



Jury Issues

Last Updated: November 2021

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1. Introduction

1. This National Legal Direction (NLD) provides guidance on the role of the prosecutor in the empanelment of the jury for the trial of a federal offence on indictment, as well as other procedural issues which might arise in the court during trial by jury.

2. Key laws and legal principles

2. Important legislative provisions and legal principles are as follows:

- Section 80 of the *Constitution* provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed.
- Subject to s80 of the *Constitution*, s68 of the *Judiciary Act 1903* (Cth) applies State and Territory laws and procedures regarding trials on indictment, to federal offences tried in State and Territory courts.
- State and Territory laws which provide for '**Judge-alone**' trials are inconsistent with s80 of the *Constitution* and are therefore not picked up and applied by s68 of the *Judiciary Act 1903* (Cth). 'Judge-alone' trials are therefore not available as a matter of federal law. See *Alqudsi v The Queen* [2016] HCA 24; 258 CLR 203.
- State and Territory laws which provide for **majority verdicts**,¹ are also inconsistent with s80 of the *Constitution* and are therefore not picked up and applied by s68 of the *Judiciary Act 1903* (Cth).

¹ A "majority verdict" is a verdict: where the jury consists of 12 jurors, on which at least 11 jurors agree, or where the jury consists of 11 jurors, on which at least 10 jurors agree. In many jurisdictions, if after the prescribed period the judge is satisfied that the jury

Majority verdicts are therefore not available as a matter of federal law. A unanimous verdict is required. See *Cheatle v The Queen* (1993) 177 CLR 541.

- Provided the jury's verdict is unanimous, it is permissible to have a **jury verdict from less than twelve jurors** in a Commonwealth matter (for example, where two jurors are discharged for ill health during a trial and there are no reserve jurors, reducing the panel to ten jurors). A unanimous verdict returned by a jury of less than twelve jurors is not inconsistent with s80 of the *Constitution*. Federal law requires unanimity but does not require such a verdict be delivered by a jury of twelve. See *Brownlee v The Queen* (2001) 207 CLR 278.
- Laws which provide for the use of **reserve jurors** (additional jurors beyond twelve, empanelled in longer trials) are not inconsistent with s80 of the *Constitution*. See *Fittock v R* (2003) 217 CLR 508.

3. Relevant legislation

3. Pursuant to section 68 *Judiciary Act 1903* (Cth), State and Territory laws and procedures regarding trials on indictment apply to trials for Commonwealth offences. Relevant laws are as follows:
 - *Juries Act 2000* (Vic);
 - *Jury Act 1977* (NSW);
 - *Jury Act 1995* (Qld);
 - *Juries Act 2003* (Tas);
 - *Juries Act 1927* (SA);
 - *Juries Act 1957* (WA); *Criminal Procedure Act 2004* (WA) Part 4, Division 6;
 - *Juries Act 1967* (ACT);
 - *Juries Act 1963* (NT); *Criminal Code Act 1983* (NT) Part IX, Division 4.
4. Jury trials for federal offences tried on indictment in the Federal Court of Australia are conducted subject to the laws and procedures set out in Division 1A of Part III of the *Federal Court of Australia Act 1976* (Cth).

4. Jury selection overview

5. Members of the public who attend court in response to a summons for jury service form the “jury pool”. When a trial judge notifies the pool supervisor of the need for a jury, a part of the jury pool is assigned to form a “jury panel”. It is the jury panel which then usually makes its way to the courtroom in anticipation of the empanelment process. Before empanelment commences, ‘excuses’ are taken.² Those members of the panel excused leave the courtroom and return to the jury pool room where they might be reassigned to another panel.
6. Once the excuses have been heard, empanelment of the jury can begin. This usually occurs in the courtroom. The names, numbers, or both names and numbers,³ of potential jurors are randomly identified by ballot and are called out one by one until the relevant number of required jurors is reached. The procedure utilised depends on the jurisdiction (refer to [Annexure A](#)). As they are called, potential jurors stand and make their way to the jury box passing by the defendants and the various legal representatives in the courtroom. At this stage, the legal representatives for the defendant and,

is unlikely to reach a unanimous verdict, a judge can ask a jury to reach a majority verdict in a criminal trial for State or Territory offences.

² When the panel of jurors is in court, a judge will often address them to explain briefly the prosecution case; to give the names of expected prosecution witnesses; and to estimate the duration of the trial. The judge will then call for excuses. Jurors can apply to be excused for any reason that would or might make them partial. Excuses can also include appointments or commitments of a juror, disabilities, and illness. It is up to the trial Judge to decide whether to excuse a potential juror and will often require the person seeking to be excused to give evidence on oath/affirmation.

³ In Victoria, the occupation is also called out – see Annexure A.

in some instances the legal representatives for the prosecution, have a limited opportunity to challenge or stand aside potential jurors before they enter the jury box and become part of the jury empanelled in the trial.

7. There are several different ways in which potential individual jurors or an entire jury are challenged. These processes are set out in the relevant laws in each jurisdiction which are described above. Relevant challenges include the following:

- **“Peremptory challenge”:**
 - In all States/Territories other than Victoria and Tasmania: a peremptory challenge may be made by either party to a prospective juror to exclude them from the jury permanently. A party is not required to provide a reason for making a peremptory challenge.
 - In Victoria and Tasmania: only the defendant can make a peremptory challenge. In those jurisdictions, the prosecution is permitted to ‘stand aside’ jurors (see below).
- **“Stand aside”:**
 - In Victoria, Australian Capital Territory, Northern Territory, and Tasmania: a “stand aside” challenge may be made by the prosecution to a prospective juror to exclude them from the jury temporarily (with the result that the juror is set aside and returned to the jury pool, to be potentially re-drawn in the ballot at a later time).
 - In all other States: these States do not allow the prosecution to stand aside jurors. These States do allow the prosecution to make peremptory challenges.
- **“Challenge for cause”:** A challenge for cause is a challenge that is justified on the grounds that the prospective juror is not eligible to serve on the jury, is not impartial, or other specified reasons.⁴ The reason for the challenge (“the cause”) is provided to the court and the other party. A challenge for cause is either upheld or dismissed by the trial judge. Both parties have unlimited numbers of challenges for cause.
- **“Challenge to the array”** – A party (in all jurisdictions other than Western Australia) has a right to challenge the entire jury panel on the basis that it has not been compiled in accordance with the procedures in the legislation or if there is any irregularity in the formation of the panel. In Queensland, Tasmania, New South Wales, and the Northern Territory, this is now a legislated right,⁵ and in Victoria, the Australian Capital Territory and South Australia, the right is one at common law. The challenge should be in writing and made before the jury is empaneled and sworn.⁶ In Western Australia, the right to challenge the whole of the jury panel was abolished by legislation.⁷

8. Prosecutors should carefully familiarise themselves with the legislation regulating jury empanelment procedures in their jurisdiction before participating in a jury empanelment process. The decision to challenge/stand aside a juror on behalf of the Crown is made by the CDPP instructing solicitor (case officer) in consultation with counsel (see Decision Making Matrix (DMM) Decision 4.30).

⁴ Refer *Murphy v The Queen* [1989] HCA 28. The High Court stated that a proposed juror could theoretically i.) not possess the necessary qualifications, ii.) have some personal defects which render them incapable of discharging their duty as a juror, iii.) not be impartial, iv.) have served on another jury in respect of the same matter, or v.) have been convicted for an infamous crime. Refer also to State/Territory jury legislation which may define relevant “cause”. Note that some legislation still refers to this type of challenge by the historical name: “challenge to the polls”.

⁵ Note that this may be referred to in legislation in different wording – for example, s40 *Jury Act 1995* (Qld) refers to “Challenge to jury panel as a whole”.

⁶ *R v Grant and Lovett* [1972] VR 423 at 425.

⁷ *Criminal Procedure Act 2004* (WA) s104(1); *Juries Act 1957* (WA) s40.

5. Jury selection principles

9. It is not the function of the prosecutor to seek to achieve a jury that will favour the prosecution. The primary duty of the prosecutor is to be fair and to ensure that the jury selection process is conducted impartially and according to law.
10. The decision to challenge or stand aside a potential juror depends on the professional judgment of the prosecutor.
11. He or she may take into account:
 - any available information which is relevant to that decision; and
 - any views expressed by the Australian Federal Police, or other partner agency, giving such weight as is appropriate. However, prosecutors do not act on instructions from partner or stakeholder agencies when engaged in a jury selection process.
12. If a prosecutor has information concerning a potential juror that suggests he or she may unduly favour the prosecution or may be known to a member of the prosecution team, the prosecutor should either challenge or stand aside the potential juror, or make the information available to the defence. There is no corresponding obligation on the defence.
13. A prosecutor should not peremptorily challenge, or stand aside, a potential juror on grounds of:
 - age (unless it has a bearing on fitness for jury service),
 - gender,
 - gender identification,
 - sexual orientation,
 - ethnic origin,
 - religious belief,
 - marital status or economic status,
 - disability (unless it has a bearing on fitness for jury service), or
 - cultural or social background.
14. The prosecutor should not discuss with anyone, especially anyone connected with the defence, the reasons for challenging or standing aside a juror. Nor should he or she ask the defence the reasons for its challenges.
15. Any material provided to the prosecution by a court official for use during the selection process should be returned to that official when the jury has been selected.

6. Jurors with non-disqualifying convictions (Tasmania only)

16. A disqualifying conviction is defined in the relevant jury legislation and bars a person from sitting on a jury. A non-disqualifying conviction is a conviction that does not affect the person's eligibility for jury service.
17. In Tasmania,⁸ information relating to juror's non-disqualifying convictions⁹ may come to the attention of the prosecutor before the time appointed for jury empanelment, being information provided by State Police in accordance with State legislation.¹⁰ A prosecutor in that jurisdiction may have regard to

⁸ Section 24 of the *Juries Act 2003* (Tas).

⁹ 'Conviction' can include matters involving a guilty finding or guilty plea where no conviction is imposed by the court.

¹⁰ This does not occur in Victoria any longer due to the High Court's decision in *Katsuno v R* (1999) 199 CLR 40. In that case the High Court held that provision to the prosecutor of the name and criminal history of persons in the jury pool prior to the delivery of a copy of the jury pool list in open court was unlawful, being a breach of the old *Juries Act 1967* (Vic). The practice does not occur in Western Australia any longer (for the history of jury vetting, see *Hunt v Western Australia* [No. 2] (2008) 37 WAR 530). The practice

the fact that a potential juror has a previous conviction, even if that conviction does not disqualify him or her from jury service. To decide whether to challenge or stand aside the juror on the basis of a non-disqualifying conviction, the prosecutor should consider:

- the details of the conviction; and
- the facts of the case on trial,

and should provide to the defence (unless to do so would be contrary to law, or to the conditions under which that information was provided to the prosecution) information concerning the juror's non-disqualifying conviction.

7. Voluntarily limiting the number of Crown challenges/stand asides regarding jurors (Tasmania, the Northern Territory and the Australian Capital Territory only)

18. In Tasmania, the Northern Territory and the Australian Capital Territory, the prosecution and defence have equal numbers of challenges, however the prosecution may also stand aside potential jurors, something which the defence is not permitted to do.
19. Prosecutors in Tasmania, the Northern Territory and the Australian Capital Territory should therefore voluntarily limit the number of potential jurors they stand aside, limiting to the number of challenges available to the defence. Prosecutors may stand aside more potential jurors only in exceptional cases where the interest of justice clearly requires it. Where there is more than one defendant, the limit is a number equal to the total number of challenges available to the defendants. Prosecutors should check applicable legislation and procedure in their jurisdiction.

8. Approaches to jurors during a trial

20. Counsel, instructing solicitors, support staff, and staff from partner or stakeholder agencies should avoid all contact with jurors in the course of a trial. If a prosecutor, for example, is seen talking to a juror, it may give the impression that there has been collusion even if the conversation had nothing to do with the trial.
21. If a prosecutor has accidental contact with a juror, he or she should draw it to the attention of the defence and the trial judge in the absence of the jury, as soon as practicable.
22. If a prosecutor becomes aware that any person other than an appropriate court official has approached a juror, he or she should inform the trial judge as soon as practicable.
23. Under no circumstances should a prosecutor approach a juror when the trial is over to ascertain the reasons for the jury's decision. Nor should a prosecutor suggest to a police officer or other investigator that he or she do so.
24. In most States and Territories there are criminal offences for seeking details of a jury's deliberations, though in some jurisdictions it is only an offence to do so if threats or intimidation accompany the approach. However, it is clearly improper. Jurors are entitled to merge back into the community when the trial is over, and no one has the right to delay that process.¹¹
25. If a prosecutor meets a former juror in a social or other context, he or she should not discuss the case.
26. If a prosecutor believes that there may have been an improper approach to a juror in the course of the trial, or that improper pressure may have been brought to bear, he or she should discuss this with counsel, the informant, the Prosecution Team Leader, and the Branch Head. It may be appropriate, depending on the circumstances, for the Practice Group Leader to be advised. If the trial is still on foot, the prosecutor should raise the issue with the defence and the trial judge. If the issue is raised post-trial

does not appear to occur in the other five jurisdictions because those jurisdictions have different procedures, for example, prosecutors may only receive the jury list on the morning of the trial and Police do not review the list beforehand.

¹¹ *Re Armstrong* (1922) 15 Cr App R 149, *Re Matthews and Ford* [1973] VR 199; *Re Donovan's Application* [1957] VR 333; *Ex Parte Hartstein*; *in re a Solicitor* (noted at (1972) 46 ALJ 369); *Prothonotary v. Jackson* [1976] 2 NSWLR 457; *AG v. New Statesman and Nation Publishing Co Ltd* [1981] QB 1.

and the court is no longer seized of the matter, the issue should be raised with the relevant head of the jury service.¹² Depending on the situation, further action may be required.¹³ In all cases, it is incumbent on the prosecutor to create detailed file notes covering the matter.

9. Discharging individual jurors or the entire jury during the trial

27. Discharge of an individual juror may occur on occasion. A juror can be discharged for death of a family member, illness, disability, or other good cause as set out in the relevant legislation.¹⁴
28. However, in some cases, there may be an incident involving a juror or the jury that results in a party making an application to discharge the entire jury. Incidents are wide-ranging and can include juror bias, wrongful disclosure of a defendant's bad character/criminal record to the jury, and material that is not an exhibit in the trial being found in the jury room. The Judge will consider the application. The test for discharge of the jury is one of necessity or a high degree of need.¹⁵ DMM Decision 4.31 provides the decision maker for a prosecution application to discharge the entire jury.

10. Related Resources

29. Other related resources include:
- [“CDPP officers serving on juries” National Legal Direction.](#)

11. Annexure A: Table of State/Territory procedures for jury ballots and the information about jurors available to parties

Jurisdiction	Calling of jurors by name or by number during the ballot	Information about jurors available to the prosecution and defendant <i>(note: usually convention only and not specified in legislation or Practice Directions. Prosecutors should check the most recent procedure in their jurisdiction)</i>
New South Wales	Number - <i>Jury Act 1977</i> (NSW) s 48	None available
Western Australia	Number - <i>Juries Act 1957</i> (WA) ss 36–36A and s43A	Name, street, and suburb addresses and (sometimes) occupation, in a list ¹⁶ - <i>Juries Act 1957</i> (WA) s 30, and <i>Criminal Procedure Rules 2005</i> (WA) Rule 57.
Victoria	Number and occupation - <i>Juries Act 2000</i> (Vic) s36 (however, judge may direct that the jury panel be called by name - <i>Juries Act 2000</i> (Vic) s 30A)	Occupation, from hearing it read out during empanelment (no list provided)

¹² Juries Commissioner or Sheriff depending on jurisdiction.

¹³ For example, a decision to make an application to discharge the Jury under DMM Decision 4.31 may be required, or consideration given to referring the matter to Police for investigation of potential offences committed.

¹⁴ The DMM does not provide a decision maker for an application to discharge a juror because this application is usually made by the juror themselves.

¹⁵ *R v Boland* [1974] VR 849 at 866 (Vic CCA).

¹⁶ Occupation may be excluded on occasion, per advice of the CDPP Perth office. Content of list is per convention only. Lists may not be available to the parties, or lists may be partially redacted, in certain trials with juror security issues: *Juries Act 1957* (WA) s43A.

South Australia	Number per convention. Note that the <i>Juries Act 1927</i> (SA) s 46 covers ballots but does <u>not</u> specify the procedure for name versus number.	Name, occupation, and suburb, in a list - <i>Juries Rules, 1996, Rule 86</i> ¹⁷
Queensland	Number and name per convention and despite s41(1)(b) of <i>Jury Act 1995</i> (Qld) (however, judge may direct that the jury panel be called by number only - <i>Jury Act 1995</i> (Qld) s 41(2))	Name, occupation, and suburb, in a list - <i>Jury Act 1995</i> (Qld) ss 29(2), 29(3) and 37
Tasmania	Name (however, judge may direct that the jury panel be called by number) - <i>Juries Act 2003</i> (Tas) s 29	Name, gender, and address. See also <i>Juries Act 2003</i> (Tas) s 27(6)
Australian Capital Territory	Name - <i>Juries Act 1967</i> (ACT) s 31	Name, in a list - <i>Juries Act 1967</i> (ACT) ss 27 and 29
Northern Territory	Number and name per convention and despite content of <i>Juries Act</i> (NT) - <i>Juries Act 1962</i> (NT) s 37	Name and occupation, in a list ¹⁸ - <i>Juries Act 1962</i> (NT) s 21 and <i>Practice Direction 1 of 1997 - Jury lists</i>
Federal Court	Name (unless the court thinks it is necessary to call the panel by number in order to protect the security of a juror or potential juror) - <i>Federal Court of Australia Act 1976</i> (Cth) s 23DU	Jury lists are not used. ¹⁹

¹⁷ Note that these are required to be cited as 'Juries Rules, 1996'.

¹⁸ Content of list is per convention only.

¹⁹ However, in some respects, the court adopts the jury empanelment procedure of the State or Territory in which the Federal offending was committed, because the Federal legislation is silent on some jury procedures. Therefore theoretically, the Federal Court may provide a jury list to the trial parties if this is the procedure in the relevant State or Territory.