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30 March 2009

Mr Laurie Glanfield AM
Director General
Attorney General's Department
GPO Box 6
SYDNEY NSW 2001

Dear Mr Glanfield,

***Re: Peremptory challenges***

Thank you for your letter seeking the Law Society's view on recommendations 43-44 of the Law Reform Commission's Report on Jury Selection and a proposal by the Chief Justice to place a statutory cap on the number of additional peremptory challenges.

The Law Society's Criminal Law Committee (Committee) has reviewed the recommendations and proposal and strongly supports the retention of the current system of peremptory challenges. The High Court of Australia has commented that "[t]he right of challenge, and particularly the right of peremptory challenge, lies at the very root of the jury system as it now exists".[1] Peremptory challenges allow both the prosecution and defence to remove the perception of juror bias by eliminating extremes of partiality on both sides.

The current system allows three peremptory challenges each to Crown and defence. Crown and defence are able to agree to an additional number of peremptory challenges, and generally do so without problems. The current system is flexible enough to work in a fashion that the parties to criminal litigation can exercise some discrimination in the constitution of the jury. At the same time, the current limitation on challenges avoids real manipulation of the jury pool.

Recommendation 43 and the suggestion by the Chief Justice would impose a statutory cap of three on the number of additional peremptory challenges and would require the court's leave to vary this. This would introduce a rigidity to the system, and the burden and cost to all of an extra pre-trial mention. The Committee notes that one of the factors



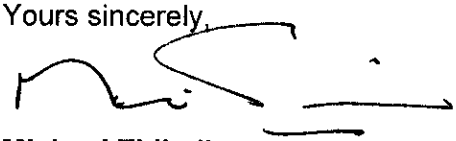
[1] *Johns v The Queen* (1979) 141 CLR 409 at 418.

a court has to consider if a party wishes to seek leave, as proposed by recommendation 43, is the extent to which it 'would be likely to add unduly to the length of the hearing' (s 192(2)(1) *Evidence Act 1995*). It would be a waste of court time to deal with this type of leave application when the current system is working well. The flexibility of the current system (with an extension to the number of challenges by consent and without leave) enables parties to deal with unexpected difficulties presented in a particular jury pool. A need to make application in advance of the trial to seek leave is cumbersome and would not cater to the unexpected situation.

The Committee considers that recommendation 43 and the proposal by the Chief Justice would introduce an unnecessary step when as noted in most cases the parties are able to agree between themselves on this issue. There appears to be no utilitarian purpose in changing the current system.

Thank you for the opportunity to provide comment.

Yours sincerely,



**Michael Tidball**
Chief Executive Officer