16 July 2018

The Hon Elise Archer MP
Attorney-General
Level 10, 15 Murray St
HOBART TAS 7000

By email: Minister.Archer@dpac.tas.gov.au

Dear Attorney-General,

As the Joint Media Organisations we write to you regarding section 37A of the *Justices Act 1959* that prohibits publication of information disclosed in open court during bail hearings which concerns us as it undermines open justice and restricts public interest reporting.

While this matter arises in the Justices Act, we note the Government is currently reviewing Tasmania's bail laws and has issued a position paper, *Reforms to the Tasmanian Bail System*.

The Foreword to that Paper says: *'This Paper considers the law relating to bail in Tasmania and issues that have been identified with it. It draws on the work of other jurisdictions in proposing a number of reforms that put community safety front and centre when the question of bail is being considered.'*

Given that the issue that arises from section 37A of the Justices Act concerns the reporting of bail hearings, we are of the view that it would be useful to seek the Government's consideration of this issue alongside considering reform of the bail system.

We have researched this matter fully, and recommend amendment by repealing section 37A of the *Justices Act 1959* so that full reports of bail proceedings can be published [OR so that the public can be fully informed regarding bail proceedings]. Our detailed reasoning follows.

Background

Tasmanian courts, like all other Australian jurisdictions, maintain the principle of open justice.

> *…[T]he rule is that generally, the administration of justice must be open to full public scrutiny and comment. This general rule has never been in doubt since at least Scott v Scott [1913] AC 417… Although couched in the language of two centuries ago, those words are just as appropriate today as they were when written:*
>
> > *'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very sole of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial. The security of securities is publicity.'*[1]

It is well understood that exceptions to this principle must either be necessary (in the case of suppression and non-publication orders) or legislated.

In 1974, the Tasmanian parliament enacted an exception in relation to reports of information disclosed in bail hearings. The Bills Register explains the rationale behind section 37A of the Act as:

> *There is no doubt that at the present time the detailed publication in newspapers of objections raised by the police to the granting of bail to a person when present in court can have the tendency of denying the person an unbiased trial by a jury, or even by a Magistrate. Frequently there has been published details of a person's past record and of his ill-repute and these are matters which cannot be disclosed at his trial other than in the most exceptional circumstances. There has on occasions also been published a statement that the police have an unassailable case against the defendant. In the interests of justice publication of this kind of information must be stopped and* [section 37A] *does just that. The reference to* [what was then section 13 of the Defamation Act 1957] *is only to make it clear that that section, which declares that is shall not be defamatory to publish a reasonable account of court proceedings, does not cut across the intention of the Section. Subsection (2) and (3) are nothing more than clarifying provisions.*

While these may have been legitimate concerns in 1974, contemporary views about the effect of pre-trial publicity on the right to a fair trial have changed significantly that section 37A of the Act is now very much out of step with current thinking. We offer the following in relation to robustness of juries, safeguards, and the fade factor of delay to support this view.

Robustness of Juries

The Tasmanian Supreme Court had already accepted as early as 1969 that juries are capable of discerning between media reports and the evidence presented in the courtroom. In *R v Kray & Ors*[2] Justice Lawton said:

> *…[T]he mere fact that a newspaper has reported a trial and a verdict which was adverse to a person subsequently accused ought not in the ordinary way to produce a case of probable bias against jurors empanelled in a later case. I have enough confidence in my fellow–countrymen to think that they have got newspapers sized up just as they have got other public institutions sized up, and they are capable in normal circumstances of looking at a matter fairly and without prejudice even though they have to disregard what they may have read in a newspaper. So, the mere fact that an earlier trial had been reported at length in*

[1] *R v Ian Roger Matterson and Anor*; Ex parte Christine Debra Moles (No 2) [1993] TASSC 75, *R v Clerk of Petty Sessions; ex parte Davies Brothers Limited* [1998] TASSC 144 at [5] – [6] and a number of other Tasmanian cases

[2] (1969) 53 Crim App R 412 at 414 cited in *Nicholas v R* [1990] TASSC 65 at [7]

the Press would not, in my judgment, amount to establishing a prima facie case of the probability of bias or prejudice in anyone summoned to attend as a juror for a later trial.

The robust nature of juries was expanded upon in *John Fairfax Publications Pty Ltd & v District Court of NSW & Ors*[3], Spigelman CJ cited a number of recent cases:

There are now a significant number of cases in which the issue has arisen as to whether or not an accused was able to have a fair trial in the light of substantial media publicity, indeed publicity much more sensational and sustained than anything that occurred here. Those cases have decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice. Trial judges of considerable experience have asserted, again and again, that jurors approach their task in accordance with the oath they take, that they listen to the directions that they are given and implement them. In particular that they listen to the direction that they are to determine guilt only on the evidence before them.

And as Mason CJ and Toohey J said in *The Queen v Glennon*[4]

[T]he suggestion that there was a substantial risk that at least one juror would have acquired knowledge, before the verdict was given, of the respondent's prior conviction was again a matter of mere conjecture or speculation. The mere possibility that such knowledge may have been acquired by a juror during the trial is not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice. Something more must be shown. The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence.

As Toohey J observed in *Hinch v Attorney General (Vic) (No 2)*[5]*:*

It may be also that earlier decisions have given too little weight to the capacity of jurors to assess critically what they see and hear and their ability to reach decisions by reference to the evidence before them.

The proposition was well stated by the Ontario Court of Appeal in *R v Hubert*[6], in a passage subsequently cited with approval in Australia *Murphy v The Queen*[7]:

In this era of rapid dissemination of news by the various media, it would be naïve to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.

Furthermore, as Kirby ACJ said in *R v Yuill*[8]:

Courts will assume that jurors, properly instructed, will accept and conform to the direction of the trial judge to decide the case solely on the evidence placed before them in court: see Demirok[9]*. There is an increasing body of judicial opinion, lately expressed, to the effect that whatever pre-trial publicity exists, jurors, when they take on the solemn responsibility of the performance of their duties in the courtroom,*

---

[3] [2004] NSWCA 324 at [103] – [110]
[4] [1992] HCA 16; (1992) 173 CLR 592 at [603]
[5] [1987] HCA 56; (1988) 164 CLR 15 at [74]
[6] (1975) 29 CCC (2d) 279 at [291]
[7] [1989] HCA 28; (1989) 167 CLR 94 at [99]
[8] (1993) 69 A Crim R 450 at [453-454]
[9] [1977] HCA 21; (1977) 137 CLR 20 at [22]

differentiate between gossip, rumour, news and opinion which they hear before the case and the evidence which they hear in the court in the trial for which they are empanelled.

As Gleeson CJ said in *R v VPH*[10]:

The jury will be given appropriate directions to confine their attention to the evidence that is put before them. Our entire system of the administration of criminal justice depends upon the assumption that jurors understand and comply with directions of that character.

Finally, as McHugh JA said in *Gilbert v The Queen*[11]:

Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.'

As is evident, the perspective that jurors properly perform their task, are true to their oath and comply with a trial judge's directions has repeatedly been applied in appellate courts over recent years.

Safeguards

The court has also developed a number of safeguards to protect against any unfairness including:

- The ability to question jurors about their exposure to media publications and excuse any potential juror who may have difficulty deciding a case impartially: see *R v Vjestica*[12] and section 39 of the *Juries Act 2003* (Tas)[13];
- Warnings and directions from the trial judge about deciding the case strictly on the evidence. We also note the instructional video found on the website of the Tasmanian Supreme Court Website[14] informing jurors of their obligations:
    - Not to talk about case with friends and family;
    - To refrain from doing their own research or investigations and applying information from sources outside the courtroom; and
    - To rely solely on evidence presented in court.

Regarding the discipline and solemnity of participation in a trial, as Lord Hope said in *Montgomery v H M Advocate*[15]:

The principle safeguards of the objective impartiality of the tribunal lie in the trial process itself and the conduct of the trial by the trial judge. On the one hand, there is the discipline to which the jury will be subjected of listening to and thinking about the evidence. The actions of seeing and hearing the witness may be expected to have a far greater impact on their minds than such residual recollections as may exist about reports about the case in the made.

There is also the ability to geographically relocated a trial, for example from Hobart to Launceston or Burnie (or vice versa) should the need arise, and the ability to stay proceedings temporarily to allow more time for the fade factor to take effect (see below).

[10] (unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Newman and Sully JJ, 4 March 1994):
[11] (2000) 201 CLR 414 at [31]
[12] [2008] VSCA 47
[13] http://www.austlii.edu.au/au/legis/tas/consol_act/ja200397/s39.html
[14] http://www.supremecourt.tas.gov.au/jurors
[15] [2003] 1 AC 641 at [673]

Fade Factor

Even without a stay of proceedings, delay is an inevitable feature of the modern court system due to the volume of cases and the nature of criminal procedure. While bail may be sought whenever a person is brought before a Justice it is most commonly applied for at a defendant's first appearance or soon thereafter. Consequently, there can be a substantial lapse of time between reports about what occurs during a bail application and the substantive hearing of the matter, giving jurors time to forget things they may have seen or read about a case. For example, as noted by Justices Cox, Underwood and Wright in 1994 in dismissing an appeal based in part on the effect of pre-trial publicity:

> *In the present case the reports had made it clear that the appellant was alleged to have stolen money from the company in a period which concluded some 20 months before the publicised collapse of Paragon Industries Pty Ltd, that he was no longer a director of it and by that stage was a resident of Melbourne. The trial did not commence for a further 27 months. It was no part of the Crown case that the appellant had contributed to the collapse of Paragon Industries Pty Ltd and in the course of the lengthy trial it was made clear that the appellant's dealings had been with Paragon 2000 Pty Ltd, that he had been an officer of that company and that the business had been sold long before the Moonah factory had closed. If any member of the jury had any recollection of the publicity concerning the collapse in March 1990 and of the erroneous linking of the appellant with the company which collapsed, we find it inconceivable that such a juror would have been influenced in the slightest by it. Such recollection, if it existed at all at the commencement of the trial, would almost certainly have been overtaken by the volume of evidence which showed the true relationship. In any event, unlike the situation in* R v Glennon *(supra) where highly prejudicial and inadmissible material not shown to be untrue had been given wide notoriety, or that in R v Pepperill*[16] *where inflammatory editorial comment on the accused had been made prior to trial, these reports at worst merely hinted at a possible connection between the collapse of the company and some wrong doing by the appellant.*[17]

Other Matters

Insofar as section 37A of the Act is also concerned with the impartiality of Magistrates, we note the decision in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[18]:

> *It is the everyday task of a judge to put out of his mind evidence of the most prejudicial kind that he has heard and rejected as inadmissible. It is not uncommon for a judge to try a case which was the subject of emotional public discussion before the proceedings commenced. I find it quite impossible to believe that any judge of the Federal Court who may ultimately deal with the proceedings in that court will be influenced in his decision by anything he may have read or heard of the evidence given or statements made at the inquiry.*

Further, if juries have the robustness set out above it would be remiss to think of Magistrates as any less capable of making decisions based on the evidence before them as opposed to what has been published in the media.

We also note that:

- Since 1974, Tasmania's population has grown from approximately 400,000 people[19] to over 515,000 – a significant increase in the size of the potential jury pool;

---

[16] (1981) 54 FLR 327
[17] George Svetomir Durovic v R [1994] TASSC 23; (1994) 4 Tas R 113 at [11]
[18] (1982) 152 CLR 25 at [33]
[19] http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/10F05951C8254871CA257B0300167D00/$File/13016%20-Tas%20Yrbook-1974.pdf

- Repealing section 37A of the Act does not affect the power of Justices to make suppression orders in appropriate cases pursuant to section 106K of the Act; nor does it lessen a publisher's obligation pursuant to the principles of *sub judice* contempt; and
- Should the present Tasmanian parliament have any further concerns about repealing section 37A of the Act, an amendment could also be made to the Juries Act in similar terms to section 68C of the *Jury Act 1977* (NSW)[20] which makes it an offence for jurors to conduct their own research into the case they have been called to adjudicate.

RECOMMENDATION – We recommend that section 37A of the *Justices Act 1959* be repealed.

We look forward to discussing this matter with you as appropriate.

Kind regards

Georgia-Kate Schubert
on behalf of the Joint Media Organisations

[20] http://www5.austlii.edu.au/au/legis/nsw/consol_act/ja197791/s68c.html