

CRIMINAL BAR ASSOCIATION OF VICTORIA

SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE FEDERAL COURT OF AUSTRALIA AMENDMENT (CRIMINAL JURISDICTION) BILL 2008

INTRODUCTION

1. On 4 December 2008 the Senate referred the provisions of *the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008* to the Standing Committee on Legal and Constitutional Affairs for inquiry and report.
2. By letter dated 10 December 2008 addressed to Peter Riordan SC, Chairperson of the Victorian Bar, the Committee invited written submissions to its Inquiry by 12 January 2008.
3. In turn, the Victorian Bar advised the Criminal Bar Association of Victoria of the invitation of the Committee to the Bar, and invited the Criminal Bar Association to make a written submission to the Committee.
4. The Criminal Bar Association offers the following written Submission to the Committee.

THE CRIMINAL BAR ASSOCIATION OF VICTORIA

5. The Criminal Bar Association 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.
6. The Association represents criminal barristers who principally prosecute, those who principally defend and those who have a mixed practice. The Association issues press releases, regularly meets with the judiciary and

government, and is involved in the continuing legal education scheme of the Victorian Bar. The website of the Criminal Bar Association can be found at www.crimbarvic.com.au and is regularly updated.

7. Members of the Criminal Bar Association 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.

HISTORICAL CONTEXT

8. The Criminal Bar Association notes that in 2005 the Australian Law Reform Commission ("ALRC") enquired into, and reported on, whether Part 1B *Crimes Act 1914* was "an appropriate, effective and efficient mechanism for the sentencing, imprisonment, administration and release of federal offenders, and what, if any, changes are desirable".¹
9. On 31 March 2005 the Commission held a hearing in Melbourne at which Richard Maidment SC (representing the Victorian Bar); John Champion SC (representing the Criminal Bar Association); Megan Tittensor (representing the Criminal Bar Association) and Ross Nankivell (representing the Victorian Bar Inc) attended.
10. Further to the oral discussions of that day, later in 2005 the Criminal Bar Association provided a written submission to the Commission on the issue of Sentencing of Federal Offenders.
11. It is relevant to note that the issue of a possible increase in jurisdiction of the Federal Court of Australia to include a criminal jurisdiction was discussed in the ALRC Issues Paper of January 2005, and further in an ALRC Discussion Paper of November 2005.²
12. In that Submission of the Criminal Bar Association we made the following comments:

¹ See: ALRC Terms of Reference, Issues Paper 29, page 5

² See: ALRC Issues Paper 29, January 2005, and ALRC Discussion Paper 70, November 2005.

“A Separate Federal System?”

34. In the List of Questions ³, and in the discussion appearing in Issues Paper 29 at Chapter 3.49 – 3.59, the Commission raises the issue of whether a separate federal system of criminal justice should be created.
35. This Association regards this as an important, complex and far-reaching issue. In truth, the issue appears to go beyond the terms of this reference to the Commission.
36. Notwithstanding, the issue of a separate federal system is a legitimate one to explore. It is a topic deserving of comprehensive treatment. The implications of such a major change in the Australian legal system extend significantly beyond the issue of federal sentencing.
37. We make the submission that the resolution of this matter requires a separate Reference to the Australian Law Reform Commission. If this was to occur the Criminal Bar Association of Victoria would be more than prepared to participate in the debate”. ⁴

SPECIFIC COMMENTS

13. We note in passing that no government body has requested our Association to so far contribute to any debate about a proposed increase in jurisdiction of the Federal Court of Australia, despite our stated willingness to be involved in the debate. We note further that the present Bill represents the first occasion of consultation that we are aware of.
14. We have had an opportunity to peruse the provisions of the *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill* 2008. The Bill comprises some 118 pages of complex draft legislation, including proposed consequential amendments to various Acts. Due to the time of year that the invitation was extended to consider this proposed legislation, and the short time limit imposed for making a Submission, the Criminal Bar Association has not had the opportunity to consider this Bill in the detail we would otherwise have regarded as essential for such important proposals.

³ List of Questions 5-2, ALRC Issues Paper 29.

⁴ Submission of the Criminal Bar Association of Victoria, at paras. 34-37.

15. Despite the lack of opportunity for detailed analysis, we are nevertheless able to say that in principle the proposal to provide the Federal Court of Australia with the relevant criminal jurisdiction is supported by this Association. Furthermore, whilst acknowledging that presently it is proposed to limit the extended jurisdiction to the disposition of cartel offences, we consider that there is merit in considering an expansion of the proposed jurisdiction to cover a wider field of criminal activity. However we recognise that this is more likely a matter for future debate, and consultation.
16. Bringing to bear our experience with the provisions of the *Victorian Crimes Act 1958*, and the impact of the development of common law on the provisions therein contained, we are of the view that the Bill provides what appear to be satisfactory and workable provisions as to form and procedure to enable the Court to deal with relevant criminal matters. However, we make the following brief specific observations:

Disclosure

Subdivision C of the Bill provides a comprehensive section that deals with the issue of disclosure. Experience shows that fair and proper resolution of criminal proceedings requires strong, effective, and continuing disclosure provisions in respect of the prosecution case. The provisions of this Bill appear between sections 23CD to 23CO.

We acknowledge the strength of these provisions and submit that in the parliamentary process there should not be a watering down of the effect of these provisions.

Furthermore, we would not agree with any proposal to require an accused to reveal his or her defence to the charges, subject to it being reasonable for the Court to require an accused to identify matters that are in issue at the trial of criminal proceedings. This may be done as part of a pre-trial process, and further, as part of an oral response to the prosecution's oral opening address before a jury. These are now standard practices in Victoria, and as such would be consistent with established and best practice in the State of Victoria. Such an approach encourages efficiencies in the processes of the Court, and allows the parties, and the court, to deal with the matters that are in issue.

Choice of Venue

17. Indictable proceedings are normally commenced by the prosecution filing an Indictment in a Court, there having been committal proceeding. We read the provisions of this Bill to provide for the possibility that in Victoria, for example, the prosecution could choose to institute a criminal trial in one of three indictable venues, namely, the Federal Court of Australia; the Supreme Court of Victoria; or, the County Court of Victoria.⁵
18. Given that three forums exist for the institution of the criminal trial, we note that the provisions of the Bill appear silent in giving the accused any say in the venue in which he or she might be tried. The choices seem limited to the discretion of the prosecution. This appears to be made clear in the Explanatory Memorandum.
19. It is our view that some safety valve should be provided for in the draft legislation which gives a legislative right for an accused person to have some say about the venue in which she or she is to be tried. This could be achieved by providing for the clear right make submissions about the appropriate forum at the committal stage, upon committal for trial taking place, and, the right to be heard in an application to change venue, at the point at which the indictment is filed in the superior court. We read the present provisions as allowing for criticism of the part of the prosecution in forum shopping. We believe that some curial control should be exercised over the discretion of the prosecution to indict where ever it pleases.
20. Further, the Court should have power, as exists in the Supreme Court and County Court of Victoria, to make venue changes of its own volition, provided that the parties have the ability to appear and make submissions about the issue. In that way, the Federal Court could choose to transfer proceedings to either of the two other courts. Likewise, those Courts should have the power to transfer proceedings to the Federal Court, if it regards that as an appropriate course to take.

⁵ The Explanatory Memorandum makes reference to the choice of Federal Court, or Supreme Court only. See p.2. However, it would appear that on present reading of the Bill, the County Court would not be excluded from hearing trials relating to cartel offences.

CONCLUSION

38. Other matters are clearly raised for discussion in the draft legislation. This Submission has not set out to address all matters raised in the Bill. There simply has been insufficient time and resources available to our Association. Accordingly, our Association has addressed some matters that seemed to it to be of significant practical importance. The failure to address many other matters should not be taken to mean that they are unworthy of discussion. Clearly many matters are important.

39. Should the Committee require further assistance in respect of any matters relevant to the Inquiry there should be no hesitation to contact John Champion SC, Chairman of the Criminal Bar Association at john.champion@vicbar.com.au

40. For the purposes of fulfilling requirements of authenticity it can be taken that John R. Champion SC is the author of this Submission, and can be contacted at Aickin Chambers, 27th Floor, 200 Queen Street, Melbourne 3000. He can be contacted by telephone at 03-9225 7777.

CRIMINAL BAR ASSOCIATION OF VICTORIA

16th January 2009