

New Zealand Law Society

JURIES (JURY SERVICE AND PROTECTION OF PARTICULARS OF JURY LIST INFORMATION) AMENDMENT BILL

- 1 The New Zealand Law Society (the Law Society) welcomes the opportunity to comment on the Juries (Jury Service and Protection of Particulars of Jury List Information) Amendment Bill (the Bill).
- 2 The Law Society does not take a position on the broad policy of the changes proposed in the Bill, but emphasises that the fundamental principle that must underlie all criminal justice legislation is that the right to a fair trial is an absolute right.¹ The Law Society's submission also raises a number of technical concerns about the Bill.

Introduction

- 3 The Bill follows on from changes to the Juries Act 1981 (the Juries Act) made in 1998, which first prohibited defendants from being given copies of jury lists to keep. The Bill limits the ability of defendants (primarily, but also private prosecutors and parties to the rare civil proceedings tried before a jury) to see – or be informed of – certain protected particulars of prospective jurors. The Law Society anticipates that defendants will continue to be able to see the names of jurors, but likely not their addresses (except perhaps in general terms, i.e. at a suburb or town level).

Clause 5 (amendments to section 7)

Disqualification

- 4 When home detention was created, it involved a process by which those sentenced to imprisonment could apply to the Parole Board to serve their prison term (or part of it) as home detention. Because of this, those on home detention had all received sentences of imprisonment and were excluded from jury service for five years. When Parliament created 'front-end' home detention as a non-prison sentencing option, it did not address whether home detention should be considered as more akin to prison (which involves a five-year disqualification from jury service), or to other community sentences (which do

¹ *R v Hansen* [2007] 3 NZLR 1 (SC).

not). This is a matter the Committee will now need to address. The Law Society is unaware of any problems having arisen from the current eligibility for jury service of those sentenced to home detention in the preceding five years, but recommends the Committee take advice on the rationale underlying the proposed law change.

Recommendation

- 5 The Society recommends that the Committee consider whether the rationale for disqualifying those who have served sentences of home detention within the preceding five years warrants such a law change.

Clause 17 (new sections 14AB and 14AC inserted)

Counsel assisting in the exercise of the challenge

- 6 In removing the ability of defendants, to see – or even be told of – the protected particulars of prospective jurors, it is difficult to see how a party’s barrister or solicitor (or the barrister or solicitor appointed by the Court for the purpose) will actually be able to assist the in the exercise of the challenge as required under new section 14AB(3). Given that challenges to jurors are – or at least can be – on client instruction, the Law Society would welcome some guidance – or the provision of guidance in jury rules – about the appropriate use of protected particulars.
- 7 The Law Society further recommends that consideration be given to increasing the number of peremptory challenges, which was reduced from six to four by the Criminal Procedure Bill. The ability to properly exercise the right of challenge will be diminished by removing some of the little information available to a defendant, and by requiring in some circumstances that a lawyer exercise the right of challenge without full instructions. It may be appropriate to increase the number of peremptory challenges to ameliorate the effect (or at least increase it for single defendant trials).
- 8 The Law Society also recommends that new section 14AC is amended so that litigants in person must be advised of the right to have a barrister or solicitor appointed to assist with the use of protected particulars of prospective jurors in the exercise of the right of challenge. Given that these are litigants in person, the right will likely be illusory if people are not informed of it.

Recommendations

- 9 The Law Society recommends:
- 9.1 That guidance is provided about the appropriate use by counsel of protected particulars of prospective jurors in the exercise of the right of challenge.
 - 9.2 That consideration is given to increasing the number of peremptory challenges to ameliorate the negative effect this change will have on the exercise of the right of challenge.
 - 9.3 That new section 14AC is amended so that litigants in person are advised of the right to have a barrister or solicitor appointed to assist with the use of protected particulars of prospective jurors in the exercise of the right of challenge.

Constables as defendants

- 10 Over the last several years, there have been a number of prosecutions of police officers, including some in respect of serious crimes involving the administration of justice. If ordinary defendants will be denied access to the protected particulars of jury list information, the Law Society does not consider that defendants who are constables should be permitted access, as new section 14AB(2)(b) permits.

Recommendation

- 11 That new section 14AB(2)(b) is amended so that defendants who are constables are not permitted access to the protected particulars of jury list information.

Breaches punishable as contempts of court

- 12 The Law Society is concerned that breaches of new section 14AB will be punishable as contempts of court, and not as ordinary offences.
- 13 The Law Society recognises that 2008 amendments to the Juries Act introduced the provision that such breaches of the Juries Act are punishable as contempts of court. In the Law Society's view, this was an unwelcome extension of the law of contempt, and remains inappropriate.
- 14 These appear to be the only provisions of their nature in New Zealand law. All other statutory contempts of court relate directly to the operation of the courts or tribunals themselves. The preparation of jury lists, and lists of protected particulars, are administrative acts essentially performed by the Ministry of Justice. They are not matters

closely related to any judicial function. The Law Society notes that actual jury tampering is not punished as a contempt of court. The Law Society submits that breaches of new section 14AB, as well as breaches of section 14A, should be recognised not as contempts of court, but as summary offences. A penalty set at the level of a breach of a suppression order would be appropriate.

Recommendation

- 15 That breaches of new section 14AB, as well as breaches of section 14A, are treated not as contempts of court, but as summary offences.

Technical Matters

Clause 10 – new section 15A, Registrar’s discretion and duty to excuse from jury service permanently

- 16 The Law Society submits that new section 15A(1) and 15A(2) should be amended by the addition of the words “as a juror” after the words “from attending”. Although that is clearly the intention, as currently drafted the section could be argued as empowering a registrar to excuse from attending in any court for any reason.

Recommendation

- 17 That the words “as a juror” be added after the words “from attending” in new sections 15A(1) and 15A(2).

Clause 10 – new section 16, Judge’s discretion to excuse from jury service on particular occasion

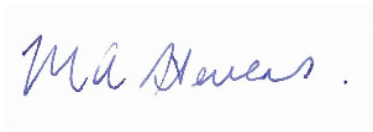
- 18 Given recent court rulings exploring how the relationships between Judges and counsel appearing before them can raise disqualifying conflicts of interest, it would be appropriate to use the opportunity this Bill presents for new section 16(3)(b) to allow that a Judge may excuse a person from attending as a juror if he or she is closely connected not just to one of the parties or the prospective witnesses (as is currently the law) but also if closely connected to one of the counsel appearing.

Recommendation

- 19 That new section 16(3)(b) should also allow a Judge to excuse a person from attending as a juror if he or she is closely connected to one of the counsel appearing.

Conclusion

20 The Society wishes to appear in support of this submission.

A handwritten signature in blue ink that reads "Anne Stevens .". The signature is written in a cursive style and is enclosed within a light gray rectangular border.

Anne Stevens
Vice President
26 May 2011