16 December 2013

SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION

REVIEW OF JURY EMPANELMENT

Introduction

The Criminal Bar association of Victoria welcomes the opportunity to make a submission to the Victorian Law Reform commission upon its review of matters concerning jury empanelment.

The Criminal Bar Association (CBA) is the peak body for barristers in Victoria practising in the criminal law. Its members comprise almost one quarter of all barristers practising in Victoria and it counts almost one third of Victoria's Judiciary among its Honorary Members.

The CBA represents criminal barristers who principally prosecute, those who principally defend and those who have a mixed practice. We issue press releases, regularly meet with the judiciary and government, and are involved in the continuing legal education scheme of the Victorian Bar. The website of the CBA can be found at www.crimbarvic.com.au and is regularly updated.

Members of the CBA appear in criminal cases of all types, both in Victoria, and across all states and territories of the Commonwealth. Further, such appearances are in matters involving all facets of the criminal law, both state and federal.

It is the view of the Criminal Bar Association that an analysis of both the relevant arguments for change and the limited data collected via juror survey that there is no clear case for changing the current system. The Criminal Bar Association also notes that whilst it is important to a degree take into consideration the impact that the criminal trial process has on jurors that this must always be done in the context of the importance of fairness to an accused person given the issues at stake. It is also important to view any impact upon jurors in light of the importance of the jury system to the administration of justice and a properly functioning democratic system.

Specific issues

1. Peremptory Challenges

1.1. The current peremptory challenge process provides a mechanism for an accused person to participate directly in the trial process. It significantly contributes to the accused's sense of involvement with and confidence in the process. It allows the accused to have an important role in helping to ensure the representativeness of the jury and with justice being seen to be done.

1.2. Whilst it is acknowledged that assessments of a potential juror's unsuitability are inherently "unscientific" and potentially inaccurate given the scant information available to an accused person the current mechanism should be retained for the below stated reasons. Concerns about the impact of peremptory challenges on jurors can be dealt with through other means such as education or carefully tailored direction without risking "throwing the baby out with the bathwater". The current process provides for a highly efficient and relatively simple safeguard, allowing an accused person to remove from the jury potential jurors who-

- present as being physically or mentally unfit in any manner,
- present as being potentially partial or biased against the accused, for example the potential juror who glares at the accused or looks at him/her in a frightened manner,
- have demonstrated through their demeanor or manner or conduct that they clearly do not wish to sit on a jury,
- or are unsuitable in any other way as it may appear in a given case.

1.3. The current system allows for the accused to have a direct and efficient involvement in the jury selection process that can redress imbalances of ethnicity, gender, age, social background and occupation, whether such concern is actual or perceived.

1.4. It is submitted that alternatives to the current system, such as redefining or increasing the use of challenges for cause are likely to be in contrast inefficient and to produce undesirable outcomes. Such outcomes may include an even greater impact on jurors' perception of invasion of privacy, interruption and fragmentation of the empanelment process, and the need for cross-examination of potential jurors. Increasing the use of challenges for cause is also likely to produce its own negative resourcing and time consequences.

1.5. There is no case for reduction in the number of peremptory challenges available to an accused person. Indeed issues that occur with "stale jury pools" mean that at times every challenge available is required to be used.

2. Calling of the panel by name or number

2.1. The Criminal Bar association submits that the default position should be empanelment by name as part of an open and transparent justice system and as an important component of the presumption of innocence.

2.2. Empanelment by number risks creating a paradigm of potential prejudice against an accused person in the mind of jurors that is both undesirable and unnecessary particularly given the presumption of innocence. The message conveyed to potential jurors by empanelment by number flies in the face of the presumption of innocence. This may be compounded in situations where you have jurors empanelled by number who have previously sat on a jury where empanelment was conducted by name.

2.3. The use of name helps to reduce the risk of a person in some way associated with the parties or the events in question inadvertently making their way onto the jury. This is particularly important in country circuit trials where the jury pool is drawn from a narrower population.

2.4. The use of name is particularly important when matters of ethnicity or religion are issues at trial.

3. Additional Jurors.

3.1. It is submitted that concerns with the impact of balloting off on jurors where more than 12 jurors are empanelled can be best addressed by empanelling more than 12 juror only where it is absolutely necessary, and by better management of juror's expectations.

3.2. The clear concern is that not balloting off jurors prior to verdict will give rise to substantial inequalities of justice where verdicts may be delivered by different numbers of jurors in different trials.

Conclusion

In conclusion it is submitted that there is no sound case for change to the current well-established jury empanelment system. Interestingly analysis of the jury survey data reveals that where informed jurors well understand the importance of the rights of accused's persons in matters relating to empanelment. Any changes, in the absence of such a case, risk instead producing greater problems than those perceived to exist. Such problems include increasing costs complexities, time delays, and

impact on jurors, at the cost of the rights of an accused person; bearing in mind it is the accused who faces the greatest risk in any trial.

CRIMINAL BAR ASSOCIATION OF VICTORIA

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