Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Juries, Social Media and the Rights of an Accused to a Fair Trial

Submission to the Tasmanian Law Reform Institute

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Protecting and promoting justice, freedom and the rights of the individual

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to provide comment on the issues paper published by the Tasmanian Law Reform Institute (TLRI), *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Issues Paper No. 30, August 2019).

The challenge of social media for the judicial system

2. Social media was identified in 2013 by 62 Australian judges, magistrates, and court administrators as the most significant challenge faced by the judicial system. In 2010, Reuters Legal compiled a tally of reported US decisions in which judges granted a new trial, denied a request for a new trial, or overturned a verdict, in whole or in part, because of juror actions related to the internet. They identified at least 90 verdicts between 1999 and 2010 that were challenged due to juror internet misconduct. They counted 21 retrials or overturned verdicts in the 2009-2010 period.[2]

3. The experience of the ALA is that use of social media by jurors is rarely explicitly admitted or brought forth through ordinary trial procedures in Tasmania. Short of a study surveying juror experiences including use of social media, there is no way of knowing the extent to which jurors use social media.

4. It is the view held by the ALA, and that held by many barristers and solicitors who practise in the area of criminal law, that social media must be widely used by jurors; simply because of how ingrained its use has become in modern behaviour. It is contrary to human experience to suppose that its use ceases when a person is empanelled as a juror.

5. If this assumption is correct, it would follow that use of social media by juries is not confined to high-profile trials, but would frequently occur in most trials.

6. It is sometimes observed that the trial process is, for jurors, often confusing, and not adapted to achieve what most jurors might regard as a just outcome. A juror who intends to do what

[2] G Barns et al., 'Juries and Social Media: Problems Arising from Jurors' Social Media Use' (2019), Paper delivered to Carroll & O'Dea, Sydney.

he or she regards as 'justice' is therefore in the position of attempting to do so in spite of the obstacles presented by the trial process and judicial direction.

7. Social media is easy to use, very difficult to detect by those who would forbid it, and is easily justified in the mind of a juror as no more than gathering publicly available information. It is therefore a relatively simple tool for a juror to use who wants to find out more information about the defendant and witnesses.

Managing social media usage by jurors

8. The ALA submits that controlling use of social media is not possible. However, a number of steps could be taken to disrupt the utility of social media to a juror who wishes to find out information.

9. The ALA submits that it should be an offence to publish the name of a defendant before she/he has pleaded guilty. Court lists should refer to defendants by their initials. Doing this will assist in preventing comment on social media aimed at identifying the accused person.

10. The ALA further submits that following arraignment, defendants should be entitled to a limited form of questioning of jurors prior to the use of any challenges. This practice is extensively used in some jurisdictions in the United States, and would assist in identifying those jurors who have used social media in connection with the trial on which they might be empanelled, or who might be inclined to use it despite judicial direction to the contrary.

11. The ALA further submits that the practice of taking mobile telephone and electronic devices from jurors should be strengthened by sequestering jurors during the trial.

12. The ALA concedes that these measures are among the more extreme options available to law reformers. Short of taking them, however, there remains an unacceptably high risk of miscarriage of justice. While jurors can largely be taken at their word that they will not use social media, its effect is insidious, and only a relatively small number of jurors need to use social media in order to produce miscarriages of justice, and to erode confidence in the judicial system.

13. Aside from these observations, the ALA notes the lack of any mechanism under the Criminal Code whereby a defendant may elect to be tried by judge alone. The availability of such a

mechanism is critical in relatively high-profile cases where the extent of social media comment may be such that the defendant is at a greater risk of not receiving a fair trial.

14. Such judge-alone trials have proven effective in cases such as the murder trial of Lloyd Rayney in Western Australia in 2012. A judge-alone trial is currently sitting in respect of Bradley Robert Edwards for a sequence of alleged murders in 1996–1997. It is difficult to imagine that Susan Neill-Fraser could ever receive a fair trial by a Tasmanian jury if her appeal presently before the Supreme Court were to succeed.

Conclusion

15. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the TLRI in respect of the review regarding juries, social media and the rights of an accused person to a fair trial. The ALA is available to provide further assistance to the Institute as it further considers the matters raised in the issues paper.

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