika*,¹ the 12 defendants each had four potential challenges to exercise. The Crown had the right to "stand-aside" an equal number of prospective jurors. To accommodate 96 potential peremptory challenges, on the day of empanelment the Juries Commissioner had to present an additional 96 citizens qualified and able to serve a lengthy term of jury duty. To empanel one jury, 2,000 citizens were summoned, of whom just over half (1,075) attended court. The accused exercised 44 out of a possible 48 "challenges"; only one out of a possible 48 "stand-aside" challenges was made by the Crown. A substantial number of eligible citizens who set aside time for jury service were peremptorily dismissed. The time and expense of the challenge process were shouldered by both the taxpayer and the parties.

The review of the peremptory challenge process in this article identifies three traditional arguments in favour of and against retention of the peremptory challenge process and evaluates their merits. This evaluation is illustrated with relevant excerpts from 53 structured interviews conducted

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¹ *R v Benbrika* (2009) 222 FLR 433.

with judges, lawyers and jury administrators.² Their views offer a more nuanced description of current peremptory challenge practices in the Australian criminal justice system. The focus is on two jurisdictions where the jury empanelment process differs: New South Wales, where jurors are empanelled by number, and Victoria, where jurors are predominantly identified in court by name and occupation. In addition, the authors consider and compare the more elaborate peremptory challenge process applied in jury trials in the United States. The authors conclude that new conditions under which the jury system operates render peremptory challenges inappropriate in contemporary Australian courtrooms.

HISTORY OF THE JURY SELECTION PROCESS

Some aspects of the commonwealth institution of criminal trial by jury adopted by s 80 of the Commonwealth *Constitution* are essential and inviolate and should not be the subject of reform. However, “some aspects of trial by jury, as it existed in the Australian Colonies at the time of Federation, are inconsistent with both the contemporary institution, and generally accepted standards of a modern democratic society”.³ In a 1993 High Court case about majority verdicts, the court identified that the one enduring element of the principle of representation is “that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State”.⁴ By comparison, modifications to jury eligibility rules so that women could serve was “a liberalization of the qualifications of jurors which involves no more than an adjustment of the institution to conform with contemporary standards and to bring about a situation in which it is more truly representative of the community”.⁵ The High Court reasoning can be extended to the peremptory challenge system. This system is merely the process by which historically the random selection of the jury was fostered. The process is in no way an essential feature of trial by jury. It can be modified to serve the needs of the contemporary community.

The peremptory challenge processes have varied over time since it was introduced in or about the 12th century. To assess arguments for and against the peremptory challenge process and the appropriateness of this procedure in the court system of the 21st century in Australian jurisdictions, some understanding of the aims of the jury system is essential. This section briefly outlines the relevant historical underpinnings of the jury system and how the peremptory challenge process has changed with the times.

When jury challenges were first introduced in England in the High Middle Ages, both parties had an unlimited number. By the 14th century, the maximum allowable number of challenges per defendant was set at 35; the Crown could stand aside potential jurors, effectively exercising the same challenge.⁶ To qualify as a juror in the early modern period (1500 to 1800), citizens had to satisfy three requirements. First, jurors had to reside in the locality of the dispute and were likely to be neighbours of the disputing parties;⁷ secondly, jurors had to own substantial property, similar to that possessed by the litigants; and, Thirdly, jurors needed to be knowledgeable about the subject matter in dispute, that is, be witnesses or be personally acquainted with one of the litigants.⁸ These requirements guaranteed that the chosen jurors were personally acquainted with at least one of the litigants. This

² Methods and procedures used in this study commissioned by the Criminology Research Council are set forth in: Goodman-Delahunty J, Brewer N, Clough J, Horan J, Ogloff J and Tait D, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia*, Research and Public Policy Series No 87, Australian Institute for Criminology (2008) p 125.

³ *Cheatle v The Queen* (1993) 177 CLR 541 at 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); 66 A Crim R 484.

⁴ *Cheatle v The Queen* (1993) 177 CLR 541 at 560; 66 A Crim R 484.

⁵ *Cheatle v The Queen* (1993) 177 CLR 541 at 560; 66 A Crim R 484.

⁶ Vidmar N, *World Jury System* (Oxford University Press, 2000) pp 21-22.

⁷ Plucknett T, *A Concise History of the Common Law* (Butterworths, 1956) p 127. This requirement was not abolished until 1705.

⁸ Windeyer WJV, *Legal History* (2nd ed, Law Book Company, 1949) p 62. Knowledge of the dispute as a requirement for jurors was eventually reduced and the requirement is now reversed; any knowledge of the dispute is a ground for excusal from jury service in Victoria.

intimate connection to the parties and their interests ensured that the jurors were not independent arbitrators, but were acting more in the capacity of representatives of the litigants. The accused knew the potential jurors and was likely to be aware of any potential biases that they might harbour against him or her. The litigants exercised their 20 challenges⁹ with this experience-based knowledge.

Subsequently, during the 18th and 19th centuries, the requirements that jurors were intimate with the subject matter, residents of the same geographic locality of the dispute and were drawn from the same socio-economic background as the accused, were watered down. By the 20th century, these prerequisites were eliminated.¹⁰ Jurors who had been neighbours of the parties and witnesses to the development of the dispute were replaced by jurors without prior knowledge of the facts of the case, and who had no past acquaintance or relationship with the litigants. Despite the absence of any need for the accused to remove a potential juror known to be biased against the accused, the challenge system was retained in the United Kingdom (although further limited to seven challenges in 1948) until the end of the 20th century.¹¹ In the 1985 Cyprus Secrets trial, nine defendants pooled their peremptory challenges. This tactic was alleged by the government to inappropriately manipulate the jury system and was blamed for the acquittals.¹² The following year, the Roskill Report on fraud trials in the United Kingdom strongly advocated the abolition of peremptory challenges in all fraud cases:

Our evidence shows that the public, the press and many legal practitioners now believe that this ancient right is abused cynically and systematically to manipulate cases towards a desired result. The current situation bids fair to bring the whole system of jury trial into public disrepute. We conclude that in respect of fraud trials such manipulation is wholly unacceptable and must be stopped.¹³

This report specified that fraud trials were in no way unique insofar as the practices of peremptory challenges were applied.¹⁴ The Roskill Committee concluded that the peremptory challenge process undermined the principle of random selection to a critical degree. Without further study, in 1988 peremptory challenges were abolished in the United Kingdom.¹⁵

In Australia, over a period of about 50 years in the early 19th century, the right to a jury trial (“the privilege of the Common People of the United Kingdom”) was fought for and acquired by the colony of New South Wales.¹⁶ Strict property and gender qualification requirements were applied for jury service.¹⁷ To be eligible to serve as a juror, one had to prove one’s wealth.¹⁸ Thus, the earliest Australian juries consisted of middle-class, middle-aged men. The property qualification was not abandoned in New South Wales until 1947¹⁹ when the laws that prevented women from serving as jurors were repealed. Only as recently as 1975 were automatic exemptions for women from jury service in Victoria removed.²⁰ The notion was that, by ensuring that those persons in the community who are citizens above 18 years of age have a prima facie right to participate in the legal system, the aim of empanelling juries representative of the community could be achieved.

⁹ The defendant’s 35 peremptory challenges were reduced to 20 in 1503, per England and Wales, Fraud Trials Committee, *Report* (Roskill Report) (HMSO, London, 1986) p 125, fn 18.

¹⁰ Horan J and Tait J, “Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria” (2007) 16 JJA 179 at 182.

¹¹ Fraud Trials Committee, n 9, p 125.

¹² Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria*, Final Report (1996) Vol 1. See also Hill M QC, *Transcript of Meeting Between Senior Members of the English Criminal Bar and Victorian Law Reform Commission (VLRC) delegation*, Parliamentary Paper No 24 (London, 4 July 1995) p 3.

¹³ Law Reform Committee, n 12 at [7.37]; see also at [7.38].

¹⁴ Law Reform Committee, n 12 at [7.36].

¹⁵ *Criminal Justice Act 1988* (UK), s 118(1).

¹⁶ Devlin P, *Trial by Jury* (Stevens & Sons Ltd, London, 1956) p 3.

¹⁷ Bennett JM, “The Establishment of Jury Trial in NSW” (1961) 3 SLR 463.

¹⁸ Horan and Tait, n 10 at 182.

¹⁹ *Jury (Amendment) Act 1947* (NSW), ss 2(3)(a), 3(3)(a).

²⁰ See *Juries (Women Jurors) Act 1964* (Vic), s 2; *Constitution Act 1975* (Vic), s 48; *Jury Act 1967* (Vic), s 4(1); *Equal Opportunity Act 1977* (Vic), s 57. See generally Law Reform Committee, n 12.

Challenges were adopted as part of the Australian jury selection process. Initially, in the small Australian community, the accused relied on his or her knowledge of the reputation of the potential jurors to assist in exercising his or her challenges strategically. The common law rule of 35 challenges for the accused was slowly reduced in all Australian jurisdictions as the jury pool widened. The requirement that jurors know nothing of the facts of the case in issue gained importance to ensure jury impartiality.

In sum, the characteristics of the average juror have changed dramatically since the inception of the peremptory challenge process. Since the High Middle Ages, the juror has metamorphosed from a partial representative of the parties to an impartial trier of fact and representative of the community at large. Intimacy has been replaced by objectivity. Whilst historically, a solid reason existed to support the exercise of peremptory challenges to select an impartial jury, this reason no longer serves the contemporary justice needs of our community. To better appreciate this assertion, an understanding of the current Australian jury selection practices is helpful.

CURRENT JURY SELECTION PROCESS

In accordance with jury legislation in each State, a panel of prospective jurors from the State electoral roll is compiled. Every citizen above 18 years of age on the electoral roll is eligible to serve as a juror. Three discrete groups are excepted: those disqualified from serving, those ineligible to serve and those with a right to be excused. A citizen may be exempted before being summoned to attend, but exemption from jury service may also be sought at any stage prior to or during the trial. Generally, in each Australian jurisdiction, prospective jurors are mailed a questionnaire or notice of inclusion to ascertain their eligibility for jury service. Subject to the response to that notice, a summons requiring the prospective juror to attend court on a specific day may be issued. Persons summoned may seek excusal or deferral if the summons date is inconvenient.²¹ Upon arriving at court, potential jurors gather in the jury poolroom, where they receive information about jury duty. In some jurisdictions, each person attending the pool is eligible for selection as a juror on any jury trial on the court lists. In other jurisdictions, jurors are summoned to a particular court for service on a specific trial.

Information available to parties at the time of challenge

All Australian criminal jurisdictions allow a peremptory challenge process as part of jury empanelment.²² In the majority of Australian jurisdictions, the name, address and occupation of potential jurors (where available from the electoral roll) are provided to counsel in advance of the peremptory challenge process, typically on the morning that the trial commences.²³ The tight timeline limits the ability of the parties to conduct research on the jurors based on the demographic information contained in the lists.

In open court, most jurisdictions announce the names of the potential jurors.²⁴ Victoria is the only State where the occupation of the panel juror is also announced in open court. In 2001, the South Australia Sheriff's Office surveyed the Sheriffs of each State about problems resulting from the publication of jurors' names in court.²⁵ Five jurisdictions reported that jurors had expressed concern for their safety after their identity was revealed in court. The three other jurisdictions had recorded incidents where the accused or a friend of the accused had threatened jurors. In response to these findings, both New South Wales and Western Australia implemented a numerical juror identification

²¹ Goodman-Delahunty et al, n 2, pp 30-31.

²² *Juries Act 1962* (NT), s 44; *Juries Act 2003* (Tas), s 35; *Jury Act 1995* (Qld), s 42; *Criminal Procedure Act 2004* (WA), s 104; *Juries Act 1967* (ACT), s 34; *Jury Act 1977* (NSW), s 42(1)(b); *Juries Act 1927* (SA), s 61(1); *Juries Act 2000* (Vic) ss 8-9

²³ For a summary of what lists are prepared using jurors names, and who has access to these lists, see Sheriff's Office, *South Australia Jury Review* (May 2002) Appendix 1, "Interstate Survey Results", Table 3.

²⁴ *Juries Act 1962* (NT), s 37(1)(b); *Juries Act 2003* (Tas), s 28(3); *Jury Act 1995* (Qld), s 37(1); *Juries Act 1967* (ACT), s 31(1); *Juries Act 1927* (SA), s 42; *Juries Act 2000* (Vic), s 36(1).

²⁵ Sheriff's Office, n 23.

system.²⁶ In South Australia, jurors are identified in open court by number only. However, prior to the peremptory challenge process, counsel are provided with a list of each potential juror's name, occupation and suburb.²⁷ Some other States granted trial judges the discretion to order empanelment of jurors by identification number only.²⁸ The authors' interviews with the Victorian judiciary suggested that empanelment of jurors by identification number only was increasingly common in that State.²⁹

Victoria: Empanelment by juror name and occupation

In Victoria, a card with the name and occupation of each potential juror is placed in the ballot box in the jury poolroom. When the jury pool supervisor is advised that a court requires a jury panel, the supervisor selects a sufficient number of cards from the ballot box, from which to constitute the panel. These are randomly drawn. As each card is drawn from the box, the supervisor announces the name on the card.

The panel of prospective jurors is taken by a court officer to the court where the trial will be heard. The ballot cards of the members of the jury panel are handed to the judge's associate, who places them in another ballot box in the court. The trial judge may then address the jury panel, offering some preliminary details about the case. The judge asks if any members of the panel wish to be excused, and their grounds. For example, a prospective juror may know one of the parties or witnesses in that case. Once the hearing of excuse applications is complete, empanelment of the jury commences.

The judge's associate draws cards at random from the ballot box (for most criminal trials, 18 cards are drawn). The judge's associate calls out the name and occupation of each prospective juror in turn. When a name is called, that member of the jury panel must rise and parade before the defendant before making his or her way to the jury box to take a seat. If either party calls out "challenge" or "stand-aside" before that potential juror is seated, the rejected juror must return to the jury poolroom.³⁰

New South Wales: Empanelment by number

When prospective jurors arrive at a New South Wales court, they receive a juror card that displays their identifying numbers. Once in the courtroom, identifying numbers are called at random by the judge's associate. If a juror's number is called, he or she must proceed to the jury box. Once 12 potential jurors are seated in the jury box, each potential juror is asked to stand in turn. Whilst the juror remains standing, counsel give the potential juror the once over and either party may reject that juror by calling out "challenge".

Interview responses from stakeholders in the 2008 study indicated that the lack of information about potential jurors was regarded by some as an impediment to the exercise of the right to peremptory challenge.³¹ Thus, to improve the utility of peremptory challenges, some stakeholders advocated that the parties should receive more information about prospective jurors, such as name and occupation, rather than number alone. The stakeholders explained that a name gives the defendant the opportunity to challenge persons on the panel from a cultural background conflicting with his/her own

²⁶ *Jury Act 1977* (NSW), s 29(4); *Juries Act 1957* (WA), s 36A.

²⁷ NSWLRC, *Jury Selection*, Report No 117 (2007) at [10.27].

²⁸ In the Queensland, the Australian Capital Territory, Victoria and Tasmania, judges have a discretion to empanel by number only: *Jury Act 1995* (Qld), s 41(2); *Juries Act* (ACT), s 31; *Juries Act 2000* (Vic), s 31(3); *Juries Act 2003* (Tas), s 29(7). In South Australia, the practice agreed to by the Chief Justice and the Chief Judge is to identify potential jurors in open court by number only but provide the parties with the potential jurors' names, suburbs and occupations: *Juries Act 1927* (SA), s 89

²⁹ See, eg Cummins J in *Director of Public Prosecutions v Ivanovic* [2003] VSC 388 at [6]-[7].

³⁰ The prosecution may challenge in every State except Tasmania. Parties may also challenge a jury for cause (*Juries Act 2000* (Vic), s 34). However, due to the limited information provided to the parties (name and occupation) challenges for cause are seldom used.

³¹ Goodman-Delahunty et al, n 2.

– the major basis upon which defence counsel exercise their challenges. The specification of juror occupation allows the defendant to challenge persons on the jury panel whose verdicts may be influenced by their working background.

Number of available challenges

The number of challenges available to each party in a criminal jury trial ranges from three in New South Wales and South Australia to 12 in the Northern Territory. In Tasmania, only the defence may exercise peremptory challenges.³² New South Wales has a provision allowing unlimited challenges by agreement between the parties.³³

Usually each party is entitled to the same number of challenges.³⁴ In Victoria, the number of challenges available is reduced in cases involving multiple defendants.³⁵ The Crown has a right of challenge and can exercise it “irrespective of sound reason or other basis”.³⁶ In practice, the Crown often has a policy to exercise this power sparingly.³⁷ Whilst the defendant has the personal right to challenge,³⁸ by convention the exercise is usually left to the defendant’s legal representative without input from the defendant. The defence “will strive to achieve a jury that he or she believes will be susceptible to the submissions of the defence”.³⁹

Many interviewees suggested that the number of challenges be further limited. One prosecutor offered this explanation as to why he favoured reducing peremptory challenges:

I think there is too much of a skewing of the jury by challenges. A handful of challenges like the civil jury system would be enough. I don’t see challenges as a necessary aspect to obtaining justice. It may be something that’s more of a symbolic value to the defendants.

Views expressed by the stakeholders as to what aspects of the jury system that they would like to see changed were similar. Opinions from both prosecutors and defence counsel about the peremptory challenge system were mild and perhaps indicative of low resistance to reforming the peremptory challenge process.

PERCEIVED IMPEDIMENTS TO THE FULFILMENT OF THE REPRESENTATIVE FUNCTION OF THE JURY

The modern jury is promoted as “representative” of community members: “(T)he lifeblood of the jury system is that citizen participation is the epitome of a free society”.⁴⁰ In the same way that members of Parliament are representatives of the people in the administrative arm of government, jurors are

³² Lieberman JD and Olson J, “The Psychology of Jury Selection” in Lieberman JD and Krauss DA (eds), *Jury Psychology: Social Aspects of the Trial Process, Psychology in the Courtroom* (Ashgate Press, 2009) Vol 1, pp 99.

³³ *Jury Act 1977* (NSW), s 42. The NSWLRC recently recommended that the ability of trial counsel to agree to an extension of the statutory number of peremptory challenges should be subject to leave from the judge, pursuant to an application before the date fixed for trial: NSWLRC, n 27, Recommendation 43.

³⁴ In Tasmania, the defendant has six challenges and the Crown none: *Juries Act 2003* (Tas), s 35.

³⁵ *Juries Act 2000* (Vic), s 39.

³⁶ *Katsuno v The Queen* (1999) 199 CLR 40 at 57-58 (Gaudron, Gummow and Callinan JJ); 109 A Crim R 66.

³⁷ This approach is sanctioned by the Victorian Office of Public Prosecutions: see Victorian Office of Public Prosecutions, *Prosecution Policies and Guidelines* (2008) at [6.3.4], <http://www.opp.vic.gov.au>, viewed 10 January 2010. The Office of Public Prosecutions in most Australian jurisdictions provide guidelines to their prosecutors along the general theme that selection of a jury is within the general discretion of the prosecutor. However, no attempt should be made to select a jury that is unrepresentative as to race, age, sex, economic or social background. An empirical survey conducted by the NSWLRC in 1985 revealed that the practice of Crown Prosecutors in exercising the right to make peremptory challenges varied considerably: NSWLRC, *The Jury in a Criminal Trial: Empirical Studies*, Research Report No 1 (1986) 47-49.

³⁸ In *Johns v The Queen* (1979) 141 CLR 409 at 418, Barwick CJ emphasised the necessity for bringing clearly to the attention of the defendant that he is entitled to exercise such a right even if counsel does it on his behalf.

³⁹ *Katsuno v The Queen* (1999) 199 CLR 40 at 65; 109 A Crim R 66.

⁴⁰ Harding R, “Jury Performance in Complex Cases, Particularly Those Involving Fraud or the Presentation of Forensic Evidence” in Challenger D (ed), *The Jury: Proceedings of Seminar on the Jury* (Australian Institute of Criminology, 1986) pp 238, 256.

representatives of the people in the legal arm of government. The right to vote and to serve as a juror ensures that the community feels responsible for making and implementing the laws, rather than feeling that the law is imposed upon it. The role of juries in representing the community in the legal system encourages the community to take ownership of that system and to comply with its laws.⁴¹ Use of the word “representative” in the context of juries is symbolic in character, as jurors do not represent any defined constituents of the community. Each juror brings his or her own opinion to the deliberation room. In reaching a verdict, the only opinions the jurors need consider are their own. In this context, “representativeness” is a selection or sample of a larger population.⁴² It is the collaboration of all jurors acting in concert that brings about a decision that is representative of the community conscience.

An important element to ensure the representative nature of the jury is random selection. Academics have noted that the strength of the jury is its independence, which is ensured by the random selection process: “Undermine this and the jury is lost”.⁴³ The principle of achieving representative juries through the process of random selection is enshrined in legislation in most Australian jurisdictions.⁴⁴

Three stages in the jury selection process have the potential to interfere with a representative outcome, namely:

1. formulation of the jury roll;
2. jury exemptions and exclusions; and
3. peremptory challenges/challenges for cause.

Policy makers have focused upon these three steps because of the concern that they undermine the notion that the jury system complies with the democratic ideal of representation. All three processes have come under increasing scrutiny over the last few decades. First, critics contend that the manner in which the jury roll is formed promotes biases against minority groups such as Aboriginal people.⁴⁵ Secondly, jury exemptions and exclusions are so numerous and haphazard that an unbalanced and unrepresentative proportion of society serves on juries.⁴⁶ The third contention is that the right of the parties to challenge potential jurors undermines the randomness of the process.⁴⁷

The processes have all been subject to recent government review or legislative reform. The New Zealand Law Reform Commission (NZLRC) asserted that the representative nature of juries is achieved when all persons who are eligible to serve on juries have an equal opportunity to serve, regardless of their background, age, race or ethnic origins.⁴⁸ The challenge process deprives some citizens of their opportunity to serve. The first two processes are not the focus of this article.

In a 2007 review of the New South Wales jury selection process, the New South Wales Law Reform Commission (NSWLRC) did not propose any change to the peremptory challenge process, but in cautious and qualified language described the reasons for retention⁴⁹ of the status quo. In analysing the impact of empanelment by number upon peremptory challenges, the NSWLRC concluded that

⁴¹ See generally Abramson J, *We, the Jury: The Jury System and the Ideal of Democracy* (Basic Books, New York, 1994).

⁴² Law Reform Committee, above n 12, p 19.

⁴³ Findlay M and Duff P, “Jury Vetting – Ideology of the Jury in Transition” (1982) 6 Crim LJ 138 at 148.

⁴⁴ *Juries Act 2000* (Vic), ss 1, 4; *Jury Act 1977* (NSW), s 12; *Juries Act 2003* (Tas), s 4; *Jury Act 1995* (Qld), s 26; *Juries Act 1927* (SA), s 29; *Juries Act 1957* (WA), s 14(2).

⁴⁵ For an elaboration of this argument, see Israel M, “Juries, Race and Construction of Community” (2000) 17 *Law in Context* 96 at 99-100.

⁴⁶ Law Reform Committee, n 12, Vol 3, p 71; NSWLRC, n 27, Chs 4-6. See also recent legislative amendments limiting the exemptions and exclusions: *Juries Act 2000* (Vic), Sch 2; *Juries Act 2003* (Tas), Schs 1-2; *Juries Act 1927* (SA), Sch 3.

⁴⁷ NSWLRC, *Jury Service* (2006) p 13.

⁴⁸ NZLC, *Juries in Criminal Trials*, Report No 69 (2001) p 56.

⁴⁹ For example, NSWLRC, n 27 at [1.47]: “to an extent”; “can skew”; “a certain level”.

“challenging is an arbitrary exercise dependent upon guesswork and dubious mythology ... not necessarily conducive to securing a fair, impartial or representative jury”.⁵⁰ The report described the peremptory challenge process as:

to an extent inconsistent with the principle of random selection and, if exercised on racial, or similar discriminatory grounds, can skew the composition of the jury. A certain level of peremptory challenge has generally been considered not to offend the principles of random selection.⁵¹

The NSWLR recommended that the continued availability of peremptory challenges be kept under review to ensure that they do in fact advance the fairness of trial by jury and not distort the process. This recommendation to maintain review, with a view to abolition if no legitimate purpose is served, suggested that the NSWLRC was sceptical of peremptory challenges and saw it as inevitable that they would be abolished.

The authors acknowledge that changes to the peremptory challenge process can not remove all biases against minority groups, nor remedy the impact of excusals and exemptions on the representativeness of the jury. In the course of debates over the use of peremptory challenges, arguments in favour of and against retaining the challenge process have been articulated.

TRADITIONAL ARGUMENTS FAVOURING PEREMPTORY CHALLENGES

In Australia, three reasons to engage parties to the dispute in the jury selection process have emerged.⁵²

Acceptance of the verdict by the defendant

From an accused’s point of view they’re standing there on their trial, it’s [an] incredibly nervous and difficult experience. It’s their trial; they are participating in a process of selecting the people that will judge them. They can only do it to a limited extent. In my view it’s fundamental that they feel that they have some input into that process (VIC Lawyer).

The reason most commonly cited by stakeholders in support of the peremptory challenge process was its function in increasing the defendant’s acceptance of and confidence in the trial outcome. Research on procedural justice confirms that it is easier for defendants to accept an unfavourable verdict by a jury that has, in part, been formulated by them.⁵³ In this sense, the peremptory challenge process diminishes criticism of the legal system by disaffected defendants.⁵⁴

Stakeholders who rated a defendant’s involvement in choosing a jury as important also acknowledged the practical limitations to this involvement. As the NSWLRC pointed out, this benefit assumes that the defendant will thoughtfully exercise this right. In reality, challenges are exercised by counsel without consulting the client or by the defendant with extensive assistance by counsel or the instructing solicitor.⁵⁵ When counsel make decisions in relation to challenges, the ideal of defendant involvement in jury selection is undermined.

Prevention of empanelment of inappropriate juries

The peremptory challenge process purportedly assists in preventing the formation of an obviously inappropriate jury when random selection produces a jury whose members are too similar.⁵⁶ For example, in a rape case where the defendant is male and the victim is a young female, the random jury

⁵⁰ NSWLRC, n 27 at [10.28].

⁵¹ NSWLRC, n 27 at [1.47].

⁵² These three reasons formed the basis for the NZLC’s recommendation that peremptory challenges remain in that jurisdiction: NZLC, n 48, p 89. For an impassioned argument in favour of retaining challenges by a United States trial consultant, see Keene DL, “Fairness, Justice and True Understanding: The Benefits of Peremptory Strikes” (2009) 21 *The Jury Expert* 24.

⁵³ Tyler TR, “Procedural Justice and the Courts” (2007-2008) 44 *Court Review* 25-31.

⁵⁴ NZLC, *Juries in Criminal Trials: Part One*, Preliminary Paper No 32 (1998) p 99; NZLC, n 48, p 89. See also Gobert JJ, “The Peremptory Challenge – An Obituary” (1989) *Crim L Rev* 528 at 529.

⁵⁵ *Johns v The Queen* (1979) 141 CLR 409 at 415-416.

⁵⁶ Findlay M et al, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) p 57.

selection process may by chance alone, produce a jury comprised exclusively of young women. One perception of such a jury is that it will be more prone to sympathise with the victim and will be biased against the defendant.⁵⁷ The peremptory challenge process allows a sufficient number of names to be drawn to reduce the likelihood that a jury comprised entirely of young women will be empanelled. When the names of the jurors are called, by invoking the peremptory challenge process, the defendant has the opportunity to modify the jury composition. In these circumstances, peremptory challenges can create a more broadly representative jury.

Community perceptions of justice are important to ensure respect for the law. The perception of an inappropriate jury by the community (regardless of the inaccuracy of that perception) can be alleviated by a legislative provision to deal with this highly unlikely circumstance. For example: “The trial judge may discharge the jury if in his or her opinion the composition of the jury is such that the trial is likely to be considered unfair.”⁵⁸ Placement of this issue in the hands of the trial judge will more effectively and efficiently alleviate concern about the formation of an inappropriate jury.

Removal of potentially disruptive jurors

Whilst Australian Crown counsel tend not to exercise their right to challenge, some will challenge jurors who sought excusal but whose request was denied by the judge.⁵⁹ This is with the implicit consent of defence counsel on the theory that a juror who seeks to be excused may be a reluctant and disruptive force on the jury. This approach is acknowledged and partially sanctioned by the Victorian Office of Public Prosecutions. Its office manual provides:

It would be appropriate to exercise the right to stand aside if it became apparent that a potential juror’s inclusion could in some way undermine the integrity of the jury, or the jury system as a whole. An example includes if ... the potential juror has unsuccessfully sought to be excused, but only if there are further indications, after the disallowing of the excuse, of the potential juror’s unwillingness to participate.⁶⁰

Two points counter this reasoning. First, there is no evidence that jurors who seek to be excused will exert a disruptive influence on the jury if empanelled. Available research indicates that jurors who are sworn (including reluctant jurors) take their oath seriously.⁶¹ Secondly, the introduction of majority verdicts for most criminal charges in all but the Australian Capital Territory⁶² means that if a disruptive juror is empanelled, the jury can continue to function (albeit in less than optimal conditions) and return a valid verdict, notwithstanding a lack of co-operation on the part of one juror.

TRADITIONAL ARGUMENTS IN FAVOUR OF REMOVING CHALLENGES

Three aspects of the peremptory challenge process have traditionally served to undermine the aim of achieving juries that adequately represent the community.

Interference with the random nature of jury selection

In the authors’ interviews in 2008, stakeholders were asked “are juries representative of our community? If not, is this a problem?” and “do peremptory challenges change the representativeness

⁵⁷ Grubb A and Harrower J, “Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim” (2008) 13(5) *Aggression and Violent Behaviour* 396. See also the discussion below about the “black sheep” effect: psychological research suggests that this assumption is probably erroneous, and that young females are typically more harsh in judging the actions of a young female sexual assault victim than are their male counterparts, perhaps because of defensive attribution, or the “black sheep” effect in social identity.

⁵⁸ New South Wales trial judges have a similar power when they perceive that the exercise of the peremptory challenge rights has resulted in a jury whose composition is such that the trial might be, or might appear to be, unfair: *Jury Act 1977* (NSW), s 47A. Since the introduction of this provision in 1987, there has been no case reported where this section is discussed.

⁵⁹ Interviews with Crown counsel by the authors in a 2008 study: Goodman-Delahunty et al, n 2.

⁶⁰ Victorian Office of Public Prosecutions, n 37 at [6.3.4].

⁶¹ Horan J, *The Civil Jury System – an Empirical Study* (PhD thesis, The University of Melbourne, 2005) p 93.

⁶² *Juries Act 1927* (SA), s 57; *Juries Act 2000* (Vic), s 46; *Criminal Code* (NT), s 368; *Juries Act 2003* (Tas), s 43; *Jury Act 1995* (Qld), ss 59-59A; *Criminal Procedure Act 2004* (WA), s 114; *Jury Act 1977* (NSW), s 55F.

of juries?" Many interviewees were of the opinion that peremptory challenges changed the representativeness of juries,⁶³ but some mixed views emerged as to whether the exercise of the challenges fostered or impeded the goal of empanelling a jury representative of the community:

It could be used to stack a jury in one way, but more often than not it's used to ensure that the randomness in that process is made more random (NSW Lawyer).

A Swedish judge observed that the peremptory challenge process is perverse: "We first labour hard to make the juries representative of the community from which they are drawn, and at the very last moment, we allow this representativeness to be destroyed."⁶⁴ As noted above, traditionally this interference was seen as a trade-off to increase the defendant's acceptance of an unfavourable verdict. The discussion below outlines how the balance between these two competing ideals has shifted, and maintenance of a random selection process, free from interference, has increased in community importance.

Loss of the educative function of juries

The participation of representative juries in the criminal justice system moulds legal decision-making by influencing the decisions of other participants in the legal system: the judiciary, litigants and their lawyers. Psychological research and anecdotal evidence suggest that juries have the ability to counter or moderate legal rules deemed unfair according to community standards.⁶⁵ A judge, unlike a jury, must provide reasons for his/her decision and therefore cannot stray from applying the law no matter how personally reprehensible that law might be. Arguably, "juries are instrumental in ensuring that the law continues to reflect the evolving normative structure of society".⁶⁶

Judges can learn from jury verdicts, since the verdicts are indicators of community values. Judges, the majority of whom are male, middle-class and from Anglo-Saxon backgrounds, are at a disadvantage in ensuring that their decisions incorporate contemporary community values. No matter how intellectually brilliant judges may be, the fact that most of them share the same privileged background means that they may lack an in-depth understanding of the moral values of the majority of the general community.⁶⁷ As McHugh J reflected on his experience with jury verdicts: "I realised I was out of touch; that I had a set of values that just were out of touch [with those of the ordinary person]."⁶⁸ The laws should reflect community values and respond to community needs. Citizen participation injects community values into our legal system through the influence that jury verdicts have on the judiciary. In this way, representative juries act to educate the judiciary.⁶⁹

By their verdicts, representative juries can communicate to the Crown that community values do or do not support prosecution of the conduct at issue. In this way, a representative jury can educate the prosecution on contemporary community values.⁷⁰ If verdicts are not perceived as representative of

⁶³ Goodman-Delahunty et al, n 2.

⁶⁴ Molin L, *Cropwood Conference on Jury Trials* (Cambridge, England, 1974) as cited in Vodanovich IM, *The Criminal Jury Trial in Western Australia* (D Phil Thesis, University of Western Australia, 1989) p 82.

⁶⁵ Boeckmann RJ, "The Surprising Liability and Fundamental Assets of Diverse Juries" (2000) 17 *Law in Context* 113 at 114.

⁶⁶ Boeckmann, n 64 at 115.

⁶⁷ Compare Brown S, "The Courts, Legal and Community Standards", Australian Institute of Judicial Administration, Law Council of Australia and Constitutional Centenary Foundation, *Courts in a Representative Democracy: A Collection of the Papers from a National Conference* (1995) p 85.

⁶⁸ *Gerlach v Clifton Bricks Pty Ltd* [2005] HCATrans 574. See also Gillies R, *The Civil Jury System – An Appropriate Method of Trial*, Paper presented at the General Meeting of the Medico Legal Society of Victoria at the Victoria Club (Melbourne, 16 November 2002).

⁶⁹ Warner K, Davis J, Walter M, Bradfield R and Vermey R. "Gauging Public Opinion on Sentencing: Can Asking Jurors Help?" (2009) *Trends and Issues in Crime and Criminal Justice* 361 at 371; The Hon JJ Spigelman AC, Chief Justice of New South Wales, *A New Way to Sentence for Serious Crime*, Address to the Annual Opening of Law Term Dinner for the Law Society of New South Wales (Sydney, 31 January 2005).

⁷⁰ Harvard Law Review, "Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion" (2005-2006) 119 Harv LR 2121 at 2130.

the community because challenges have skewed the representative nature of the jury, the risk increases that judges, lawyers and the corporate world will trivialise or ignore the voice of the jury.

The rebuttal contention is that the number of challenges is so small that verdicts nonetheless represent community attitudes on the issues, and therefore, the educative jury function of the legal community is not compromised. The demographic profile of the 628 empanelled jurors surveyed in the 2008 study demonstrated that the jurors were broadly representative of the Australian community in terms of age, gender and ethnic background, but not education level: the average juror was better educated than the average Australian.⁷¹ Thus, despite the interference of exclusions, exemptions and challenges, the juries in the three States were sufficiently representative. Assuming that the other States experience a similar pattern of overall minimal distortion of the jury representativeness, it is likely that juries can fulfil their educative function regardless of peremptory challenges.

Introduction of bias in a system which strives to be impartial

The third way in which the representative nature of the jury is undermined by the current peremptory challenge system in Australia is that it allows the litigating parties to implement challenges based on their subjective biases. Parties to the dispute may choose to exclude an eligible juror from the jury panel based on personal characteristics such as gender, race, and age. In Victoria, where the parties are usually informed of the name and occupation of potential jurors just before they exert their right to peremptorily challenge, these two additional rudimentary indicators are a further basis to deselect jurors.

The consensus among stakeholders interviewed in 2008 was that peremptory challenges hindered the representativeness in Australian juries primarily because lawyers use the challenges to try to mould or stack the jury:

I think that in order to exercise a peremptory challenge or if you're going to have peremptory rights of challenge, you need some basis for exercising it ... we shouldn't be there trying to mould the jury in a particular way (VIC Lawyer).

Both judges and lawyers expressed reservations about the bases used in challenging specific jurors. They described these decisions as “just the vibes” and “baffling, reliant on mythology or self-delusion”. One judge commented: “I think I'm bewildered as the next person as to why Counsel challenge people peremptorily.”

Similar sentiments were expressed by lawyers; one Crown counsel from New South Wales noted:

We as defence lawyers like to fool ourselves that somehow our instinct is capable of judging those people and that our challenges make a real difference.

Both judges and lawyers were critical of the peremptory challenges exercised on the basis of superficial judgments about jurors in response their physical appearance:

It's very remiss, peremptory challenging ... But as to looking at someone and saying, you're not bright enough, you're too old. I mean, it's all rubbish in my book. You can't judge a book by its cover (NSW Lawyer).

Factors such as the juror's attire (whether he or she is wearing a suit), grooming, age, gender, jewellery and any visible lapel badges, may all be taken into account by the parties when selecting a jury.⁷² Since the parties are not required to explain their reasons for challenging a potential juror, the challenge may be based solely on a discriminatory factor such as gender or race. This strategy may serve the tactical objectives of the parties, but it undermines jury representativeness.

⁷¹ Of the 628 jurors empanelled 26% had a university degree whereas only 18% of the Australian community are tertiary educated: O'Brien K, Goodman-Delahunty J, Clough J and Pratley J, “Factors Affecting Juror Satisfaction and Confidence in New South Wales, Victoria and South Australia” (2008) *Trends and Issues in Crime and Criminal Justice* 354. Australian Bureau of Statistics, *Education and Training Experience, Australia 2005 (6278.0)*, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6278.0Main+Features12005?OpenDocument> viewed 7 January 2010. Results of another recent study of over 400 Victorian civil jurors demonstrated that the jurors were broadly representative of the Victorian community in terms of age, gender and ethnic background, but not education level: the average civil juror was better educated than the average Victorian: Horan, n 61, p 288.

⁷² Kerr J, *A Presumption of Wisdom. An Expose of the Jury System of Injustice* (Angus & Robertson, 1987) p 58.

Whilst Crown guidelines advising prosecutors not to challenge on the grounds of race, religion, gender, age and the like are common in Australia, no equivalent guidelines restrain Australian defence counsel.⁷³ Few rules exist to govern the manner in which the parties exercise their rights to peremptorily challenge jurors who appear on a jury panel.

Differences in the parties' approach to this issue were evident in interview responses from the stakeholders in the 2008 study. Some concern was expressed that counsel in South Australia use peremptory challenges to exclude jurors from specific occupational groups, such as schoolteachers, who are perceived to be very directive and independent minded. This predilection might influence the representation on empanelled juries of teachers and members of kindred occupational groups. In trials involving sexual assault, defence counsel were observed by some of the interviewed judges to exercise challenges to try to shift the gender balance in a manner perceived as more favourable for their client. One judge described the following challenge process in a criminal case:

In one empanelment, it was very obvious that the accused was challenging all women and the rest of the panel noticed this. It is possible that the jury used this against the accused.

Jurors who become aware that defence counsel are purposely stacking the jury might resent this manipulation and infer that the defendant is guilty before hearing the evidence, or be dismissive of defence witnesses and arguments.

A perception held by some defence counsel was that jurors who share a common ethnic background with the victim will be overly sympathetic towards the victim.⁷⁴ Consequently, defence challenges are often applied to strike potential jurors whose name or appearance suggests a similar cultural background to that of the victim. No recent cases reflect this concern, but in 1981, an all-white jury was discharged in a District Court case at Bourke where the defendant was Aboriginal.⁷⁵ The reaction of the general community to a guilty verdict from an all-white jury against a defendant from a minority group was highlighted in the extreme 1992 United States case of Rodney King. The Los Angeles black community rioted following the acquittal of white defendant policemen of assault charges in the face of videotaped evidence of them beating the African-American victim with their batons.

Some stakeholders acknowledged that the manipulation of the peremptory challenge system is not confined to the parties. The current peremptory challenge process is likely to encourage citizens to resort to behaviour that is less than desirable. Community folklore suggests that if someone wishes to avoid jury service, he or she should wear a business suit to court and carry a copy of *The Financial Review*, as this will provoke defence counsel to challenge him or her.⁷⁶

Options to improve rather than abolish peremptory challenges have also been proposed. For instance, suggestions have been made to increase the juror profile information available to parties. Another recommendation is to subject counsel to guidelines that prohibit reliance on subjective biases when exercising peremptory challenges.

Increasing juror profile information

A report on New South Wales criminal jury trials, prepared when jury empanelment was conducted by name, recommended that "for a system of challenge to operate in a more logical and scientific manner, more information on prospective jurors needs to be available to the challenger".⁷⁷

Attorneys in the United States receive more information on prospective jurors and are also entitled to submit questions to potential jurors about their values and beliefs in a "voir dire" before they exercise their challenges, although in Federal Court, the questioning is conducted by the

⁷³ Defence counsel are subject to such guidelines in the United States.

⁷⁴ Interviews with defence counsel by the authors in the 2008 study: Goodman-Delahunty et al, n 2. See also Gillies, n 68.

⁷⁵ "White Jury Discharged" (1981) 1 Abor LB 5. The Aboriginal Legal Service raised such concerns in its submission to the NSWLRC regarding the Jury Selection Report (n 27): Aboriginal Legal Service, *Submission 9* (2007).

⁷⁶ Gillies, n 68.

⁷⁷ Findlay et al, n 56, p 176.

presiding trial judge.⁷⁸ Many skilful lawyers use the voir dire to establish rapport, to build a favourable impression of their clients, or educate jurors about the issues in advance of the trial rather than to select or deselect specific individual jurors.⁷⁹ In the last 38 years, primarily wealthy defendants in high profile cases have employed jury consultants to assist attorneys in selecting a sympathetic jury by conducting customised jury research.⁸⁰ The most popular techniques used by consultants to aid in jury selection are community surveys, focus groups and mock jury studies; less frequently used methods include scoring systems to rank prospective jurors' body language to detect possible attempts at deception.⁸¹ Community surveys are used to identify patterns of answering questions that correlate with verdict preferences. These patterns provide more reliable information and can provide clearer direction in questioning and selecting jurors than the hunches about jury selection that lawyers bring to the courtroom.⁸² The patterns may not be apparent to the opposing party and can be used to construct supplemental jury questionnaires or voir dire questions. For example, in a recent United States terrorist trial, in which concerns about juror prejudice were paramount, before empanelment, 328 potential jurors identified by number responded to 83 written questions jointly prepared by the parties covering a broad range of topics, from jurors' views on the Israeli-Palestinian conflict to their impressions of the defendant and the case in issue gained from published media reports.⁸³ American jurisdictions vary regarding the scope of voir dire questioning of prospective jurors, the time allowed and whether the questioning is conducted by the lawyers or only the judge. These differences affect the ability of lawyers and consultants to effectively pick a jury.⁸⁴ Recently, United States courts have been imposing strict time-limits on attorney-conducted voir dire.⁸⁵

The ability of trial consultants to select juries effectively following voir dire varies.⁸⁶ While studies on the effectiveness of scientific jury selection techniques have produced inconsistent mixed results, there is no dispute that jurors' social attitudes and personality traits are somewhat more predictive of their verdicts than jury demographics.⁸⁷ Some commentators argue that measures of real-world success require comparisons of juries selected at random with those professionally selected.⁸⁸ A recent scholarly review of empirical research that directly assesses the effectiveness of scientific jury selection confirmed that superficial characteristics of jurors such as facial features, clothing, or body type are poor indicators of a juror's personality or likely behaviour, and that demographics, ethnic origins, religion, spoken language, income and age range are also unreliable predictors of juror behaviour.⁸⁹

Selection based on the United States peremptory challenge system is a guessing game.⁹⁰ The available research on the American approach does not encourage Australia to adopt a time-consuming

⁷⁸ Lieberman JD and Sales BD, *Scientific Jury Selection* (American Psychological Association, Washington DC, 2007) pp 104-105; Mize GE and Hannaford-Agor P, "Building a Better Voir Dire Process" (2008) 47 *The Judges' Journal* 1 at 7.

⁷⁹ Blue LA, "Making the Most Out of Your Voir Dire" (2006) 15 *Voir Dire* 7.

⁸⁰ Lieberman and Sales, n 78, p 8.

⁸¹ Lieberman and Sales, n 78, p 10.

⁸² Posey A and Wrightsman L, *Trial Consulting* (Oxford University Press, New York, 2005) p 6.

⁸³ Vidmar N, *Declaration in United States v Al-Arian and Hatem Fari* (2005) Case No 8:03-CR-77-t30TBM, US District Court, Middle District of Florida, Tampa Division (28 April 2005).

⁸⁴ Lieberman and Olson, n 32, p 98-99; Frederick JT, *Mastering Voir Dire and Jury Selection* (American Bar Association, 2005) p 5.

⁸⁵ Lieberman and Sales, n 78, p 106.

⁸⁶ For a summary of the current views on the effectiveness of jury consultants, see Posey and Wrightsman, n 82, pp 200-206; Kressel NJ and Kressel DF, *Stack and Sway: The New Science of Jury Consulting* (Westview, 2002) pp 128-135; Seltzer R, "Scientific Jury Selection: Does it Work?" (2006) 36 *Journal of Applied Social Psychology* 2417.

⁸⁷ Lieberman and Olson, n 32, pp 103, 106.

⁸⁸ Diamond SS, "Scientific Jury Selection: What Social Scientists Know and Don't Know" (1990) 73 *Judicature* 178 at 179; Saks MJ, "The Limits of Scientific Jury Selection: Ethical and Empirical" (1976) 3 *Jurimetrics* 3 at 13.

⁸⁹ Kressel and Kressel, n 86, p 131.

⁹⁰ Kressel and Kressel, n 86, p 129.

and expensive voir dire process. For example, studies show that jurors are reluctant to disclose biases in response to questions posed in open court.⁹¹ Moreover, the American approach is aimed at selecting or deselecting jurors more favourable to one party, rather than impartial triers of fact.⁹²

Introduce peremptory challenge guidelines for counsel

Another option proposed if peremptory challenges are retained rather than abolished is to subject counsel to guidelines that prevent them from relying on their own subjective biases and stereotypes when challenging potential jurors. The recommendation follows the American example. Unlike Australia, American defence counsel are prohibited from exercising peremptory challenges that have a discriminatory impact on the jury.⁹³ For example, in a case in which a black defendant faced theft and burglary charges, the prosecutor used his challenges to ensure that no black juror was empanelled.⁹⁴ When the defendant was convicted by the all-white jury, an appeal was allowed on the basis that race-based peremptory challenges in criminal trials were unconstitutional. Eight years later, this principle was extended to challenges based on gender.⁹⁵

The United States approach redresses inappropriate use of bias in the peremptory challenge process but it is difficult to monitor, because the parties will ensure that they justify their challenges with reasons unrelated to racism, sexism or other forms of prejudice.⁹⁶ A recent review of the United States process underscored the shortcomings of these guidelines:

the peremptory challenge, by its very nature, is fertile ground for the influence of race on jury selection. Current safeguards against such influence are untenable: Even when attorneys are aware of the impact of race, they are unlikely to admit it, and even when judges scrutinize peremptory justifications for evidence of discrimination, they are unlikely to find it.⁹⁷

The United Kingdom declined to follow the approach taken in the United States. Chief Justice Lane observed that the essence of the British jury system is random selection. A judge should not intervene to ensure that particular groups are represented. Even if the jury in a particular case does not appear to represent a cross-section of the community, the parties must take the jurors as they come.⁹⁸ The rule that the judge has power to direct a jury to be racially balanced was considered and rejected in Victoria in 1997 for the same reasons as those asserted by Lord Lane.⁹⁹ The parties' right to peremptorily challenge jurors becomes meaningless when numerous restrictions are placed upon the exercise.

Thus the American approach does not offer a simple, effective solution to ensure that the peremptory challenge process is free from inappropriate bias. Over the past few decades, numerous governmental measures have been introduced to combat all forms of racism and sexism in Australia. The ability of a defendant to publicly make decisions based on racism or sexism controverts contemporary community standards. If the criminal jury system in Australia is to satisfy its representative function, it should remove a legal procedure that allows decisions based on racism or sexism.

THE JURY TRIAL OF THE 21ST CENTURY

Four other aspects of contemporary Australian communities render peremptory challenges outmoded and reveal that they work against fundamental aims of the present-day criminal jury system.

⁹¹ Mize GE, "Be Cautious of the Quiet Ones" (2003) 10 *Voir Dire* 2.

⁹² Hoffman MB, "Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective" (1997) 64 *U Chi L Rev* 809.

⁹³ See generally Findlay et al, n 56, p 242-245.

⁹⁴ *Batson v Kentucky* 476 US 79 (1986).

⁹⁵ *JEB v Alabama ex rel TB* 511 US 127 (1994).

⁹⁶ Fukurai H, Butler E and Krooth R, *Race and the Jury* (Plenum Press, New York, 1993) p 15.

⁹⁷ Sommers SR and Norton MI, "Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate" (2008) 63 *American Psychologist* 527 at 536.

⁹⁸ *R. v Ford* (1989) 1 QB 868 at 873-874.

⁹⁹ Law Reform Committee, n 12, Vol 3, pp 182-185.

Multiculturalism

As noted above, where available, the name, address and occupation of potential jurors are consulted by defence counsel to assess how closely they align with those of the defendant. A few generations ago, a person's name was a fairly accurate indicator of ethnic, cultural and religious background. The juror's occupation was regarded by counsel as an indicator of:

- level of education (for example, a scientist is better equipped to follow DNA evidence);
- political leanings (a union representative probably holds leftist political views); or
- socio-economic status (a doctor is likely to be more sympathetic towards another professional defendant).

However, several generations of multiculturalism have caused such ethnic, cultural and religious distinctions to dissolve in the mix of Australian society.

A juror's home address was once a reliable indicator of that person's class or social status. In the last few decades, the traditionally poorer, inner-city suburbs in some Australian cities have attracted the young, educated and wealthy city workers. Geography is no longer as accurate an indicator of a juror's socio-economic status or political leanings. The labour market in the 21st century differs so significantly from that of 100 years ago that one can no longer rely upon a person's job title as an indicator of his or her level of education, political leanings or class. Suppose a prospective juror wears a suit and describes herself as a company manager. Does she run her own business out of the spare bedroom or is she the founding director of a multinational Telco? Does she have a MBA or did she just scrape through high school? The profile information available to counsel may be of little value to guide counsel in applying challenges.

Legal folklore suggests that defence counsel should exercise their challenges to compose a jury of as many members of the accused's social group as possible.¹⁰⁰ This strategy presumes that jurors will be more lenient towards defendants whom they perceive as members of their own social group and as similar to themselves.¹⁰¹ However, theory and research also support a counter hypothesis: the danger in favouring jurors similar to the defendant is that jurors may perceive the defendant as "a black sheep" or wayward member of their group, cast the defendant in a negative light and deal with him or her more severely.¹⁰² An attorney is ill-advised to use challenges to stack a jury with jurors who match the ethnicity of the defendant, expecting more lenient treatment. The importance of ethnic pride and diversity in multicultural societies suggests that "the black sheep effect" is increasingly prevalent.

Where no juror name or occupation is provided, the parties exercise their challenges on the basis of other unreliable indicators such as gender, age, skin colour, ethnic facial features, facial expressions, dress, posture and gait.¹⁰³ A considerable body of research has shown that the actual impact of juror demographic features on their verdicts is minimal.¹⁰⁴ Counsel draw on many and varied theories as to the type of juror best suited to a particular type of case.¹⁰⁵ None of these theories have any evidential basis.¹⁰⁶ One Deputy Senior Crown Prosecutor in New South Wales observed that in the generation or so that she has run jury trials, the steady relaxation of dress codes in society has resulted in circumstances in which challenges can no longer be based on what a potential juror wears. Everyone wears jeans. A grunge dresser is just as likely to carry a copy of *The Financial Review*

¹⁰⁰ Boeckmann, n 65 at 116-118.

¹⁰¹ Boeckmann, n 65 at 118.

¹⁰² Kerr NL, Hymes RW, Anderson AB and Weathers JE, "Defendant Juror Similarity and Mock Juror Judgments" (1995) 19 *Law and Human Behavior* 545 at 561; Frederick, n 84, p 22. For a summary of the current state of research on the influence of the black sheep effect see Boeckmann, n 65 at 118-122.

¹⁰³ Lieberman and Olson, n 32, pp 106, 117.

¹⁰⁴ Lieberman and Olson, n 32, pp 107, 117; Frederick, n 84, p 16.

¹⁰⁵ Interviews with defence counsel by the authors in the 2008 study: Goodman-Delahunty et al, n 2. See also Gillies, n 68.

¹⁰⁶ *Katsuno v The Queen* (1999) 199 CLR 40 at 65; 109 A Crim R 66: "There are many theories and claims, some apocryphal and all untested in this country, about the susceptibilities of juries and the matters which should guide counsel in deciding whether to make a peremptory challenge."

tucked under his or her arm as anyone else on the panel. In her opinion, as the world becomes more egalitarian, so too juries appear more cohesive.¹⁰⁷ Contemporary society ensures that the jury selection parade has more in common with the superficialities of a fashion week parade than it does with a finely tuned justice system whose fundamental aim should be to achieve a representative jury.

Community perceptions of justice

One way in which the jury is thought to be of value to the community is by enhancing the legitimacy of the legal system and, consequently, compliance with community laws.¹⁰⁸ Legitimacy, the belief that one ought to obey the law, forms a basis for the effective functioning of legal authorities. If the contemporary community perceives value in the jury system, that confidence in the jury system serves our community well. Confidence in the court system ensures a respect for the law and therefore the maintenance of the democratic state. The broader ramifications of the inclusion of the jury in the political system as a whole are that the jury “makes the administration of justice a matter of the people and awakens confidence”¹⁰⁹ in the law. The jury “binds the citizen with increased public spirit to the government of his Commonwealth and gives him a constant and renewed share in one of the highest public affairs, the administration of justice”.¹¹⁰

Findings in a recent series of studies of American citizens and jurors provided support for these views on the utility of the jury system.¹¹¹ Participation in jury service made citizens more supportive of not only the criminal jury system, but also judges.¹¹² Jury service had a significant impact on broader civic participation.¹¹³ Participation in the criminal jury system strengthened citizen’s faith in government and in their fellow citizens. They also perceived themselves as more politically capable and virtuous following jury duty.

Citizens gained a positive perspective on the legal system through their direct exposure to the workings of justice.¹¹⁴ By participating in legal decision-making process, jurors formulated opinions about the legal system.¹¹⁵ Jurors took their experience of jury duty back into the community. The sharing of their experience contributed to perceptions of the jury system by their friends, colleagues and families. Participation as a juror enhanced the legitimacy of the criminal justice system. Another relevant finding was that the quality of jury experience impacts on future attitudes towards democratic institutions. Jurors whose experience was relatively engaging and better than anticipated were more likely to vote in the future.¹¹⁶

From a non-empanelled juror’s point of view, randomly selected members of the public are “rejected” without good reason. This is one of the last impressions that those jurors will take back to the community. Whilst the justice system verbally sends jurors the message of the importance of an evidence-based, impartial verdict, visually they watch the lawyers acting on their biases in the absence

¹⁰⁷ Cunneen M, “Getting it Right: Juries in Criminal Trials” (2007) 90 *Reform* 43.

¹⁰⁸ Burke K and Leben S, “Procedural Fairness: A Key Ingredient in Public Satisfaction” (2007-2008) 44 *Court Review* 4.

¹⁰⁹ Lieber F, *On Civil Liberty and Self-Government* (1853) pp 194-195. See also Findlay M, “Juries Reborn” (2007) 90 *Reform* 9.

¹¹⁰ Lieber, n 109.

¹¹¹ The Jury and Democracy Project methodology and result summaries can be found at <http://www.jurydemocracy.org> viewed 10 January 2010.

¹¹² Gastil J et al, *Seeing is Believing: The Impact of Jury Service on Attitudes Toward Legal Institutions and the Implications for International Jury Reform* (2006), <http://www.jurydemocracy.org> viewed 10 January 2010.

¹¹³ Gastil J et al, “Jury Service and Electoral Participation: A Test of the Participation Hypothesis” (2008) 70 *Journal of Politics* 351 at 363-365.

¹¹⁴ Tyler TR, *Why People Obey the Law* (Princeton University Press, 1990) p 94.

¹¹⁵ See, generally, Findlay M, “Legitimizing Criminal Justice Through Community Engagement: Lessons from the Jury Experience” (2008) 20 *Current Issues in Criminal Justice* 303.

¹¹⁶ Gastil et al, n 113, at 360-363.

of any evidence during the challenge process. To the community, the perception of justice is just as important as the business of justice. The peremptory challenge process does not assist positive perceptions of our justice system.

The negative impact of rejection on perceptions of the representativeness of juries was confirmed in the authors' 2008 study by comparing the perceptions and responses of 138 challenged and 730 non-challenged jurors drawn from three States in Australia.¹¹⁷ Responses of the two groups were undifferentiated with respect to their perceptions of the jury system, whether jury service was an important civic duty, and whether it was interesting and/or educational. In other words, the experience of being challenged in court was unrelated to views on these topics. However, when asked how representative they thought juries in their State were of their community, those jurors who had been challenged during the jury selection process were significantly more likely to conclude that juries in their State were not representative than were similarly situated jurors who were not challenged in court¹¹⁸ The challenged jurors carried this negative perspective about deficits in the representativeness of juries back into the community.

The negative impact of the biased challenge process on juror perceptions is not a matter that has been central to the challenge debate. However, it is a factor that should, in the authors' opinion, counter the argument that the peremptory challenge process serves to promote the perception to the defendants that the system is not rigged. Juror perceptions (and consequently community perceptions) are inter-linked with, and just as important as, perceptions held by the defendants to jury trials.

The personal repercussions of the challenge process by "rejected" jurors are also worthy of consideration. Upon being challenged, one young woman reported to a newspaper that she "found it embarrassing and I feel I am a laughing-stock".¹¹⁹ The official Western Australian website for jurors advises: "If you are challenged, you should not be alarmed or upset." The New South Wales Jury Service brochure acknowledges that the challenge process is embarrassing for some citizens:

The law gives the prosecution and defence the right to challenge (reject) a certain number of potential jurors without giving reasons. A challenge should not be regarded as a personal criticism. It is a right given by law to the parties involved in the trial.¹²⁰

This description implies that some jurors will experience rejection and take it as a personal criticism. It is a human instinct to want to be chosen for whatever the task is to be faced. Not only is it disappointing for some not to be chosen, but the manner in which the "cattle call" is conducted in some jurisdictions is fundamentally disrespectful of humans and their fragile egos. No matter how often the court instructs us that being "rejected" should not be regarded as a personal criticism, human nature will incline jurors who are challenged to take it personally.

Based on comments from stakeholders interviewed in 2008, the authors recommended that courts avoid "humiliating or embarrassing jurors by requiring them to stand or parade in front of the defendant".¹²¹ Some stakeholders commented that, whilst parading before the defendant is intimidating, the procedure can be clearly explained by the judge, so need not be changed. For example, one judge said:

I watch people in criminal matters where they have to walk past the dock, and I think some are very intimidated and embarrassed. But explaining the process would assure them – I think we can do a lot more to explain along the way what's going on (VIC judge).

¹¹⁷ Goodman-Delahunty et al, n 2.

¹¹⁸ Goodman-Delahunty et al, n 2. Higher mean scores indicate stronger agreement with the statement "Juries in my state are not representative of the community": M=2.71 vs 2.4, t(741) = 2.41, p<.05.

¹¹⁹ "Serving Your Jury Duty – Rejection Can be Humiliating", *Daily News* (Western Australia) (21 August 1985) cited in Vodanovich, n 64, p 9.

¹²⁰ New South Wales Government, Attorney-General's Department, Office of the Sheriff, *Jury Service: A Rewarding Responsibility* (2008) p 10.

¹²¹ Some jurisdictions do not require the potential jurors to parade past the accused. However, all jurisdictions require the potential juror to be superficially inspected by the parties in public.

Other stakeholders viewed the Victorian practice of making jurors parade before the defendant while the accused and his/her solicitor whisper and point as embarrassing, but necessary. However, potential jurors do not volunteer for this humiliation. They come to court with the expectation of serving as a lay judge and leave with the embarrassment of having been unfairly judged. This negative experience may leave some “rejected” jurors, who were previously enthusiastic about serving, with an unfavourable impression of the jury system, and may decrease their willingness to comply with any subsequent jury summons.

The ceremony of the court room (such as bowing to the judge and referring to him/her as his Honour or her Honour) imparts to citizens the importance and solemnity of the occasion. The atmosphere is purposefully created to impress the seriousness of the role of the decision-maker upon potential jurors. The superficial nature of the challenge process in which barristers give the jurors the “once over” in public before rejecting them for no apparent reason stands in stark contrast to an otherwise austere proceeding.

Rights of jurors

Jurors’ rights have recently gained prominence in discussions of jury reform. The right of the litigant to challenge is at odds with a citizen’s democratic right to serve on a jury.¹²² A retired Victorian Supreme Court Judge asserts that “[d]emocracy demands juries”.¹²³ Just as the right to vote symbolises the individual citizen’s role in governing a democracy so, too, does the right to jury participation symbolise the individual citizen’s role in the judicial system. Direct participation of the community in trial decisions symbolises the ownership of the administration of justice.¹²⁴ In an increasingly impersonal and bureaucratic community, voting and jury service are the two key activities by means of which citizens share in civic responsibility. “Democracy is premised on faith in the ability of mass political processes to generate a kind of collective wisdom and the epistemological accessibility of the law as a condition of this faith”.¹²⁵ An ideal expression of “collective wisdom” is jury deliberation. The jury therefore contributes to the creation of a culture of democracy. The Victorian Office of Public Prosecutions office manual acknowledges that the right of each person to sit on a jury is an important civic entitlement and should not be infringed lightly.¹²⁶

Good reasons are needed to deprive a citizen of such a right. The “good reason” used to justify peremptory challenges in the past is outmoded. In the 21st century, where the impact of court decisions on non-parties is increasingly recognised by the law, it is fitting that a voice be accorded to a group of historically silent citizens – the jury – and the right of citizens to serve on a jury.

Cost of the peremptory challenge process

The cost of participating in the contemporary Australian legal system is prohibitive. Supreme Court trials are estimated to cost \$40,000 per day¹²⁷ (several hundred dollars per minute). Only very wealthy individuals and large corporations can afford the legal fees associated with resolving a dispute by trial in the superior courts of this country. As a consequence, most citizens lack access to their own justice system. Today, the “cost of juries is a necessary and integral part of our system of justice”.¹²⁸ Any cost savings to the processes should be implemented to increase access of the justice system to the people it is supposed to serve.

In the four larger Australian jurisdictions of New South Wales, Victoria, Western Australia and Queensland, approximately 160,000 citizens are summoned to jury service each year; in the smaller

¹²² McEldowney J, “Stand by for the Crown, An Historical Analysis” (1979) 7 Crim L Rev 272 at 281.

¹²³ Teague B, “Democracy Demands Juries” (1987) 1 LJ 5.

¹²⁴ See Gastil et al, n 113 at 364; Boeckmann RJ and Tyler TR, “Trust, Respect, and the Psychology of Political Engagement” (2002) 32(1) *Journal of Applied Social Psychology* 2067.

¹²⁵ Harvard Law Review, “Developments in the Law – The Civil Jury” (1997) 110(7) Harv LR 1409 at 1439.

¹²⁶ Victorian Office of Public Prosecutions, n 37 at [6.2.3].

¹²⁷ Cowdery N, “Majority Jury Verdicts” (2007) 90 *Reform* 17 at 18

¹²⁸ Black M, “The Introduction of Juries to the Federal Court of Australia” (2007) 90 *Reform* 14 at 16.

jurisdictions of the Australian Capital Territory, South Australia and Tasmania, approximately 3,500 summons are issued annually. Significantly fewer than half of those summonsed will go on to serve as jurors.

The challenge process requires the Sherriff's/Juries Commissioner's Office to spend time and money ensuring that those citizens attend the court at the chosen time. The challenge process consumes several minutes of court time which equate to a few thousand dollars per trial. This amount is not insignificant, albeit relatively small, in relation to the cost of the entire trial. Nevertheless, in the interests of improving access to justice, the expense of the challenge process should be a factor taken into account in balancing the arguments for and against retention of the peremptory challenge process.

CONCLUSION

History demonstrates that the jury system is ever evolving. One hundred years ago a representative jury was comprised of men of wealthy land holdings, and until the end of the 20th century, citizens over 65 years of age or women who were pregnant were deemed unsuitable for jury service. To contemporary Australians, these historical juries were unequivocally unrepresentative. Before long, our children and grandchildren will regard the challenge process of the early 20th century as a curiosity.

Australian courts have embraced the use of numbers to identify members of a jury panel. This system reduces the challenge process to a guessing game – an embarrassment in a criminal justice system that otherwise thrives on logic. The 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 community values at large.¹²⁹

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 than reliance upon inaccurate 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 consequently struggling to provide access to justice for the citizens it serves, the cost savings of abolishing the peremptory challenge process is worthy of note.

The challenge process deprives some citizens of their opportunity to serve. There must be good reason to deprive a citizen of this increasingly recognised right. Furthermore, citizens should not be forced to participate in the potentially personally embarrassing jury “rejection” process. Randomly selected juries educate lawyers and the judiciary as to contemporary community values. There should be strong justification for interfering with the random selection of juries so as not to place this educative role in jeopardy.

Most importantly, in a modern context, peremptory challenges serve to undermine the essential elements of the impartial jury: that they be randomly selected and representative of the community. The conditions under which and the way in which challenges are used today means that they no longer assist in securing an impartial jury in any meaningful way. A leading criminal justice scholar rates the peremptory challenge as:

one of the most un-democratic features of our democratic trial system ... If we accepted the democratic rhetoric of the jury system we would select juries so that they reflected the breadth of our communities rather than the group left over when lawyers had expended their challenges on pet hates.¹³⁰

¹²⁹ See, generally, Dryzek JS, “Democratization as Deliberative Capacity Building” (2009) 42 *Comparative Political Studies* 1379; Goodin RE, *Innovating Democracy: Democratic Theory And Practice After The Deliberative Turn* (Oxford University Press, 2008).

¹³⁰ Alschuler A, “The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts” (1989) 56 *U Chi L Rev* 153, 156 (fn 10), 232.

Abolishing peremptory challenges does not entail “abandonment of an essential feature of the institution of trial by jury”. This proposal is no more than “an adjustment of the institution to conform with contemporary standards and to bring about a situation in which it is more truly representative of the community”.¹³¹

¹³¹ Adopting the words of the court in this majority verdict case to the peremptory challenge issue: *Cheatle v The Queen* (1993) 177 CLR 541 at 560; 66 A Crim R 484.