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LAW REFORM COMMISSION

CRIMINAL PROCEDURE

THE JURY IN A CRIMINAL TRIAL

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The Commission invites submissions on the issues raised in this Discussion Paper. A Comment Sheet may be found at page 269. We would be pleased to receive replies in this form. Submissions and comment sheets should reach us by 31 December 1985. All inquiries and comments should be directed to:

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TENTATIVE PROPOSALS

AND

ISSUES RAISED FOR CONSIDERATION

CHAPTER 3: TENTATIVE PROPOSALS

1. All electoral subdivisions should be allocated to jury districts pursuant to section 9(2) of the Jury Act, 1977: paragraph 3.18.

2. The only ground for exemption as of right should be hardship to the applicant or to others. Schedule 3 to the Jury Act, 1977 should accordingly be repealed: paragraph 3.22.

3. Commonwealth Public Servants, Divisions 3 and 4, should be available to perform jury duty in New South Wales courts. Clause 16 of Schedule 2 to the Jury Act, 1977 should be repealed: paragraph 3.30.

ISSUES RAISED

* Whether spouses of people in ineligible occupations, or some of them, should be liable to perform jury service. Currently the spouses of Judges, Masters, Members and officers of the Parliament, Magistrates, police officers, Crown Prosecutors, Public Defenders and prison officers are ineligible for jury service: paragraph 3.20.

* Whether people given non-custodial sentences should be disqualified from jury service. Currently a person who has been:

  (a) convicted of an offence which may be punishable by imprisonment;

  (b) bound by recognizance to be of good behaviour or to keep the peace;

  (c) the subject of a probation order; or

  (d) disqualified from holding a licence to drive for a period in excess of six months,

  is disqualified for five years: paragraph 3.21.

* Whether people aged between 65 and 70 should be required to perform jury service. Currently people of or above the age of 65 may claim an exemption as of right: paragraph 3.25.

* Whether people of or above the age of 70 should be ineligible for jury service. Currently such people are qualified but may claim an exemption as of right: paragraph 3.25.

* Whether measures should be taken to encourage people with the responsibility for caring for young children to make themselves available for jury service. Currently people having the care, custody and control of children aged under 18 may claim an exemption as of right: paragraph 3.26.

* Whether mobility-impaired people should be considered to be ineligible for jury service by reason of illness or infirmity. Currently such people are deleted from the jury roll on this ground if they so request: paragraph 3.28.

* Whether the ability to read English should be a necessary qualification for a juror. Currently those unable to read English are ineligible for jury service: paragraph 3.29.

CHAPTER 4: TENTATIVE PROPOSALS

1. It should be an offence for the Sheriff to permit inspection of the jury panel before the first day of the trial: paragraph 4.19.

2. The number of peremptory challenges in all cases, including murder, should be reduced to three or four for each accused and a total of three or four for the Crown irrespective of the number of co-accused: paragraph 4.20.

ISSUES RAISED

* Whether counsel should be provided with further information about prospective jurors to assist the making of challenges, and, if so, on what conditions: paragraph 4.22.

* Whether the full name or the surname only of each prospective juror should be read in court: paragraph 4.22.

* Whether the juror's oath should be simplified and the text of the oath read aloud by each juror: paragraph 4.23.

CHAPTER 5: TENTATIVE PROPOSALS

1. The Notification of Inclusion on a Draft Jury Roll should:
   (a) include an explanation in major languages other than English as to the import of the Notification;
   (b) advise that people unable to read or understand English are ineligible for jury service;
   (c) include a brief explanation of the nature of jury service;
   (d) advise recipients that a penalty can be imposed for failure to respond as and where appropriate; and
   (e) advise recipients that the Sheriff has a discretion to excuse people from jury service for good cause: paragraphs 5.7–5.8.

2. The Jury Summons should:
   (a) advise recipients that applications to be excused may be made to the Sheriff;

(b) advise recipients that application to be excused may be made in person to the presiding judge on the day on which attendance is required: paragraph 5.9.

3. An Explanatory Booklet should be prepared and distributed to every person summoned for jury service. This Booklet should discuss the nature of a juror's responsibilities, the jury's role, the conduct of trials and explain common concepts which will be used: paragraph 5.10.

4. The Jury Act, 1977 should, for the sake of certainty, be amended to provide that jurors have a right to be provided with reasonable refreshment and standard amenities during adjournments of a trial: paragraph 5.14.

5. The presiding judge should advise the jury panel as to the estimated length of the trial and should excuse those who apply to be excused because they would be likely to be adversely affected if required for that period: paragraph 5.16.

6. Jury fees should be raised to the level of male average weekly earnings. Jurors who continue to receive a wage or salary while performing jury duty should not be entitled to claim the jury fee: paragraph 5.22.

7. Jurors should be entitled to claim compensation for personal injury sustained during a period of jury service in the same way and on the same basis as claims can be made under the Workers' Compensation Act, 1926: paragraph 5.25.

ISSUES RAISED

* Whether a videotaped film explaining the jury's role, court procedures and common concepts used in criminal trials should be shown to prospective jurors before any jury is empanelled: paragraph 5.11.

* Whether the jury should be permitted to separate after it has been charged to consider its verdict: paragraph 5.17.

* Whether travelling expenses should be paid to jurors and, if so, what form they should take: paragraph 5.25.

* Whether publication of jurors' identities should be permitted and, if so, in what circumstances: paragraph 5.29.

CHAPTER 6: TENTATIVE PROPOSALS

1. Procedures should be formulated to ensure that the trial judge addresses jurors at the commencement of the trial on the following topics:
   * the course the trial will take;
   * the role of the jury; and
   * the law on matters such as the standard and burden of proof and the presumption of innocence: paragraph 6.3.

2. Each juror, at the discretion of the trial judge, should be provided with a file containing the following documents:
   * a copy of the indictment: paragraph 6.4;
   * a copy of the documentary exhibits: paragraph 6.11; and
   * a document setting out the alternative verdicts available to the jury: paragraph 6.31.

ISSUES RAISED

* Whether the jury, at the commencement of the trial, should be provided with a written statement of the facts to be proved by the Crown or of the elements of the offence(s) charged: paragraph 6.5.

* Whether defence counsel should be permitted to open to the jury at the end of the Crown opening: paragraph 6.7.

* Whether the jury should be provided with a glossary of legal terms: paragraph 6.8.

* Whether counsel should be permitted briefly to introduce each witness by referring to the element(s) of the offence to which his or her evidence relates: paragraph 6.9.

* Whether jurors should, as a matter of course, be provided with notebooks and pens and told of their right to take notes: paragraph 6.16.

* Whether detailed instructions on the relevant law should be given at the commencement of the trial: paragraph 6.20.

* Whether judges should be required to use standard forms to instruct juries on relevant law where such forms are available: paragraph 6.30.

* Whether directions of law should be provided to the jury in writing: paragraph 6.30.

CHAPTER 7: TENTATIVE PROPOSALS

1. Judges should request Crown counsel to outline for the jury panel the nature of the case and the identity of the accused and likely witnesses. The judge should then request people who feel they would be unable to give impartial consideration to the case to come forward: paragraph 7.6.

2. The court officer responsible for the jury should be required to take an oath when being put in charge of the jury, undertaking to shield the jury from outside influences: paragraph 7.9.

3. Pre-trial hearings should be used, where possible, to resolve disputes as to the admissibility of evidence, both to avoid interrupting the trial with voir dires for this purpose and to reduce the risk that the jury will hear inadmissible evidence: paragraph 7.15.

4. Where there has been substantial pre-trial publicity, the judge should invite people who feel they have been prejudiced by this to apply to be excused: paragraph 7.16.

ISSUES RAISED

* Whether additional measures should be taken to ensure that corrupted jurors do not serve on juries: paragraph 7.8.

* Whether trial judges should, at their discretion, allow a trial which has been affected by the publication of prejudicial material to continue to its conclusion (instead of discharging the jury) on the understanding that a verdict of guilty would be quashed because of the irregularity: paragraph 7.9.

* Whether judges should be empowered to order that members of the social or peer groups of the accused should be included on the jury: paragraph 7.12.

* Whether the judge's instruction limiting the use to which prejudicial information can be put is a sufficient guarantee that the jury will not be prejudiced: paragraph 7.15.

* Whether the contempt laws in relation to the publication of material likely to prejudice a jury are adequate and appropriate: paragraphs 7.21-7.22.

* Whether, in cases where pre-trial publicity has been extremely prejudicial, the accused should be entitled to apply for trial by a judge sitting without a jury: paragraph 7.23.

CHAPTER 8: TENTATIVE PROPOSALS

1. It should be a universal practice for the jury to be advised of its right both to ask questions of the judge and to have any part of the evidence read from the transcript: paragraph 8.5.

2. The minimum deliberation period before a jury can be discharged without verdict should be reduced from six hours: paragraph 8.17.

ISSUES RAISED

* Whether juries should ever be denied access to certain exhibits and, if so, on what grounds: paragraph 8.3.

* Whether multiple copies of documentary exhibits should be provided to the jury: paragraph 8.3.

* Whether the jury should be provided with a transcript of all or part of the evidence either as a matter of course, at its request, or at the discretion of the presiding judge: paragraph 8.4.

* Whether jurors should be prohibited by statute from disclosing their deliberations: paragraph 8.12.

* Whether the publication of disclosures by jurors about their deliberations should be an offence: paragraph 8.13.

* Whether the evidence of jurors about the jury's deliberations should be admisible in subsequent legal proceedings and, if so, in what circumstances: paragraph 8.14.

* Whether any change to the current practice whereby the jury is advised to elect a foreman as early as possible is necessary: paragraph 8.15.

CHAPTER 9: TENTATIVE PROPOSALS

1. Each member of a jury in a criminal trial should be polled to ensure that the verdict is unanimous: paragraph 9.4.

2. Where alternative factual bases for a conviction are left to the jury, the judge should direct the jury to consider on which ground its verdict is based. When the verdict is rendered in such a way that the ground accepted is not clear, the judge should first ask the foreman whether the jury reached a unanimous view as to which ground it accepted. Only if the jury's view is unanimous should the judge ask which ground was accepted. The jury's answer should be binding on the judge when sentencing: paragraph 9.17.

3. Where both the first jury and the second jury have failed to reach agreement after being asked to deliberate upon a verdict, statute should provide that there will not be a third trial: paragraph 9.22.

ISSUES RAISED

* Whether the jury should continue to have the prerogative to recommend mercy and, if so, whether it should be told of this in the summing-up: paragraph 9.5.

* Whether the rule requiring a jury's verdict to be unanimous should be retained: paragraph 9.10.

* Whether the judge in a criminal trial should have a discretion to request the jury to return a special verdict and, if so, in what circumstances: paragraph 9.14.

* Whether juries should be discharged immediately they have delivered their verdicts or whether the matter should remain at the discretion of the presiding judge: paragraph 9.23.

CHAPTER 10: TENTATIVE PROPOSALS

1. Trial by a jury of twelve citizens randomly selected from the general community should be retained for all serious criminal cases: paragraph 10.15.

2. The evidence of technical and scientific witnesses should, if the presiding judge considers it would assist the jury, be capable of being given by:

(a) reading a document; and/or
(b) tendering the document, provided that the witness is available to give oral evidence if required.

The question whether either procedure should be adopted should be settled at a pre-trial hearing: paragraph 10.17.

3. The power of the presiding judge, in his or her discretion, to instruct the jury as to individual charges and individual accused and to require the jury to deliberate separately on each should be affirmed: paragraph 10.18.

4. The power of the presiding judge, in his or her discretion, to provide to the jury a written statement setting out the alternative verdicts available should be affirmed: paragraph 10.18.

5. When a trial is expected to be lengthy, the summons to the jury panel should include a notice to this effect inviting potential jurors to apply to the Sheriff for excusal where necessary: paragraph 10.19.

6. The additional juror procedure should be introduced in New South Wales by an amendment to the Jury Act, 1977. At the end of the evidence, if the remaining jurors exceed twelve, twelve only should be ballotted to form the deliberating jury: paragraph 10.23.

ISSUE RAISED

* Whether the minimum allowable size of a jury should be less than ten at the judge's discretion and irrespective of the consent of the Crown and the accused: paragraph 10.21.

Preface

I. INTRODUCTION

A. Terms of Reference

On 17 January 1982, the Attorney General of New South Wales, the Hon. F.J. Walker, Q.C., M.P., made the following reference to the Commission:

> "To inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto; and in particular, without affecting the generality of the foregoing to consider -
>
> (a) the means of instituting criminal proceedings;
>
> (b) the role and conduct of committal proceedings;
>
> (c) pre-trial procedures in criminal proceedings;
>
> (d) trial procedures in matters dealt with summarily or on indictment;
>
> (e) practices and procedures relating to juries in criminal proceedings;
>
> (f) procedures followed in the sentencing of convicted persons;
>
> (g) appeals in criminal proceedings;
>
> (h) the classification of criminal offences;
>
> (i) the desirability and feasibility of codifying the law relating to criminal procedure."

B. History of the Reference

In December 1982 the Commission published an Issues Paper which was principally concerned with proceedings in Courts of Petty Sessions (now renamed Local Courts). Work on the reference was then deferred because of staff changes and

the concentration of the Commission's resources on its major reference on Accident Compensation. Work was resumed in the second half of 1984 when Mr. Paul Byrne was appointed as Commissioner in charge of this reference. In October 1984 the Criminal Procedure Division of the Commission decided to commence intensive research on the subject of juries with a view to producing a Discussion Paper for community consultation. Ms. Meredith Wilkie, then a Legal Officer at the Commission and currently Acting Senior Legal Officer has been primarily responsible for this research and for writing this Discussion Paper.

B. Program for the Reference

As can be seen the terms of reference are very wide. They cover all criminal proceedings in all State Courts. The Commission has planned a program of research by dividing the reference into the following areas:

* the classification of criminal offences;
* procedure before trial;
* trial procedure;
* the jury in criminal trials;
* penalties and sentencing;
* appeal procedure;
* criminal investigation; and
* the organisation of prosecuting authorities.

For each topic, the Commission intends to publish a working paper describing current law and practice which puts forward, where appropriate, tentative proposals for change. These

papers will be distributed widely to interested groups and individuals for consideration and comment. Following this public consultation, the Commission will report to the Government. In these reports the Commission will make recommendations for reform.

As a background, or perhaps more accurately, as a foundation, to its work on criminal procedure, the Commission has been engaged in an examination and analysis of the fundamental principles of criminal justice. The tangible result of this project will be found in a statement of the principles and standards which have been applied to each phase of the Commission's work. So far as juries are concerned, this statement can be found at page 7 of this Discussion Paper. Whilst it is desirable that there be consistency among the various branches of criminal procedure, differences in emphasis can be anticipated, depending on the specific area which is under consideration.

C. The Commission's Objectives

The criminal law and the manner in which it is enforced have a significant impact on the quality of life enjoyed by the individual citizens of any community of people. It has been said that the administration of criminal justice is the most important function of government in a civilised community.

> There is no accepted test of civilisation. It is not wealth or the degree of comfort or the average duration of life or the increase of knowledge. All such tests would be disputed. In default of any other measure, may it not be

> suggested that as good a measure as any is the degree to which justice is carried out, the degree to which men are sensitive as to wrong doing and desirous to right it.[1]

In order to be effective the criminal justice system must not only reflect community standards of fairness and justice, it must also enjoy the confidence of the public. In order to do that it should be capable of surviving public scrutiny. The Commission regards this project as one of the most important it has undertaken. Every person is a potential participant in the criminal justice system either as an accused person, a victim, a witness or a juror. While the 'quality of life' of every citizen in New South Wales is affected by the criminal justice system, it is as important to recognise that the standing of this community within the international community of nations is, at least in the eyes of some observers, directly related to the standard to which it aspires in the administration of justice.

II. THE JURY IN A CRIMINAL TRIAL

A. Introduction

The terms of reference specifically refer to "practices and procedures relating to juries in criminal proceedings". In recent times attention has been focused on the operation of the jury system in Australia, particularly in Victoria and South Australia, with debate centering on the relevance of the jury to modern conditions. In June 1984 Victoria's Chief Police Commissioner, Mr. Mick Miller, called for the abolition of juries. He claimed that jurors were ill-equipped to decide

complicated matters of fact.[2] Victoria's Attorney-General, Mr. Jim Kennan, countered by describing the jury system as "basic to the notion of democracy".[3] At about the same time a similar debate was conducted in the South Australian media after a bill to amend the Juries Act, 1927 was introduced into Parliament. That amendment, which was passed in October 1984, abolished civil juries and made jury trial in criminal cases optional at the instance of the accused person.[4] Again the police argued publicly that criminal juries should be abolished,[5] while others, including the South Australian Law Society, condemned the amendments.[6]

The well publicised trial of Michael and Lindy Chamberlain and the South Australian Royal Commission of Inquiry into the conviction of Edward Splatt have also focused attention on the competence of criminal juries. In these two cases the primary issue in question was the ability of juries to assess complex forensic evidence. There has also been some interest in the subject in New South Wales. Published letters to the editor of the Sydney Morning Herald have called for an overhaul of the State's jury system, for inquiry and reform.[7] The Commission has responded to this interest in the jury system both by producing this Discussion Paper for the purpose of community consultation and by undertaking a comprehensive programme of empirical research which is described in the Appendix. The concluding stage of our preliminary research has coincided with the aftermath of the trial of Mr. Justice Murphy. This has increased the interest of the media (and

probably the community) in the jury system to unprecedented levels and given stark prominence to this aspect of the administration of criminal justice.

B. Scope of this Discussion Paper

This Discussion Paper is concerned both with the administration of the jury system outside the court room and with the use of the jury in criminal trials. The topics covered are:

* the selection of jurors;
* shielding jurors from prejudice;
* presenting evidence to jurors;
* communication with jurors;
* jury deliberation;
* the jury's verdict; and
* the special problems of long and complex trials.

An attempt has been made to describe the law and procedure relevant to the jury system as well as to identify problem areas. Where possible, the Commission has made tentative proposals for reform. Elsewhere a variety of issues are canvassed. Any tentative conclusions reached do not, by any means, preclude discussion. On the contrary, where the Commission does express a preference for specific reforms, we do so with the intention of provoking debate and encouraging submissions.

Fundamental Principles Related to the Jury System

In the course of examining the law and practice relevant to the questions which the Commission is addressing in this aspect of the Criminal Procedure reference, and in considering the various proposals for change that have been suggested in the course of this inquiry, we have recognised certain principles which we regard as fundamental. They are at once the foundation upon which our work on this subject is based and the signposts which guide the direction of any movement for change. These principles have played an important role in our assessment of the current law and practice and in the formulation of our tentative proposals for reform. We intend to state them in detail. They are not in any particular order of priority.

1. The Desirability of Community Participation

The public interest in the orderly administration of justice is clear. Community participation is one means of ensuring that accountability is preserved as a real and practical feature of the system of criminal justice. If community participation is desirable, then it should be encouraged. Where it is seen to impose a burden, then that burden should be evenly distributed by being shared equally among the members of the community.

2. Fairness and Justice

The overriding feature of any system of criminal justice should be that it is fair. In achieving this goal, the principle that justice should not only be done but be seen to be done is important. The appearance of justice is part of the substance of justice. In particular, it is necessary that there be an emphasis on the protection of the disadvantaged. People whose knowledge of the criminal justice system is limited and those whose ability to participate is restricted should not be prevented from receiving the benefits of a system which is supposed to distribute its benefits equally and consistently.

3. Efficiency

The need for efficiency in the administration of criminal justice may be measured primarily by reference to the standard and quality of justice and secondly by reference to the cost and the duration of criminal proceedings. The efficient use of available resources involves those resources being applied to achieving a fair result in an acceptable manner for the least possible cost and in the shortest possible time. Duplication and waste of resources, incorrect decisions and unsatisfactory methods of procedure are indicators of inefficiency.

4. Consistency with Flexibility

Since the objective of certainty in the definition of the criminal law, which we regard as important, implies that like cases will be treated alike, there is a consequent need for consistency in the approach to and the disposition of cases of a similar kind. While this objective should be pursued to obtain uniform results, at the same time the need for flexibility to cope with the variations between cases should be recognised.

5. The Right to Trial by a Competent Court

This right cannot be effectively achieved without ensuring that the tribunal called upon to make decisions in a criminal case makes those decisions in an informed way. This necessarily requires an understanding of all the issues which the case raises. In particular, the competence of the tribunal of fact should be pursued as a desirable practical goal.

6. The Elimination of Misleading Practices

The rules of criminal evidence and procedure should be designed primarily to facilitate a fair trial. They should embody practices which are open and realistic and take account of current standards of knowledge within the community.

7. Minimising the Risk of Convicting the Innocent

The rules of criminal procedure should be formulated so as to minimise the risk that people who are in fact innocent are wrongly convicted. We recognise that the pursuit of this

objective may result in the development of rules which enable people who are actually guilty to avoid conviction. We consider the ancient homily that it is better to let several guilty persons go free than to convict one innocent person to be an undoubtedly proper statement of principle.

8. The Grounds on which the Law should be Changed

The law and practice of the conduct of criminal proceedings should not be altered unless there is a clearly demonstrated need for reform. Accordingly those who propose reforms carry the burden of showing the need for them and the utility and desirability of the new laws or practices which they propose. We should not recommend change merely for the sake of change.

9. The Publicity of Criminal Justice

The recognition of the need for the courts to be open to public scrutiny implies that the community has a right to access to, and information about, court proceedings. There are circumstances in which otherwise legitimate publicity will prejudice the conduct of a fair trial. Where this occurs there is a conflict between the objectives of conducting a fair trial and maintaining the public's access to the criminal courts. There is, accordingly, in those circumstances a need to balance these interests.

Footnotes

1. Sir John MacDonnel, Historical Trials (Oxford University Press, London, 1927), at p.148.

2. The Age 2 June 1984.

3. Ibid.

4. Juries (Amendment) Act 1984 (S.A.).

5. Sunday Mail 6 May 1984.

6. Ibid.

7. Sydney Morning Herald 6 October 1984, at p.14 (P. Stevens); 19 October 1984 (F.L. Poulier, W.R. Carney); 19 November 1984, at p.10 (H. Edwards).

Chapter 1

Historical Background

I. INTRODUCTION

1.1 A discussion of the features and possible reform of the modern jury should be prefaced by a description of its historical development. This is so for a number of reasons. First, an examination of the course of the jury's development will show clearly that the jury is an institution which can evolve to serve changing conditions without detriment to its essential nature. Second, such an examination reveals that each age has valued the jury not only as a time-honoured tradition but also as an institution which is one of the indicia of our concept of democracy. This is shown most clearly by the demands for the introduction of jury trial pressed by the first British settlers of New South Wales. Thirdly, it is clear that the features of the criminal jury as we know it in New South Wales - the jury of twelve ordinary people chosen at random, deliberating in secret and rendering a unanimous verdict - have evolved over time and are even now by no means universal. In different ways in different jurisdictions the features of the jury have evolved further: sometimes only in the interests of cost-saving and efficiency; at other times to reflect community expectations.

II. ORIGINS OF THE JURY

1.2 Our right to trial by our peers is often said to be a sacred and fundamental right enshrined in the Magna Carta of 1215. However, jury trial did not spring fully-fledged into

being on that date. Rather it developed over many centuries. The group of twelve was originally used to provide, rather than find, the facts. The Normans introduced this method of gathering information for fiscal and administrative purposes: twelve local men would be sworn and would furnish information about rights to land or numbers of livestock. Local men, in groups of twelve, would also be sworn and required to inform the King's itinerant judges of suspected criminals. Such groups became known as juries of accusation. Suspects were then always tried by one of several 'ordeals' in which God was invoked to distinguish the innocent from the guilty.[1]

1.3 The body of twelve is also found in the civil procedure known as compurgation. This ancient procedure, used in actions of debt and detinue until about 1600, involved the defendant swearing he or she did not owe the money and producing eleven "oath-helpers" to testify as to his or her credibility.[2] The criminal jury also has roots in the grand jury. The grand jury, in later times numbering twenty-three members of a community, was a jury of presentment. When people were accused of crime, the grand jury was convened

> ... to decide whether there was sufficient evidence to put individuals on trial before the justices. If the grand jurors considered that there was a case to answer, they found the bills 'true' by writing billa vera on the back; if not, they endorsed the bill ignoramus (we do not know) and proceedings on the bill ended. The finding of a true bill by the grand jury was not a judgment or a finding of guilt, and it required only a majority vote of twelve; it was an accusation upon reasonable suspicion, the effect of which was to initiate proceedings between the king and the accused person to try the issue of guilt.[3]

1.4 When trial by ordeal of water was virtually abolished by the Pope's order at the Fourth Lateran Council of 1215 that priests were no longer to participate, English judges had to find a way other than reliance on God and religious conviction of trying the question of guilt. Since the facts were outside their own knowledge, the judges could not decide on guilt. Over time the jury of accusation came to be used to swear to the facts and make a true decision. By the end of the thirteenth century this group became the trial jury, the petty jury of twelve countrymen. The Magna Carta of 1215 provided another model for the jury. Among other things, it guaranteed the nobility, who had long objected to being tried in the King's courts, trial by their peers.[4]

1.5 Thus, the fundamental form of the jury can be found in a range of legal practices which offered procedures appropriate to criminal trials. Over the ensuing centuries, as criminal law evolved, the features of the jury also changed. In great part these changes were brought about by considerable opposition to the use of juries to try criminal matters. There was initially some concern that criminal issues were too important, especially where the death penalty applied, to be left to human fallibility. Trial by ordeal could be preferred because "jurors might err where God would not".[5] It may be that the requirement that a jury's verdict be unanimous, established in 1367, was motivated, in part, by a comparison with trial by ordeal. In order to approximate the certainty and reliability of the ordeal, jury trial at least had to offer

a unanimous decision. The principle that juries should be impartial also took centuries to develop. It was not until 1352 that an accused person could object that members of the trial jury had also been members of the jury of accusation.[6] Yet the early jury continued to be formed as it was precisely because, being from the same community as the accused person, it, unlike the judges, could be expected to know the circumstances of the alleged offence. During the fourteenth century jurors were even actively encouraged to inform themselves before trial. Gradually, however, it became an irregularity for a party to communicate privately with jurors, at least once they were sworn. To avoid improper influences, the practice arose of isolating the jury during the trial. By the middle of the sixteenth century it was irregular for jurors even to inform each other of facts within their private knowledge without giving evidence in open court.[7] Thus, three centuries passed before the jury became a body charged with determining a civil dispute or a criminal accusation on the evidence presented alone.

1.6 It took somewhat longer to develop the concept of the jury as the sole trier of facts, distinct from and independent of the presiding judge. Until 1670, juries were frequently punished, by fines and imprisonment, for bringing in perverse verdicts, especially verdicts contrary to the directions of the judge. In that year the independence of juries was authoritatively established.[8] The democratisation of the jury has been an even more recent development. Property

qualifications once ensured that juries were "predominantly male, middle-aged, middle-minded, and middle class".[9] The property qualification was not abandoned in New South Wales until 1947, and not until 1967 in the United Kingdom. It was not until 1977 that the privilege of jury service was extended to women on the same basis as men in New South Wales.

III. THE JURY IN NEW SOUTH WALES

A. The Introduction of Civil Juries: 1823

1.7 While juries were used at inquests by coroners,[10] the right to trial by jury did not accrue to the early British settlers in Australia for the probable reason that it was considered inappropriate for a convict settlement controlled by the military.[11] The Letters Patent of 1787 constituted a criminal court of a Deputy Judge-Advocate and six naval or military officers. In 1809 Deputy Judge-Advocate Bent criticised this court as having too close an analogy to a court martial. As the free population expanded, the demand for the right to jury trial grew and in 1823 the Imperial Parliament passed the New South Wales Act establishing a Supreme Court and providing for civil jury trial on the application of a party. If there was no such application, the usual mode of civil trial was by a judge sitting with two assessors, who were Magistrates or Justices of the Peace.[12] There is some evidence that a grand jury of indictment was convened in Sydney in the 1820's, but this institution has never been legislatively introduced in New South Wales.[13] Civil jurors had to own 50 or more acres of cleared land, or other real

property to the value of at least 300 pounds, which property had to be situated in the colony.[14] The Act of 1823 further provided that any person accused of any crime, misdemeanour or offence was still to be tried by a judge and seven commissioned army or navy officers nominated by the Governor.[15] The Australian Courts Act of 1828 continued these provisions. The Act of 1828 also provided for the establishment of Courts of General and Quarter Sessions for the summary trial of convicts on all charges except where the death penalty applied.[16]

1.8 In 1832 an Imperial statute was passed setting out more fully the qualifications of civil jurors and the grounds of disqualification and exemption. Every male between the ages of 21 and 60 resident in Cumberland county (an area somewhat larger than the present Sydney metropolitan area) having, within the colony, a clear income from real estate of at least 30 pounds per year or a clear personal estate of at least 300 pounds value was qualified and liable to serve on a civil jury.[17] Men falling within this category who:

* were not natural-born subjects;
* had been convicted of treason, felony or any infamous crime; or
* were of bad fame, of dishonest life or conduct, or of immoral character or repute,

were disqualified.[18] Certain men were exempted from serving: that is to say, they were not liable to serve "except by and with their own consent". This class included judges, practising lawyers, members of the Legislative and Executive Council, priests and clergymen, medical practitioners, police, officers in the services, and schoolmasters.[19]

1.9 The administration of the jury system established in 1832 was substantially continued until 1977. Each district's jury list was prepared annually, either by the Superintendent of Police or a Bench of Magistrates. The list was published and objections to any people included were heard and determined by specially convened Courts of Petty Sessions. Once finalised, the list was forwarded to the Sheriff for entry into the Jurors' Book. When required, jurors were summoned from the list in alphabetical order.[20]

1.10 Where a civil jury was granted the Court was required, if an application was made by a party, to order a special jury. Special juries were constituted by people of a higher station than was acceptable for common juries. Thus a man described in the Jurors' Book as an Esquire or being of a higher social status, a Justice of the Peace, a merchant or a bank director was qualified to serve on special, as well as on common, juries.[21]

B. The Introduction of Criminal Juries: 1832

1.11 The usual mode of criminal trial continued to be by a judge sitting with a jury of seven army and/or naval officers. However, from 1832 if a free settler charged with any crime, misdemeanour or other offence in the Supreme Court, showed that the Governor, a Member of the Executive Council or any officer of the services had a personal interest in the case, the Court would order the trial to be held before a jury of twelve civilian residents. The jurors were to be selected from the special jurors' list.[22]

1.12 In 1833 criminal trial by civilian juries of twelve was made available on request to all people, free settlers and convicts alike, charged with crimes misdemeanours or offences in the Supreme Court.[23] Convicts were still tried summarily when charged in Courts of General and Quarter Sessions. These Courts were also opened to the trial of free settlers who, when charged there, were entitled to jury trial.[24] The jurors were to be drawn from the Jurors' Book rather than from the special jurors list unless the Crown or the accused requested a special jury. In that event the Court was required to order a special jury.[25]

1.13 In 1838 criminal trial by seven commissioned army or navy officers was finally abolished and all trials of free settlers (or freed convicts) in the Supreme Court and the Courts of General and Quarter Sessions were to be by civilian juries of twelve.[26] As the populations in certain areas increased sufficiently to make jury trial viable, this right was extended. Thus jury trial became available in Parramatta, Campbelltown, Windsor, Bathurst and Maitland in 1833,[27] and in Berrima in 1839.[28] By 1840 all major towns had Circuit Courts and juries for these courts were summoned from the local residents.[29]

C. The Introduction of the Civil Jury of Four: 1844

1.14 In 1844 the use of assessors in civil cases was wholly discontinued. The usual mode of civil trial became the jury of four special jurors.[30] If a party applied for a jury of

twelve the Court could grant it and could order such jury to be constituted by common or special jurors or both.[31] For the first time provision was made for less than unanimous verdicts in civil trials. If, after at least six hours deliberation, a civil jury was not unanimous, the verdict of three-quarters of their number (3 of a jury of 4; or 9 of a jury of 12) would be accepted. If a majority verdict could not be agreed upon after twelve hours, the jury would be discharged.[32]

D. Consolidation of the Legislation: 1847

1.15 In 1847 the juries legislation was consolidated. The qualifications and disqualifications for common jurors remained unaltered.[33] The list of those automatically exempt (their names would not be inserted in the lists) was expanded by including bank staff, public servants and those incapacitated by disease or infirmity from performing jury duty. The only people who had to claim the exemption in order to be exempted were those over sixty.[34] The special juror qualification was extended to include city council members.[35] The common jury of 12 was to be the usual mode of criminal trial, although the Court could order a special jury if the prosecutor or accused applied for one (except in cases of treason or felony).[36] The special jury of four was to continue to be the usual mode of civil trial, although the Court could order a jury of twelve on the application of a party.[37] The right of both parties to challenge the array alleging impartiality on the part of the Sheriff was expressly preserved as was the right of the prosecutor to ask jurors to stand by for the Crown. Particular

jurors could only be challenged by the Crown for cause but the accused in a case of treason or felony had twenty peremptory challenges.[38] In civil cases the challenge procedure was not used. Instead the list of prospective jurors - twice the number needed - would be sent to each party in advance of the trial and each would strike a quarter of the number. Those remaining formed the jury.[39]

1.16 The law as to juries, their selection and administration, remained essentially the same from 1847 until 1947. In 1876 it was provided that jurors were no longer to be summoned in alphabetical order but by lot. The same Act enlarged the qualifications for special jurors.[40] The qualifications of common jurors were also extended to include men who had been naturalized or who, although aliens, had been resident in the Colony for at least seven years.[41]

E. Reduction in the Use of Juries

1.17 As the colony grew, the need to deal more expeditiously with minor offences become apparent. In 1833, Police Magistrates were appointed in Sydney to deal summarily with breaches of the peace and similar offences.[42] An Act of 1883 provided for the summary trial of certain assaults, larcenies, frauds and malicious damage at the discretion of the magistrate.[43] Section 501 of the Crimes Act, 1900 now provides for the summary trial of certain indictable offences without the accused's consent. In 1900, these offences were common and aggravated assaults, except where accompanied by an

attempt to commit a felony; minor larcenies; receiving stolen property; and malicious damage.[44] Section 501 was amended in 1924 and a property value limit was imposed on indictable offences triable summarily without the accused's consent. The limit at that time was ten pounds.[45] This amount was increased in 1955 to fifty pounds,[46] in 1974 to $500,[47] and in 1983 to $2,000.[48] At the same time, the range of offences subject to section 501 was also increased.[49]

1.18 Another way of reducing the use of juries was to offer people charged with certain more serious indictable offences the choice of summary or jury trial. The inducement to choose trial before a magistrate was, and continues to be, that the penalties available to a magistrate are less severe than in the higher courts. Not every accused person has this option. The most serious offences are still triable only by a jury. In 1900, the Crimes Act permitted a range of indictable offences to be dealt with summarily if the accused consented and the magistrate was of the view that the offence was suitable, so long as the subject matter of the charge was less than twenty pounds. The offences included simple larceny, conversion as a bailee, stealing, dog-stealing (second offence), damage with intent to steal, stealing or destroying plants, stealing from a boat, stealing as a servant, false pretences, and attempts to commit any of the above. Upon summary conviction the maximum penalty was six months imprisonment or a fine of 20 pounds, substantially less than the maximum penalties available upon conviction by a jury.[50] In 1924 the maximum value of the

subject matter of an indictable offence triable summarily with the consent of the accused had been increased from 20 pounds to 100 pounds. The list of offences was also increased, but continued to be confined to property offences, with the exception of attempting suicide.[51]

1.19 Offences against the person were first made triable summarily with the consent of the accused in 1955 with the introduction of this procedure in cases of indecency between males.[52] This recognised the fact that many offenders wished to plead guilty to this offence before a magistrate in order to avoid publicity.[53] In 1974 carnal knowledge, common assault and assault occasioning actual bodily harm were made triable summarily with the consent of the accused.[54] In 1983, the offences of malicious wounding, culpable driving occasioning grievous bodily harm and larceny of a motor vehicle of any value were added.[55] Over the years the maximum monetary value of property the subject of property offences triable summarily with the accused's consent has been increased, most recently, in 1983, from $1,000 to $10,000.[56] This last increase represented a tenfold increase in less than a decade, yet it was introduced with virtually no publicity and no comment.

1.20 The civil jury has also declined significantly. Civil juries are generally only used to try claims of defamation, malicious prosecution, civil fraud, false imprisonment and seduction. In other civil actions the court may order a jury trial at the request of either party, but this is very rare.[57]

F. Democratisation of the Jury

1.21 It is ironic that the reduction in the use of juries has gone hand in hand with their increasing democratisation. The "anachronistic"[58] property qualification for jury service was finally abolished in 1947.[59] This "democratic advance"[60] was one of three made in that year. Women became qualified for jury service on their application and special juries were abolished.[61] The Attorney General of the day stated:

> It is desirable that as many as possible should participate in that service and become aware of the way in which the law operates, and how trials are conducted.[62]

It was not until 1968 that women were automatically included on the jury rolls of those few districts where facilities permitted. But a woman could still cancel her liability to serve by simple notice to the officer responsible for the rolls.[63] The process of democratisation was continued by the Jury Act, 1977 which is discussed below (paragraphs 1.24-1.27). In Chapters 3 and 4 of this Working Paper we consider ways in which the representative nature of juries can be further improved. It should be mentioned here that, although juries are now used in a much more limited range of cases than ever before, significant numbers of people still come into the jury system each year. In March 1985, for example, some 184,741 people were on jury rolls in New South Wales. From 1 June 1983 to 31 May 1984, 135,464 were summoned to attend courts to be available for jury service and about 50,670 actually served on juries.

G. The Impact of the Supreme Court's Summary Jurisdiction

1.22 In 1967, a summary jurisdiction was conferred upon the Supreme Court. A single Supreme Court judge was empowered to try any offences expressed in legislation to be triable summarily by the Supreme Court.[64] Until this time only Magistrates (and Justices of the Peace) had summary jurisdiction. However, it was felt that certain offences involving severe penalties should be tried by Supreme Court judges.[65] Among other things, such a mode of trial means that reasons for judgment are given. Certain offences under the Prices Regulation Act, 1948 and the Clean Air Act, 1961, among others, can be proceeded with in the summary jurisdiction of the Supreme Court.

1.23 In 1979, an amendment to the Crimes Act, 1900 was passed which gave the Supreme Court summary jurisdiction to try certain "white collar" crimes including:

* offences under the Companies Act, 1961, including attempting to commit such offences and conspiracy to do so;
* offences under the Securities Industry Acts, 1970 and 1975;
* conspiracy to cheat and defraud;
* company fraud offences under the Crimes Act, 1900.[66]

Although the right to a jury was not abolished for these trials, it was anticipated that many accused would in fact elect non-jury trial.[67] A number of advantages were claimed for the summary procedure.

> ... first, it allows for a more speedy determination of the issues; second, it does away with the need for committal proceedings which are often lengthy and costly not only to the community but, significantly, also to many accused persons; third, it allows for the more efficient and more practical resolution of difficult points of law which might arise in the course of proceedings; fourth, it is most likely to reduce the length of the time that the actual trial will take; fifth, it is probably fairer to the accused in that it will avoid the danger that some accused persons face of being ruined - not only in the eyes of the community in respect of their reputation, but also financially - by the time the committal proceeding before the magistrate is completed; and finally, it will avoid the possibility that an accused person may be unfairly disadvantaged at his ultimate trial, as sometimes occurs from unfavourable coverage of committal proceedings by the media.[68]

The change was further designed to ensure that justice would be done "both to an accused person and to the community in cases involving complex questions of corporation and securities law, which so often are beyond the grasp of the ordinary lay juror".[69] Summary trial in the Supreme Court under the Crimes Act, 1900 is dependent on an application by the Attorney General, and, upon the completion of pre-trial procedures, on an election for summary trial by the accused.[70] A very small number of accused have elected this form of summary trial and to date only one such trial has actually gone ahead.[71]

H. The Current Jury Act: 1977

1.24 In 1977 it was realized that the New South Wales juries legislation was not fulfilling the philosophy of the jury system as a means of providing impartial trial by one's peers. The Act of 1912 was finally repealed and a new Act passed. The "primary aim" of the Jury Act, 1977 is:

> ... that jury service, so far as is practicable, will be shared equally by all adult members of the community.[72]

In furtherance of this aim, women became qualified and liable to serve in the same way as men. The only exception is that pregnant women can claim an exemption as of right.[73] Further, the number of people previously entitled to claim an exemption was reduced. In particular, State public servants and bank officers are no longer entitled to an exemption.[74] The reference to the exclusion of people of "bad fame or of immoral character and repute" was dropped.

1.25 An improved method of compiling jury rolls ensures that the same core of people do not form the greater proportion of each roll. This occurred in the past as a function of the old method of compiling the rolls:

> ...according to the existing Act the police are required to compile this list each year. In theory a new list of persons would be compiled each year. In this way the burden ... is supposedly spread evenly throughout the community. Unfortunately, this does not happen in practice. It cannot because of the sheer size of the task involved, unless a substantial number of police ... are allocated for the sole job of interviewing persons for inclusion on jury rolls. What has happened over the years is that when the Sheriff requires the officer in charge of police at, say, Penrith, to collect 7,000 names for the following year's jury roll he copies down the names on the previous year's roll. There may be on it in the order of 6,000 names so he then interviews an additional 1,000 persons in order to get the required number ... Over the years the rolls have included the same nucleus of potential jurors and this fact has given rise to the contention that the only way to get off a jury roll is to die.... Accused people are not being tried by a truly representative section of the community; it is largely the same section over and over again.[75]

The police no longer have any role in the preparation of the jury rolls. The Sheriff compiles the jury rolls directly from the appropriate electoral rolls at random, generally using a computer.[76] The participation of the police was clearly in conflict with their involvement in criminal trials for the prosecution.[77]

1.26 Other administrative improvements include:

* each roll lasts for three years instead of just one;[78]

* jury pools can be used so that a number of courts in the one complex are able to draw from the one pool rather than summon a separate jury panel for each trial;[79]

* a draft roll is drawn up, all people included are advised of their inclusion and required to inform the Sheriff if they are disqualified or ineligible or wish to claim on exemption as of right. When the final roll is prepared the only further attrition should be by the discretionary grant of excusal on a particular occasion;[80]

* this new power of the Sheriff to excuse people on a particular occasion means that a prospective juror need not wait until included on a panel to seek excusal from the presiding judge.[81] Administrative efficiency can be enhanced.

1.27 Some of the above administrative measures will also improve the conditions of jury service for jurors themselves. The opportunity to seek excusal from the Sheriff means less inconvenience to the individual. In the past,

> ... a person who sought to be excused from jury service had to attend before a judge and inform him of his reasons, and in the majority of cases the fact that his application would be granted was a foregone conclusion. In effect, we were telling these unfortunate people, 'You must come along and tell the judge that you can't come along'.[82]

Now the Sheriff can grant an excusal claimed before the day on which the juror is required to appear for service.[83] Another improvement permits a person whose claim for exemption as of right has been denied by the Sheriff to appeal to a Local Court (formerly a Court of Petty Sessions). Until the appeal is determined the person will not be summoned for jury service.[84] Again, a person who has just completed a three-year period of liability to be summoned for jury service (such a person may indeed have been summoned two or three times) will not usually be included on the next succeeding jury roll: such a person may claim an exemption as of right.[85]

IV. CONCLUSION

1.28 Judging from the lack of Parliamentary and media interest in, and, hence, of public knowledge about, the progressive legislative limitations on the range of trials required to be conducted before a jury, it would appear that there is little concern that the jury is in danger of disappearing and that there is little awareness of this danger. For this reason alone the public discussion which, we hope, will be encouraged by this Discussion Paper, is important. Moreover, the time for reform would appear to be ripe if the lack of public concern about the jury is a result of dissatisfaction with or distrust of jury verdicts, disillusionment with the administration of the jury system or a general feeling of alienation from the administration of justice as a whole. In the next Chapter we consider the arguments advanced both for and against the jury and conclude

that it is still a vital institution in the criminal justice system. The remainder of the Discussion Paper is devoted to a consideration of ways in which the jury system can be made more effective and accessible, as well as acceptable to judges, legal practitioners, accused people and the community at large.

Footnotes

1. J.H. Baker, An Introduction to English Legal History (Butterworths, London, 2nd ed., 1979), at p.64.

2. Id., at pp.64-65.

3. Id., at p.415.

4. A. Dickey, "The Jury and Trial by One's Peers" (1973-1974) 11 University of Western Australia Law Review 205, at p.207.

5. H. Foster, "Trial by Jury: The Thirteenth-Century Crisis in Criminal Procedure" (1979) 13 University of British Columbia Law Review 280, at p.291.

6. Ibid.

7. J.H. Baker, note 1 above, at pp.65-66.

8. Bushell's Case (1670) 6 State Trials 999.

9. P. Devlin, Trial by Jury (Stevens and Sons Ltd., 1956), at p.20.

10. See for example "Examination of A.W.H. Humphrey", Historical Records of Australia, 13 March 1820 and "Examination of T.Archer", Historical Records of Australia, 27 April 1820.

11. J.M. Bennett, "The Establishment of Jury Trial in New South Wales" (1959-1961) 3 Sydney Law Review 463.

12. 4 George IV, c.96, s.VI.

13. The grand jury was virtually abolished in the United Kingdom in 1933: Administration of Justice (Miscellaneous Provisions) Act 1933 (U.K.), s.1.

14. 4 George IV, c.96, s.VII.

15. Id., s.IV.

16. 9 George IV, c.83, s.17.

17. 2 William IV., No. 3, s.II.

18. Id., ss.IV, V.

19. Id., s.III.

20. Id., ss.VI-VIII, XII, XIV.

21. Id., ss.XXIII, XXIV.

22. Id., ss.XV, XVI.

23. 4 Wil. IV, No. 12, s.2.

24. Id., s.12.

25. Id., ss.8,9.

26. 3 Vic., No. 11.

27. 4 Wil. IV, No.12, s.13.

28. 3 Vic., No. 17.

29. 4 Vic., Nos. 22 and 28.

30. 8 Vic., No. 4, s.1.

31. Id., s.2.

32. Id., s.4.

33. 11 Vic., No. 20, ss.1,3.

34. Id., s.2.

35. Id., s.10.

36. Id., ss.17,18.

37. Id., ss.20,21.

38. Id., s.24.

39. Id., s.26.

40. 40 Vic., No.6., ss.2,3.

41. Id., s.10. This followed the English extension of liability to aliens who had been resident in the United Kingdom for ten years: Juries Act 1870 (U.K.), s.8.

42. 4 Wil. IV., No.7.

43. 46 Vic., No.17, ss.63-69,150-176,222-229,289-290.

44. Crimes Act, 1900, ss.493-497,501-526,529,532-542.

45. Crimes (Amendment) Act, 1924, s.24.

46. Crimes (Amendment) Act, 1955, s.4(1)(i).

47. Crimes (Amendment) Act, 1974, s.11(o).

48. Crimes (Amendment) Act, 1983, schedule 1, clause (3).

49. Crimes Act, 1900, ss.179, 247.

50. Crimes Act, 1900, ss.476-478.

51. Crimes (Amendment) Act, 1924, s.23(a).

52. Crimes (Amendment) Act, 1955, ss.3(a), (d), 4(f).

53. N.S.W. Parliamentary Debates, Legislative Assembly, 23 March 1955, p.3229 per the Hon. W.F. Sheahan, Q.C., M.L.A., Attorney General.

54. Crimes and Other Acts (Amendment) Act, 1974, s.11, inserting new s.476.

55. Crimes (Amendment) Act, 1983, schedule 1, clause (2)(d).

56. Id., clause (2)(b), (f). The previous change was in 1974, see note 54.

57. Supreme Court Act, 1970, ss.87,88. And see Law Reform (Miscellaneous Provisions) Act, 1965 and Administration of Justice Act, 1968.

58. N.S.W. Parliamentary Debates, Legislative Assembly, 15 November 1947, p.1121 per the Hon. C.E. Martin, M.L.A., Attorney General.

59. Jury (Amendment) Act, 1947, ss.2(3)(a), 3(3)(a). The property qualification was not abolished in the United Kingdom until 1972: Criminal Justice Act 1972 (U.K.), s.25(1).

60. NSW Parliamentary Debates, Legislative Assembly, 15 November 1947, p.1121 per the Hon. C.E. Martin, M.L.A., Attorney General.

61. Jury (Amendment) Act, 1947, ss.2,3,4. Women satisfying the property qualification became liable in England to jury service in 1919: Sex Disqualification (Removal) Act (U.K.), s.4(2) and Schedule. Special juries were abolished in England two years later, although the

special commercial juries in the City of London were retained until 1971: Juries Act 1949 (U.K.), s.18. Special juries are still used in Tasmania: Jury Act 1899 (Tas.), ss.10,38,40.

62. NSW Parliamentary Debates, Legislative Assembly, 15 November 1947, p.1121 per the Hon. C.E. Martin, M.L.A., Attorney General.

63. Administration of Justice Act, 1968, s.10.

64. Supreme Court (Summary Jurisdiction) Act, 1967, s.3.

65. NSW Legislative Assembly, 7 November 1967, p.2878 per the Hon. K.M. McCaw, M.L.A., Attorney General.

66. Crimes Act, 1900-1979, s.475A and Tenth Schedule.

67. NSW Parliamentary Debates, Legislative Assembly, 23 April 1979, p.4916 per the Hon. F.J. Walker, Q.C., M.P., Attorney General.

68. NSW Parliamentary Debates, Legislative Assembly, 28 March 1979, p.3321 per the Hon. F.J. Walker, Q.C., M.P., Attorney General.

69. Id., at p.3323.

70. Crimes Act, 1900-1979, ss.475A(1), 475B(1); Supreme Court (Summary Jurisdiction) Act, 1967, s.4(1).

71. Attorney General of New South Wales v. Chambers, Supreme Court of New South Wales, Criminal Division (Roden J.), 24 June 1983 (unreported).

72. NSW Parliamentary Debates, Legislative Assembly, 22 February 1977, p.4254 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

73. Jury Act, 1977, s.5 and schedule 3, clause 5.

74. Public servants employed in the State Attorney-General's Department, the Department of Corrective Services, the Police Department, the Legal Services Commission, the Corporate Affairs Commission, the Board of Fire Commissioners, the State Emergency Services and the Health Commission (in connection with ambulance services), however, are ineligible to perform jury service. In addition, all departmental permanent heads and all members of the State Public Service Board are ineligible: schedule 2.

75. N.S.W. Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4475 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

76. Jury Act, 1977, ss.9,12.

77. NSW Parliamentary Debates, Legislative Assembly, 22 February 1977, p.4255 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

78. Jury Act, 1977, s.10. In most other Australian jurisdictions the jury rolls are renewed annually: Juries Act 1927 (S.A.), s.20; Juries Act 1957 (W.A.), s.14; Juries Act 1962 (N.T.), s.21. See also Juries Act 1967 (Vic.), s.8. In the Australian Capital Territory a jury list might be in use for up to four years: Juries Ordinance 1967 (A.C.T.), s.19.

79. Jury Act, 1977, s.29.

80. Id., ss.13,14.

81. Id., s.38.

82. NSW Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4483 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

83. Jury Act, 1977, s.38(1)(a). A similar provision had operated in the United Kingdom since 1922: Juries Act 1922 (U.K.), s.3.

84. Jury Act, 1977, s.15.

85. Id., schedule 3, clause 8

Chapter 2

The Jury in the Criminal Justice System

I. INTRODUCTION

2.1 As we have revealed in Chapter 1, the jury is an evolving institution both with respect to its composition and with respect to its role in the criminal justice system. As to the composition of the jury, there has been a relatively recent and quite dramatic "democratization" of the jury. In New South Wales a far broader cross-section of the general community is now liable for jury service than was the case before 1977. In Chapter 3 we consider the argument that the modern jury must represent a fair cross-section of the community and propose amendments to further enhance the representative composition of juries.

2.2 The description of the evolution of the jury in Chapter 1 also highlighted the declining use of the jury. Juries are rarely used in civil litigation and are no longer available in most minor criminal trials. However, when a serious penalty could be imposed the accused person still has a right to be tried by a jury of his or her peers. We have described the categories of offences for which an accused person may elect summary trial and thereby be liable to a substantially diminished maximum penalty if convicted. Arguments can be made against using a reduction in penalty as an incentive to encourage the choice of summary trial in preference to jury trial. Arguments can also be made against the differentiation

between indictable offences triable summarily without the accused's consent and those so triable at his or her option and also between the latter class of offence and offences triable only before a jury. For example, concern may be expressed that expediency has overridden considerations of public policy and broader principle in the choices made on these questions. The Commission has not considered these questions in this Discussion Paper, preferring to deal with them in a paper covering a range of fundamental issues in the criminal justice system with particular reference to procedural matters.

2.3 Indeed, in this Discussion Paper we have tended to discuss procedural changes to the jury system largely in isolation. We do not, however, neglect the fact that the jury is closely interrelated with the criminal justice system as a whole. The jury's evolution is one part of the evolution of that entire organism and any changes to it which we may recommend will resound throughout. Moreover, any reforms in other areas of criminal procedure could vitally affect jury trials. In some areas we have referred to proposals in our second Discussion Paper on Procedures Before Trial, particularly those whose chief purpose is to improve jury trial procedures. Similarly, in later Discussion Papers other links will be made where relevant.

2.4 In other areas we are inhibited in suggesting changes which would impinge on the substantive criminal law. One very important example is in relation to complex instructions of

law. While we believe that most directions which juries require can be given in simple language and, thus, fully understood, we fear that further research may force us to conclude that some directions are too complex to be properly communicated to lay people. It could be argued that, in such cases, the substantive law should change to accommodate the audience. We are constrained from making such recommendations, however, although it may be that we will recommend a separate investigation of such matters.

2.5 Before we consider what improvements can be made in the system of criminal jury trial, we must deal with the threshold question whether juries should be retained or abolished. The remainder of this Chapter is devoted to a discussion of the opposing arguments on this question.

II. ARGUMENTS FOR THE ABOLITION OF THE JURY

2.6 The arguments which can be advanced in support of the case for the abolition of the jury in criminal trials can be separated, we believe, into four categories. First, criticisms are made of the jury which cannot be denied, such as that juries are costly. Such arguments can be met with the response that these features are disadvantages which are outweighed by the advantages of jury trial. Second, some critics look at features of the jury system, such as the jury's ability to bend the law without breaking it, as a serious flaw in the jury system, while others, including this Commission, consider it to be a significant advantage. Third, there are criticisms which

can, we believe, be refuted. Finally, there is a class of criticism directed solely at the use of juries in long and complex cases. We deal more fully with this last category in Chapter 10 of this Discussion Paper.

2.7 The chief criticisms of the jury are, first, that it is inefficient and, second, that it is ineffective. In other words, it is claimed that the jury cannot, for a number of reasons, properly fulfil its role. One reason put forward for the incompetence of juries is the very democratisation which we consider so crucial to its continued acceptability. It is said that the average intelligence of jurors has declined as the ownership of property is no longer a qualification.[1] More specifically, it is said that jurors are now less likely to understand financial matters and therefore less able to appreciate the evidence in fraud trials. Similarly, it is said that, since they have no scientific knowledge, they cannot understand scientific evidence. It is patently not the case that intelligence is the sole preserve of those who possess material wealth. Neither can it be said that the essential concepts of fraud are beyond the grasp of all but a few members of the community. Moreover, as we argue in Chapter 10, complex evidence in any case should be presented in a way that can be adequately understood by any member of the community regardless of experience or qualifications.

2.8 Another reason put forward to demonstrate the jury's alleged incompetence is found in more general misconceptions about particular types of evidence or classes of witnesses. For example, it is feared that jurors, not being equipped with research results on the unreliability of much identification evidence, are unable to assess the reliability of eyewitnesses. One study has shown:

> The crucial factor affecting a juror's evaluation was the amount of confidence displayed by the witness. Jurors were inclined to believe witnesses who were highly confident more than those who had less confidence.[2]

And yet, in fact, confidence is not an indicator of accuracy. One possible way of dealing with this problem is for the judge to carefully warn jurors about the risks of identification evidence. Another problem is the tendency to rely on the expert witness, accepting his or her opinion without question. Part of the problem in this context is the language in which expert evidence is usually given. In Chapter 10 we consider ways of making expert testimony more accessible to jurors.

2.9 More generally, the criticism has been made that the jury is required to perform irrationally. Noting that juries generally are unable to ask questions of witnesses and counsel, are presented with information in a fragmentary manner, are not assisted by access to documents and transcript and observe a trial dominated by the dispute mode and persuasive argument, Mungham and Bankowski ask:

> ... how, in the midst of the turmoil of the adversary mode, can any jury be expected to do its own work 'efficiently'?[3]

Judges are not required to make decisions in such an irrational manner. When considering a criminal matter the judge has before him or her all the relevant documents including, of course, the indictment, the transcripts and his or her own notes. Moreover, the judge can give the matter leisurely consideration. The jury, in contrast, must commence its deliberations immediately after the case is completed and the judge's summing-up has been delivered. It is suggested that mature consideration and reflection are denied them. Why, the critics ask, do we impose on juries a method of working which operates so contrary to human logic? The Commission considers that a great deal can be done to improve the rationality of jury trials even within the confines of trial procedure alone. Much of this Discussion Paper is devoted to examining means by which such improvement can be achieved.

2.10 Some critics point to the rate of acquittals by juries as indicative of their incompetence.[4] Such critics perceive the majority of acquittals as jury errors, or the result of bribery or intimidation. This criticism is most often made by police and it strongly suggests that the police, who lay the charge and gather the evidence, are right in all cases. If they were, then trial by jury would be unnecessary. What the criticism ignores is that the police generally know more about the case and the accused than can be submitted to a jury. For example, the police assessment can be influenced by their awareness of an accused's record of past convictions. Judges and magistrates are usually the only other participants in a

position to determine guilt. Yet judges in New South Wales have overwhelmingly supported the retention of trial by jury in criminal cases[5] and numerous judges in many common law jurisdictions have affirmed they generally agree with the verdicts of juries.[6]

2.11 In Chapter 7 we describe the requirement that each accused be tried by an impartial tribunal as being a fundamental principle of criminal justice. Some critics believe that lay jurors, not trained to ignore prejudicial information, are unable to guarantee to an accused an impartial trial. Jurors, it is argued, are too readily swayed by the rhetoric of persuasive counsel and by the appearance of the accused. Stereotypes may play a role which can be further highlighted by media publicity before the trial. Jurors may bring with them strong prejudices which, far from cancelling each other out, reinforce one another. In Chapters 4 and 7 we describe the current procedures for ridding a jury of bias and propose improvements. Moreover, we have faith in the ability of jurors to make impartial decisions reflecting a broad community conscience. It is important that jurors are given adequate orientation to help them understand their role and the significance of impartiality. We deal with this latter subject in Chapter 5.

2.12 Related to the issue of bias or partiality is the protection of jurors from hearing certain prejudicial evidence. We discuss this subject in Chapter 7. It can be

argued that if elaborate rules of evidence were not required to shield jurors from prejudice, in other words, if lay juries were no longer used, the tribunal of fact would be free to accept prejudicial evidence which is relevant and probative. Such a tribunal would be more likely to get to the truth of the matter. On the other hand, as we argue below, the very presence of the jury is an essential safeguard against the presentation of unfairly prejudicial information.

2.13 In Chapter 6 we consider the problem of legal language and juror comprehension. We accept that there will be little support for the jury system if it is generally believed that jurors understand little of the law they are required to apply. The Commission considers this to be a most serious problem and one which threatens the survival of the jury system. In Chapter 6 we discuss possible ways in which juror comprehension can be enhanced. We also propose to sponsor further development of standard jury instructions for the guidance of judges (see Appendix). Again it is frequently argued that as the criminal law becomes more complex and the nature of evidence tendered in some criminal cases more technical, the capacity of the jury to cope with the demands of its role is diminished. It is argued that the complexities involved in the trial of some charges have rendered such charges unsuitable for trial by a body of men and women chosen at random from the community without reference to their experience or qualifications. It is suggested that lay people are unable to assess technical evidence because they are

unfamiliar with the language in which it is given or with its conceptual framework. Thus, some commentators argue that the jury should not be used for certain cases. Fraud and commercial prosecutions, in particular, fall into this category.[7] In Chapter 10 the argument is made that much technical evidence can be made comprehensible to jurors. Emphasis is laid on the mode of presentation of such evidence.

2.14 The jury is, of course, an expensive method of trial. Not only must the twelve jurors be paid but so must the others, often more than thirty, who form the pool from which the jury is selected. The jurors, moreover, while they are serving, are kept from their ordinary occupations and responsibilities. In addition, court personnel are employed to administer the jury system at all stages. This is one criticism which, we believe, falls into the category of "well worth it". Indeed, it could be argued that the jury system is no more expensive than most of the suggested alternatives. A panel of three judges, on judicial salaries, for example, might work through the evidence more quickly than a jury can, but would ultimately prove more expensive because they would tend to deliberate at greater length and would have to prepare written reasons for decision. Expert assessors, even if a panel of only two or three were required, would need to be paid a very much higher fee than lay jurors currently receive.

2.15 Time, too, would not necessarily be saved if the jury were discarded. The presentation of evidence is a relatively slow process when a jury is involved, but deliberation follows immediately and no reasons need be given for verdict. Even a single judge will, in most cases, take much longer on deliberation and the preparation of reasons although there is no doubt that the presentation of the case itself can be expedited. We agree with the proposition that,

> ... the role of our judicial system is to dispense justice and not to dispatch business. The speed at which a case progresses is not, thankfully, the true measure of whether justice has been done.
>
> ... curing court delay must be done without destroying the quality of the end product.[8]

2.16 Many of the criticisms outlined above are soundly based. We consider, however, that the conclusion which follows from an analysis of them is not the abolition of the criminal jury system but its reform. The jury, in the future as in the past, must evolve to meet existing demands and to reflect current concepts of its role and function. In the next Part we outline the unique strengths of the jury system.

III. ARGUMENTS FOR THE RETENTION OF THE JURY

2.17 Juries are traditionally used to assess and determine the facts in a criminal trial because they are considered to be able to do this better than a judge. It is believed that juries are the best judges of the credibility of witnesses and that they are best able to accurately characterise behaviour as

reasonable or unreasonable and so on. This is so because they bring to their task a range of backgrounds and experiences of necessity far broader than that possessed by a single judge.

> It is the mix of different persons with different backgrounds and psychological traits in the jury room that produces the desired results. There is both interaction among jurors and counteraction of their biases and prejudices.[9]

The Law Reform Commission of Canada has suggested that the jury has a number of unique features which together make it accurate as a fact-finder and reliable in its assessment and characterization of behaviour. They are:

> * a jury brings to bear on its decision a diversity of experiences;
>
> * because the jury deliberates as a group, it has the advantage of collective recall; and
>
> * the jury's deliberative process contributes to better fact-finding because each detail is explored and subjected to conscious scrutiny by the group.[10]

It can be argued that the more representative a jury is the better it is able to perform its fact-finding task.

> ... among the twelve jurors there should be a cross-section of the community, certainly not usually accustomed to evaluating evidence, but with varied experiences of life and of the behaviour of people.[11]

It is felt that such a group is "better able to understand and appraise conduct than one who lives the remote life of a judge".[12]

2.18 As well as being best suited to determine facts, the jury is able, unlike the judge, to give weight to the broad equities in the individual case. While a judge is bound by

precedent and statute, the jury can take into account the "human" factor. It is in this way that each jury verdict can bring to bear the broad community conscience. Where precedent and statute set down the law in a general sense, the jury can adjust the law to the merits of each case.

> Is it not better that juries should be swayed by sympathy than that judges should be swayed by purely technical or legal considerations? Jurymen will do a little wrong in order to do a great right. They endeavour to do justice without regard to strict law. A judge, bound by precedent, must tread the straight and narrow path.[13]

The jury's equitable power, it is argued, ensures that the criminal justice system continues to have the support of the public and of the direct participants, especially accused people.

> Citizens believe that juries of their peers are more likely to consider individual circumstances in applying legal rules. A group of one's peers certainly can empathise with particular circumstances faced in a fact pattern.[14]

The jury represents the conscience of the community from which it is drawn. It is able to do justice, and because the finding of a jury creates no precedent, it is able to decide a case equitably without making bad law.[15] As the Supreme Court of the United States has acknowledged:

> ... in differing from law-bound conclusions, juries serve some of the very purposes for which they were created, and for which they are now employed.[16]

2.19 The role of the jury in relieving judges of responsibility for determining criminal issues has also been stressed.

> The weight of responsibility is lifted from their shoulders - a weight which, in criminal cases, would often be almost unbearable.[17]

Of course, the judge is not entirely relieved of responsibility. He or she is responsible for controlling the proceedings and instructing the jury. Nevertheless, the sharing of responsibility would seem to be significant. Juries also shield judges from opprobrium and allegations of bias. The decision-maker in a criminal jury trial is an almost anonymous group of twelve ordinary citizens with no attachment to the particular case and no dependence upon or relationship with the other participants. The particular jury does not have a history or a record and it has no future after the trial is concluded. The judge, on the other hand, could be identified with his or her record and allegations of bias might be easy to make. The sentencing practices of various judges are, from time to time, subjected to considerable public attention. The use of the jury to render verdicts prevents the problems which would arise if such attention was focussed in the same way on judges for their verdicts.

2.20 The jury system is sustained not only by its effectiveness as a dispenser of justice in individual cases but also by its practical and symbolic function as a democratic institution. This function may conveniently be discussed under two broad headings.

* The jury system legitimises the criminal justice system by providing a link between that system and the community.

* The jury system is the ultimate protection of the individual citizen and, indirectly, of society as a whole against oppressive laws and the oppressive enforcement of laws.

2.21 The jury acts as a two-way link between the community and the legal system. One of its functions, arguably the most important function it performs, is to make sure that the legal system does not become distinct from, and alien to, the community. Individual citizens have, however briefly, a direct influence on the process of criminal justice and its values. The use of juries keeps the criminal justice system in step with the standards of ordinary people. Because "they represent current ethical conventions" juries "are a constraint on legalism, arbitrariness and bureaucracy".[18] The other important function is to ensure that community support for the criminal justice system is maintained.

> Part of the function of the jury is ideological. Via the celebration of the 'communion of peers' its aim is to legitimise the law and legal institutions.[19]

It is often argued that in order that the community accept the decisions of courts as "legitimate" or fair, proper and just, they must identify with the process of justice. An important way in which this community acceptance or identification is achieved is by requiring citizens to participate in the administration of justice by serving on juries.

2.22 The jury system ensures a measure of accessibility in the criminal justice system. Because the jury is the ultimate decision-maker, each case must be presented in a manner,

language and broad value framework which juries of laypeople both understand and accept. This compels both lawyers and judges to present the law comprehensibly and to reveal some of the underlying principles of the law and the justice system, which in time decreases the mystique generally associated with the courts.

> The importance of the jury lies in the fact that lawyers and judges know that their arguments must be pitched on a level that the man in the street can understand. Juries counter the centrifugal tendencies of authorities.[20]

The jury is an active participant in each trial if only because the entire case is directed towards the jury's verdict as its ultimate result. Judges and counsel recognise the need to direct their communication to the juries. The effective communication of a case to the jury should result in a verdict which is a fair reflection of the merits of the case. Accessibility is enhanced in a broader sense also when it is considered that people who have served on juries have received an education in the relevant law and procedures which will stay with them in the future.[21]

2.23 It is also claimed that the jury system is a bastion against oppression. This feature incorporates the reluctance of juries to apply the law in cases where an unjust, unfair or harsh result will occur. It also sees the jury system more broadly as a continuing check on the "rightness" of the law, on criminal investigation practices and prosecutorial policy,[22] and on the independence and quality of judges.[23] The results of the Chicago Jury Project offer one example of this. It was

found that juries tended to "punish" the prosecution with acquittals or convictions on lesser charges where police and/or prosecution behaviour was considered to be unfair, in cases involving entrapment, physical violence, harrassment to obtain a confession, or a failure to prosecute all participants.[24] The jury's ability so to express its disapproval is an indirect control on the practices of the authorities. One commentator believes that the most important role of the jury in contemporary society is in preventing police influence in the courts from becoming dominant.[25] Moreover, the jury is often relied on to mitigate the harsh results which the law may demand, even to the point of returning a "perverse" verdict of not guilty as a protest against an unjust law. Thus, the jury is seen as a political institution. Both by its presence and by its verdict, the jury assumes a degree of responsibility for the integrity and fairness of the criminal law and the criminal justice system.

2.24 The jury system does not rely merely upon the sense of responsibility of each juror to defend the individual accused against oppression. Built into the system are safeguards to further protect the accused person against wrongful conviction. We have mentioned above the importance of a jury which represents a cross-section of the community. Individual prejudices are, it is hoped, counteracted and the resulting interplay of views and backgrounds leads to a fair and balanced assessment of the case. Another important feature is the

"innocence" of jurors who, coming fresh to each case, are unlikely to have developed specific stereotyped prejudices to prevent them giving open-minded consideration to the case.

> A judge in a criminal court is constantly confronted with criminals. This can become such a routine job that in spite of conflicting evidence he may reach a quick decision, thinking that it is a run-of-the-mill case. If the same evidence is taken before a carefully attentive jury - where the presiding judge is precluded from dropping a subject prematurely - the chances are that the accused may well be acquitted for lack of evidence.[26]

2.25 Again, the very presence of the jury has led to the development of rules of evidence which ensure that prejudicial material is not presented and, therefore, cannot influence the jury in its deliberations. Thus the presence of the jury "may be regarded as helping to guarantee an unbiased judgment".[27] Accused people may be suspicious of judges who are required to disregard prejudicial material ruled inadmissible and lack confidence in their ability or willingness to ignore such material. The jury, however, offers the accused a tribunal protected from prejudicial material and able to concentrate only on the evidence and the other factors which it is entitled to take into account.

2.26 The retention of the jury as the tribunal of fact in the trial of serious offences suggests that it is regarded as an acceptable means of dealing with questions of guilt and that the jury is a necessary safeguard when a significant penalty could be imposed. The increasing range of criminal charges

being determined without the use of a jury indicates that its use is considered problematic in some quarters for whatever reason. This apparent ambivalence in the community's attitude to the jury may result from ignorance of the jury's role or from apathy as to its future. Alternatively, the value of jury trial may have been consciously weighed against the social importance of different offences and the expense, delay and inefficiency believed to result when a jury must be empanelled. In the case of very serious crimes it is clear that the perceived costs of jury trial are still considered to be well worth paying.

2.27 The Commission is firmly of the opinion that trial by jury should be retained in serious criminal cases. The jury is an effective institution for the determination of guilt. It has the added benefit of possessing the ability to do justice in the particular case. The jury system is, moreover, an important link between the community and the criminal justice system. It ensures that the criminal justice system meets minimum standards of fairness and openness in its operation and decision-making, and that it continues to be broadly acceptable to the community and to accused people. The participation of laypeople in the system itself validates the administration of justice and, more generally, incorporates democratic values into that system.

Footnotes

1. C.L. Newman, "Trial by Jury: An Outmoded Relic?" (1955) 46 Journal of Criminal Law, Criminology and Police Science 512, at p.516.

2. L.Re. "Eyewitness Identification: Why So Many Mistakes?" (1984) 58 Australian Law Journal 509, at p.516.

3. G. Mungham and Z. Bankowski, "The Jury in the Legal System", in P. Carlen (ed.), The Sociology of Law (Sociological Review Monograph 23) 202, at p.213.

4. See, for example, Sir Robert Mark, then Commissioner of the Metropolitan (London) Police, Minority Verdict (Dimbleby Memorial Lecture, B.B.C., 1973).

5. Survey of Judges, July 1985, New South Wales Law Reform Commission (results to be published).

6. H. Kalven and H. Zeisel, The American Jury (Chicago University Press, 2nd ed., 1971), at p.318; S. McCabe and R. Purves, The Jury at Work (Blackwell, Oxford, 1972), at p.38; Lord Du Parq, Aspects of the Law (Holdsworth Club Lecture, 1948), at p.10; J. Baldwin and M. McConville, Jury Trials (Clarendon Press, Oxford, 1979), at p.4; Estey, J. (Canadian Supreme Court) in "Changes needed to save jury system, judge says", Canberra Times 10 August 1985, at p.12; D.S. Hogarth (formerly Supreme Court of South Australia), letter to the editor, Weekend Australian 20 July 1985.

7. A. Samuels, "The Great Unknown" (1968) 118 New Law Journal 1132.

8. R. Janata, "The Pros and Cons of Jury Trials" (1976) 11 The Forum 590, at p.592.

9. Id., at pp.595-596.

10. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at p.6. See also The Law Society (U.K.), "Another Chance for the Jury?: Evidence to the Roskill Committee on Fraud Trials" (1984) The Law Society's Gazette 3574.

11. Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at p.84.

12. Ibid.

13. P.A. Jacobs, "Trial by Jury - Its Origin and Merits" (1948) 21 Australian Law Journal 462, at p.463.

14. L. Pressler, "The Right to Trial by Jury: The Best Appendage of Freedom" (1983) 19(9) Trial 56, at p.57.

15. P.A. Jacobs, "A Plea for Juries" (1932) Australian Law Journal 208, at p.209.

16. Duncan v. Louisiana 391 U.S. 145 (1968), at pp.156-157.

17. P.A. Jacobs, note 15 above, at p.210.

18. M.D.A. Freeman, "The Jury on Trial" [1981] Current Legal Problems 65, at p.90.

19. G. Mungham and Z. Bankowski, note 3 above, at p.217.

20. M.D.A. Freeman, note 18 above, at p.89.

21. See generally Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at p.13; Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedures and Evidence (Third Report, 1975), at p.83.

22. The Law Society (U.K.), note 10 above.

23. Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at p.82.

24. H. Kalven and H. Zeisel, note 6 above, at pp.318 ff.

25. W.R. Cornish, The Jury (Penguin, 1968), at p.144.

26. E. Knittel and D. Seiler, "The Merits of Trial by Jury" (1972) 30(2) Cambridge Law Journal 316, at p.323.

27. Id., at p.318.

Chapter 3

The Selection of Jurors

I. INTRODUCTION

3.1 The process of selecting people to attend jury panels or pools has a number of aims:

* to spread responsibility for jury service throughout the community;
* to ensure a sufficient supply of prospective jurors qualified to serve;
* to ensure each jury panel or pool is representative of the community;
* to avoid partiality in the compilation of panels and pools;
* to ensure that no person who is biased serves on a jury;
* to avoid imposing an onerous burden on any person or group of people; and
* to ensure that no person who is fundamentally incompetent to cope with jury service is empanelled.

The roll compilation and jury selection procedures instituted by the Jury Act, 1977 further these aims. This Chapter, after describing those procedures, describes the ways in which these aims are promoted. The second part of the Chapter discusses ways in which the procedures might be improved to more fully reflect the goals and the philosophy of the jury system: to make the jury system fairer, more efficient and more effective.

A. Compiling the Jury Roll

3.2 The jury roll for each jury district, of which there are seventy-two in New South Wales,[1] is renewed every three years. The current electoral roll for each subdivision

allocated to the jury district is put into a computer and the computer selects at random the number of names requested.[2] The number selected varies greatly between jury districts. For example, the last draft jury roll for Sydney totalled 202,541 while in districts such as Kiama and Tumut the draft jury roll contains fewer than five hundred names. In major towns the numbers still tend to be below five thousand: for example, Wagga Wagga, 3039; Lismore, 2646; Dubbo, 2953. Each person selected receives a notification of inclusion on a draft jury roll. If the recipient is disqualified from or ineligible for jury service or wishes to claim an exemption as of right (the schedules to the Act listing classes within the above categories are set out on the notification form) he or she must so notify the Sheriff within fourteen days.[3] The Sheriff then deletes the names of all those people whose reasons for deletion he or she accepts. Although the proportion varies greatly between jury districts, an average thirty-two per cent of people included on a draft jury roll are deleted before the final roll is certified. Another large percentage is deleted while the jury roll is in force so that the actual available numbers can be less than half the number on the draft roll.

B. Selection of Jurors

3.3 Once the Sheriff has certified a jury roll, it will supply jurors for the district for the next three years. In response to an order from a judge or registrar of a court to summon a specified number of jurors for a trial or inquest, the Sheriff selects the required number at random, again usually by

computer, from the appropriate current jury roll. Each person selected is issued a summons through the post requiring his or her attendance at a specified place, date and time. The Sheriff must give at least seven days notice and usually gives at least fourteen days notice.[4]

3.4 People so summoned may apply to the Sheriff, personally or in writing, to be excused from jury duty on that particular occasion. If the Sheriff grants this application, the person continues to be liable to serve on a later occasion; his or her name is not removed from the jury roll. If the application to be excused is not made until the day specified in the summons, it must be made in person to the presiding judge.[5] The size of each jury roll is calculated so that each person included will be summoned for jury service not more than three times over the three year period for which the roll is current. This is not by any means a universal rule, however. A very few jury rolls may not even be used at all.[6] This will occur where no jury trial is convened in the district during the currency of the jury roll. The following table shows the number of people who were summoned to perform jury duty in New South Wales in the year ended 31 May 1984.

Jurors Summoned - New South Wales -
1 June 1983 to 31 May 1984.[7]

Jurisdiction	City	Outer Metropolitan and Country	Totals
Supreme Court:			
civil	8,893	1,122	10,015
criminal	20,376	5,337	25,713
District Court:			
civil	3,380	802	4,182
special & criminal	40,500	54,718	95,218
Coroners Courts	30	306	336
Totals	73,179	62,345	135,464

II. THE PHILOSOPHY OF THE SELECTION PROCEDURES

A. Shared Responsibility for Jury Service

3.5 The philosophy underlying the 1977 Act was stated to be "that jury service, so far as is practicable, will be shared equally by all adult members of the community."[8] The Jury Act, 1977 makes "every person who is enrolled as an elector for the Legislative Assembly" both qualified and liable to serve as a juror.[9] All people aged eighteen years and over who:

* are natural born or naturalized subjects; and

* who have lived in Australia for at least six months continuously and in any subdivision for at least one month immediately preceding the date of the claim for enrolment,

are entitled and, indeed, required, to enrol as electors for the Legislative Assembly. In order to qualify for a grant of Australian citizenship one must, among other criteria, have lived in Australia for at least one year and have an adequate knowledge of the English language. Some Australian citizens

are not eligible to vote: mental patients and prisoners serving sentences of twelve or more months imprisonment. These people are not permitted to serve as jurors.[10]

B. Representative Panels and Pools

3.6 The Jury Act, 1977 thus tries to ensure that jury panels and pools will be representative by initially making all adult citizens liable for jury service, and implements Parliament's recognition that:

> The jury system aims to provide the courts with a tribunal that is both impartial and representative of the ordinary citizen.[11]

The importance of having juries that are representative has long been recognised. An English committee stated in 1965 that,

> A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues that face them the corporate good sense of that community. This cannot be in the keeping of the few, but is something to which all men and women of good will must contribute.[12]

The United States Supreme Court has held that the constitutional requirement that juries must be impartial necessarily implies that juries must be selected from a cross-section of the community.[13] According to one commentary:

> The rationale for the cross-sectional or representative jury is that the various biases held by members of such a jury will essentially offset each other, causing the final verdict to be the product of a 'diffused impartiality'. Thus, representative juries guarantee that 'a range of biases and experience will bear on the facts of the case'.[14]

3.7 The 1977 Act improved representativeness in a number of ways. Most importantly, women are now equally qualified and liable to serve. Again, the old system of permitting the Executive to exempt occupational groups as it saw fit has been abolished and all exemptions must now be embodied in a schedule to the Jury Act, 1977, requiring passage through Parliament. A wide range of government employees were exempted by regulation prior to 1977.[15] Such people are now liable for jury service.

3.8 The process used to compile jury rolls since 1977 is also designed to enhance representativeness. Names for each roll are selected at random by computer from the relevant electoral roll. Each roll lasts up to three years and then a new roll is compiled.[16] People are not required to serve on consecutive rolls.[17] In this way the responsibility to serve is rotated and a random selection ensures, so far as is possible, that each roll is representative.

C. Impartiality

3.9 Random selection by computer also ensures that no partiality on the part of the Sheriff or Sheriff's officers can bias the selection made. As has been recognised,

> ... it is the very randomness of the jury which has provided a bulwark against an oppressive state...[18]

The Sheriff in New South Wales controls the numbers of jurors summoned to each panel or pool, as well as the total number of people included on each jury roll, but cannot choose particular individuals or classes of people.

3.10 Obvious partiality in the jurors themselves is also limited by excluding from jury service people involved in or with the legal system. The likelihood that people convicted of the more serious offences will be biased is dealt with by disqualifying them from serving. The Act of 1977 determines which offences are serious enough to warrant disqualification by reference to the penalty imposed. Thus a person convicted, in New South Wales or elsewhere, of an offence carrying a penalty of life imprisonment, or sentenced to a term of imprisonment exceeding two years, is disqualified for life. A person who has served any shorter prison sentence is disqualified for ten years from the expiration of the sentence. A young person found guilty of an offence and detained in a juvenile institution is also disqualified for ten years. Lesser offenders are disqualified for five years.[19]

3.11 Other participants, direct and indirect, in the legal system are ineligible to serve on juries: judges, legislators, lawyers, magistrates, police officers, prison officers and all employees of the Attorney General's Department, the Corrective Services Department, the Security Service of the State Rail Authority, the Legal Services Commission and the Corporate Affairs Commission.[20] Quite apart from any concern about the impartiality of such people, they are people,

> ... whose presence on juries would, in view of their close association with the administration of law and justice, be inconsistent with the concept of juries as a distinct element in the process of law, drawn from the community at large.[21]

D. Avoiding Hardship

3.12 Jury service has been described as "one of the fundamental obligations of citizenship".[22] Yet it is a duty which removes people from their workplaces, sometimes for lengthy periods, confining them to an unfamiliar environment and demanding of them great attention to, and conscientious consideration of, an issue of some moment to the community as a whole. The responsibility placed on each juror and on the group of twelve as a whole is considerable. There will inevitably be some people whose daily tasks are considered to be so essential to the community that they should not be allowed to serve. The uninterrupted performance of the ordinary duties of such people will be of greater value to the community than their availability for jury service. In New South Wales the occupations so highly valued are chiefly emergency and rescue services. Also ineligible are permanent heads of State Government departments and the members of the State Public Service Board.[23]

3.13 People outside these occupations might also experience hardship, or cause hardship to others, by performing jury service. There are some categories of people who, the Act accepts, are likely to be in this position and who should be free to weigh up for themselves the hardships involved. The Act lists seventeen categories of people who may claim exemption from jury service as of right; that is to say, without the need to explain the nature of the hardship, but simply by identifying themselves as fitting within one or other

of the listed categories. The list includes practising dentists and medical practitioners, people aged 65 or more, people having the sole full-time care of a child under 18, of an aged person or of an invalid, and people living more than 56 kilometres from the place at which they would be required to serve.[24]

3.14 It can further be envisaged that people unable to describe themselves as so listed would yet experience considerable hardship if required to perform jury service; hardship which the system may be unwilling to impose. The excusal of such people is at the discretion of the Sheriff, in the first instance, and ultimately the responsibility of the presiding judge. A person summoned to attend for jury service may be excused for "good cause".[25] The Act does not attempt to define the term "good cause" but the Sheriff probably sympathetically considers temporary and unavoidable absence from the jury district, temporary illness, and probable serious detriment to a sole business.[26] The judge is likely to be persuaded by similar reasons and will also be likely to excuse a person who, though willing to serve for a day or a week, would be likely to suffer unduly from being committed to a trial lasting some weeks or months. The judge will also recognise that a deeply resentful juror would not make a "good" juror and will probably excuse, for example, a person with a conscientious objection to jury service.[27]

E. Competence

3.15 While it is important that a jury should be drawn from a genuine cross-section of the community, it is also important that each member of the jury should be capable of participating in a decision. This is what is meant here by competence. The question whether, in some or all cases, a high level of competence is necessary, based, for example, on intelligence or qualifications, is considered in Chapter 10. The competence currently demanded is the capability of hearing and understanding the proceedings of the court and of participating in a group determination. The Jury Act, 1977 does not permit children or people who are deaf to serve on juries, for example, nor people who do not understand English.[28]

III. DEFICIENCIES IN THE SELECTION PROCEDURES

3.16 There is no doubt that the selection procedures established by the Jury Act, 1977 can be improved to more effectively implement the stated philosophy. The optimum achievement of the goals of the jury system is significant to its acceptability to the community and its effectiveness as an instrument of justice.

> ... in the day-to-day administration of justice nothing is of more importance than that the jury system should work, and that it should work justly and efficiently.[29]

It is the Commission's view that, in order for the jury system to work justly and efficiently, the principles of random selection, representativeness, competence and impartiality, as well as the avoidance of undue hardship, must be fully

implemented. Currently, however, the representativeness of juries is undermined in ways which cannot be explained by reference to other aims such as competence or impartiality. The following paragraphs describe the ways in which the selection procedures exclude people and groups of people, thus undermining the representativeness of jury rolls, panels and pools.

A. Exclusions in the Roll Compilation Process

3.17 As we have seen, all people enrolled to vote in New South Wales are stated to be qualified and liable for jury service unless disqualified, ineligible or exempt as of right pursuant to the schedules to the Jury Act, 1977. Looking more closely at the situation, however, it appears that numbers of electors are excluded because the electoral rolls containing their names are not used in the preparation of jury rolls. The Jury Act, 1977 requires that jury districts be established comprising "such electoral districts or sub-divisions as are prescribed".[30] In fact subdivisions have been used. Over 10 per cent of electoral subdivisions, however, have not been allocated to any jury district.[31] The Commission has been unable to discover why these subdivisions have been excluded. Some of them are located at a considerable distance from any court house at which a District Court will be convened. However, a person unwilling to travel more than 56 kilometres each way in order to perform jury service is entitled to claim an exemption as of right[32] and, as the former Attorney General, the Hon. F.J. Walker, Q.C., M.P., has stated, "a

person who resides more than the prescribed distance from the place at which he is required to serve and is prepared to attend for jury duty, should not be precluded from doing so".[33] Moreover, some of the excluded subdivisions are well within 56 kilometres of the nearest court, as can be seen from the following table.

Excluded Subdivision	Nearest Jury District	Approximate Road Distance
Blayney	Orange	26 Km
Bogan Gate	Parkes	38 Km
Broken Bay	Gosford	18 Km
Coolamon	Wagga Wagga	29 Km
Crookwell	Goulburn	49 Km
Culcairn	Albury	51 Km
Forster	Taree	34 Km
Junee	Wagga Wagga	37 Km
Katoomba	Lithgow	38 Km
Kyogle	Lismore	43 Km
Manilla	Tamworth	44 Km
Mount Wilson	Lithgow	32 Km
Narromine	Dubbo	40 Km
Raymond Terrace	Maitland	26 Km
Richmond	Penrith	20 Km
Wee Waa	Narrabri	42 Km
Windsor	Penrith	23 Km

Other excluded subdivisions may have mainly elderly populations, perhaps of retired people. Again such people can claim an exemption as of right if they do not wish to serve.[34]

3.18 In his second reading speech on the Jury Bill, the Hon. F.J. Walker, Q.C., M.P., then Attorney General, stated:

> ... it is the Government's intention that all bar a few electoral subdivisions will be used in the selection process. Two that come to mind are the subdivisions of Wilcannia and Menindee in the electoral district of Broken Hill. It will be obvious to honourable members why it is not intended to use these subdivisions as a source of prospective jurors.[35]

Presumably Mr. Walker was referring to the very high Aboriginal populations in those subdivisions. In the light of the continuing over-representation of Aborigines as accused people, it is unfortunate that a number of the excluded subdivisions have proportionately very high Aboriginal populations. While the total Aboriginal population of New South Wales is a mere 0.7% of the State's population,[36] the proportion of Aborigines in Wilcannia is 30.7 per cent and in Menindee it is 20.4 per cent. Other excluded subdivisions include Cargelligo with 7.1 per cent Aboriginal population; Coonabarabran, 7.7 per cent; Gilgandra, 9.9 per cent; Narromine, 6.0 per cent; and Warren, 9.2 per cent.[37] While Aborigines are still disproportionately subjected to criminal sanctions,[38] it is important that Aborigines should also be adequately represented on jury panels. The Commission considers that all electoral subdivisions should be allocated to jury districts imposing the obligation and the privilege of jury service on all electors in the State.

B. Exclusions for Bias

3.19 We have seen that people involved in the administration of justice - judges, lawyers, police and others - are not permitted to serve on juries. The advantage of the understanding of law and procedure which such people could contribute to a jury is outweighed by the belief that they will not approach the task with a fresh, open and impartial mind, and the fear that they would dominate the other members of the jury to detriment of a full discussion by all participants.

The Jury Act, 1977, however, also makes spouses of some of these people ineligible: the spouses of judges, of members and officers of the Parliament and Executive Council, of coroners and Magistrates, of police officers, of Crown Prosecutors and public defenders, and of prison officers.[39] The Law Reform Commission of Western Australia has recommended that "extension of ineligibility to the spouses of those in ineligible occupations is unjustified."[40] That Commission believed,

> ... while shared attitudes may exist in some cases the Commission is not aware of any research which shows that this is to any significant extent, or that the spouses of those concerned are not as capable as anyone else of fulfilling their duty as jurors. If spouses of those in ineligible occupations are to be made ineligible, so probably should their children, parents, relations or even close friends. It would be undesirable in principle to extend ineligibility so far.[41]

3.20 Even if shared attitudes do not operate, however, an accused person may well fear that the spouse of a police officer or Magistrate, out of loyalty to his or her wife or husband, would be more inclined to adopt the known attitude of that person than to put personal loyalties aside and consider the case objectively. The accused person will be aware that a juror may discuss the trial with his or her spouse, if not while it is proceeding at least after it is over, and that a spouse in an ineligible occupation might bring emotional pressure to bear on the juror. An accused might also fear that a police officer could reveal to a juror-spouse that the accused has a criminal record or "is known to police". Moreover, although actual bias might not occur if spouses of

those in ineligible occupations were permitted to serve, it could be argued that they should not be permitted to do so if accused people, on reasonable grounds, fear or suspect bias. One commentator disagrees, and argues that:

> Although shared attitudes may exist, it is doubtful that they exist to such a large degree that spouses would not be as capable as any other member of the community of rendering an impartial decision. Because discarding spouses of ineligible persons results in an unwarranted loss of possible jurors and thus injures the representative nature of the jury, this ineligibility should be withdrawn.[42]

Preliminary research in New South Wales suggests that less than 2 per cent of people deleted from jury rolls are spouses of people in ineligible occupations. In Victoria, Queensland, the Australian Capital Territory, New Zealand and the United Kingdom spouses of people in ineligible occupations are not themselves ineligible. In the Northern Territory only judges' spouses are excluded while spouses of police officers must serve.[43] The Commission invites submissions as to whether spouses of those in ineligible occupations should continue to be ineligible. It may be that the spouses of those in some occupations should continue to be ineligible while others become liable to perform jury service.

3.21 Also excluded are people who have been punished for certain offences, including serious traffic offenders.[44] One commentator has argued that offenders should be able to serve because it is "wrong morally and from a point of view of practice to exclude citizens with convictions". This is because,

> Inevitably it focuses on the question of penal policy. The rationale of sentencing is to rehabilitate an offender, which literally means to make whole again, to take part in society.[45]

Disqualification for a period after the expiration of a sentence is inconsistent with this goal. The same commentator has also noted that,

> There is no statistical evidence to suggest that people with convictions are less likely to be impartial and objective.[46]

The risk of bias, on the face of it, would seem to be small where the person was convicted of a minor offence and/or given a non-custodial sentence such as a good behaviour bond, a fine, or simply a driver's licence disqualification. The Commission invites submissions as to whether such offenders should continue to be disqualified from jury service.

C. Exclusions on the Ground of Hardship: Exemption

3.22 We have seen that the list of occupations who may claim exemption from jury service as of right was drawn up on the assumption that people in those occupations are most likely to experience hardship (or to cause it to the people they serve) if required to serve on juries. The Government also expected that many such people would in fact elect to serve.[47] The Sheriff allows for a 40 to 50 per cent attrition of each draft jury roll as a result of the exclusion of those disqualified, ineligible and exempt as of right.[48] The final jury roll is unlikely to include many people who elected to serve although entitled to claim the exemption as of right. The Commission's own preliminary research indicates that over 50 per cent of

deletions from jury rolls are of people claiming an exemption as of right. The procedure for granting exemptions as of right does not require hardship to be established. Rather, hardship is assumed from the nature of the individual's occupation. This approach has been abandoned recently in California in the interests of improving representativeness. In order to avoid serving there each individual must show "undue hardship on the person or the public served by the person".[49]

3.23 In a 1983 survey, the Law Foundation of New South Wales found that "the occupational background of jurors in the sample compared quite closely with that of the general community".[50] However, the broad occupational groups used - professional, administrative, clerical and sales, farmers - would not show up any under-representation of medical practitioners, dentists, pharmacists and other occupations exempt as of right. The Commission favours the Californian approach to exemptions which, however, will impose a greater burden of decision-making on the Sheriff. Each application for exemption would have to be individually assessed, although it might be expected that guidelines would soon be developed to assist the responsible officers. We also note that people whose applications are refused by the Sheriff would, under the Jury Act, 1977 in its present form, be entitled to appeal to a Magistrate.[51] In this way, too, guidelines on what constitutes hardship would be developed. In spite of the likely increase in administration required, the Commission considers that such a step may be demanded by the principle requiring juries to be representative

of the community. The occupational groups to be affected should be surveyed as to their responses to this proposal and to ensure that no particular and unfair difficulty would be imposed.

3.24 We would exclude from this proposal two groups of people who may currently claim an exemption as of right. People who are on an existing jury roll and people who have been granted an exemption from jury service either for a period or permanently by a judge at the end of a period of lengthy jury service[52] should continue to be exempt as of right. If possible the names of such people should be tagged or coded on the computer lists so that the computer does not select them while so tagged. The feasibility of such a procedure should be examined by the Sheriff. If it is possible, it will relieve these people of the need to claim and establish an exemption and would avoid the need for the legislation to create a special category of exemption as of right containing only these two groups.

3.25 Hardship is also a reason for permitting people aged 65 and over to claim exemption as of right. The Law Foundation's survey found, in 1983, that the elderly were under-represented on juries.[53] As the proportion of those aged over 65 increases, more and more people are able to avoid jury service and juries are becoming increasingly less representative of the community. The Commission considers that people aged under 70 should not be exempt from jury service unless they can show

individual hardship. This age has been chosen chiefly because it is the retiring age for judges. We leave open the question whether people aged over 70 should continue to be eligible for jury service or should be ineligible. Some may consider that people aged over 70 are no longer competent to perform jury service. If those aged over 70 are to continue to be eligible to perform jury service the need may arise to distinguish those who are competent and those who are incompetent because of age. The Commission invites submissions as to how competence could be determined.

3.26 Also able to claim exemption as of right are people having the care, custody and control of children under the age of 18. If, as we have suggested, the classes of exemption are repealed and replaced by a single provision requiring the proof of individual hardship, people caring for young children will probably still be exempted on their application. The Commission's preliminary research indicates that over one-quarter of deletions from the jury roll are of people claiming the exemption by virtue of their responsibility for children under the age of 18. We invite submissions as to whether measures should be taken to encourage those responsible for caring for young children to make themselves available for jury service. For example, child care facilities could be provided on or near court premises to assist those responsible for young children. Similarly, those caring for elderly relatives may be enabled to attend by arrangement with community nursing services or public home care facilities.

D. Exclusions on the Ground of Hardship: Excusal

3.27 The Sheriff's Office does not currently record the reasons accepted by the Sheriff for excusing people from jury service. On the whole we have no means of knowing whether an already unrepresentative jury roll is further skewed by the excusal process. We expect, however, that one group of people, those responsible for small partnerships or sole businesses, are generally excused and are, therefore, under-represented on juries. In 1983 the Law Foundation of New South Wales was generally satisfied with the representativeness of a sample of actual jurors on indices of age, occupation and country of origin.[54] The Commission is conducting a further survey which, among other things, will discover the reasons accepted by the Sheriff for excusing people from jury service.

E. Exclusions on the Ground of Incompetence

3.28 As we have seen, the required standard of competence for jury service is relatively low: one must simply be well enough to perform a juror's duties, be in possession of one's mental and physical faculties and be able both to read and understand English.[55] Some courts in Sydney are equipped for mobility-impaired jurors and where these people wish to serve they are encouraged to do so. In most districts, however, such people cannot be accomodated. Such people and other handicapped people who apply to be deleted from the jury roll on the ground of illness or infirmity are generally deleted by the Sheriff. Courts are public buildings and should be accessible to all members of the public. Handicapped people

may be present in court as accused, plaintiffs, witnesses, jurors, family or simply as members of the public, and their access and accomodation should be facilitated. It is to be hoped that the policy of the State Government to improve access to public buildings for physically handicapped people will soon lead to all court houses being made accessible with proper accomodation for mobility-impaired jurors. The Commission invites submissions as to whether physically handicapped people should continue to be deleted from the jury roll at their request as ineligible to perform jury service.

3.29 The requirement that jurors be able to read English has the result of excluding many people from jury service and probably selectively excludes people from particular ethnic communities. The Senate Standing Committee on Language and the Arts recently estimated that at least 287,000 and possibly as many as 442,000 Australians born in non-English speaking countries do not read English. At least 66,000 people over the age of 14 years do not read English at all.[56] Groups among whom literacy in English may be expected to be poor are concentrated in New South Wales (38 per cent of people whose first language is not English) and Victoria (35 per cent).[57] While nationally about 97 per cent of the population speaks English,[58] there is growing concern about the standards of literacy of people for whom English is their first and only language. For example, in a 1976 survey the Australian Council for Educational Research found that 25 to 30 per cent of 10 and 14 year old students were unable to fully comprehend continuous

prose of the kind contained in normal school texts and reference books.[59] The question whether the literacy requirement should be abandoned (i.e. whether people who speak and understand, but do not read, English should become eligible for jury service) must be considered in the light of decisions made about the amount of written material to be made available to juries.

F. Other Exclusions

3.30 There is one class of people who are ineligible for jury service in New South Wales and for whom no excuses on the grounds of partiality or hardship can be offered. They are Commonwealth public servants who have been withdrawn by the Commonwealth itself in Federal legislation[60] backed up by the Jury Act, 1977.[61] There are 38,570 Commonwealth public servants in New South Wales, just over one per cent of electors in the State.[62] Now that most State public servants are liable for jury service there seems to be no reason for excluding Commonwealth public servants. Third and Fourth Division officers of the Commonwealth Public Service are generally liable for jury service in Victoria, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory while exempt in the other three States.[63] The release of these people, however, must be a subject of negotiation between the State and Federal governments, although there is some doubt as to the constitutionality of the Commonwealth legislation exempting Commonwealth public servants.

IV. TENTATIVE PROPOSALS

3.31 The Commission considers that the goals of the jury selection procedures are proper and that their full implementation is vital to the just and efficient working of the jury system. Amendments to the Jury Act, 1977 as suggested below would more fully implement the goal of representativeness in particular. The following amendments are proposed.

1. All electoral subdivisions should be allocated to jury districts pursuant to section 9(2) of the Jury Act, 1977 (paragraph 3.18).
2. The only ground for exemption as of right should be hardship to the applicant or to others. Schedule 3 to the Jury Act, 1977 should accordingly be repealed (paragraph 3.22).
3. Commonwealth Public Servants, Divisions 3 and 4, should be available to perform jury duty in New South Wales courts. Clause 16 of Schedule 2 to the Jury Act, 1977 should be repealed (paragraph 3.30).

3.32 A number of other issues have been raised for consideration in this Chapter. We do not make tentative proposals with respect to these questions but list them here for further discussion. They are:

* whether spouses of people in ineligible occupations, or some of them, should be liable to perform jury service. Currently the spouses of Judges, Masters, Members and officers of the Parliament, Magistrates, police officers, Crown Prosecutors, Public Defenders and prison officers are ineligible for jury service (paragraph 3.20);
* whether people given non-custodial sentences should be disqualified from jury service. Currently a person who has been:
  (a) convicted of an offence which may be punishable by imprisonment;
  (b) bound by recognizance to be of good behaviour or to keep the peace;
  (c) the subject of a probation order; or
  (d) disqualified from holding a licence to drive for a period in excess of six months;

  is disqualified for five years (paragraph 3.21);
* whether people aged between 65 and 70 should be required to perform jury service. Currently people of or above the age of 65 may claim an exemption as of right (paragraph 3.25);
* whether people of or above the age of 70 should be ineligible for jury service. Currently such people are qualified but may claim an exemption as of right (paragraph 3.25);

* whether measures should be taken to encourage people with the responsibility for caring for young children to make themselves available for jury service. Currently people having the care, custody and control of children aged under 18 may claim an exemption as of right (paragraph 3.26);
* whether mobility-impaired people should be considered to be ineligible for jury service by reason of illness or infirmity. Currently such people are deleted from the jury roll on this ground if they so request (paragraph 3.28); and
* whether the ability to read English should be a necessary qualification for a juror. Currently those unable to read English are ineligible for jury service (paragraph 3.29).

Footnotes

1. Jury Regulation 471 of 1981.
2. Jury Act, 1977, ss.10,12.
3. Id., s.13(1) and Jury Regulation 191 of 1977, Schedule 2, Form 1.
4. Jury Act, 1977, ss.23, 26-27.
5. Id., s.38(1).
6. The rolls for Grenfell, Walgett, Wellington, Tumut, Corowa and Temora were certified in December 1982 and have not been used. The rolls for Braidwood, Quirindi, Scone, Tenterfield and Port Macquarie were certified in January 1983 and have not been used.
7. Personal Communication, then Under-Sheriff of New South Wales, Mr. D. Lennon.

8. NSW Parliamentary Debates, Legislative Assembly, 22 February 1977, p.4254 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

9. Jury Act, 1977, s.5.

10. Parliamentary Electorates and Elections Act, 1912, ss.20(1), 21, 34; Australian Citizenship Act 1948 (C'th), s.14(1).

11. NSW Parliamentary Debates, Legislative Assembly, 22 February 1977, p.4254 per the Hon. F.J. Walker, Q.C. M.L.A., Attorney General.

12. Report of the Departmental Committee on Jury Service (Cmnd.2627, 1965), para.53.

13. Taylor v. Louisiana 419 US 522 (1975).

14. W.A. Macauley and E.J. Heubel, "Achieving representative juries: a system that works" (1981-1982) 65 Judicature 126, footnotes omitted.

15. NSW Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4479 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

16. Jury Act, 1977, ss.10,12.

17. Id., schedule 3, clause 8.

18. H. Harman and J. Griffith, Justice Deserted: The Subversion of the Jury (National Council of Civil Liberties Pamphlet, 1979), at p.13.

19. Jury Act, 1977, schedule 1 and see NSW Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4477 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

20. Jury Act, 1977, schedule 2.

21. NSW Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4478 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

22. Id., 22 February 1977, p.4254 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

23. Jury Act, 1977, schedule 2.

24. Id., schedule 3.

25. Id.,s.38.

26. P.R. Weems, "A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California" (1984) 10 Sydney Law Review 330, at p.335.

27. New South Wales Law Reform Commission, Conscientious Objection to Jury Service (December 1984, LRC 42), para.2.19.

28. Jury Act, 1977, schedule 3, clause 12: "a person who is unable because of illness or infirmity to discharge the duties of a juror" is ineligible; clause 11: "a person who is unable to read or understand the English language" is ineligible.

29. NSW Parliamentary Debates, Legislative Assembly, 22 February 1977, p.4254 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

30. Jury Act, 1977, s.9(2).

31. Jury Regulation No.471 of 1981.

32. Jury Act, 1977, schedule 3, clause 10 and Jury Regulation No.191 of 1977.

33. NSW Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4478 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

34. Jury Act, 1977, schedule 3, clause 4.

35. N.S.W. Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4479 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

36. Australian Bureau of Statistics, 1981 Census of Population and Housing.

37. Ibid, by towns only. Figures for Local Government Areas cannot be directly compared with electoral subdivisions.

38. Commission of Inquiry into Poverty in Australia: Outline of first main report (April 1975), at p.265.

39. Jury Act, 1977, schedule 2.

40. Law Reform Commission of Western Australia, Report on Exemption from Jury Service (Project No.71, 1980), para.3.29.

41. Ibid.

42. P.R. Weems, note 26 above, at p.336.

43. Juries Act 1967 (Vic.), schedule 2; Jury Act 1929 (Qld.), s.8; Juries Ordinance 1967 (ACT), s.11; Juries Act 1981 (N.Z.), s.8; and Juries Act 1974 (U.K.), schedule 1; Juries Act 1962 (N.T.), schedule 7.

44. Jury Act, 1977, schedule 1.

45. E. Reid, "Excluding jurors" (1984) Legal Action 12.

46. Ibid.

47. NSW Parliamentary Debates, Legislative Assembly, 24 February 1977, p.4479 per the Hon. F.J. Walker, Q.C., M.L.A., Attorney General.

48. P.R. Weems, note 26 above, at p.336.

49. D.W. Brown, "Eliminating exemptions from jury duty: what impact will it have?" (1978-1979) 62 Judicature 436.

50. P. Grabosky and C. Rizzo, Jurors in New South Wales (Law Foundation of New South Wales, 1983), at p.6.

51. Jury Act, 1977, s.15.

52. Id., schedule 3, clauses 8, 9.

53. P. Grabosky and C. Rizzo, note 50 above, at p.6.

54. Ibid.

55. Jury Act, 1977, schedule 2, clauses 11 and 12.

56. Senate Standing Committee on Language and the Arts, A National Language Policy (A.G.P.S, 1984), at p.36.

57. Id., at p.13.

58. Id., at p.18.

59. Education Research and Development Committee, Australian Studies in School Performance: Vol I: Literacy and Numeracy in Australian Schools: A First Report (A.G.P.S., 1976), at pp.105-106.

60. Jury Exemption Act 1965 (C'th).

61. Jury Act, 1977, schedule 2, clause 16.

62. Australian Public Service Board, Annual Report 1984, pp.150-151. There were 3,440,404 people enrolled to vote in New South Wales at the end of January, 1985.

63. Jury Exemption Regulations, 1970 (No.131), clauses 6, 7.

Chapter 4

Empanelling the Jury

I. INTRODUCTION

4.1 The jury for a trial is chosen from a panel of people summoned to attend. The size of a panel is determined by the Sheriff, taking into account the number of challenges to be available and the possibility that people will ask to be excused. In the presence of the accused in open court, names are drawn at random until twelve jurors are selected. The remainder of the panel is either discharged or returned to the jury pool and kept available in the event of their being required for another trial. Both the Crown and the accused may object to prospective jurors, subject to limitations which are detailed below. A juror who is objected to, or 'challenged', is excused. By the use of the challenge, therefore, counsel attempt to influence the constitution of the jury. This Chapter describes the rights of challenge and assesses their propriety in the light of the above-stated goals of the jury selection process, most notably impartiality and representativeness. Other aspects of the empanelling procedure are also noted.

II. CHALLENGE TO THE ARRAY

4.2 At common law both the accused and the Crown could object to the jury panel as a whole. The Jury Act, 1977 preserves this challenge.[1]

> Challenge to the array is exception taken to the whole panel of persons returned by the summoning officer by reason of matter personal to the officer himself.[2]

The position of the summoning officer may be clearly inconsistent with impartiality, such as where he or she is related to one of the parties, or it may be merely suspected. In either case, the array may be challenged.[3] The challenge must be in writing. In 1974 an Aboriginal accused in Tamworth challenged the array on the basis that no Aborigines were on the jury panel. The challenge failed when it was shown that there were some Aborigines on the jury roll for the district and no impropriety could be attributed to the Sheriff.[4] Failure on the part of the Sheriff to draw up the jury panel in accordance with the law is also a ground for challenge to the array. In R. v. Grant and Lovett, two labourers, one white and one Aboriginal, challenged the array on the basis that no juror was either a labourer or an Aborigine and that, therefore, the accused were not provided with a jury of their peers. The trial judge ruled that the challenge must fail as the Sheriff had complied with the provisions governing the selection and summoning of jurors.[5]

4.3 Because jury pools in New South Wales are now selected at random by computer with no discretionary input by the Sheriff, a challenge to an array is unlikely to succeed. As an added precaution, the Jury Act, 1977 provides that the court may order some other person to summon the jury panel where the Sheriff "is a party, or in any manner interested" in a trial.[6] Thus the use of a computer to compile jury rolls and to select and summon people for jury pools and panels is a safeguard against the Sheriff tampering with the randomness and

representativeness of juries. In other jurisdictions there is a further safeguard in that the Sheriff can be convicted of an offence under the juries legislation if he or she fails to comply with the statutory provisions as to selecting and summoning jurors.[7]

4.4 In New South Wales, the only personal influence which the Sheriff could exercise is in the discretion to excuse a person from complying with a summons. As a general rule this discretion is only exercised after the Sheriff has received an application from the individual to be excused. The reasons for such applications, therefore, are beyond the control of the Sheriff. The Commission has been advised, however, that the Sheriff may initiate applications for excusal in limited circumstances, such as where a physically handicapped person attends for jury service in a court where accommodation is inadequate. We note, in this context, that the presiding judge has a discretion to excuse any person if he or she is of the opinion that it is necessary for the proper conduct of the trial.[8] Therefore, it is perhaps proper for the Sheriff to draw the presence of some otherwise qualified people to the attention of the presiding judge. For example, the Sheriff should advise the judge that a prospective juror appears to be deaf or drunk. Such "tampering" with the composition of jury panels is entirely proper, and a challenge to the array based upon it would be unlikely to succeed.

III. CHALLENGES FOR CAUSE

4.5 Both the accused and the Crown have an unlimited right to challenge individual prospective jurors for cause. This challenge must be made after the person has been called to take his or her place on the jury (a process known as ballotting) but before he or she is sworn.[9] The grounds for the challenge must fall into one of three categories: that the person is not qualified under the Jury Act, 1977 to serve as a juror; that the person is disqualified or ineligible pursuant to Schedule 1 or 2 to the Act; or that the person is suspected of bias.[10] In New South Wales the challenge is determined by the presiding judge.[11] A prospective juror who is challenged for cause may be questioned on oath by the challenging party, but not before good grounds are established. The challenge must first be made, the cause stated and some evidence tendered by counsel in support of the objection before the person challenged may be examined to prove the cause to the judge.[12] In New South Wales the challenge for cause is very rarely used. One reason for this is probably the large number of peremptory challenges available.[13]

4.6 The challenge for cause is also difficult to initiate because neither the accused nor the Crown officially receives any information about the prospective jurors other than their names. Moreover, the names are not made available until the ballotting of the panel in open court commences. Neither side may inspect the panel prior to this time.[14] Thus there is no opportunity for the Crown to run checks on each prospective

juror, as occurs in certain sensitive trials in the United Kingdom, to determine whether he or she is disqualified from serving by virtue of a prior criminal conviction or to discover information on the political and other allegiances of each juror.[15] Thus, the challenge for cause depends on counsel (or the accused) recognising each juror as ballotted, either by appearance or by name. In country districts a practice seems to have developed whereby counsel acquire additional information about prospective jurors. Counsel may be advised by a local solicitor or, in the case of prosecuting counsel, by a local police officer, as to the reputation, life-style, attitudes and connections of each prospective juror. In this context, we consider that our proposal in paragraph 7.6 that prospective jurors should be asked to advise the judge if they feel they could not give objective consideration to the case would adequately meet the concern, felt mainly in country towns, that an impartial jury is difficult to achieve because many residents would know both the accused and the victim, if any.

4.7 The challenge for cause is made quite differently in many United States jurisdictions. The selection of the jury is a lengthy process involving extensive questioning of prospective jurors by opposing counsel. The aim of this questioning is to discover information about each prospective juror which might suggest specific prejudices, and even to elicit admissions of bias. Such information is then used to submit a challenge for cause.[16] If the challenge for cause

does not succeed, counsel may wish to challenge the prospective juror peremptorily. This so called "voir dire" procedure can be criticised on three main grounds. First, it is so time consuming that the empanellment of the jury can take longer than the case itself. Second, the procedure gives counsel an opportunity to use persuasive and argumentative rhetoric in an attempt to subtly co-opt the sympathy and support of jurors even before they are empanelled. Third, the questioning can be intrusive and an interference in prospective jurors' privacy. For all three reasons, the Commission would not wish to see the United States procedure introduced in New South Wales.

IV. PEREMPTORY CHALLENGES

4.8 The peremptory challenge is a challenge without cause stated. It has its origin in the concern that the accused should "have a good opinion of his jury".[17] It is a mechanism designed to ensure the existence of an impartial jury in the particular trial.

> The theoretical basis that justifies the arbitrary elimination of randomly selected jurors is to obtain a jury devoid of predisposition with regard to the particular defendant and issues.[18]

The effect of a peremptory challenge is automatically to exclude the person who is challenged, and it is made as the jurors are ballotted. In New South Wales each side has the same number of peremptory challenges: twenty where the offence charged is murder and eight in any other case.[19]

4.9 Until 1977, the Crown had the additional right to ask jurors to "stand by for the Crown". The stand by is an ancient procedure developed at a time when the Crown did not have the right to make peremptory challenges. The Crown instead was given an unlimited right to request prospective jurors, as they were ballotted, to "stand by for the Crown". These people would not be sworn but would, in effect, go to the back of the queue. Only if those remaining were insufficient to complete a jury were the people stood by ballotted again. In order to eliminate them a second time, the Crown was required to show cause. In the United Kingdom the Crown still has this right while the peremptory challenges of the accused have been reduced to three.[20]

4.10 Peremptory challenges are intended to be used to eliminate extremes of partiality and prejudice. In New South Wales, peremptory challenges are usually based on the name of the prospective juror and/or his or her appearance, including sex, age, race and dress. As we have mentioned above (paragraph 4.6), in country towns counsel may have much more information. It is with respect to the peremptory challenge that the ideal of a randomly selected representative jury most clearly conflicts with the need to ensure that the jury is impartial. Critics argue that to permit counsel to challenge peremptorily is to allow the parties to influence the randomness and representativeness of juries.[21] Others value the accused's challenges for the opportunity they offer to veto a number of prospective jurors whom they fear, but could not

prove, could be prejudiced against them. The peremptory challenge is the only effective tool with which the accused can eliminate suspected bias from the fact-finding tribunal and attempt to secure a jury of his or her peers.

4.11 The Commission considers that the rules as to peremptory challenges can be improved to balance more effectively the competing aims of representativeness and impartiality. There are a number of options for reform of the peremptory challenge. They are:

* retention of the current rule of equal rights of peremptory challenge for the Crown and the accused;
* abolition of the peremptory challenge;
* abolition of the Crown's peremptory challenges and retention of the right of the accused; and
* reduction in the available number of peremptory challenges for both the Crown and the accused.

The following paragraphs discuss each of these options and we express a tentative preference for the final option.

A. Retention of the Existing Rights

4.12 The retention of the existing number of peremptory challenges raises two problems. First, the total number of peremptory challenges available to the Crown can be large where there are multiple accused. The New South Wales Court of Criminal Appeal held recently in Dickens that in a trial of a number of co-accused the number of Crown peremptory challenges is equal to the number permitted to one accused (that is, either eight or twenty) multiplied by the number of

accused.[22] The problem for the jury system is that a very large jury panel must be summoned in a trial of multiple accused to ensure that twelve will remain in the event that all concerned exercise all challenges. For example, if the forty-one people accused of murder in respect of the "Milperra massacre" are committed for trial, at the very least 1,652 prospective jurors would have to be summoned. Because of the anticipated number of applications to be excused, a much larger number would in fact have to be summoned. The Commission has been informed that the Attorney General's Department is considering an amendment to the Jury Act, 1977 to permit the Crown to exercise only the peremptory challenges of one party, rather than reflecting the number of accused people.

4.13 The second issue raised by the retention of all existing peremptory challenges is illustrated by a case in Bourke in 1981. The accused was Aboriginal and the Crown prosecutor challenged each Aborigine ballotted for the jury with the result that an all-white jury was empanelled. The presiding judge then discharged the jury saying that justice must not only be done, but must also be seen to be done.[23] In the trial of Georgia Hill, who was accused of murdering her husband, the prosecutor systematically challenged all nineteen women who were called from the panel. The resulting jury was composed predominantly of males.[24] Such a use of the peremptory challenge by the Crown appears to be an abuse of the challenge and its purpose.

4.14 In California a restriction has been placed on the use of the peremptory challenge so as to effectively prohibit the challenge affecting the representativeness of juries. In Wheeler the Californian Supreme Court held that the United States Constitution guarantees each accused a jury drawn from a cross-section of the community. This guarantee is violated when the peremptory challenge is used to systematically exclude certain groups from the jury. Therefore, the prosecution at least is not now permitted to challenge on the presumption of group bias. Group bias was defined as partiality arising from membership in "an identifiable group distinguished on racial, religious, ethnic or other similar grounds".[25] One commentator has suggested that this prohibition achieves the proper balance between the prosecution's desire to exclude biased jurors and the requirement of a representative jury.[26] However, such a restriction on the prosecution's peremptory challenges virtually means that the prosecutor must have a cause which would be at least arguable if the challenge was for cause, but need not state the cause unless and until there is an objection to the use of the peremptory challenge.

4.15 This interpretation of the right of peremptory challenge has also been adopted in New York and three other states,[27] but it has been strongly disapproved in the United Kingdom. The English Court of Appeal in Mason held that prosecution counsel have a right to request that a member of the jury panel shall stand by, and that right can be exercised without there being a provable valid objection, until such time as the panel is exhausted.[28]

> ... For centuries the law has provided by enactment who are qualified to serve as jurors, and has left the judges and the parties to criminal cases to decide which members of a jury panel were suitable to serve on a jury to try a particular case. To this extent the random selection of jurors has always been subject to qualification. Defendants have long had rights to peremptory challenges and to challenges for cause; prosecuting counsel for centuries have had the right to ask that a member of the panel should stand by for the Crown and to show cause why someone should not serve on a jury; and trial judges, as an aspect of their duty to see that there is a fair trial, have had a right to intervene to ensure that a competent jury is empanelled. The most common form of judicial intervention is when a judge notices that a member of the panel is infirm or has difficulty in reading or hearing; and nowadays jurors for whom taking part in a long trial would be unusually burdensome are often excluded from the jury by the judge.
>
> In our judgment, the practice of the past is founded on common sense. A juror may be qualified to sit on juries generally but may not be suitable to try a particular case ...[29]

B. Abolition of the Peremptory Challenge

4.16 It is difficult to make a case for denying altogether the accused's right to make peremptory challenges. When a jury is summoned it is in accordance with statutory qualifications and procedures by officers of the Crown to try the accused on a serious charge. The denial of any input by the accused to the composition of the jury when the State has, in a broad sense, determined who will be called, would further prejudice the accused's position. Further, if neither party could make peremptory challenges, the challenge for cause would come to the fore. The determination of challenges for cause is time-consuming and involves questioning the challenged juror

about private matters which could be distressing. For these reasons the peremptory challenge might be retained as a more efficient and fair device than the challenge for cause.

C. Abolition of the Crown's Peremptory Challenges

4.17 The Crown's right to make peremptory challenges has very recently been abolished in South Australia.[30] It could be argued that the prosecution should be satisfied with each jury panel as constituted under legislative procedures and, if dissatisfied, should assign a cause for each challenge. The use of the peremptory challenge by the Crown to influence the composition of the jury so that it will be more favourable to the Crown is a tactic which places Crown counsel into the ring of battle when arguably the Crown should be seen to be objective and above the fray. This attitude could well explain the traditional denial of the peremptory challenge to the Crown and resort to the stand by procedure (paragraph 4.9). There are occasions, however, when the availability of the Crown's right of peremptory challenge would benefit interests other than that of the Crown. If, for example, the Crown was aware of something in the background of a prospective juror making him or her unsuitable to try the particular case, as could occur, as mentioned above, in country courts, challenging the person peremptorily might be more humane than airing the matter in open court for the purpose of a challenge for cause.

4.18 One possible consequence of the abolition of the Crown's right to make peremptory challenges is that the Crown could seek to gain more information with which to make challenges for cause more effectively. In the United Kingdom, the practice of supplying to the prosecution the list of jurors summoned has been approved in order to combat possible bias against the Crown in very sensitive cases.[31] In terrorist cases and cases involving national security where it is likely that part of the evidence will be heard in camera, checks are run on criminal records as well as on Special Branch files which will show up political affiliations.[32] This procedure is known as "jury vetting". The prosecution is concerned to identify people who,

> ... either voluntarily or under pressure, may make an improper use of evidence which, because of its sensitivity, has been given in camera, [or whose] political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of sectarian interest or pressure group to a degree which might interfere with [their] fair assessment of the facts of the case or lead [them] to exert improper pressure on [their] fellow jurors.[33]

Armed with this information, the prosecution in the United Kingdom can stand by jurors whom it considers "undesirable". Information revealed by vetting which suggests that a prospective juror might be biased against an accused is required to be made available to the defence.[34]

4.19 Jury vetting in a far wider range of cases apparently takes place in New Zealand,[35] and the police have the opportunity to vet jury panels in Victoria and the Australian Capital Territory where the Police Commissioner receives the

list of names in advance of the trial to check whether anyone has a criminal record.[36] In Victoria it has been alleged that the police abuse their role and provide "information about potential jurors' trivial brushes with the police" to prosecuting counsel who could assume that those people held anti-police views and request them to stand by.[37] This measure is unnecessary in New South Wales where the Jury Act, 1977 requires people who are disqualified by virtue of a criminal record to so notify the Sheriff. We consider that vetting of jurors is antithetical to the ideal of random selection. As we have noted above, the Jury Act, 1977 in fact prohibits inspection of the panel.[38] The Commission proposes that to further guard against pre-trial disclosure of the panel to the prosecution or the defence, the Jury Act, 1977 should provide that the Sheriff is prohibited from permitting any inspection of the panel before a trial.

D. Reduction of Peremptory Challenges

4.20 It could well be argued that the existing number of peremptory challenges available to both sides is too high, allowing counsel too much influence over the representativeness of juries.[39] With eight peremptory challenges for each side (twenty where the charge is murder), New South Wales has the highest number of any common law jurisdiction. In Tasmania and the Northern Territory the accused has six peremptory challenges, and in the Territory an accused charged with a capital offence has twelve. In South Australia and the United

Kingdom the peremptory challenges of the accused have been reduced to three.[40] This reduction caused a public outcry in the United Kingdom.

> Though he will not personally know his jurors nowadays, his right of peremptory challenge must still be regarded as important. Those jurors will make a decision which could result in his being imprisoned for many years. Because of that it would seem fair to allow him to take a subjective view and say 'I do not want to be tried by that person; he looks hostile'.[41]

It should be remembered, however, that this comment was made in the context of a reduction of the accused's peremptory challenges from seven to three while the Crown retained an unlimited right to stand jurors by. If the representativeness of jury panels is enhanced by the adoption of our proposals in Chapter 3, we consider that three or four peremptory challenges represent a more appropriate balance between the interests of the parties in eliminating those who may be hostile and the interests of the community in juries being representative and randomly selected.

4.21 Real bias on the jury panel is best eliminated, we consider, not by the use of challenges based essentially on stereotypes and guesswork, but by a clear direction from the presiding judge that people unable to give an impartial judgment should not serve on the jury. We propose, in Chapter 7, that before selection of the jury commences, the panel should be advised about the nature of the case and the identity of the accused and likely witnesses. The judge should invite prospective jurors who feel they could not be objective to

notify him or her with a view to being excused. This procedure could relieve counsel of the need to challenge at least some of the panel who appear to be hostile.

4.22 Responsible use of the peremptory challenge could be enhanced by increasing counsel's knowledge about prospective jurors. For example, as each person is ballotted his or her address and occupation could be read out in addition to his or her name.[42] A major difficulty with this suggestion is that if more information about jurors is made public, the risk that they will be traced and intimidated or bribed is increased. Former jurors in Victoria have suggested that in future addresses and occupations should not be read in court, stating that they were made to feel insecure as a result of this practice.[43] Counsel may be satisfied if surnames only and suburbs only were to be available, together with occupation. The risk that jurors could be traced would be minimised if, as at present, only the names are called in court, and counsel provided, on the day of the trial, with the other information in written form. A duty could be imposed on counsel not to use this information for purposes other than making challenges. As the defence challenge is the right of the accused, questions also arise as to the circumstances, if any, in which an accused could properly be denied access to such a list. One possibility is that counsel should have a right to inspect the list. An unrepresented accused could be offered representation only for the empanelling procedure. If this offer were refused, the denial of access to the list may not be seen as a denial of a right of the accused.

V. THE JUROR'S OATH

4.23 A person ballotted as a juror who is not challenged is then sworn. He or she promises to:

> ... well and truly try and true deliverance make between our Sovereign Lady the Queen and the accused whom you shall have in charge, and a true verdict give according to the evidence.[44]

In New South Wales the juror does not say these words but responds when they are read by saying either "So help me God" or "I do", according to whether he or she is making an oath or an affirmation. Nevertheless, it may be time to modernise the text as has recently been done elsewhere. Jurors in the United Kingdom now say:

> I swear by Almighty God that I will faithfully try the defendant and give a true verdict according to the evidence.[45]

A similar simplified oath is now used in Western Australia.[46] The Commission invites submissions as to whether the New South Wales oath needs reform and whether jurors should be required to repeat the text of the oath or affirmation to ensure that its import is properly understood.

VI. TENTATIVE PROPOSALS

4.24 The Commission is of the view that the existing rules with respect to challenges to the array and for cause should be retained without alteration but that the current rules as to peremptory challenges permit counsel too much influence over the composition of juries, thus adversely affecting their representativeness. The availability of a large number of peremptory challenges also conflicts with the aim of random

selection of juries. The Commission proposes that the number of peremptory challenges in all cases, including murder, should be reduced to three or four. Each accused should be entitled to this number of peremptory challenges while the Crown should have a total of three or four challenges only irrespective of the number of co-accused (paragraph 4.20). The Commission also considers that pre-trial vetting of the jury panel, by either party or by both, would be antithetical to random selection of juries representing a cross-section of the community. We propose that the Jury Act, 1977 should provide that the Sheriff is prohibited from permitting any inspection of the jury panel before a trial (paragraph 4.19). We would also welcome submissions on the questions whether counsel should be provided with further information about prospective jurors to assist the making of challenges and, if so, on what conditions, and whether the full name or the surname only of each prospective juror should be read in court (paragraph 4.22). Finally, we have raised the question whether the juror's oath should be simplified (paragraph 4.23).

Footnotes

1. Jury Act, 1977, s.41.

2. Halsbury's Laws of England (4th ed., 1979) Vol.26, para.621; McMahon v. Sydney City Council [1963] S.R. (N.S.W.) 507; R. v. Thomas [1958] V.R. 97.

3. Halsbury's Laws of England (4th ed., 1979), Vol.26, para.621.

4. Private communication, Mr. G.F. Hanson, the then Sheriff of NSW, 12 March 1985.

5. [1972] V.R. 423, at p.425.

6. Jury Act, 1977, s.25.

7. Cf. Jury Act 1929 (Qld.), s.48 (iii); Juries Act 1927 (S.A.), s.80(j); Juries Act 1957 (W.A.), ss.53, 54(e); Jury Act 1899 (Tas.), s.66; Juries Act c.226 (Ontario), s.42(1)(c).

8. R. v. Cullen [1951] V.L.R. 335; Duffus v. Collins (1966) 83 W.N. (Pt. 1) (N.S.W.) 399, at p.402, per McClemens J.

9. Jury Act, 1977, ss.45,46.

10. Halsbury's Laws of England, (4th ed., 1979), Vol.26, para.627.

11. Jury Act, 1977, s.46. Of the Australian jurisdictions, only Queensland retains the traditional method of determining a challenge for cause: trial by the jurors already empanelled or by two indifferent people chosen by the court from the panel: Jury Act 1929 (Qld.), s.38 and Criminal Code Act 1899 (Qld.), s.612.

12. R. v. Chandler [1964] 2 Q.B. 322; McMahon v. Sydney City Council [1963] S.R. (N.S.W.) 507.

13. P.R. Weems, "A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California", (1984) 10(2) Sydney Law Review 330, at p.341.

14. Jury Act, 1977, ss.40(1), 48(2)(b). Cf the situation in Victoria where it is provided that a copy of each panel from which a criminal jury is to be struck is to be forwarded to the Chief Commissioner of Police not later than twelve days before the trial. The police are responsible for making inquiries as to whether any person named is disqualified from serving by virtue of a prior conviction: Juries Act 1967 (Vic.), s.21(3).

15. "Attorney General's Guidelines on Jury Checks" [1980] 3 All E.R. 785.

16. B.M. Mogil, "Voir Dire and Jury Psychology" (1979) New York State Bar Journal 382.

17. H. Broom, Commentaries on the Laws of England (Maxwell, Sweet and Stevens, 1869), Vol.iv., at p.442.

18. P.N. Silverman, "Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law" (1983) 44 University of Pittsburgh Law Review 673, at p.675.

19. Jury Act, 1977, ss.42, 43(1).

20. Juries Act 1974 (U.K.), s.12(1)(a). Three States of Australia have retained the stand by for the Crown: in Tasmania it is retained intact compared to the accused's right to six peremptory challenges: Jury Act 1899 (Tas.), ss.54, 55. In Western Australia the stand by is limited to four in addition to the Crown's right to eight peremptories: Juries Act 1957 (W.A.), s.38. The stand by is limited to six in the Northern Territory and is in addition to peremptory challenges: Juries Act 1962 (N.T.), ss.43, 44.

21. C. Kitchen, "Trial Juries Stacked - Liberals", The Sun 15 February 1985; B. Birnbauer, "Liberals to Review Jury Selection", The Age, 15 February 1985.

22. [1983] 1 N.S.W.L.R. 403.

23. J.A. Scutt, "Trial by a jury of one's peers?" (1982) 56 Australian Law Journal 209.

24. J. Basten, "Jury Vetting - A Privilege of the Prosecution" (1981) 6 Legal Service Bulletin 154, at p.155.

25. People v. Wheeler 583 P.2d 748 (1978), at pp.761-762 citing Taylor v. Louisiana 419 U.S. 522 (1975) .

26. J. Marks, "Recent Cases" (1979) 48 University of Cincinatti Law Review 599, at p.607.

27. Massachusetts, New Mexico and Florida.

28. R. v. Mason [1980] 3 All E.R. 777.

29. Id., per Lawton L.J., at p.781.

30. Juries (Amendment) Act 1984 (S.A.), s.30 repealing s.62 of the principal Act.

31. R. v. Mason [1980] 3 All E.R. 777.

32. "Attorney General's Guidelines on Jury Checks" [1980] 3 All E.R. 785, at pp.785-787.

33. Id., at p.785.

34. Id., at p.788.

35. Juries Act 1981 (N.Z.), s.14; D.A. Yallop, Beyond Reasonable Doubt (Hodder and Stoughton, 1978), at p.219.

36. Juries Act 1967 (Vic.), s.21(3); Juries Ordinance 1967 (A.C.T.), s.24(3), (4).

37. S. Voumard, "Anti-police jurors precluded: lawyer", 13 May 1985 The Age.

38. Jury Act, 1977, s.40(1).

39. This argument was advanced in the mid-1970's by the United States Supreme Court recommending that peremptory challenges should be reduced to five. The proposal was rejected by Congress: P.N. Silverman, "Survey of the Law of Peremptory Challenges: Uncertainty in The Criminal Law" (1983) 44 University of Pittsburgh Law Review 673, at pp.702-703.

40. Jury Act 1899 (Tas.), s.54; Juries Act 1962 (N.T.), s.44(1); Juries Act 1927 (S.A.), s.61; Criminal Law Act 1977 (U.K.), s.43.

41. H. Harman and J. Griffith, Justice Deserted: The Subversion of the Jury (National Council of Civil Liberties Pamphlet, 1979), at pp.19-20.

42. As in Victoria, Juries Act 1967 (Vic.), s.33.

43. Letters to the Victorian Police Commissioner, Mr. Mick Miller, courtesy Mr. Miller and the Law Reform Commission of Victoria.

44. Supreme Court of New South Wales, Manual for the Guidance of Associates, at p.23.

45. Practice Direction (1984) New Law Journal 942.

46. The West Australian, 29 May 1985.

Chapter 5

Conditions of Service for Jurors

I. INTRODUCTION

5.1 In the criminal jury trial fairness to the accused is most important. This fairness requires that the tribunal is both impartial and competent. The conditions in which jurors serve can enhance their effectiveness, efficiency and competence. If the conditions are poor, they can seriously undermine these qualities. The conditions will also affect the willingness of citizens to undertake jury service and the enthusiasm and confidence with which they perform it. This Chapter considers current conditions under four broad headings: information, physical conditions, compensation and personal protections.

II. INFORMATION

5.2 A juror is expected to hear evidence and argument and then deliberate upon a verdict. The juror's capacity to perform this task will be impaired if he or she is confused about the role and obligations of jurors, and uncertain about the procedures both in the court room and in the jury room. Yet each juror's undivided attention is essential if the accused is to be assured of a fair trial. Information about their task is chiefly given to jurors by the presiding judge in the summing-up to the jury. The summing-up is discussed in Chapter 6. Information from other sources may or may not be available. These sources may include:

* information provided when a person is advised of inclusion on a draft jury roll;

* information provided with a summons to attend;

* information provided individually or to the whole jury panel at the court; and

* information provided to the jury once empanelled.

The Commission is conducting research to determine what information jurors desire and at what stage it should be provided. An assessment will also be made of the form in which such information should be provided: written, by means of forms or pamphlets; visual, by means of videos or slides; aural, by means of addresses by the Sheriff or a judge. Information for jurors is currently provided in a rather ad hoc manner.

A. Information Currently Provided

5.3 When jurors are first notified of their inclusion on a draft jury roll they are invited to advise the Sheriff if they are disqualified, ineligible or wish to claim exemption as of right.[1] The three schedules to the Jury Act, 1977 listing people in those categories are set out on the notice. However, people are not advised of the following:

* that a person who fails to advise the Sheriff that he or she is disqualified or ineligible can be fined;

* the function of jurors and what will be expected of them; or

* that they may seek to be excused from jury service once summoned by applying to the Sheriff.

Our survey of prospective jurors may reveal that other information would also be welcomed by jurors at this stage.

5.4 The Jury Summons is a shorter document advising only the court, the date and the time of attendance and the penalty for failure to attend.[2] Currently no explanatory information is provided with a summons. Even the number and name of the street where the court is located does not appear on the summons and people are not advised that they may apply to be excused by contacting the Sheriff upon receipt of the summons. Consequently, many people who would have been excused by the Sheriff now miss half a day's work and travel to the court to make a personal application to the judge. Even when the application is granted the person must be paid for half a day's attendance.

5.5 The Sheriff or one of his officers may be able to provide some information, orally, to prospective jurors who ask questions either by telephone prior to the day of attendance or personally on that day. As a general rule the panel is not assembled and given relevant information in a standard form or invited to ask questions. A Sheriff's officer will usually advise the panel of the estimated length of a case, where it is expected to be substantial, and invite those wishing to be excused to apply personally to the judge.

5.6 Once a jury has been empanelled, the judge will generally make some introductory remarks. We anticipate that judges vary considerably in the content of these remarks. Our survey of judges will seek to obtain information about judicial practice and their views as to what topics the introductory address should cover.

B. Information Which Should Be Provided

5.7 The Commission considers that more information should be provided on the notification of inclusion on a draft jury roll. One significant omission at present is an explanation in major languages other than English. Such an explanation need merely state: "This is a notification of inclusion on a draft jury roll. If you do not read or understand the English language you are ineligible for jury service. You must notify the Sheriff if you are ineligible for jury service for this, or any other, reason." Such a notice would mitigate the chance that a person unable to read or understand English would ignore the notification and would, therefore, not be deleted from the jury roll. Such a person currently risks a penalty for failing to notify the Sheriff of ineligibility and may risk a further penalty for ignoring a summons. If the summons is complied with the person may even be selected for a jury. In paragraph 3.29 we have raised the question whether, in any event, people who speak but do not read English should continue to be ineligible for jury service. If this question is ultimately answered in the negative, our proposed notice would be differently worded.

5.8 For the benefit of all recipients the notification could usefully include the following:

* a brief explanation of the nature of jury service;

* advice that a penalty can be imposed for failure to notify the Sheriff of disqualification or ineligibility;

* advice that people not deleted from the jury roll may apply to be excused from jury service upon receipt of a summons.

The Commission also considers that the notification should be assessed and, if necessary, improved by an expert in effective written communication. The importance of effective communication at this stage should not be under-rated. Accurate completion of the form will give the Sheriff more confidence in the accuracy of the jury roll and will avoid considerable administrative inconvenience at later stages.

5.9 The Jury Summons could also be improved. In particular, it should advise that excusal from jury service is available for "good cause" and that applications should be directed to the Sheriff before the date specified in the summons for attendance. It should further state that applications for excusal may be made in person to the presiding judge at the court on the day specified in the summons. The summons should advise, where it is a summons to attend a jury pool, that the maximum time one can be kept at a jury pool unless empanelled for a trial is five days. The provision of information on these matters could make jury service seem much less burdensome because it is a little less uncertain and unknown.

5.10 A carefully prepared and fully informative document in booklet form should be prepared taking into account the results of the Commission's survey on jurors' information needs. There are three stages at which this booklet could be made available:

(i) with the notice of inclusion on a draft jury roll;

(ii) separately to all those included on the final jury roll; and

(iii) with the first jury summons.

There are problems with each. If posted with the original notice there will be an over-coverage of up to 50 per cent. About half those on the draft jury roll are deleted from the final roll. On the other hand, it could be argued that if more information is provided about jury service, those who are entitled to claim exemption as of right may feel more inclined to serve. If posted at the time the jury roll is finalised the booklet will represent a significant extra expense as the Sheriff does not currently send a further notification that one is included on the final roll. On the other hand, an explanatory document supplied at the commencement of a three year period of liability for jury service would be timely. If posted with the first jury summons, the information in the booklet will be received between two and four weeks before the first period of jury service when the person is perhaps most anxious to obtain information. Whichever option is ultimately favoured, the Commission is firmly of the view that such a booklet should be supplied automatically to everyone called for jury service in the State, and should not be held back to be made available only on request. To this end it should be small enough to make printing and postage economically feasible. The Commission understands that a special committee has been formed by the Chief of Justice of New South Wales to prepare a booklet to meet this need.

5.11 The question of pre-trial information and orientation has recently been considered by the Canadian Law Reform Commission. That Commission recognised that prospective jurors can have misconceptions about the nature of their responsibilities, the conduct of trials and common concepts which will be used. These misconceptions must be corrected if the jury is properly to fulfil its functions. The Commission recommended that the orientation process should include three stages. First, a handbook should be distributed with every juror summons, to ensure that uniform information is given to all jurors. Second, all jurors should, at the commencement of their period of service, view a five-to-ten minute slide and audio presentation about jury service and court room procedures. Third, the customary preliminary instructions of the judge to the empanelled jury covering these matters should be mandatory.[3] We further consider the subject of the judge's opening remarks to the jury in Chapter 6.

III. PHYSICAL CONDITIONS

5.12 The physical working conditions of jurors will obviously affect the efficiency and willingness with which they discharge their duties. They will affect concentration, morale and even health. In extreme cases the physical conditions will even make the jurors' task impossible at times, as where traffic noise drowns the voices of witnesses or counsel in the court room. The Commission's survey will attempt to discover from jurors what conditions disturbed or distracted them and will ask them to offer suggestions for improvement.

5.13 The stress of a criminal trial can be magnified when the conditions for jurors are difficult. In 1983, the New South Wales Law Foundation questioned a number of jurors and invited them to suggest ways in which the working conditions could be improved. One in five respondents offered suggestions including the improvement of seating and air conditioning and the provision of microphones. One in four jurors reported some difficulty in understanding what was going on during the trial. Most of these people attributed their difficulty to problems with acoustics, background noise and/or difficulty in hearing.[4] The Commission's own survey of jurors should obtain some information about current working conditions.

5.14 Jurors in New South Wales do not have a right to reasonable refreshment and standard amenities. The Jury Act, 1977 empowers the presiding judge to order that these be provided and they invariably are provided.[5] Jurors have a right to reasonable refreshment in Canada.[6] Jurors in New South Wales can be kept together for the entire trial if the judge so determines, although the usual practice is that the jury is permitted to separate at the close of each day's evidence. Jurors can be kept deliberating for as long as the judge determines although the practice is that where deliberation is likely to be lengthy, the jury is permitted to break off at the end of an afternoon or evening and resume the next morning. Members of the jury are securely accomodated overnight. On the other hand, where a jury informs the judge that it will be likely to render a verdict even quite late at

night, the court will generally permit deliberations to continue, holding itself available to receive the verdict at night. This might be preferable to requiring the jury to break off and resume for perhaps only a short time the next day. The Commission considers that the appropriate person to determine these matters is the presiding judge who is charged with balancing the interests of the jury and fairness to the accused. These matters should be left, as at present, in the judge's discretion, with the possible exception that the Jury Act, 1977 should provide that jurors have a right to reasonable refreshment. This is not, however, a problem in practice so far as we are aware.

5.15 The willingness of citizens to serve on juries will also be affected by the impact of service on their daily lives and work. In New South Wales a typical jury roll continues in force for three years and, in the Sydney jury district, people on the roll can expect to be summoned two or three times in that period. When summoned to a jury panel, a prospective juror must attend the specified court on the specified day and, if chosen for a jury, for each day of the trial thereafter. When summoned to a jury pool the person will be required to attend for a maximum of 5 days unless empanelled on a jury. If empanelled, a juror's service will be complete when that jury is discharged.[7] This procedure may be contrasted with the South Australian procedure (similar to that in many states of the United States) of requiring the one pool of prospective jurors to be available for selection on juries for an entire month.[8] Thus any juror may, in his or her month of service,

try two or more criminal cases. Despite submissions that a month of service was onerous and that experienced jurors may become cynical and less receptive to the defence position, the Criminal Law and Penal Methods Reform Committee of South Australia did not recommend any changes to the organisation of juror availability. The Committee doubted the strength of the arguments put and noted certain advantages of the South Australian procedure. These include savings in administrative time and expense and the likelihood that after a month of service a juror would be unlikely ever to be required again.[9] The Law Reform Commission of Canada, on the other hand, has stated:

> Short jury terms make it possible for more people to serve on juries and minimizes the personal disruption of jury service. It should mean that most people would be able to serve without fear of undue economic hardship. Thus, the jury would be more representative of the community and the burden or jury duty more equitably distributed. Another benefit would be that more people would be exposed to the jury system and would thereby gain an increased appreciation of judicial administration.[10]

The Commission considers that the current procedures in New South Wales work to the best advantage of prospective jurors and of accused people. They are also, arguably, more cost-efficient than the South Australian option because they do not result in large numbers of people being required to make themselves available for lengthy periods.

5.16 Since hardship may result more readily from lengthy service than from a short period of duty, prospective jurors should be told of the anticipated length of a trial in order

that they can apply to be excused by reason of hardship by the judge.[11] In an English Practice Direction in 1981, Lord Chief Justice Lane directed judges in civil cases to "enquire of prospective jurors whether they will suffer inconvenience or hardship by having to serve for the estimated length of the trial and excuse those who will be so affected."[12] In New South Wales it is the practice for Sheriff's Officers and sometimes for judges, to advise the panel of the anticipated length of the trial and to invite applications for excusal. The Commission considers that all judges should make such an enquiry. Where the length of a trial causes hardship to arise a serving juror may seek to be discharged before giving a verdict. In R. v. Hambery[13] the trial judge discharged one juror who was due to go away on a holiday. Again, jurors are more likely to become ill, or even to die, in the course of a lengthy trial. There is also a greater risk of a juror suffering a bereavement.[14] A trial may continue uninterrupted with a reduced complement of jurors. The presiding judge may order that the trial is to continue with only eleven or ten jurors. If the number is reduced further, the written consent of both the Crown and the accused is required before the trial may continue.[15] However, it is clearly in the interests of justice to all concerned that the continuing availability of all jurors be assured, as far as is possible, before the jury is empanelled. Thus, counsel should be in a position to advise the court of the likely duration of the trial. Judges and coroners are empowered, in New South Wales, upon discharging

jurors after a lengthy trial, to direct that the jurors should be exempt from further service for a specified period, even permanently.[16]

5.17 Although jurors are now permitted to separate and return home at the close of each day's evidence, they still may not separate during deliberation.[17] Communication with members of the public at this time is strictly forbidden.[18] This rule can be onerous when a jury must be accomodated overnight. In a long trial the jury may need to deliberate for some days. During this time jurors are not only unable to return home but may not communicate with family and friends. The reason for the rule is that it ensures the verdict is a result of the deliberations of the twelve (or fewer) who heard the evidence, addresses and summing-up and is uninfluenced by chance conversations or information obtained from the media. The Commission invites submissions as to whether the isolation of the jury during its deliberations is still necessary and desirable, particularly in a lengthy case.

IV. COMPENSATION

A. Jury Fees

5.18 Jurors in New South Wales receive payment on a sliding scale. The amounts were increased each year between 1977 and 1982, and again early in 1985. A juror who is required for less than four hours on only one day currently receives $23.00. A juror required for a longer period on the first day is entitled to $46.00. A juror required for a full week will

receive $46.00 for each of the first three days and $47.00 each for days four and five, whereafter the daily fee continues to increase on a sliding scale.[19] In South Australia, by way of contrast, a flat rate applies subject to the possibility of an increase up to a ceiling where a particular juror establishes that he or she receives a daily wage greater than the basic rate. The Criminal Law and Penal Methods Reform Committee of South Australia felt that the rates were inadequate for employed people. That Committee recommended that the minimum rate of pay for jurors should be adjusted with variations in the basic wage and that where a juror's average daily rate of pay exceeds the amount fixed as the minimum jury fee, the amount he or she receives should be increased to that daily rate of pay.[20]

5.19 Some attention has also recently been given to jury fees in Canada. The Law Reform Commission of Saskatchewan has noted:

> As a general principle, jury service should not be a money-making proposition. But neither should it involve jurors having to forego their regular income. To date, juror compensation by the province has been changed on a haphazard, ad hoc basis. Jury service is an important civic responsibility. As such, it seems reasonable that every juror should receive hourly compensation at the provincial hourly minimum wage.[21]

Because many employers, either by virtue of award provisions or voluntarily, continue to pay employees performing jury service, the Commission further recommended that "jurors who continue in receipt of a salary or wages would by force of the legislation be compelled to assign their juror earnings to their employers".[22]

5.20 In a recent working paper, the Law Reform Commission of Canada stated:

> Ideally then, jury fees should ensure that jury service in no way disrupts a person's ordinary earnings, that no one receives a windfall while serving on the jury, and that jurors are treated as equals.[23]

Making very similar recommendations to those made by the Law Reform Commission of Saskatchewan, the Canadian Commission made the following points:

* if the fees are too low jury service will impose an undue economic burden on many jurors or make it difficult to obtain a jury that represents a true cross-section of the community;

* jurors who are required to endure economic hardship are perhaps more likely to be dissatisfied with their experience and, as a result, to discharge their functions less responsibly; and

* the fees should not underline the socio-economic class differences of jurors. It is important that during jury service they regard one another in all respects as equals.[24]

5.21 In the United States there has been some debate as to the effect of jury payments on juror satisfaction and willingness to serve. Pabst, Munsterman and Mount's study of jurors who had completed a period of jury service found that 90 per cent were favourably impressed with jury duty and that neither having lost money nor the amount of the jury fee, which varied from $US3.00 to $US20.00 per day, affected the favourable attitude.[25] Richert, on the other hand, argued that the high rate of applications for excusal (about 50 per cent of those summoned in one eleven-month period by a New Jersey court) is likely to be at least influenced by the amount

of payment offered. He noted that 20 per cent of those seeking excusal in the New Jersey study were concerned about financial loss. A further study, of jurors who had actually attended, showed that 81 per cent considered the fee inadequate even though most of them (75 per cent) did not suffer financially. When asked how jury duty could be improved, 31.4 per cent recommended an increase in the fee.[26]

5.22 The Commission's own survey of jurors will attempt to discover whether jurors consider current fee levels in New South Wales to be satisfactory. Our current view is that the fees are too low and should be raised to the level of average weekly earnings for adult males in full-time employment in the State: currently $87.10 per day. While some people, for example those receiving unemployment benefits, would obtain a windfall from serving, the Commission considers that the jury fee should be determined by reference only to the value of the work done. The jury fee should be seen as payment for performing jury service and not in any way as compensation for lost earnings or profits. We do not consider, however, that jurors who continue to receive a wage or salary while they are performing jury service should also receive the jury fee. Where an employer is willing to support an employee on jury duty, that employee should not be entitled to claim the jury fee. The claim form should require each claimant to certify that he or she has not, and will not, receive a normal salary for the period of jury service.

5.23 Because the jury fee should be payment for work done, there should be no additional compensating measure for those actually suffering greater financial loss. We note that sole business operators are usually excused from jury service on their application and consider that others likely to suffer serious financial hardship should have the responsibility for drawing this to the judge's attention when seeking to be excused. Therefore, we would not consider appropriate the implementation in New South Wales of the Queensland procedure for making applications for ex gratia compensation for financial losses over and above the jury fees.[27]

B. Travelling Expenses

5.24 The travelling expenses of jurors in New South Wales are calculated according to the distance of the juror's residence from the court. From 1977 until the beginning of 1985 the rate was eight cents per kilometre travelled.[28] In February 1985 the rate was increased to 10 cents per kilometre.[29] The Law Reform Commission of Manitoba has recommended that the mileage rate paid to jurors should be the equivalent of that paid to civil servants and others travelling on government business.[30] In New South Wales, such a rate could be paid to all jurors, irrespective of their actual method of travel, or only to those driving to court. Consideration could be given to providing free parking for jurors at city and metropolitan courts. For those without cars, consideration could be given to paying their taxi fares. Alternatively, in the metropolitan area, free travel by public transport could be arranged. A

special juror's travel card could be posted with the Jury Summons, stamped with the first date on which attendance is required. The card could be renewed, or stamped with further dates, if necessary, by the Sheriff.

5.25 The ease with which people can travel to and from court will not only affect their attitudes to jury service. It can determine whether they make themselves available or not. Preliminary research by the Commission suggests, for example, that in Sydney's western districts, where the public transport service is poor, the Sheriff has deleted people from the jury roll on the basis of claims that travelling will be difficult. The Commission considers that, if travelling expenses are to be paid at all, they should be realistic. At the same time, we see virtue in the argument that, if the jury fee is raised to the male average weekly earnings, the cost of travelling should be paid by the juror from the jury fee. That fee would then be more readily recognisable as payment for work done, and it is arguable that transport to and from the place of work should be borne by the juror himself or herself.

C. Personal Injury Compensation

5.26 Jurors are not covered by workers' compensation while attending court for jury service.[31] A juror injured in court or in traffic on the way to court can only apply to the Attorney General for an ex gratia payment and is not entitled to full and adequate compensation. Only in Victoria has a statutory right to compensation for personal injury been

created. A juror's entitlements are the same as under the workers' compensation provisions: the juror will be compensated if he or she was injured while attending court in answer to a summons, while temporarily absent with the court's permission, or while travelling to or from court. The benefits payable are the same as those payable under the Workers' Compensation Act and compensation for jurors is administered by the Workers' Compensation Board. A juror's compensation is paid direct from Consolidated Revenue.[32] The Commission proposes that similar legislative provision should be made in New South Wales.

V. PERSONAL SECURITY

5.27 While citizens who acknowledge the civic importance of jury service may be willing to put up with interruption and inconvenience, and even a degree of discomfort, during the period of jury service, few would accept that continuing ill-effects should be tolerated. A juror should, upon discharge, return to anonymity, with the ramifications of the period of service and the verdict reached making little impression on his or her ordinary life beyond a feeling of satisfaction in having done an onerous task well and of having learnt about and participated in an important social process. Thus, in a number of ways, the jury system seeks to protect jurors from continuing interference.

5.28 Jurors are, to a large degree, anonymous. Their full names are read out in court for the purpose of calling them into the jury box. We have suggested in Chapter 4 that surnames only would suffice (paragraph 4.22). Once sworn, the jurors are not again referred to publicly by name but only as "members of the jury". Counsel are prohibited from communicating with jurors once a trial has finished as this would be an intrusion on the anonymity to which jurors are entitled.[33] It is an offence in New South Wales to "publish or print any material or broadcast or televise any matter of such a nature that a person may thereby be informed, whether by implication or otherwise, of the identity or address of any juror".[34] The terms of this provision do not confine the prohibition to the duration of the trial. However, it is suggested that the section should be amended to more clearly prohibit all publication, even once the trial is concluded.

5.29 In Australia it has been held to be undesirable for a newspaper to publish accounts of the observations of a juror in relation to a recently concluded trial.[35] The Law Reform Commission of Canada, on the other hand, has recommended that publications of this type should be permitted and that jurors ought to be able to be identified if they consent.[36] No similar protection would appear to apply in the United States. An article in The American Lawyer, which appeared a few months after the completion of a notorious libel action against the Washington Post newspaper, traced the progress of jury room discussion, attributing views and statements to several named

jurors and holding the foreman up to ridicule as well as to, perhaps justified, criticism.[37] It can be argued that the offence of publication should not apply where the juror consents in writing to being identified. We invite submissions as to whether and in what circumstances publication of jurors' identities should be permitted. We discuss the broader issue of the publication of details about a jury's deliberations in Chapter 8.

5.30 The law of contempt and the Jury Act, 1977 do attempt to protect the physical security of jurors. It is contempt of court to use or threaten violence, or even to use threatening or abusive language, in or near the courts to a juror, and such an offence will be dealt with summarily upon a complaint being made.[38] A juror's safety may be threatened by an approach designed to "corruptly influence" the juror, an offence known as embracery for which the penalty on indictment in New South Wales is seven years imprisonment.[39] Where a juror has been threatened, he or she may be discharged upon advising the court of the threat.[40] Fear of consequences may be considered a valid reason for excusing a prospective juror from service.[41]

5.31 The Jury Act, 1977 also protects jurors in their employment. It is an offence in New South Wales for an employer to dismiss an employee or to injure the employee in his or her employment or to alter the employee's position to his or her prejudice by reason of the fact that the employee is summoned to serve as a juror. The onus of proof is on the

employer to prove that the employee's jury service was not the cause of the dismissal. Upon conviction, an employer can be ordered to reimburse the employee for lost wages and to reinstate the employee.[42] In 1980 the Law Reform Commission of Canada recommended that similar provisions should apply in that country.[43]

VI. TENTATIVE PROPOSALS

5.32 The jury system, though essentially a device of the criminal justice system designed to provide a fair trial to accused people, recognises both that this fairness is dependent on the provision of satisfactory conditions for jurors and that the public acceptability of juries largely depends on fair treatment being extended to jurors. The Commission considers that the conditions of service for jurors can be improved in a number of ways, and would, therefore, propose the following.

1. The Notification of Inclusion on a Draft Jury Roll should:

   (a) include an explanation in major languages other than English as to the import of the Notification;

   (b) advise that people unable to read or understand English are ineligible for jury service;

   (c) include a brief explanation of the nature of jury service;

   (d) advise recipients that a penalty can be imposed for failure to respond as and where appropriate; and

(e) advise recipients that the Sheriff has a discretion to excuse people from jury service for good cause (paragraphs 5.7-5.8).

2. The Jury Summons should:

(a) advise recipients that applications to be excused may be made to the Sheriff;

(b) advise recipients that applications to be excused may be made in person to the presiding judge on the day on which attendance is required (paragraph 5.9).

3. An Explanatory Booklet should be prepared and distributed to every person summoned for jury service. This Booklet should discuss the nature of a juror's responsibilities, the jury's role, the conduct of trials and explain common concepts which will be used (paragraph 5.10).

4. The Jury Act, 1977 should, for the sake of certainty, be amended to provide that jurors have a right to be provided with reasonable refreshment and standard amenities during adjournments of a trial (paragraph 5.14).

5. The presiding judge should advise the jury panel as to the estimated length of the trial and should excuse those who apply to be excused because they would be likely to be adversely affected if required for that period (paragraph 5.16).

6. Jury fees should be raised to the level of male average weekly earnings. Jurors who continue to receive a wage or salary while performing jury duty should not be entitled to claim the jury fee (paragraph 5.22).

7. Jurors should be entitled to claim compensation for personal injury sustained during a period of jury service in the same way and on the same basis as claims can be made under the Workers' Compensation Act, 1926 (paragraph 5.26).

5.33 This Chapter has raised certain other issues for discussion. They are:

* whether a videotaped film explaining the jury's role, court procedures and common concepts used in criminal trials should be shown to prospective jurors before any jury is empanelled (paragraph 5.11);
* whether the jury should be permitted to separate after it has been charged to consider its verdict (paragraph 5.17);
* whether travelling expenses should be paid to jurors and, if so, what form they should take (paragraph 5.25); and
* whether publication of jurors' identities should be permitted and, if so, in what circumstances (paragraph 5.29).

Footnotes

1. Jury Regulation No.191 of 1977, schedule 2, Form 1.

2. Id., Form 3.

3. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp.69-73.

4. P. Grabosky and C. Rizzo, Jurors in New South Wales (Law Foundation of New South Wales, 1983), at pp.10,13.

5. Jury Act, 1977, s.55.

6. Criminal Code 1970 (Canada), s.576(5).

7. Jury Act, 1977, ss.24(3), 35.

8. Juries Act 1927 (S.A.), s.29.

9. Court Procedure and Evidence (Third Report, 1975), at pp.109-110.

10. The Jury in Criminal Trials (Working Paper 27, 1980), at p.66.

11. Jury Act, 1977, s.38(1)(b).

12. Reproduced [1981] C.L.Y. para.1483.

13. [1977] 3 ALL E.R. 561.

14. In R. v. Tortomano [1979] V.R. 31 the judge discharged a juror whose wife had attempted suicide and was in hospital. In R. v. Richardson [1979] 3 All E.R. 247 the judge discharged a juror whose husband had died suddenly. In each case the trial continued with eleven jurors.

15. Jury Act, 1977, s.22(a).

16. Id., s.39(1).

17. Id., s.54.

18. R. v. Furlong (1950) 34 Cr.App. R. 79; Fanshawe v. Knowles [1916] 2 K.B. 538.

19. Jury Regulation 22 February 1985.

20. Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at pp.94-95. See now Juries Act 1927-1984 (S.A.), s.70.

21. Proposals for Reform of the Jury Act (1979), at p.7.

22. Id., at p.8.

23. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at p.67.

24. Ibid.

25. W.R. Pabst, G.T. Munsterman and C.H. Mount, "The myth of the unwilling juror" (1976) 60(4) Judicature 164.

26. J.P. Richert, "A new verdict on juror willingness" (1977) 60(10) Judicature 497.

27. Jury Act, 1929 (Qld.), s.21B.

28. Jury Regulation 24 September 1982.

29. Jury Regulation 22 February 1985.

30. Law Reform Commission of Manitoba, The Administration of Justice in Manitoba: Part II: A Review of the Jury System (Report 19,1975), at p.53.

31. Workers' Compensation Act, 1926, s.7.

32. Juries Act 1967 (Vic.), Part VII, ss.59, 64.

33. Prothonotary v. Jackson [1976] 2 N.S.W.L.R. 457.

34. Jury Act, 1977, s.68. See also Juries Act 1957 (W.A.), s.57; Juries Act 1967 (Vic.), s.69.

35. Re Matthews and Ford [1973] V.R. 199.

36. Law Reform Commission of Canada, The Jury (Report 16, 1982), at p.53.

37. S. Brill, "Inside the Jury Room at the Washington Post Libel Trial", The American Lawyer November 1982, at p.1.

38. Halsbury's Laws of England (4th ed.), Vol.26, para.654.

39. Jury Act, 1977, s.67.

40. R. v. Stretton and Storey [1982] V.R. 251. Compare Antonio Zampaglione and Others (1982) 6 A.Crim.R. 287 where it was held that a threatening telephone call had not been shown to have influenced the juror; and R. v. Boland [1974] V.R. 849 where it was held that, partly due to the length of the trial, the judge had been right to refuse to discharge a juror who had been promised money for voting for a conviction.

41. A. Jennings and D. Wolchover, "Northern Ireland: Star Chamber versus the Gang of Twelve - I" (1984) New Law Journal 659, at p.660.

42. Jury Act, 1977, s.69.

43. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp.63-65.

Chapter 6

The Course of the Trial

I. INTRODUCTION

6.1 In this Chapter we consider some problems faced by jurors in the course of a criminal trial. The jury is required to listen to the addresses and arguments of counsel and to the evidence presented by witnesses, to observe the demeanour of witnesses and to listen to the summing-up by the trial judge. The next task is to discuss the evidence and the relevant law to determine the facts and to reach a verdict according to the evidence accepted. It is a complex and demanding task requiring the jurors to apply their own experience of the world and their capacity for logical thought in an often emotional context. It is a task made more difficult by a number of trial procedures. For example, the adversary mode of presenting evidence is rarely logical and orderly. The emphasis on oral evidence requires jurors to rely heavily on their memories. Legal rules are generally explained only after the evidence is presented, and both counsel and the judge tend to use legal jargon and complex language even when addressing the jury. It is crucial that the jury, as triers of fact, understand their role, the evidence and the legal principles they are required to apply. Adequate comprehension will assist the jury to work efficiently and to render verdicts according to law. We consider some ways in which the jury can be assisted to perform its functions more effectively.

II. ORIENTATION

6.2 It is not difficult to perceive that a jury must experience considerable difficulty if required to listen to evidence and arguments without having been told anything of its own role. Recognising this, some judges in New South Wales make some introductory remarks to the jury before the opening address of the Crown. The Commission's survey of judges seeks to obtain information about how widespread this practice is and what judges cover in their opening remarks. Prospective jurors can have misconceptions about the nature of their obligations and responsibilities, the mode of conduct of trials and even the basic principles of the criminal justice system. We have proposed, in Chapter 5, that these matters should be explained briefly to all people summoned for jury service in an Explanatory Booklet accompanying the Jury Summons and have also raised the issue whether an audio-visual presentation shown to prospective jurors before empanellment would assist in consolidating the information and explanations given as well as ensuring that all jurors receive uniform information. We consider that similar information should be included in preliminary remarks by the judge which, in addition, should extend to matters related to the particular case at hand and to matters not able to be well covered either by an Explanatory Booklet or in an audio-visual presentation. Considering the scope of the judge's preliminary remarks, the Law Reform Commission of Canada has recommended that the following should be covered:

(a) the function of the indictment,
(b) the function of the jury as sole judges of the facts,
(c) the restriction of their consideration to the evidence,
(d) the presumption of the accused's innocence,
(e) the benefit of reasonable doubt,
(f) matters concerning credibility,
(g) the functions of court and counsel,
(h) the elements of the crime charged,
(i) a glossary of some of the terms to be used,
(j) admonition as to outside conversation, newspaper accounts, etc,
(k) explanation of the procedure to be followed, including the order of presenting proof and the examination of witnesses,
(l) the importance of cross-examination,
(m) the right of the accused to remain silent,
(n) the need occasionally to send the jury out of the room while matters relating to the admissibility of evidence are considered,
(o) whether or not the taking of notes is permitted,
(p) explanation of the verdict and how it is reached,
(q) obligation to keep secret their deliberations.[1]

The Canadian Commission recommended that judges should be required by statute to instruct a jury on these matters at the commencement of the trial.

6.3 The need for some pre-trial orientation is clear. As one former juror commented in a law journal article:

> ...considerable anxiety would have been allayed had we been given instructions at the beginning as well as the end of the trial...A brief explanation of the procedure might have enabled us to understand the significance of the repetition of certain details and the lack of weight given to others.[2]

The Commission therefore tentatively proposes that procedures should be formulated to ensure that the trial judge addresses jurors at the commencement of the trial on the following topics:

* the course the trial will take;

* the role of the jury; and

* the law on matters such as the standard and burden of proof and the presumption of innocence.

In Part V of this Chapter we raise the issue whether further instructions of law should also be given at the commencement of the trial.

III. OPENING THE CASE TO THE JURY

6.4 When the jury is empanelled and sworn the accused is "given into its charge" and the indictment is read. Rarely is the indictment a simple document. Although reference will be made to the offence charged and the elements of that offence throughout the trial, and particularly in the trial judge's summing-up, the jury would also be assisted by having a copy of the indictment before it during the trial. This would ensure that there was no misunderstanding as to the terms of the indictment. The Commission, therefore, tentatively proposes that each juror should be provided with a copy of the indictment at the commencement of the trial. The nature of this document and its proper use should, of course, be the subject of a direction from the trial judge.

6.5 The Crown Prosecutor opens the Crown case by summarising it in an address to the jury and stating, among other things, that certain witnesses will be called to establish certain facts. In some cases, it could be argued, some of this information could usefully be reduced to writing and provided

to the jury for constant reference during the trial. We have in mind here a brief summary of the facts which the Crown must establish in order to prove its case. We recognise certain difficulties with the preparation of such a summary. First, although it would include nothing more than a summary of the material in the opening address by the Crown Prosecutor it could tend to have a greater influence on the jury because it would be in written form and available throughout the trial. Careful drafting by the Crown and adequate instructions on its use by the judge would be needed to ensure that the jury did not come to view the document as setting out the facts which have actually been proved instead of merely the facts which the Crown sets out to prove. Second, as the document would need to be checked by the judge and by defence counsel, substantial argument as to its content could result. There is a possibility that appeals could be founded on disputes about the document. On the other hand, the option could be available to defence counsel to prepare a similar document setting out in summary form the chief points in the defence case. Alternatively, the jury could be provided with a document which lists the elements of the offence(s) charged and, beside each one, the witnesses to be called and the exhibits to be tendered in relation to it. In our view the preparation of either form of document would not be an imposition upon the resources of the prosecution, nor should there be any real objection to making it available to the court. The conventionally thorough preparation of the prosecution case would probably result in such a document being produced in any event. We invite submissions as to the provision of such a document to the jury.

6.6 A document setting out the facts to be proved could assist the presiding judge in achieving a shorter trial and, perhaps, a more freely flowing delivery of evidence, and in summing-up to the jury in a manner satisfactory at least to the Crown. This could be so if the document were to be agreed upon by the Crown, the defence and the judge at a pre-trial hearing. The document could then more clearly show which facts were disputed and which were not in dispute. Evidence which is largely irrelevant could be dispensed with or dealt with in shorter form. Again, where a line of questioning is, when challenged, defended on the basis that its relevance will emerge later, the summary of the facts to be proved should enable this forensic device to be kept properly in check. The jury may be more directly assisted by the provision of such a document in assessing the relative weight and significance of evidence as it is presented and in locating that evidence in the structure of the Crown case. This would allow the case to be presented to the jury in a fashion both more informative and more coherent. This benefit may override the difficulties presented by such a document.

6.7 An alternative method of assisting the jury to understand which matters are disputed and which are not, would be to permit defence counsel to address the jury immediately after the Crown Prosecutor's opening address. The purpose of such an address would be to alert the jury from the early stages of the trial as to the nature of the accused's defence. We would certainly not propose that defence counsel be

compelled to adopt this procedure. However, if it were used, some trials could be greatly simplified. Attention could be focussed on the real issues in the case. Difficulties would arise, however, in cases of multiple accused. The risk would be that the Crown opening would be separated possibly by days from the Crown case. The Crown could lose the advantage of the opening summary. If this suggestion were adopted, defence counsel's opening address would not be permitted to be lengthy or argumentative. The advantage to the defence in this procedure would be in readying the jury for a challenge to the Crown case. This could avert the risk that the jury will listen, possibly for days or weeks, to the Crown case in an unquestioning, accepting frame of mind without concentrating on those matters to which the defence wishes to draw attention when the opportunity arises.

6.8 Much of the argument and direction addressed to juries is couched in complex language and often in legal jargon. Such language may, at times, be confusing for the jury. In Chapter 5 we have proposed that an Explanatory Booklet should be prepared and provided to all prospective jurors. This Booklet, among other things, should explain the more common concepts used in a criminal trial. In Part V of this Chapter we discuss the need for judges' summings-up to use language which can be understood by jurors. These measures should go some way towards assisting jurors to come to grips with the language of the proceedings and should also have an educative effect on criminal lawyers themselves. Counsel should avoid unnecessary

jargon and use language that is readily understood by lay people when discussing legal concepts and the situations which arise in the course of a criminal trial. We invite submissions as to whether the jury should also be provided with a glossary of legal terms likely to be encountered in the course of the trial and, if so, as to who should prepare this glossary. The former Victorian Director of Public Prosecutions has recommended the provision of such a glossary.[3]

IV. PRESENTING THE EVIDENCE

A. Witnesses

6.9 As we have noted above, the Crown's opening address will usually refer to the witnesses to be called to establish certain facts. It is unlikely, however, that, by the time the witness is called, the jury will accurately remember the issues to which his or her evidence will be addressed. It may be that counsel should be permitted briefly to introduce each witness by reference to the element(s) of the offence to which his or her evidence relates. For example, counsel may say "Witness A is called to give evidence as to the cause of death". If the jury has a document setting out the elements of the offence, the introduction could refer them directly to that document. Counsel should, of course, avoid statements such as "Witness A is called to describe how he struggled to disarm the accused before the victim was shot". Nevertheless, there is a clear danger that jurors will confuse any claim made by counsel for the evidence of a witness with the evidence itself. This

danger is greater than any raised by an inaccurate or misleading opening address because the Crown's introduction would immediately precede the witness's evidence. The Commission invites submissions as to the desirability of such a procedure. It may be that this procedure would be of greater value in a long or complex trial, offering the added advantage of permitting Crown counsel to abbreviate the opening address.

6.10 In Chapter 10 we consider the problems raised for juries by a particular class of witness: expert witnesses. We there propose that the evidence of such witnesses should be able to be received in written form or that such witnesses should be permitted to read their evidence from a prepared document. The judge would first have to be satisfied that this procedure would assist the jury. The procedure would encourage the logical presentation of what is usually quite complex evidence. Such evidence is often not capable of being organised chronologically as in the case of much other evidence.

B. Exhibits

6.11 During the course of a trial a number of documents and photographs may be tendered as exhibits. If admitted, the document or photograph is then passed around for each member of the jury to examine. The exhibit will be taken by the jury into the jury room when it retires to consider its verdict. We suggest that when it is known in advance what photographic and documentary material is to be presented to the jury, a copy should be made for each juror to be given to him or her at the

time it is tendered and admitted. This practice would have to be carefully monitored to ensure that all documents, particularly those of a sensational kind, are returned to the court at the conclusion of a trial. We are of the view that the advantages of this proposal are so great in terms of juror comprehension that the extra cost and effort are justified.

6.12 Discussing the desirability of each juror being given a copy of any documentary exhibit, Mr. Justice Lee of the New South Wales Supreme Court has said:

> If, for instance, a record of interview is to go into evidence, the jury should have a copy of it in their hands when counsel is cross-examining on it. How often have I seen an effective cross-examination of police officers on a record of interview, go right over the heads of a jury because they could not follow the fine but significant nuances which counsel was seeking to reveal.[4]

The ability to peruse the relevant photograph or document is also invaluable when reference is made to it during the addresses of counsel and the summing-up by the trial judge. We, therefore, tentatively propose that each juror, at the discretion of the trial judge, should be provided with a file containing the documents in the case, namely:

* a copy of the indictment (paragraph 6.4);
* admissible documentary evidence;
* a copy of each explanatory statement prepared by counsel, if any.

The provision of such a file could be ordered by the judge either on his or her own initiative or upon the application of either party. This order could be made either at a pre-trial hearing, if any, or at the commencement of the trial.

C. Technological Aids

6.13 Traditionally evidence must be presented to jurors orally by the witnesses themselves. The presence of witnesses permits the jury to observe demeanour under examination and cross-examination and permits the witnesses evidence-in-chief to be tested by opposing counsel. These important procedural advantages could be compromised were oral evidence to be completely substituted with documentary materials, video interviews or statements, or other forms of evidence. Nevertheless the Commission considers that graphic aids and modern technology could assist in the effective presentation of some evidence and the explanation of some issues. Models, diagrams and films could be used to enhance the jury's understanding and appreciation of the evidence.

6.14 One particular suggestion for the use of visual aids in the court room is the idea put forward by Mr Justice Maxwell of the Supreme Court of New South Wales that, during the course of the closing arguments of counsel and of the summing-up by the judge, a slide of each witness could be displayed when reference is made to his or her evidence. In a lengthy case, particularly, jurors may not have a good memory of the evidence of early witnesses. A photograph could jog the memory and recall for jurors their impressions of the witness. Care must be taken to photograph the witness on the day on which he or she gives evidence so that clothing, hairstyle and general appearance are the same. The responsibility for taking the

photographs would, perhaps, best be left to officers of the court rather than to agents of the counsel tendering the witness.

D. Note-Taking

6.15 Whether jurors may or may not take notes during the trial is a matter for the trial judge's discretion. Arguments have been advanced against permitting jurors to take notes:

* a juror who has taken notes may exert more influence during deliberations than those who have not;

* jurors may note trivial details yet neglect important matters;

* jurors taking notes may fail to observe non-verbal factors such as demeanour;

* jurors taking notes may distract those who are not; and

* the quality of the notes taken may vary greatly both between jurors and over time as energy and concentration flag.[5]

On the other hand, it is argued that notes would be a valuable aid to memory and could actually assist concentration.

6.16 The Law Reform Commission of Canada recommended that jurors should be permitted to take notes. The following precautions should be adopted:

* all jurors should have an equal opportunity although none should be required to take notes;

* jurors should be assured of the confidentiality of their notes;

* jurors should be admonished to be as tolerant of the notes of another as they should be of another's independent recollections of the proceedings.[6]

In a short trial the disadvantages of note-taking may outweigh any advantages. We invite submissions as to whether jurors should always be provided with notebooks and pens and told of their right to take notes or whether the matter should continue to be left to the discretion of the presiding judge.

V. INSTRUCTING THE JURY

6.17 A jury is obliged to follow the instructions on the relevant law that are given to them by the judge. The jury's task is to apply those directions to the facts it determines have been established in arriving at a lawful verdict. We will see in Chapter 9 that the jury, ultimately, cannot be forced to apply the law as directed by the judge. Nevertheless, the jurors are technically obliged to do so. The judge, on his or her part, has an obligation "to direct the jury as to the principles of law which they should apply when considering the matters placed before them".[7] A great deal of our faith in the jury system is founded on the assumption "that a jury can be adequately informed of the law's requirements by oral instructions from a judge".[8] It is, therefore, most important that the instructions are comprehensible to jurors, as well as being accurate, complete and unbiased. Studies in the United States and in New South Wales have identified a number of problem areas in current summing-up practices. These are:

* timing of instructions;
* retention; and
* language.

This Part will examine each of these problem areas in turn, assessing the empirical evidence and discussing proposed solutions.

A. Timing of Instructions

6.18 In current Australian practice it would appear that instructions of law, including those that are common to every criminal trial such as the standard and burden of proof, are generally given to juries only after the evidence and the addresses of counsel. The danger in this practice is that the jury may have assessed the evidence when tendered on the basis of perhaps, inappropriate, irrelevant or mistaken ideas.

> What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanour, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the event?[9]

One study has even shown that the judge's instructions may only have an effect on the jury's decision when delivered at the commencement of the trial. In a test situation, decisions of mock jurors did not vary according to whether they were instructed at the end of the trial or not at all. Instructions only had an impact when given before the trial.[10]

6.19 We consider that preliminary instructions would result in a fairer trial for two reasons. First, the instructions would direct the jurors' attention to the matters at issue, having an incidental beneficial influence on retentive capacity. Secondly, the jurors would be provided with the

appropriate legal framework from the outset.[11] The current form of a typical summing-up supports this view. Usually the judge instructs on the relevant law first and then draws upon the evidence to illustrate the directions of law. The evidence is summarised in the context of the relevant law.

6.20 It is not suggested that preliminary instructions would substitute for the summing-up at the conclusion of the case.

> They are intended to provide the jurors with an orientation on burden of proof, proper evidence, and witness credibility and with a summary of the issues they will be called on to decide.[12]

To take account of the possibility that the matters on which preliminary instructions have been given do not, in the event, arise during the trial, or that matters arise which are not covered by the preliminary instruction, it has been suggested that,

> ... the judge should warn the jury that issues may arise during the trial which the pretrial instructions do not cover specifically. Likewise, the judge should warn the jury that early instructions may touch on issues which are not essential to the jury's decision. In the final, corrective charge, the court should deliver revised instructions with specific and clear correction of any errors in the preliminary instructions.[13]

We have proposed above (paragraph 6.3) that the judge's preliminary remarks should cover, among other things, the law on matters such as the standard and burden of proof and the presumption of innocence. We invite submissions as to whether more detailed instructions of law, such as directions on the elements of the offence(s) charged, should be given at the beginning of the trial.

B. Retention

6.21 Common experience suggests that ordinary people are unable to concentrate for hours without respite on a monologue. Yet a judge's summing-up may last for hours, over several days, and is delivered by a single speaker usually without visual aids. Appeal courts, examining the transcripts, generally assume that the jury, having heard the judge's summing-up, both understood it and applied it. The jury could do neither if unable to concentrate on the delivery or to remember the content in the jury room. The Commission's survey of jurors will question them on their views as to the conditions in which they were required to attend to a case, including the judge's summing-up, and will invite them to offer suggestions for improvement. At present we are of the view that attention should be directed to the following main areas:

* physical conditions;
* note-taking;
* brevity;
* visual aids; and
* provision of written instructions.

6.22 Concentration can be expected to be impaired when conditions are uncomfortable. In Chapter 5 we noted the complaints voiced by some jurors in a 1983 study by the New South Wales Law Foundation (paragraph 5.13) Proper physical conditions are clearly essential for efficient retention of the judge's instructions. The Commission's survey of jurors seeks to find out whether any improvement has been made in conditions

in the two and a half years since the above-mentioned study. The desirability of permitting jurors to take notes and have other documentary memory aids, as discussed above, applies equally when the judge is summing-up. Visual aids could be helpful where a trial has been lengthy and many witnesses have been examined.

6.23 Brevity is also important, both for retention and for comprehension. The judge's instructions follow the addresses of counsel and the jury might well feel that they are being reminded a third time of the evidence. However, the judge will be concerned that the instructions survive any scrutiny they receive on appeal. This concern militates against brevity in the summing-up. At least one judge in New South Wales has questioned the need to address the jury on every conceivable issue of law when the issue in dispute is clear. Mr. Justice Roden in Mills[14] quoted Lord Hailsham in the House of Lords:

> The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour around the area of law affected by the case....In the present instance there was only one issue of primary fact, the speed at which the cycle was travelling, and I doubt whether a direction could have been faulted if the jury had simply been told that if they were satisfied that the prosecution had proved that the accused had been travelling at a grossly excessive speed they were entitled to infer that he had been driving recklessly and as a result had caused Mrs. C.'s death ...[15]

Mr. Justice Roden noted that it seemed still to be necessary in New South Wales "for every term used in relevant legislation to be defined, for a multitude of rules of law to be explained,

and for every jury to be subjected to ... a 'law lecture', or a series of them".[16] The associated problem of repetition might be solved if instructions were given at the commencement of the trial and/or if a written copy or summary of the instructions were provided to the jury upon retiring. The need to repeat crucial matters several times in the summing-up could be obviated because the jury would already have obtained a good understanding of those points and would have been able to apply that understanding to the evidence as and when presented.

6.24 Research in the United States has shown that "jurors simply cannot remember, let alone master, instructions after having heard them only once".[17] Researchers have found that juries which have been given a written copy of the instructions perform more efficiently, engage in more informed deliberations, and feel more confident about their decisions.

> ... it could hardly be doubted that the jury would benefit from a written precis or some record of the summing-up for reference in their deliberations. Practical difficulties at once suggest themselves. However, it would certainly lessen the possibility of misunderstanding as to what the judge said without in any way removing from the jury a function which it alone can discharge.[18]

There is no doubt that a trial judge has a discretion to provide the jury with written directions to complement the oral summing-up, provided that he or she makes it clear that the written directions are to be used as an aid to understanding, and not in substitution for, the oral directions.[19] The practical difficulties, however, are manifold. Most judges sum up to the jury from notes only, without having prepared a

written address. While the judge's words could be written and transcribed, it would be impractical to delay the jury's deliberations while this was done. The transcribed instructions may, in some cases, contain a degree of repetition which is more confusing than helpful in written form.

6.25 The difficulties presented when a jury is provided merely with a summary of the oral directions are illustrated by the case of Petroff.[20] In that case the jury members were each handed a lengthy document containing a summary of some of the relevant matters of law. The trial judge, in his oral summing-up, at times read from this document and at other times gave additional directions. While the majority of the Court of Criminal Appeal considered that the manner in which the directions were given and their content were of considerable assistance to the jury, a number of problems were identified. For example, there was the risk, acknowledged by the trial judge, that the jury might not pay full attention to the oral summing-up, but would tend to read the document before them. As the document merely summarised some matters of law the jury could completely miss other matters. This difficulty could be resolved by keeping the summary from the jury until it retires to consider its verdict. Even then, however, a summary is incomplete. In Petroff there was some concern that the jury would give little weight to the directions on the standard of proof because the document did not contain a statement on that subject. Although the trial judge had given an oral direction

on standard of proof the jury could have given greater attention and weight to the directions of law set out in the written summary.

6.26 The cases in which judges, in their discretion, tend to adopt the procedure of providing to the jury a written summary of the directions of law are those in which very complex oral directions are required: provocation, self-defence and diminished responsibility are prominent.[21] Without wishing to inhibit the judge's discretion in this matter the Commission's tentative view is that the risks associated with written directions make their use in short and straightforward trials impractical and possibly dangerous. We note, for example, that some judges in the United States have resisted providing juries with written instructions in the fear that they will become distracted and bogged down in legal argument or rely on one instruction to the exclusion of others.[22]

C. Language

6.27 The first concern of researchers assessing the level of comprehension of instructions by juries is the language in which they are expressed. Legal jargon is properly understood only by lawyers and those working closely with them. Yet,

> As trial instructions become subject to potentially demanding appellate review they become prolix, inconsistent and excessively technical.[23]

A large number of North American studies have shown that commonly used instructions are at best poorly understood by juries.[24]

6.28 The fault would seem not to lie with the complexity of the legal concepts themselves, although this is a common belief of lawyers. The results of one United States study "cast doubt on attorneys' assertions that it is the conceptual complexity of a jury instruction that creates comprehension problems and that therefore rewriting instructions will not help".[25] This study identified a number of linguistic constructions (and not just particular words) which were largely responsible for the poor comprehension of the instructions tested. Judges themselves are not unaware of the difficulties. For example, Lord Diplock observed in D.P.P. v. Hester:

> To incorporate in the summing up a general disquisition upon the law of corroboration in the sort of language used by lawyers may make the summing up immune to appeal upon a point of law, but it is calculated to confuse a jury of laymen and, if it does not pass so far over their heads that when they reach the jury room they simply rely upon their native commonsense, may, I believe, as respects the weight to be attached to evidence requiring corroboration, have the contrary effect to a sensible warning couched in ordinary language directed to the facts of the particular case.[26]

Mr. Justice Roden of the Supreme Court of New South Wales, in an address appropriately entitled "The Law and the Gobbledegook", stated,

> One of the keys to effective communication is to use the language of the person to receive the message, rather than that of the person delivering it.[27]

Following this argument through into his judgment in Petroff, Mr. Justice Roden said,

> The summing up is an exercise in communication. It is designed to instruct and inform. Sometimes the directions to be given will be so simple and readily comprehensible as to require no more than mere statement. Sometimes they will be more difficult; ... Sometimes repetition, sometimes restatement, sometimes explanation, sometimes illustration, will be required. The language chosen will always be calculated to be readily understood. If principles have to be stated in terms not familiar or readily comprehensible to people not trained in semantic skills and not accustomed to drawing fine lines of distinction, such devices as paraphrasing, expanding, and illustrating, seem to be necessary, if understanding is to be secured.[28]

6.29 It was with a view to ensuring that instructions would be understood by juries, that a committee of judges of the Supreme Court of New South Wales and of the District Court of New South Wales sought the assistance of the Australian Institute of Criminology in developing standard instructions.[29] Standard instructions were first written by committees of judges in the United States during the 1930's.[30] They were not examples of instructions gleaned from appeal cases, but standardized instructions which could be adapted to different factual situations. Only recently have psycholinguists been involved in drafting standard instructions to add comprehensibility to the existing virtues of accuracy and convenience. After empirically testing the New South Wales draft instructions, the Australian Institute of Criminology researchers noted that they were not developed

> ... scientifically or with the assistance of psychologists trained in the use of language and communications. In other words, in the course of drafting, the instructions were not subjected to rigorous testing and analysis but merely developed intuitively by members of the Jury Committee.[31]

They recommended that,

> ... it would seem desirable to provide for a more structured approach to the development of standard jury instructions by employing a gradual process of empirical testing.[32]

The Commission has been given the support of the judges concerned to conduct further research on the development of standard instructions for use in New South Wales.

6.30 Standard instructions are useful so far as they go. Not only must they be adapted to varying fact situations but different juries will respond in different ways. Ultimately the judge is responsible for ensuring that the jury has understood, and he or she can best do this by observing the jurors' responses and demeanour. There is also a need to guard against a simple reading of the relevant standard instructions. The directions on the law must still be illustrated by reference to the evidence in the case. Moreover, reading is rarely as effective a method of communication as the current practice of speaking to the jury simply with the aid of notes. Nevertheless, if standard instructions can be developed which are based on established principles of effective communication, the task of the judges would, we believe, be made easier.

6.31 Two issues arise from the development of standard instructions. The first is whether judges should be required to use the instructions. The second is whether a jury could be assisted by having copies of the relevant standard directions in the jury room during deliberations. The difficulty with this second suggestion is that while the judge's summing-up would relate the directions on law to the evidence in the case, the standard printed instructions would not. The jury could become more confused about the proper way to use the directions of law. The Commission invites submissions on these questions.

6.32 We do consider, however, that a jury would be greatly assisted both in recalling and applying the summing-up and in rendering a true verdict if it were to be provided with a printed document setting out the available verdicts for each charge. We discuss this matter further in Chapter 10 (paragraph 10.18) in the context of long and complex trials. We are tentatively of the view that, except where only one accused and one charge are involved and the verdict can be only guilty or not guilty, a written statement should be provided to the jury setting out the alternative verdicts possible for each charge.

VI. TENTATIVE PROPOSALS

6.33 In this Chapter we have identified a number of procedures common to most criminal trials which operate to diminish the efficiency and effectiveness of juries. We have tentatively proposed some alternative procedures to overcome these difficulties. They are:

1. Procedures should be formulated to ensure that the trial judge addresses jurors at the commencement of the trial on the following topics:

   * the course the trial will take;

   * the role of the jury; and

   * the law on matters such as the standard and burden of proof and the presumption of innocence (paragraph 6.3).

2. Each juror, at the discretion of the trial judge, should be provided with a file containing the following documents:

   * a copy of the indictment (paragraph 6.4);

   * a copy of the documentary exhibits (paragraph 6.11); and

   * a document setting out the alternative verdicts available to the jury (paragraph 6.31).

6.34 We have raised other issues about which we do not make tentative proposals.

* whether the jury, at the commencement of the trial, should be provided with a written statement of the facts to be proved by the Crown or of the elements of the offence(s) charged (paragraph 6.5);
* whether defence counsel should be permitted to open to the jury at the end of the Crown opening (paragraph 6.7);

* whether the jury should be provided with a glossary of legal terms (paragraph 6.8);
* whether counsel should be permitted briefly to introduce each witness by referring to the element(s) of the offence to which his or her evidence relates (paragraph 6.9);
* whether jurors should, as a matter of course, be provided with notebooks and pens and told of their right to take notes (paragraph 6.16);
* whether detailed instructions on the relevant law should be given at the commencement of the trial (paragraph 6.20);
* whether judges should be required to use standard forms to instruct juries on relevant law where such forms are available (paragraph 6.30); and
* whether directions of law should be provided to the jury in writing (paragraph 6.30).

Footnotes

1. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp 71-72.
2. "The Jury" (1968) Scots Law Times 183.
3. Director of Public Prosecutions, Victoria, Annual Report (1983-1984), at p.18.
4. Proceedings of the Sydney University Law School Institute of Criminology, The Criminal Trial on Trial, 30 June 1982, Sydney.
5. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980) at pp 116-117; V.E. Flango, "Would jurors do a better job if they could take notes?" (1980) 63(9) Judicature 436, at p 437.

6. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp.117-118.

7. R. v. Kemp (1950) 50 S.R. (N.S.W.) 1, at p.4, per Street A.C.J. See also R. v. Owen [1965] N.S.W.R. 1477, at pp.1482-1483, per Herron C.J.

8. D.U. Strawn and R.W. Buchanan, "Jury confusion: A threat to justice" (1976) 59(10) Judicature 478.

9. B. Prettyman, "Jury Instructions - First or Last?" (1960) 46 American Bar Association Journal 1066.

10. S.M. Kassin and L.S. Wrightsman, "On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts" (1979) 37 Journal of Personality and Social Psychology 1877, at p.1881.

11. J.C. Goldberg, "Memory, Magic, and Myth: The Timing of Jury Instructions" (1981) 59 Oregon Law Review 451, at p.461.

12. W.W. Schwarzer, "Communicating with Juries: Problems and Remedies" (1981) 69 California Law Review 731, at p.755.

13. J.C. Goldberg, note 11 above, at p.470; see also Director of Public Prosecutions, Victoria, Annual Report (1983-1984), at p.17.

14. Mills, Sinfield and Sinfield, Supreme Court of New South Wales, Court of Criminal Appeal, 19 July 1985 (unreported).

15. Reg v. Lawrence [1982] A.C. 510, at p.519.

16. Mills, Sinfield and Sinfield, Supreme Court of New South Wales, Court of Criminal Appeal, 19 July 1985 (unreported).

17. W.W. Schwarzer, note 12 above, at p.756. See also R. Forston, "Sense and Non-Sense: Jury Trial Communication" [1975] Brigham Young University Law Review 601.

18. "Current Topics: The Task of the Jury" (1956) 29(9) Australian Law Journal 467.

19. Salem, Supreme Court of New South Wales, 13-14 March 1979, unreported; Petroff [1980] 2 A. Crim. R. 101.

20. [1980] 2 A. Crim. R. 101.

21. Ruano, Supreme Court of New South Wales, 15 February 1977, unreported; Salem, Supreme Court of New South Wales, 13-14 March 1979, unreported; Petroff [1980] 2 A. Crim. R. 101.

22. W.W. Schwarzer, note 12 above, at pp.756-757.

23. Id., at p.736.

24. See, for example, R.P. Charrow and V.R. Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions" (1979) 79 Columbia Law Review 1306; A. Elwork, B.D. Sales and J.J. Alfini, Making Jury Instructions Understandable (Contemporary Litigation Series, Michie Co., Charlottesville Va., 1982), at pp.13-14; A.N. Doob and H. Kirshenbaum, "Some Empirical Evidence on the Effect of 5.12 of the Canada Evidence Act upon the Accused" (1973) 15 Criminal Law Quarterly 88; R.W. Buchanan, B. Pryor, K.P. Taylor and D.U. Strawn, Legal Communication: An investigation of juror comprehension of pattern instructions, unpublished report cited by L.J. Severance and E.F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" (1982) 17(1) Law and Society Review 153, at p.174; O'Reilly, "Why Some Juries Fail" (1974) 41 D.C.B.J. 69; R. Forston, note 17 above; D.U. Strawn and R.W. Buchanan, note 8 above.

25. R.P. Charrow and V.R. Charrow, note 24 above, at pp.1320, 1334.

26. D.P.P. v. Hester [1973] A.C. 296, at pp.327-328.

27. The Hon. Mr. Justice Adrian Roden, "The Law and the Gobbledegook", in Institute of Criminology, Criminal Evidence Law Reform (April 1981), at pp.28-29.

28. Petroff [1980] 2 A. Crim. R. 101, at pp.128-129.

29. I. Potas and D. Rickwood, Do Juries Understand? (Australian Institute of Criminology, 1984), at p.4.

30. R.G. Nieland, Pattern Jury Instructions: A Critical Look at a Modern Movement to Improve the Jury System (American Judicature Society, 1979), at pp.6-7.

31. I. Potas and D. Rickwood, note 29 above, at p.6.

32. Id., at p.58.

Chapter 7

Eliminating Bias from the Trial

I. INTRODUCTION

7.1 The continuing acceptability of the jury system depends largely on the confidence of the accused and of the general community in the impartiality of the jury and the sincerity of its verdict.

> This confidence on the part of the accused - and, indeed, on the part of all parties to any case, and even of the public at large - is of the utmost importance, as without it they would cease to regard the trial process, and perhaps even the entire legal system, as being a legitimate institution. Without the element of legitimacy a trial process is, of course, little more than formalised gangsterism.[1]

An impartial tribunal is crucial to our system of criminal justice. An impartial tribunal has also been recognised as a fundamental human right. Article 14(1) of the International Covenant on Civil and Political Rights provides in part:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

7.2 The trial judge has an overriding responsibility to ensure that the trial is conducted fairly.[2] This responsibility, which incorporates a duty to reduce or eliminate prejudice and the appearance of prejudice, is all the more vital in a trial before a jury.

> Everyone surely agrees that the well of justice must remain clear. Thus by one means or another the poison of prejudice must be kept away from it. If it is not, then the possibility of a miscarriage of justice inevitably accompanies prejudice. No one will know what harm is then done except the jury whose verdict, whatever it be, will not inform others as to whether or not it is tainted by prejudice.[3]

Fairness to the accused is a very difficult concept to define, however. It must be looked at in the context of all the surrounding circumstances.[4]

7.3 Following the recent amendments to the Justices Act, 1902 to require magistrates to consider whether a jury would or would not be likely to convict the accused person when deciding whether to commit him or her for trial, concern was expressed that the trial could be prejudiced where the jurors were aware that a magistrate had decided the accused was likely to be convicted. The jury could "misinterpret its role as little more than a rubber stamp to endorse the suppositions of the committing magistrate".[5] This possibility could arise if the nature of a committing magistrate's task were to become public knowledge or if, in a particular case, media publicity is given to the result of committal proceedings in the form of words used in the Justices Act, 1902.[6] It may be that, to avoid such prejudice occurring, the section should be further amended to clarify the magistrate's role. The remainder of this Chapter is concerned with three important sources of prejudice:

* the biased juror;
* prejudicial evidence;
* prejudicial publicity.

II. THE BIASED JUROR

A. Selecting an Impartial Jury

7.4 We have seen, in Chapter 3, how the selection procedures introduced in New South Wales in 1977 aim to ensure representativeness and randomness and, hence, impartiality in a broad sense. A representative jury is, broadly speaking, a guarantee of impartiality because individual biases are balanced. At the same time, there are some classes of people in the community who, because of their experience or occupation, would be unlikely to be truly impartial and are hence disqualified or ineligible for jury service: those with criminal records, police officers, magistrates, practising lawyers and so on. In Chapter 3 we have made suggestions for widening the pool of people available for jury service and thus enhancing the representativeness of jury rolls.

7.5 We have also seen, in Chapter 4, that the challenge for cause could be used to eliminate the randomly selected juror from a particular trial on the basis of circumstances rendering him or her biased, or likely to be biased, in that trial. The peremptory challenge can be used to eliminate suspected bias but might also be used for the very purpose of actively promoting the constitution of a jury in one's favour. We have suggested that too much interference in the random and representative character of juries is detrimental to the jury system and have proposed that the number of peremptory challenges available to the Crown and to the accused should be reduced.

7.6 Confidence in the impartiality of the jury would also be enhanced if prospective jurors were given an opportunity to notify the court if they feel they would be unable to give impartial consideration to the particular trial. Friends and relatives of the accused, employees of counsel, acquaintances of witnesses and former victims of offences similar to that charged should not serve on the jury. In order to notify the judge of these matters, prospective jurors must be told in advance of the nature of the case and the identity of the accused and likely witnesses. The judge could advise the panel of these matters. The Law Reform Commission of Western Australia has recommended that the making of such an announcement by the judge should be authorised by statute.[7] In Canada, the procedure whereby the presiding judge questions the panel prior to the selection process in order to determine whether a basis for lack of indifference exists on the part of any of the prospective jurors, has been approved.[8] Where a judge feels that in order to make such an announcement he or she would need to find out too much about the case and thereby risk his or her impartiality in the eyes of the jury, the Crown could be asked, in the presence of the jury panel, to outline the nature of the case and the identity of the accused and likely witnesses. The presiding judge could then address the panel by reference to the Crown's outline and invite those who feel they may be biased to come forward. The Commission considers that this latter procedure is to be preferred.

7.7 We note that the presiding judge is not obliged to discharge a juror who notifies the court that he or she would not be impartial. The judge has a discretion whether to excuse such a juror, which discretion will be exercised having regard to the proper conduct of the trial.[9] The aim has been described in England as being to identify those "personally concerned in the facts of the particular case, or closely connected with a party to the proceedings or with a prospective witness". English judges, for example, have been directed that general grounds such as race, religion, political beliefs or occupation are not sufficient grounds for discharging prospective jurors.[10] Indeed it has recently been held in England that personal reasons for being biased against either the prosecution or the defence were not grounds for disqualifying a juror. A jury's verdict was unsuccessfully challenged on the ground that one of the jurors had been a working (i.e. non-striking) coal miner and the accused, a striking miner, was charged with damaging the car of a working miner on his way to work.[11]

7.8 A person required by the judge to remain on the jury panel in spite of professed bias would probably be challenged by the Crown or the defence, and excluded in that way. A prospective juror who has been bribed or threatened, or who carries a personal grudge, however, is unlikely to notify the court in response to an invitation to do so. In New South Wales, bribery and intimidation are not likely to occur prior to the commencement of a trial, chiefly because no-one but the

Sheriff knows in advance of the trial who is on the jury panel.[12] An additional safeguard exists in three Australian jurisdictions in that impersonation of a juror is an offence.[13] The Commission invites submissions as to whether additional steps should be taken in New South Wales to ensure that corrupted or other biased jurors do not serve.

B. Prejudice Arising During the Course of the Trial

7.9 The responsible court officer or Sheriff's Officer is, among other things, required to shield the jury from outside influence of a potentially improper kind. When a jury is taken on a view, for example, it is placed in the charge of the Sheriff's Officer who is required to make an oath undertaking to convey the jury directly to the location and not to allow them to communicate with members of the public or witnesses in the case. It would seem that this procedure might be usefully employed in the early stages of a criminal trial when the jury is placed in the charge of the Sheriff's Officer at the first break or adjournment. If this were done, it would emphasise both to the Sheriff's Officer and to the members of the jury the importance of the concept of protecting the jury from outside influence. It is only a very short procedure but it may well have significant benefits. A problem may arise where more than one Sheriff's Officer is in charge of the jury at various times during the day or during the course of a trial. This may be easily overcome by swearing each of the Sheriff's

Officers who are to have the jury in their charge. We understand that this is the practice in England. Our tentative view is that it should be adopted in New South Wales.

7.10 A juror may be prejudiced during the course of a trial in a number of ways. A juror could obtain access to inadmissible prejudicial information such as the accused's record of convictions, engage in conversation about the case with counsel, a witness or the accused, or be bribed or threatened. As a general rule the juror prejudiced by such an occurrence should be discharged.[14] There are also circumstances in which it will be safer to discharge the entire jury and order a new trial. This will occur, for example, where the judge considers that there is a real danger of prejudice to the accused in that the discharged juror has prejudiced the remainder of the jury or some of them.[15] An alternative method of dealing with overwhelming prejudice arising in the course of a trial could be for the judge to permit the jury to bring in its verdict on the condition that, if the accused is convicted, the prejudice will be a ground of appeal. This would not of course be conveyed to the jury. One argument in favour of this procedure is that, in spite of the prejudicial material or occurrence, the jury may not have convicted the accused person. It is very difficult to make generalisations about this subject. We simply observe that

there may be cases in which it would be in the interests of the accused and the community to avoid the need to conduct a second trial.

7.11 Where the prejudice is not revealed until the verdict has been given and the jury discharged the matter can be raised in an appeal. An appeal based on prejudice of this kind can only succeed if evidence about the occurrence can be given to the appeal court. Such evidence may be taken from counsel witnessing or participating in an improper conversation with a juror, for example. If a person who is not a member of the jury has told the jurors or some of them about the accused's record, that person could be called to give evidence of that matter and the appeal court would then consider whether there had been a miscarriage of justice.[16] Where only members of the jury are witnesses to an occurrence taking place during deliberations, however, the court will not accept their evidence. Thus where a member of the jury reveals the accused's prior criminal record to the jury during deliberations, the court will not take evidence from any member of the jury about that event.[17] The secrecy of the jury room is protected. In Chapter 8, (paragraph 8.14), we discuss further problems raised when prejudice occurs in the jury room and invite submissions as to whether the secrecy of the jury room should be breached to the extent necessary to permit a juror to give evidence as to objective facts affecting the jury's deliberations.

C. Inclusion of Peers

7.12 An accused person may consider that elimination of those with a particular bias from the jury is not sufficient. Positive inclusion of jurors favourable to the accused may be sought. Such arguments have in fact been made. Accused people have applied for special measures to be taken to ensure that the jury includes their "peers".[18]

> ... An accused may seek to be tried by such persons [his or her peers] in some cases, and in particular those which concern matters of which he himself is knowledgeable but which are outside the normal experience or range of knowledge of the average person, because he considers that such individuals are more likely than ordinary jurors to understand the facts and arguments that he intends to present in his defence.[19]

One commentator has proposed that "a judge could be given power upon application by either of the parties or at his own instance, to order that a certain number of jurors ... be drawn from the racial minority of which the accused is a member, or indeed from any other group in society with which he identifies himself".[20] In New South Wales, the Jury Act, 1977 establishes a code for the random selection of jurors which limits the discretionary power of the judge in the areas it covers.[21] While a judge has the power to discharge a jury so constituted as to be unfair to the accused,[22] it is unlikely that any residual discretion remains to permit a judge to require a jury to be constituted in a particular way. This situation may be contrasted with the English position whereby a judge has the power to order a jury to include a black juror,[23] to be composed entirely by members of one sex,[24] or to be drawn from an area with a high population of people

from the same background, including racial origin, as the accused.[25] The Commission invites submissions as to whether judges should have the power described above or whether other measures should be taken to ensure that members of the social or peer group of an accused are included on his or her jury. We note that our proposals in Chapter 3 for improving the representativenes of jurors would make more likely the inclusion, by random selection, of the peers of certain accused people, for example Aborigines, on juries. In addition, our proposal in Chapter 4 for the reduction in peremptory challenges will decrease the Crown's opportunity to eliminate the peers of the accused from the jury.

III. PREJUDICIAL EVIDENCE

7.13 In a sense, of course, much of the evidence tendered by the Crown in a criminal trial is prejudicial to the person who stands accused in the sense that it implies guilt. Some evidence which is highly prejudicial, however, is not disclosed to the jury. Rules of evidence have developed with respect to various classes of evidence governing the question whether such evidence should be admitted in certain circumstances or not at all, and limiting the general discretion of the presiding judge in certain ways. For example,

> As a general rule the prosecution is debarred from tendering evidence to show that the defendant is of bad character, or is guilty of criminal acts other than the offence charged, or has a propensity to commit criminal acts of the same nature as the offence charged, merely for the purpose of leading to the conclusion that the defendant is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.[26]

Even where evidence is apparently admissible, the presiding judge has a discretion to disallow it if its admission "would operate unfairly against the defendant".[27] Thus the judge may exclude illegally obtained evidence which is technically admissible.[28] Evidence ought to be excluded "if its prejudicial tendency outweighs its probative value in the sense that the jury may attach undue weight to it or use it for inadmissible purposes".[29]

7.14 Where prejudicial evidence is heard by the jury inadvertently, the trial judge has a discretion to discharge the jury.[30] Generally a high degree of need for discharge must be apparent,[31] and the more usual remedy is a correcting instruction from the judge to the jury.[32]

> Much depends in every case on the nature and degree of the alleged prejudice, the body of evidence already heard and yet to be heard, how far the prejudicial matter may be submerged and pushed into the background by the totality of the evidence, and whether in all the circumstances a clear warning to the jury will be sufficient to avoid or dispel any prejudice and enable a fair trial to be held.[33]

7.15 Whether the judge's statement to the jury to ignore such material can secure a fair trial, however, is debatable. One Canadian study tested whether mock jurors' verdicts could be affected by instructions limiting the use to which they could put information about the accused's prior convictions. They were presented with a written description of testimony which included evidence of prior convictions. Half the group were further provided with "limiting" instructions. The researchers

found that the limiting judicial instructions had no effect on the decisions of the instructed jurors when compared with the decisions of the non-instructed group.[34] These results at least alert us to the possibility that jurors, speaking generally, either are not capable of putting inadmissible material from their minds or are not persuaded by judicial instructions of the propriety and desirability of doing so. In such circumstances, the limiting instruction may be ineffective. One important way to ensure that prejudicial evidence is not given accidentally in the hearing of the jury, is by disclosure of the prosecution's case at a pre-trial hearing. Disputes as to admissibility can be determined in advance of the trial.[35]

IV. PREJUDICIAL PUBLICITY

7.16 Jurors may also be prejudiced against an accused by material published in the media. Where prejudice may affect an entire jury panel, as where pre-trial publicity has been extensive, the trial might be postponed[36] or a change of venue approved.[37] Where a judge is aware of an amount of pre-trial publicity he or she should make a point of instructing the jury, or panel, to disregard what they have read or seen beyond the courtroom itself.[38] Prospective jurors who feel they would or could be prejudiced by the publicity should be invited to apply to be excused.[39]

7.17 Where prejudicial publicity occurs during the trial the judge may determine that a limiting instruction will be sufficient to ensure it does not affect their deliberations. When publicity is seriously prejudicial, a mistrial can be declared and the jury discharged.[40] Of course, the judge may question the jurors as to whether they actually viewed or read the prejudicial publication. Even if jurors are aware of the publication it may be that its impact has not been seriously detrimental. The question for the judge, and for the appeal court, is whether the publicity rendered the jury unable to do justice according to its oath. The hallowed principle that justice should not only be done but should also be seen to be done is to the fore in considering prejudicial publicity during a trial. The discharge of the jury is not required, however, when all that is established is that the publicity made it more difficult for the jury to do justice.[41]

A. Change of Venue and Postponement

7.18 In New South Wales a court may order a change of venue for a trial if it becomes apparent "that a fair and impartial trial cannot otherwise be had".[42] The principle to be applied when an accused applies for a change of venue was set out in Cattell.[43] It was said there that "the established principle" was

> that the Attorney-General's discretion to lay the venues for criminal trials should not be overridden save in exceptional cases and for real and substantial reasons... [At the same time, each trial] should be had in such circumstances that all reasonable men would admit that it is a fair trial.[44]

The presiding judge, considering an application for a change of venue, will take account of the whole of the circumstances. In a trial for attempted murder in Griffith, for example, the Court of Appeal refused a change of venue in spite of the publicity which had been given in Griffith to the committal proceedings. The publicity was limited to records and published accounts of the committal proceedings and the court feared that, if the change of venue application was approved in such a case, the same ground could be raised in respect of every trial scheduled for a country town.[45] More recently, however, in Rushbrook, a change of venue was ordered from Wollongong to Sydney in a case in which the accused was charged with offences committed in Wollongong and reports of the committal proceedings had been published in a newspaper circulating in that city.[46]

7.19 A change of venue may be a useful solution where publicity has been mainly confined to the area(s) in which the offence was committed. When State-wide publicity of a highly prejudicial nature in major newspapers and on the media has occurred, however, no venue may be entirely satisfactory. In such cases, which would be unusual, postponement of the trial may be desirable. The Supreme Court Rules, giving the presiding judge unqualified control over the hearing and determination of criminal proceedings, appear to authorise an order for postponement in the interests of "the just and efficient disposal of the proceedings".[47]

B. Proceedings for Contempt of Court

7.20 The likelihood that the publication of prejudicial material during the course of a trial will be punished as contempt of court operates as an inhibition on such publication. The publication, when trial is imminent or during the course of a trial, of material intended or tending to prejudice the fair trial of the accused or to interfere with the course of justice is contempt of court.[48] It is a serious contempt to publish the criminal record of an accused,[49] to comment on the previous bad character of the accused,[50] or to publish a pre-trial confession.[51] It is a contempt to publish comment on pending proceedings which prejudges the merits of the case,[52] or which is likely to hold up a witness or potential witness in a criminal trial to public criticism or opprobrium,[53] or which attacks the veracity of a witness.[54] It has been held that it is a contempt for a newspaper to report on evidence sought to be tendered at the trial of an accused person before a jury where the trial judge has ruled that evidence inadmissible.[55] However, to report the occurrence of an offence, an arrest or charge will not be contempt provided the publication does not purport to prejudge any issue.[56] Generally speaking it is permissible to report fairly and accurately on criminal proceedings.[57]

7.21 It can be appreciated that the effects of wrongful publication can include wasted expense on an aborted jury trial, delay in concluding proceedings and additional distress for accused people and victims of crime. In the absence of an

Australian counterpart of the United States First Amendment guaranteeing freedom of speech and of the press, the rules as to contempt of court nevertheless seek to establish a fair balance between the two public interests: impartial justice and public discussion.[58] The Chief Justice of Victoria remarked recently:

> We in this country pride ourselves upon the fairness with which accused persons are treated and the courts go to great lengths to ensure that accused persons have a fair trial. But all the courts' efforts will be in vain if the purveyors of news distribute far and wide, so that members of the jury must see or hear it, information about an accused which the rules designed to achieve a fair trial prescribe that they should not see or hear.[59]

7.22 The Australian Law Reform Commission has suggested that the law relating to contempt is so uncertain that it forces publishers to be over-cautious. This in turn is an undue restriction on publicity of court proceedings and, more generally, on freedom of expression.[60] The New South Wales Court of Criminal Appeal, however, has been reluctant to interfere with the exercise of a trial judge's discretion in deciding not to discharge a jury when prejudicial publicity has occurred. There is a tendency to rely on the ability of jurors to ignore such publicity. In R. v. Smith, Chief Justice Street said,

> This Court has repeatedly emphasised that the decision to discharge or not is essentially one within the discretion of the trial judge, being a decision to be made in the awareness of contemporary atmosphere and the likelihood of material prejudice being occasioned to the accused person. Moreover, trial judges should not be encouraged to discharge juries merely upon the ground of some prejudicial material having been published if appropriate directions can cure the situation.[61]

7.23 Where pre-trial publicity has been prolonged and substantial, arousing a good deal of public debate as in, for example, the Chamberlain and Trimbole cases there may be an argument for giving the accused the option to elect trial by a judge sitting without a jury. In Chapter 10 the Commission rejects the argument in favour of judge-only trial in very complex cases. In the context of extremely prejudicial pre-trial publicity, however, non-jury trial at the option of the accused could be the only way to secure an impartial trial for some people. If such an option were implemented, we consider that a clear case of prejudice because of publicity so widespread that change of venue, postponement or a warning to the jury would not be effective, must be made out by the accused person before a trial by a judge sitting alone could be contemplated. The Commission would welcome submissions on this issue and we refrain from making a tentative proposal at present.

V. TENTATIVE PROPOSALS

7.24 An impartial tribunal is fundamental to our system of criminal justice. To avert prejudice, the Commission considers that the following additional measures should be taken.

1. Judges should request Crown counsel to outline for the jury panel the nature of the case and the identity of the accused and likely witnesses. The judge should request people who feel they would be unable to give impartial consideration to the case to come forward (paragraph 7.6).

2. The court officer responsible for the jury should be required to take an oath when being put in charge of the jury, undertaking to shield the jury from outside influences (paragraph 7.9).
3. Pre-trial hearings should be used, where possible, to resolve disputes as to the admissibility of evidence, both to avoid interrupting the trial with voir dires for this purpose and to reduce the risk that the jury will hear inadmissible evidence (paragraph 7.15).
4. Where there has been substantial pre-trial publicity, the judge should invite people who feel they have been prejudiced by this to apply to be excused (paragraph 7.16).

7.25 This Chapter has raised other issues about which we make no tentative proposals. They are:

* whether trial judges should, at their discretion, allow a trial which has been affected by the publication of prejudicial material to continue to its conclusion (instead of discharging the jury) on the understanding that a verdict of guilty would be quashed because of the irregularity (paragraph 7.9);

* whether, with the consent of the accused, trials marred by overwhelming prejudice should be permitted to continue to their conclusion on the condition that, if a conviction results, the prejudice will be a ground of appeal (paragraph 7.9);
* whether judges should be empowered to order that members of the social or peer group of the accused should be included on the jury (paragraph 7.12.);
* whether the judge's instruction limiting the use to which prejudicial information can be put is a sufficient guarantee that the jury will not be prejudiced (paragraph 7.15);
* whether the contempt laws in relation to the publication of material likely to prejudice a jury are adequate and appropriate (paragraphs 7.21-7.22); and
* whether, in cases where pre-trial publicity has been extremely prejudicial, the accused should be entitled to apply for trial by a judge sitting without a jury (paragraph 7.23).

Footnotes

1. A. Dickey, "The Jury and Trial by One's Peers" (1973-1974) 11 University of Western Australia Law Review 205, at p.223.

2. R. v. List [1965] 3 All E.R. 710, at p.711; MacPherson v. The Queen (1981) 147 C.L.R. 512.

3. Attorney-General v. English [1982] 2 All E.R. 903, at p.909.

4. King v. The Queen [1969] 1 A.C. 304, at p.319; Reg. v. Murphy [1965] N.I.L.R. 138, at p.149, per Lord MacDermott.

5. [1985] Reform 120.

6. Justices Act, 1902, s.41.

7. Law Reform Commission of Western Australia, Report on Exemption from Jury Service (Project No.71, 1980), at p.44.

8. R. v. Makow (1974) 20 C.C.C. (2d) 513; R. v. Hubbert [1977] 2 S.C.R. 267; R. v. Alward [1978] 1 S.C.R. 559.

9. Duffus v. Collins (1966) 83 W.N. (Pt.1) (N.S.W.) 399, at p.402, per McClemens J.

10. Practice Note [1973] 1 All E.R. 240.

11. Reg. v. Pennington [1985] Crim. L.R. 394.

12. Jury Act, 1977, s.40(1).

13. Juries Act 1957 (WA), s.55; Juries Act 1962 (N.T.), s.55; Juries Ordinance 1967 (A.C.T.), s.43.

14. R. v. Box [1963] 3 All E.R. 240; R. v. Stretton; R. v. Storey [1982] V.R. 251. But see R. v. Boland [1974] V.R. 849 and Antonio Zampaglione and Others [1982] 6 A. Crim. R. 287 where the juror was not discharged because the threat did not make him impartial.

15. R. v. Hood [1968] 2 All E.R. 56; R. v. Stretton; R. v. Storey [1982] V.R. 251; R. v. Sawyer (1980) 71 Cr. App. R. 283; R. v. Spencer and Smails [1985] 1 All E.R. 673. But see R. v. Hill, NSW Supreme Court, Court of Appeal, 28 February 1980 (unreported), where the whole jury should not have been discharged because the jurors offered the bribe had not communicated this fact to the other jurors.

16. R. v. Booth [1983] 1 V.R. 39.

17. Thompson v. R. [1962] 1 All E.R. 65; R. v. Brown (1907) 7 S.R. (N.S.W.) 290.

18. R. v. Grant and Lovett [1972] V.R. 423.

19. A. Dickey, note 1 above, at p.211.

20. A. Dashwood, "Juries in a Multi-racial Society" [1972] Criminal Law Review 85, at p.94.

21. Duffus v. Collins (1966) 83 W.N. (Pt.1) (NSW) 399, at p.402, per McClemens J.

22. J.A. Scutt, "Trial by a jury of one's peers?" (1982) 56 Australian Law Journal 209.

23. R. v. Broderick [1970] Crim. L.R. 155.

24. John Pierre Vaquier (1924) 18 Cr.App.R. 112; Margaret Anne Sutton (1968) 53 Cr.App. R. 128.

25. P. Healy, "Jury to be drawn from Asian area", The Times 5 November 1984, at p.3.

26. Halsbury's Laws of England (4th edition, 1976), Vol.11, para.369, citing Makin v. Attorney General for New South Wales [1894] A.C. 57 and Thompson v. R. [1918] A.C. 221. See also Crimes Act, 1900, ss.411-413B; Markby v. The Queen (1978) 140 C.L.R. 108; Driscoll v. The Queen (1977) 137 C.L.R. 517; Reg. v. McKeon (1961) 78 W.N. (N.S.W.) 798; Stephens v. The Queen, High Court of Australia, 18 April 1985 (unreported).

27. Callis v. Gunn [1964] 1 Q.B. 495, at p.501, per Lord Parker C.J.

28. R. v. Lee [1950] A.L.R. 517; King v. R. [1969] 1 A.C. 304.

29. Cross on Evidence (2nd Australian Edition, 1979), at p.30.

30. R. v. Featherstone [1942] 2 All E.R. 672; R. v. Parsons [1962] Crim. L.R. 631; R. v. Weaver [1968] 1 Q.B. 353; R. v. Palin [1969] 3 All E.R. 689; R. v. Ball [1961] S.R. (N.S.W.) 37.

31. Winsor v. R. (1866) L.R. 1 Q.B. 390, per Erle C.J., at p.394; R. v. Boland [1974] V.R. 849; Peter Vaitos (1981) 4 A. Crim. R. 238.

32. The Queen v. Storey and Another (1978) 140 C.L.R. 364; Prestage v. The Queen [1976] Tas. S.R. 16; The Queen v. Duvivier (1982) 29 S.A.S.R. 217; R. v. McKittrick [1980] V.R. 637; R. v. Matusevich and Thompson [1976] V.R. 170. Compare R. v. Sarek [1982] V.R. 971; R. v. Knape [1965] V.R. 469; William Peckham (1935) 25 Cr. App R. 125.

33. R. v. Boland [1974] V.R. 849, at p.866.

34. A.N. Doob and H. Kirshenbaum, "Some Empirical Evidence on the Effect of 5.12 of the Canada Evidence Act upon the Accused" (1973) 15 Criminal Law Quarterly 88.

35. Discussion Paper, Procedures Before Trial, Chapter 9.

36. Supreme Court Rules, 1972, Part 75, Rule 11(4)(a).

37. Crimes Act, 1900, s.577.

38. See the comments attributed to White J in the trial for murder of Bevan Von Einem, "Discard what you have heard, judge tells jury", Advertiser, 16 October 1984.

39. Ibid. See also para.7.6.

40. The Queen v. Sherrin (1978) 20 S.A.S.R. 164.

41. Duff v. The Queen (1979) 39 F.L.R. 315.

42. Crimes Act, 1900, s.577.

43. R. v. Cattell [1968] 1 N.S.W.R. 156.

44. Id., per Sugarman J.A., at p.157. See also Holmes J.A., at p.159.

45. R. v. Dorrington [1969] 1 N.S.W.R. 381.

46. R. v. Rushbrook [1974] 1 N.S.W.L.R. 699.

47. Supreme Court Rules, 1972, Part 75, Rule 11(4)(a).

48. Parashuram Detaram Shandasani v. King Emperor [1945] A.C. 264, at p.266, per Lord Goddard C.J.; A-G v. Mirror Newspapers Ltd. [1962] S.R. (N.S.W.) 421, at p.423.

49. R. v. Parke [1903] 2 K.B. 432; R. v. Davies [1906] 1 K.B. 32; Re Thomas [1928] S.A.S.R. 210; A.-G. v. Willesee (1980) 2 N.S.W.L.R. 143.

50. R. v. Thomson Newspapers Ltd., ex parte A.-G. [1968] 1 All E.R. 268; Maher v. Carson and Williams (1920) 22 W.A.L.R. 81.

51. R. v. Clarke, ex parte Crippen (1910) 103 L.T. 636; A.-G. v. John Fairfax and Sons Ltd. [1980] 1 N.S.W.L.R. 362. In Canada the publication of an alleged admission or confession made at the pre-trial stage is an offence until the accused is discharged or the trial is completed: Criminal Code 1970 (Canada), s.470(2).

52. R. v. Odhams Press Ltd., ex parte A.-G. [1957] 1 Q.B. 73; A.-G. v. John Fairfax and Sons Ltd. [1980] 1 N.S.W.L.R. 362; R. v. Pacini [1956] V.L.R. 544.

53. R. v. Bottomley, The Times 19 December 1908 R. v. McCreadie (1899) 16 W.N. (N.S.W.) 110.

54. Re Labouchere, ex parte Columbus Co. Ltd. (1901) 17 T.L.R. 578.

55. Ruse v. O'Sullivan [1969] W.A.R. 142.

56. R. v. Payne [1896] 1 Q.B. 577; Packer v. Peacock (1912) 13 C.L.R. 577; James v. Robinson (1963) 109 C.L.R. 593.

57. R. v. Gray (1865) 10 Cox C.C. 184; R. v. Kray (1969) 53 Cr. App. Rep. 412; Ex parte Kear; Re Consolidated Press Ltd. (1954) 54 S.R. (N.S.W.) 95.

58. Mr. Justice David Hunt, "Why No First Amendment? The Role of the Press in Relationship to Justice" (1980) 54 Australian Law Journal 458.

59. Peter Vaitos (1981) 4 A. Crim. R. 238, at p.245, per Young C.J.

60. Australian Law Reform Commission, Reform of Contempt Law, (Issues Paper No.4, January 1984), at p.14.

61. Omitted from the reported judgment but quoted in Reg. v. Munday, Supreme Court of N.S.W., Court of Criminal Appeal, 29 November 1984, unreported, per Street C.J. See also R. v. Hemming [1985] Crim. L.R. 395.

Chapter 8

The Jury's Deliberation

I. INTRODUCTION

8.1 A jury's verdict is supposed to be:

* based on the evidence alone;
* lawful;
* a result of agreement by all twelve jurors;
* determined by deliberation; and
* final.

This Chapter and the following Chapter will consider to what extent each of these requirements is fulfilled in practice and will assess the rules and procedures for deliberating on and rendering a verdict. The deliberation process will be examined first.

II. MATERIALS

8.2 As a general rule jurors may now have with them in the jury room while they are deliberating all exhibits admitted into evidence during the trial.[1] In addition, the jury may look at public documents, even though not exhibits, with the approval of the court.[2] While some commentators have noted that more care should accompany the jury's access to exhibits, it has been argued that jury decision-making could be greatly improved if other materials were also to be supplied.[3]

A. Exhibits

8.3 The Law Reform Commission of Canada has proposed that a discretion should be retained by the presiding judge as to whether and which exhibits should be permitted into the jury

room. The judge should allow in exhibits which would not put jurors' safety at risk or risk damage to the exhibits themselves. Other material "placed on the record" should be permitted if it might, in the judge's opinion, assist the jury in reaching a verdict.[4] The judge should continue to have a discretion, however, to refuse to permit the jury to take in exhibits if their value to the jury in reaching a proper verdict is outweighed by the danger that the jury might make improper use of the material, be confused or misled by it, or become unduly prejudiced against one of the parties.[5] Jurors must be warned against using exhibits in experiments and substituting their own results for the evidence given in open court.[6] The Commission invites submissions as to whether

(i) juries should be denied access to exhibits and, if so, on what grounds; and

(ii) whether multiple copies of certain documentary exhibits should be provided.

B. Transcript of Evidence

8.4 It has also been suggested that jurors would benefit by having a copy of the transcript of evidence in the jury room.[7] Judges acting alone would not usually make a decision without reference to the transcript or to comprehensive notes, at least in a trial lasting some days. Juries could use a transcript to refresh their memories. Currently juries may return to court and request that the judge re-read excerpts from the transcript. It is a common observation that juries who are reminded of the evidence in this way often quickly return a verdict. This may suggest that some debate on a

particular point had previously taken place in the jury room which, when resolved, permitted the verdict to be agreed. It could be argued, therefore, that it would be both more efficient and less time-consuming to provide a copy of the transcript at the beginning of deliberations. Some arguments Ogainst this view must be considered, however.

* There is a danger that the transcript, even if edited by a senior court officer, may contain inaccurate or even inadmissible material.

* The jury may give undue emphasis to part of the transcript while ignoring another, perhaps contradictory, part.

* Jurors might be tempted to spend their time reading from the transcript and neglect to fully discuss the issues.

* The provision of the transcript alters the balance of the trial which is currently in favour of oral material. Jurors reading selected passages from the transcript may substitute a new perception of the evidence from that obtained in the course of the trial.

In 1980 the Law Reform Commission of Canada tentatively recommended that normally a jury should not be given a transcript of the evidence.[8] The Criminal Law and Penal Methods Reform Committee of South Australia, on the other hand, recommended that a jury should be entitled, if it so wishes, to take the transcript into the jury room. That Committee considered it to be anomalous that exhibits can be taken into the jury room but not the transcript in which those exhibits are explained and placed in context.[9] The Commission invites submissions on this subject.

III. JURY QUESTIONS DURING DELIBERATIONS

8.5 Jurors can be helped to a better understanding of the evidence given or the issues raised if they can ask questions of the court during deliberations. A fundamental rule is that questions asked by the jury after they have retired must be dealt with in open court in the presence of both counsel and of the accused.[10] Breach of this rule will usually result in a conviction being quashed.[11] Moreover, answers to such questions must generally introduce no further evidence.[12] An exception is where the defence expressly wishes the additional material to be adduced.[13] Therefore, the jury is generally restricted to asking to be reminded of evidence (from the transcript) or for further instruction on the law. The Commission considers that it should be a universal practice for the jury to be advised of its right both to ask questions of the judge and to have any part of the evidence read from the transcript.

IV. IMPROPRIETIES IN DELIBERATION AND THE SECRECY OF THE JURY ROOM

8.6 There are few conventions or rules about what is the proper way for a jury to deliberate. For example, there must be honest agreement on the verdict. A decision reached by tossing a coin would be improper,[14] as would "a loose acquiescence by a minority for the sake of conformity and avoiding inconvenience".[15] The jurors are expected to discuss the case freely.[16] It is anticipated that every juror will participate but there is, of course, no requirement of equal

participation from each.[17] The jurors would be in breach of their oaths if they considered information other than the evidence admitted in court. Again, the jury is not entitled to separate while considering its verdict and must have no communication concerning the case with any outsider.[18] The verdict is for the twelve jurors alone. The courts go to some length to protect the jurors from extraneous influences by directing them at the end of each sitting day and before retiring to consider their verdict, and by requiring a court officer to take responsibility for the jury during the trial.

8.7 Impropriety in the jury's deliberations can result in a verdict being quashed on appeal or, if discovered in the course of deliberations, in a mistrial being declared and the jury discharged before giving a verdict. For example, it has been held that:

> If a juror after the judge has summed up in a criminal trial separates himself from his colleagues and, not being under the control of the Court, converses or is in a position to converse with other persons, it is an irregularity which renders the whole proceedings abortive. It is not necessary or relevant to consider whether the irregularity has in fact prejudiced the prisoner, and the only course open to the Court is to discharge the jury and commence the proceedings afresh.[19]

The reasoning is that isolation of the jury during deliberations is one of the essential steps in criminal procedure. To deprive the accused person of this protection amounts to a miscarriage of justice and, it has been held, the court has no option but to quash the conviction.[20]

8.8 Often, however, there is no remedy for an impropriety during deliberation. The courts have held that the evidence of jurors about deliberations will not be admitted on an appeal. Examples of this exclusionary rule of evidence have been where evidence was sought to be given to prove acts of misconduct by jurors in the jury room, to show that the jury had reached its verdict in disregard of the evidence or on the basis of evidence not received in open court and not admissible, to show that a juror subscribed to the verdict only because he or she believed that the jury would be kept together until a unanimous verdict was reached, or to show that the jurors were under some misunderstanding.[21] On the other hand, evidence will be taken from jurors about having been offered bribes or having been threatened during an adjournment,[22] and non-jurors will be questioned as to their conversations with jurors.[23] The jury room itself, however, is sacrosanct.[24]

8.9 There are three aspects to the notion of the secrecy of the jury room which must be considered.

* The right of a juror to disclose what occurred in the jury room.

* The right of non-jurors to publish jurors' disclosures as to what occurred in the jury room.

* The admissibility as evidence in court proceedings of jurors' disclosures as to what occurred in the jury room.

In Australia, the secrecy of jury deliberations has been held to be a paramount interest. The Full Court of the Supreme Court of Victoria has stated that:

> the interest of the community in ensuring freedom of debate in the jury room and finality of verdicts outweighs [the interests of the community and of litigants] in seeing that the accepted rules and formalities of a fair trial are maintained and enforced.[25]

Information volunteered by jurors about their deliberations can lead, however, to the appointment of a special judicial inquiry into the reliability of a conviction. Thus, there may be situations in which it is in the public interest that jurors disclose the content of their deliberations and that those disclosures receive media attention.

A. Jurors' Obligation of Secrecy

8.10 Once discharged it is unlikely that jurors are bound by any enforceable obligation not to disclose what has taken place in the jury room,[26] although it is an accepted rule of conduct that the jury's discussion should be treated as private and confidential.[27] Lord Devlin has suggested that,

> The lack of any formal obligation to secrecy is a vestige of the embryonic jury. Since jurors were originally purveyors of what was supposed to be public knowledge, there was nothing for them to be secret about.[28]

Members of a grand jury, on the other hand, were required to swear an oath of secrecy.[29] In 1968 in the United Kingdom the rule of conduct maintaining jury room secrecy was felt to have been so well adhered to that no prohibition on jurors' disclosures was felt to be called for.[30] In Canada, however, it is an offence for a juror to disclose "any information relating to the proceedings of the jury when it is absent from

the court room that was not subsequently disclosed in open court", except in prosecutions of third persons charged with interfering with the course of justice.[31]

8.11 It could be argued that to prohibit jurors' disclosures indefinitely is an infringement both of their right of free speech and of their right to resume their anonymity uninhibited by the continuing effects of their period of jury service. It can also be argued that the publication of jurors' descriptions about their experiences can have an educational effect on the public. Certainly jurors have given press interviews and published articles about their experiences, including the process of deliberation.[32] Very recently a "blow-by-blow" description of the deliberation in the trial of Mr. Justice Lionel Murphy appeared in The National Times[33] which journal also published the story of one juror in the trial of Norman Gallagher.[34] This practice was long ago described by a judge as "most improper, deplorable and dangerous".[35] On the other hand it is difficult to find grounds for prohibiting such disclosures when neither the accused nor the jury members are identified, that is, where the disclosure does not obviously refer to a particular trial but concerns the general subject of jury service.

8.12 The difficulties that arise when publicity is given to jurors' disclosures about a trial that is both recent and identified are illustrated by the actions of some of the jurors in the trial of Mr. Justice Murphy.[36] Those disclosures were

characterized by high emotion, conflicting versions and great public interest. Moreover, they were made very soon after the trial, which itself had been well publicised, and when an appeal was pending. Politicians and academics were among those who publicly criticised the verdict and the Federal Attorney-General, Lionel Bowen, reportedly felt that the jurors had been provoked into answering the attacks.[37] The trial judge was presented with an application from counsel for the accused for the jurors to be recalled and questioned about their deliberations. This, however, he declined to do. Counsel argued that, if the jurors' allegations were found to be true, the verdict would have to be set aside. The judge, however, refused to consider the disclosures published in the media.[38] The controversy surrounding these disclosures and those by the Gallagher juror, have prompted authorities in at least two States to consider prohibitions on juror disclosures. In Victoria, legislation prohibiting public statements by jurors is apparently likely to be introduced this year.[39] In Western Australia, however, the Attorney General, after an investigation, decided that such legislation was not necessary at present.[40] The Commission is tentatively of the view that there should be some restriction on disclosure by jurors. The Commission invites submissions on this issue and as to whether there should be a prohibition on jurors' disclosures generally, or whether the prohibition should be limited to certain kinds of disclosure.

B. Publication of Jurors' Disclosures

8.13 Whether or not there is to be any prohibition upon jurors themselves, it may be felt that a prohibition should apply to the media. It has been difficult to date to categorise publications of jurors' disclosures as contempt of court. If the publication occurs once the trial is finally completed with no possibility of a retrial, the only basis for a contempt charge is that the publication involves an interference with the due administration of justice as a continuing process because it tends:

> (a) to imperil the finality of jury verdicts and thereby diminish public confidence in the general correctness and propriety of such verdicts and (b) to affect adversely the attitude of future jury men and the quality of their deliberations.[41]

It has been held to be undesirable for a newspaper to publish accounts of the observations of a juror in relation to a recently concluded trial.[42] Since 1981 in the United Kingdom, statute has provided that such publications are in contempt of court. It is a contempt of court

> to obtain, disclose or solicit, any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.[43]

Publicity given to disclosures made by jurors may give added cause for concern that fear of being publicly exposed, even anonymously, will have the effect of inhibiting frank discussion and expression of views in the jury room. There is also a danger that people will be unwilling to serve as

jurors.[44] The Commission proposes that the publication of jurors' disclosures which identify the trial in question should be an offence. It may be that publication in certain circumstances should be permitted, for example, when neither the accused nor any other juror is identified. Again it may be necessary only to prohibit paying or offering to pay a juror for his or her "story". In this way the disclosure is likely to be made and solicited in good faith.

C. Jurors' Disclosures as Evidence

8.14 Other jurisdictions have recognised that there may be occasions when justice requires that the courts accept jurors' evidence about their deliberations. To the extent necessary, mechanisms have been developed to permit minimal breach of jury room secrecy without totally undermining the principles of finality of verdicts and jurors' privacy. In the United States Federal courts, for example, jurors' evidence "on the question whether extraneous prejudicial information was improperly brought to bear upon any juror" is admissible in an inquiry into the validity of a verdict.[45] However,

> A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict ... or concerning his mental processes in connection therewith ...[46]

The Law Reform Commission of Canada has proposed that a person convicted by a jury should be able to apply to the Minister of Justice for an inquiry into the validity of the verdict. Upon such an inquiry, a juror should be permitted to give evidence

of objective events occurring during deliberations but not of subjective mental or emotional processes. If, after such an inquiry, the Minister were satisfied that irregularity or misconduct occurred during the deliberations "which indicates that the verdict did not reflect the judgment of all jurors", a new trial could be ordered. The Canadian Commission felt that a remedy such as this should be provided to accused people in cases of blatant jury misconduct.[47] We invite submissions as to whether and, if so, in what circumstances, jurors' evidence as to the jury's deliberations should be admissible in appeal proceedings.

V. THE ROLE OF THE FOREMAN

8.15 The role of the foreman will vary depending on the personalities on each jury, as will the nature and level of discussion. The traditional direction given to jurors after they are sworn advises them to elect a foreman at the earliest convenient time. It has been suggested that early election of a foreman is important for two reasons. First, the foreman having been elected before deliberation commences, "the procedures in the deliberating room are likely to be more orderly". Secondly, as jurors' queries and requests are best directed through the foreman, it is important that that person be identified from the commencement of the trial.[48] The Canadian Criminal Code 1970 now requires the judge to direct the jury to elect a president in the early stages of the trial.[49] On the other hand, the benefit to be derived from deferring the selection of the foreman is that the jurors,

knowing each other better, are likely to choose a more suitable representative. The Commission invites submissions as to whether any change to the current practice in this regard is necessary.

VI. LENGTH OF DELIBERATION

8.16 The maximum length of time which a particular jury should be permitted or required to deliberate is at the discretion of the presiding judge. In a complex case involving detailed evidence on a number of charges and lasting some months, the jury must be given adequate time to consider the full ramifications of the whole of the evidence carefully. They might need to be sequestered for several days or even weeks. The length of the deliberation, however, should not be so oppressive as to coerce a verdict. There is a minimum time limit imposed. A jury may not be discharged without giving a verdict (subject to impropriety or unfairness as discussed above) until it has tried to reach agreement for at least six hours. The presiding judge may decide to keep a jury deliberating longer, but may not discharge it before the expiration of that period.[50]

8.17 Deliberation time has been identified as one of three "major determinants of verdicts"[51] by jury researchers in the United States. For example, juries ultimately unable to agree have been found to spend on average, three times longer in deliberation than juries who deliver a verdict, yet a unanimous verdict requires a longer deliberation time than a majority

verdict. Predictably, twelve-member juries take longer to reach a verdict than six-member juries.[52] Findings of this type suggest that deliberation time is a sensitive factor affecting outcome. The Commission is concerned that no useful purpose can be served by detaining a jury for six hours when it is unable to agree after a lesser but reasonable period in a relatively straightforward case. We consider that, when a judge has stressed the jury's obligation to consider the evidence and the directions in the summing-up and to discuss the case with open minds attempting to reach a unanimous verdict, the additional measure of keeping the jury together for at least six hours can be counter-productive where it is clear from the early stages of deliberation that agreement will not be reached. We propose that the minimum deliberation period should be reduced, and we invite submissions as to the proper minimum period which should apply. The presiding judge is in the best position to determine, in his or her discretion, what is the proper maximum length of deliberation, and this determination will usually be made after consultation with the jury and with counsel. Accordingly, we do not consider that any maximum period should be specified by legislation.

VII. TENTATIVE PROPOSALS

8.18 In this Chapter we have described the law relating to jury deliberations. We have considered whether that law operates fairly from the point of view of the accused and effectively from the point of view of the administration of justice. We tentatively propose the following reforms.

1. It should be a universal practice for the jury to be advised of its right both to ask questions of the judge and to have any part of the evidence read from the transcript (paragraph 8.5).
2. The minimum deliberation period before a jury can be discharged without verdict should be reduced from six hours (paragraph 8.17).

8.19 There are other questions which have been raised in this Chapter. The Commission also invites submissions on these:

* whether juries should ever be denied access to certain exhibits and, if so, on what grounds (paragraph 8.3);
* whether multiple copies of documentary exhibits should be provided to the jury (paragraph 8.3);
* whether the jury should be provided with a transcript of all or part of the evidence either as a matter of course, at its request, or at the discretion of the presiding judge (paragraph 8.4);
* whether jurors should be prohibited by statute from disclosing their deliberations (paragraph 8.12);
* whether the publication of disclosures by jurors about their deliberations should be an offence (paragraph 8.13);

* whether the evidence of jurors about the jury's deliberations should be admissible in subsequent legal proceedings and, if so, in what circumstances (paragraph 8.14); and
* whether any change to the current practice whereby the jury is advised to elect a foreman as early as possible is necessary (paragraph 8.15).

Footnotes

1. Hodge v. Williams (1947) 47 SR (NSW) 489; Reg. v. Bradshaw (1978) 18 SASR 83.

2. Vicary v. Farthing (1595) Cro.Eliz.411; Cole v. De Trafford (No.2) [1918] 2 KB 523.

3. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp.125-126.

4. Law Reform Commission of Canada, The Jury (Report 16, 1982), at p.73.

5. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at p.132.

6. Kozul v. The Queen (1980-1981) 147 C.L.R. 221.

7. Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at p.105.

8. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp.132-134; and recommended in The Jury (Report 16, 1982), at pp.76-77.

9. Criminal Law and Penal Methods Reform Committee of South Australia, note 7 above, at p.105.

10. R. v. Ion (1950) 34 Cr.App.Rep. 152; R. v. Fitzgerald (1889) 15 V.L.R. 40; R. v. Kachikwu (1968) 52 Cr.App.Rep. 538; R. v. Lenton (1919) 14 Cr.App.Rep. 105; Rabey v. R. [1979] W.A.R. 84; R. v. Townsend [1982] 1 All E.R. 509.

11. R. v. Fitzgerald (1889) 15 V.L.R. 40.

12. R. v. Davis (1960) 44 Cr.App.Rep. 235; R. v. Oduro (1983) 76 Cr.App.Rep. 38; R. v. Wilson (1957) 41 Cr.App.Rep. 226; R. v. Lawrence [1968] 1 All E.R. 579.

13. R. v. Nixon [1968] 2 All E.R. 33. However, new evidence was held to have been wrongly admitted in R. v. Corless [1972] Crim. L.R. 314 because it was not done at the instance of the defence.

14. Vaise v. Delavel (1785) 99 E.R. 944.

15. Halsbury's Laws of England (4th Ed., 1975), Vol.11, para.323.

16. A verdict has, however, been accepted when the jury did not leave the jury box and the foreman did not consult his colleagues: R. v. Young [1964] 1 W.L.R. 717.

17. American research suggests that up to 20% of jurors will fail to participate altogether: R. Hastie, S.D. Penrod and N. Pennington, "What Goes on in a Jury Deliberation" (1983) 69 American Bar Association Journal 1848, at p.1849.

18. R. v. Ketteridge [1915] 1 K.B. 467.

19. Ibid.

20. R. v. Neal [1949] 2 K.B. 590, at p.594, per Lord Goddard C.J.

21. Re Matthews and Ford [1973] V.R. 199; Burnside v. The Queen [1963] Tas. S.R. 174; Thompson [1962] 1 All E.R. 65; Papadopoulos [1976] N.Z.L.R. 621; and Melik (1915) 11 Cr. App. R. 100 are some of the cases cited by E. Campbell, "Jury Secrecy and Impeachment of Jury Verdicts - Part I" (1985) 9 Criminal Law Journal 132, at p.147.

22. Waring [1972] Q.W.N. 20; Woolcott v. Forbes (1944) 44 S.R. (N.S.W.) 333.

23. Zampaglione (1981) 6 A. Crim . R. 287.

24. This principle has been reaffirmed by Cantor J. in R. v. Murphy and is currently under consideration by the Supreme Court of Victoria in R. v. Gallagher.

25. Re Matthews and Ford [1973] V.R. 199, at p.211.

26. E. Campbell, "Jury Secrecy and Impeachment of Jury Verdicts - Part I" (1985) 9 Criminal Law Journal 132, at pp.133-134; P. Devlin, Trial by Jury (Stevens and Sons Ltd., 1956), at p.46; A.-G. v. New Statesman [1981] Q.B. 1.

27. Ellis v. Deheer [1922] 2 K.B. 133, at p.118 per Bankes L.J.

28. P. Devlin, note 26 above, at p.46.

29. Ibid.

30. Criminal Law Revision Committee, Secrecy of Jury Room (Tenth Report, 1968, Cmnd.3750), at p.4.

31. Criminal Code 1970 (Canada), s.576.2.

32. See, for example, J. Kaplan, "In Praise of Juries: A Personal Experience" (1979) New York State Bar Journal 384; S. Brill, "Inside the Jury Room at the Washington Post Libel Trial", November 1982 The American Lawyer 1; "Behind the Door" [1976] New Zealand Law Journal 142; C. Petre, "View from the Jury Room", The National Times 4 to 10 May 1984, at p.15; J. Kent, "What happens deep inside a jury's mind ...", Sydney Morning Herald 8 September 1984, at p.38.

33. J. Penberthy, "Inside the Murphy Jury", The National Times 26 July to 1 August 1985, pp.1, 3-4, 26-27.

34. G. Brooks, "A Gallagher Juror's Story", The National Times 9-15 August 1985, pp.18-19.

35. R. v. Armstrong (1922) 16 Cr. App. R. 149, at p.159 per Lord Hewart C.J.

36. M. Trembath, "Jury 'Foreman' Speaks Out" The Sun 11 July 1985, p.2; "'Sorry' woman writes to Murphy" Melbourne Sun 19 July 1985; J. Penberthy, "Inside the Murphy Jury", The National Times 26 July-1 August 1985, pp.1, 3-4, 26-27; J. Payne, "Jurors' lives touched by the trauma of a decision", The Sun Herald 28 July 1985.

37. "Murphy jury contempt action halted", The Examiner 6 August 1985.

38. R. Campbell, "Validity of Murphy verdict questioned", Canberra Times 19 July 1985.

39. P. Debelle, "State may muzzle jurors", Melbourne Herald 12 August 1985.

40. "No gag on WA jurors", West Australian 14 August 1985, p.13.

41. Attorney-General v. New Statesman and Nation Publishing Co. Ltd. [1981] 1 Q.B. 1, at p.6.

42. Re Matthews and Ford [1973] V.R. 199.

43. Contempt of Court Act 1981 (U.K.), s.8(1).

44. Following the disclosures of the Murphy jurors the rate of applications for excusal reportedly increased dramatically.

45. Federal Rules of Evidence, P.L. 93-595, Rule 606(b).

46. Ibid.

47. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp.149-150.

48. Law Reform Commission of Canada, The Jury (Report 16, 1982), at p.54.

49. Criminal Code 1970 (Canada), s.561(3).

50. Jury Act, 1977, s.56. The same rule apples in Victoria: Juries Act 1967 (Vic.), s.46(1); Queensland Criminal Code 1899 (Qld.), s.628 (check); and the A.C.T.: Juries Ordinance 1967 (ACT), s.38. In jurisdictions where majority verdicts are acceptable in criminal cases they may be taken after shorter deliberation: 4 hours in South Australia: Juries Act 1927 (S.A.), s.57; 3 hours in Western Australia: Juries Act 1957 (W.A.), s.41; and 2 hours in Tasmania (except in capital offences where 6 hours are required): Jury Act 1899 (Tas.), s.48(4),(5).

51. R. Hastie, S.D. Penrod and N. Penington, "What Goes on in a Jury Deliberation" (1983) 69 American Bar Association Journal 1848.

52. Id., at pp.1848-1853.

Chapter 9

The Jury's Verdict

I. INTRODUCTION

9.1 One reason put forward for abolishing jury trials is that juries do not come reliably, or often enough, to "correct" verdicts. This is said to be evidenced by the number of times trial judges have disagreed with jury verdicts. On the other hand, one reason put forward for retention of jury trials, most often by judges, is that juries usually, or almost always, arrive at verdicts with which judges are in agreement. The Chicago Jury Project results showed that judges agreed with the juries' verdicts in seventy-five per cent of cases surveyed. Where there was disagreement, juries tended to be more lenient, often acquitting in cases where prosecution methods could have been considered to be unfair.[1]

9.2 Lord Devlin has recognised the great value which flows from the freedom of juries to view the criminal law as flexible rather than rigid and to take an equitable approach in line with community attitudes.

> If you want certainty or predictability, you must keep the judgment running close to the law. If you want the best judgment in the light of all the facts when they have emerged, then it will be one that has moved nearer to the aequum et bonum [equity and good conscience]. The unique merit of the jury system is that it allows a decision near to the aequum et bonum to be given without injuring the fabric of the law, for the verdict of a jury can make no impact on the law.[2]

Consistent jury acquittals, however, may well have an impact on the law. The offence of culpable driving was created largely because juries consistently acquitted bad drivers charged with manslaughter. Jury verdicts are a way of informing legislators of public attitudes to the criminal law. Trial by jury is "an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just".[3] On the other hand, it has been argued that juries have not consistently defended the public interest in equity and justice but have been more likely to submit to oppressive laws such as the attack on freedom of speech by the sedition laws, and the attack on freedom of association by anti-industrial union laws.[4]

II. FORM OF THE VERDICT

9.3 The jury is not completely at liberty as to the verdict it can render. The verdict must, of course, relate to the charges in the indictment. Where the jury is not restricted to a verdict of guilty or not guilty of the offence charged, any alternative verdict rendered must be authorized by law. If the indictment is drawn in such a way that the offence charged leaves open an alternative count of a less serious offence, the jury might convict the accused only of the less serious charge.[5] There are many statutory alternatives. For example, the Crimes Act, 1900 provides that where the charge is murder but the jury is satisfied that there was provocation or diminished responsibility, the accused can be convicted of manslaughter.[6] A second limitation on the jury's control over

the verdict is the judge's role in "taking the case away" from the jury and directing an acquittal where the evidence could not sustain a conviction. In exceptional circumstances the judge may refuse to accept the jury's first verdict and require it to deliberate further.[7] Ultimately, however, the verdict is the jury's prerogative and the judge has little power to interfere. The judge may not intimidate or pressure a jury to come to a particular verdict, or to any verdict at all.[8]

III. DELIVERY OF THE VERDICT

9.4 The foreman, who delivers the jury's verdict, should do so in the presence and hearing of the remainder of the jury. If none of them then protest at the verdict delivered, no juror can later come forward to say he or she disagrees with that verdict.[9] Where the foreman renders the verdict <u>out</u> of the hearing of fellow jurors, however, their consent cannot be assumed.[10] While a jury can correct its verdict before being discharged,[11] it cannot later return to court to plead that the verdict was given under a misapprehension.[12] The argument that the secrecy of the jury's deliberations should give way to the interests of justice when inadmissible evidence has apparently been considered by a jury, (see paragraph 8.14), would seem to apply equally where a jury gives its verdict under a misapprehension about its meaning. A measure of certainty in the concurrence of all jurors in the verdict could be achieved if each juror were to be asked individually what his or her verdict was or whether he or she agreed with the verdict delivered by the foreman. This procedure, known as

polling the jury, is an option now available to the presiding judge if he or she considers the situation warrants it.[13] The procedure has been criticised on the basis that the jury's verdict is a corporate decision and individual polling is warranted only in unusual circumstances.[14] On the other hand, unanimity is required for a valid verdict and polling is an effective way of ensuring that unanimity exists. The Commission proposes that each member of a jury in a criminal trial should be polled by the presiding judge to ensure that the verdict is unanimous. An alternative which may be considered is to require each juror to sign a document which is a formal record of the verdict.

9.5 A jury may add a rider to a verdict of guilty, recommending mercy. Such a recommendation, however, is not binding on the judge when sentencing.[15] Neither counsel nor the judge may invite a jury to add a recommendation for mercy.[16] There is debate both about whether juries should continue to have this power and about whether they ought to be told of it. It may be argued that the availability of the recommendation for mercy could operate to the disadvantage of the accused. A juror reluctant to concur in a guilty verdict may be persuaded by the offer of the majority to recommend mercy. This consideration was one reason for the Law Reform Commission of Canada's recent proposal that the jury's prerogative to recommend mercy should be abolished and that the jury should be instructed that it has no such prerogative. The other reasons were, first, that it is not part of the jury's

role to influence sentence and, second, that any suggestion from the jury would be made in ignorance of factors relevant to the sentencing process.[17] On the other hand, it might be argued that a jury which has heard the evidence and come to a determination of guilt beyond reasonable doubt should be entitled to signal its recognition of mitigating factors. The recommendation for mercy could be seen as a comment by the jury on the facts proven as well as a comment on what the sentence should be. We invite submissions as to whether the jury should continue to have the ability to recommend mercy, and, if so, whether it should be so advised in the judge's summing-up. If the jury is to be advised of its prerogative, the question arises as to what form such advice or direction should take.

IV. THE UNANIMITY RULE

9.6 In New South Wales criminal verdicts must be unanimous.[18] Unanimity is required in order to convict an accused, and also in order to acquit. In Newell Mr. Justice H.V. Evatt stated,

> ... trial by jury has been universally regarded as a fundamental right of the subject and unanimity in criminal issues had been regarded as an essential and inseparable part of that right, not a subordinate or merely procedural aspect of it.[19]

In this context it must be remembered that the deliberating jury may not be composed of twelve members. Up to two of the original jury may be discharged in the judge's discretion, while the jury may drop below ten members with the written consent of the Crown and the defence.[20]

A. Majority Verdicts: Rationale and Principle

9.7 Some difficulties have been identified with achieving unanimity, and a number of jurisdictions will accept a majority verdict in a criminal trial where a jury is unable to achieve unanimity after a specified period.[21] Unanimity would seem to require a longer deliberation period than a majority verdict. Moreover, a jury able to render a majority verdict is probably less likely to disagree. Thus a new trial is unnecessary.[22] The reason given for the introduction of majority verdicts in the United Kingdom in 1967 was:

> ... to prevent one or two bribed or intimidated jurors from preventing conviction.[23]

Critics have suggested, however, that the real reason was a reaction to the then recent democratisation of the jury, when all voters became qualified to serve, and thus to

> ... the possibility that the jury might start taking seriously the ideology of representing all the people ... that bohemian or radical standards may infect the jury ...[24]

9.8 Majority verdicts have been justified in the United States from a functional point of view.

> ... the purpose of trial by jury is to prevent oppression by the Government ... In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.[25]

Federal juries must be unanimous, but States may now provide for majority verdicts in cases where juries have twelve members. Majority verdicts by six-member juries, however, have

been held to be unconstitutional in the United States.[26] In Scotland, where juries have fifteen members,[27] the verdict of a simple majority will suffice.[28]

9.9 There is some evidence that "nobbling" of jurors (i.e. bribery or intimidation) occurs in New South Wales. The judgment of the New South Wales Court of Criminal Appeal in Hill reveals that one juror was offered money by telephone during the course of the trial. That attempt was discovered because the juror involved informed the court.[29] However, it is not clear that hung juries form a significant proportion of trial results.[30] Experience with majority verdicts in the United Kingdom shows that between nine and twelve per cent of trial verdicts are by majority.[31] It could be that, without the availability of majority verdicts, the juries in those trials would have failed to reach a verdict. On the other hand, it could be that some of those juries would have achieved unanimity if given more time to attempt it. Currently juries in the United Kingdom must try to reach a unanimous verdict until at least two hours have elapsed.[32] Until then, they are not told of their right to bring in a majority verdict. Evidence from the Chicago Jury Project suggests that majority verdicts would make little impact on the rate of hung juries. It would seem that juries initially split 11-to-1 or 10-to-2 tend to achieve unanimity after some deliberation and that it is juries in which the initial minority is larger that ultimately fail to agree.[33]

B. Arguments in Favour of Unanimity

9.10 A number of arguments can be made for the retention of the unanimity rule. First, the unanimity requirement is said to reduce the risk that innocent people will be convicted by increasing the accuracy of jury fact-finding. A jury is assumed to be an accurate fact-finder because it brings to bear on the decision-making process the collective experience and recall of twelve people, and because the deliberative process in which they engage encourages a give-and-take by which ideas and arguments (including those of a minority) are tested and refined, adopted or rejected. The unanimity requirement is necessary to ensure that these attributes of jury decision-making are present.[34] Second, because the jury is expected to operate as a collective, it is argued, it must collectively be convinced of guilt beyond a reasonable doubt. How can the requirement of proof beyond reasonable doubt be satisfied when some members of the jury hold doubts and will not concur in a verdict?[35] Third, it is felt that unanimous verdicts are more acceptable than majority verdicts to participating jurors, to the community, and to accused people.[36]

9.11 The significance of some of the alleged risks of the unanimity requirement may also be doubted. For example, in 1982, the Law Reform Commission of Canada stated that "the problems some people associated with the unanimity requirement, hung juries and corrupt jurors, were not nearly so serious as is sometimes argued."[37] It can therefore be argued that the

unanimity requirement is an important safeguard against wrongful convictions and acquittals and a fundamental feature of the jury system. In 1965 the Morris Committee in the United Kingdom argued that,

> ... the absence of a certain number of disagreements would itself be disturbing, since in the nature of things 12 individuals chosen at random are unlikely always to take the same view about a particular matter, and the existence of disagreements may, therefore, be evidence that jurors are performing their duties conscientiously.[38]

The Commission invites submissions on the desirability or otherwise of altering the current requirement of unanimity in verdicts in criminal trials.

V. THE JURY'S OBLIGATION TO APPLY THE LAW

9.12 Juries have the power to refuse to apply the law as interpreted by the judge to the facts they find in a particular case.[39] More correctly perhaps, a "perverse" acquittal cannot be reviewed: it is final and conclusive.[40] Neither can a judge direct a jury to convict. It is not the judge's task to decide the question of guilt; the jury must.[41] This is not to say that the judge may not tell the jury that, in his or her opinion, the only verdict which they can, in conscience, render is a verdict of guilty. In such a case, the summing-up must also make it clear to the jury that the matter is for them alone.[42] Thus, while the jury <u>should</u> obey the law,

> ... it is an obedience which they cannot be compelled to give. They are the wardens of their own obedience and are answerable only to their own conscience...[43]

It would seem, however, that juries rarely refuse to apply the law interpreted for them by the presiding judge. The researchers on the Chicago Jury Project suggested four reasons why juries rebel so infrequently:

* the law has adjusted to prevailing values;
* the group nature of the jury curbs eccentric views;
* the jury is solemnly invested with an important public task; and
* the jury is never told that it has the power to "nullify", i.e. render a perverse verdict.[44]

9.13 The jury's "nullification power", its "privilege of returning a perverse verdict", has been put forward as one of its virtues:

> The jury thus represents a uniquely subtle distribution of official power; an unusual arrangement of checks and balances. It represents also an impressive way of building discretion, equity, and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it.[45]

The occasional refusal of a jury to convict, in spite of the evidence and the instructions of the judge, might be an example of a jury rejecting the harshness of a law or its application to a particular case. Alternatively, of course, waywardness might be a sign of ignorance or confusion. The acceptability of perverse verdicts always assumes that the jurors have properly understood the law they are rejecting. The validity of the jury system is dependent on the assumed competence of juries to apply the law as received from the judge. As we

argued in Chapter 6, the best way of reducing the incidence of ignorance and confusion is by making jury instructions more understandable to juries.

9.14 The usual nature of a jury's verdict, being a general verdict without a statement of reasons, may not allow the judge or the parties to be sure that the jury was satisfied beyond reasonable doubt as to each of the elements to be proved. It has been argued that requiring special verdicts - answers to a series of questions on the facts - would be one way of ensuring that ultimate verdicts are lawful, as the application of the law to the facts found could be made by the presiding judge.[46] The English Court of Criminal Appeal has observed, however, that

> Special verdicts ought to be found only in the most exceptional cases....[47]

It is clearly desirable, moreover, that a jury which has given specific answers to questions on the facts should then be empowered to return an appropriate general verdict.[48] The Commission invites submissions as to whether judges in criminal trials should have a discretion to require a special verdict and, if so, in what circumstances. We consider that the best way of increasing the prospect of responsible consideration of the case by the jury is to adequately instruct them on the elements of the offence and to improve the effectiveness of instructions.

VI. INTERPRETING THE VERDICT

9.15 In a contested case, the guilty verdict of a jury must precede sentencing. Sentencing is a matter solely for the judge and, as a general rule, the possible sentence is not a matter which the jury should take into account in deliberating upon a verdict. One exception to this rule is created by the Mental Health Act, 1983, which requires the presiding judge to tell the jury that the consequences of a verdict of "not guilty by reason of mental illness" are that the defendant will be detained in custody until released by due process of law.[49]

9.16 In most cases the factual basis of a guilty verdict will be clear to the judge from the way in which the case was argued in court. When an accused could properly have been found guilty on one of alternative bases, however, the judge will generally receive no assistance from the jury's verdict as to which basis, one of which will often be less aggravating, was accepted by them. How, then, should the judge approach the sentence? If only one view of the verdict is reasonably open, the judge is bound to accept that view in sentencing. Where two views are open, however, it has been held in Australia that the judge is entitled to make his or her own findings of fact consistent with the verdict, and is under no obligation to view the facts in the light most sympathetic to the accused.[50] This position can be contrasted with the recent English ruling that,

> Where a defendant has been convicted by the jury, and the verdict of the jury is consistent with more than one version of the facts, the court should give to the defendant the benefit of any doubt there might be over the basis of the verdict.[51]

9.17 Clearly the situation, when it arises, presents a dilemma. The English Court of Criminal Appeal has made two suggestions for avoiding the problem:

> * ... the prosecution should endeavour to avoid the possibility of dilemmas of this kind arising by drafting the indictment to include counts which would have clear factual implications;
>
> * Judges could avoid such dilemmas by avoiding directions to juries to consider convicting on alternative bases, except where there is a clear requirement to do so.[52]

Others have made suggestions for dealing with the problem when it arises. For example, it has been suggested that jurors should be questioned as to the basis on which a guilty verdict has been returned.[53] There is an accepted practice, at least in cases of murder where there is evidence both of provocation and of diminished responsibility, of inquiring of the jury which basis was accepted. The risks in questioning the jury were adverted to by Mr. Justice Stephen in the High Court:

> Care must no doubt be taken to ensure both that the foreman clearly understands the nature of the question and that he is fully capable of answering it, that is, that he in fact knows what are the grounds which have led his fellow jurors to their verdict. If there has been no unanimity as to grounds or if individual jurors have not disclosed, and may, indeed, not be prepared to disclose, their grounds the foreman cannot of course, supply the information sought. It should be made clear to him that his function is only to answer to the best of his ability the question asked, ensuring that, if answered, it does truly

> reflect the jury's unanimous view. The question should, of course, be so confined as to ensure that it does not invite any spontaneous general disclosure of the jury's deliberations.[54]

The Commission considers that, where alternative bases for a conviction (which have different consequences for sentencing) are left to a jury, the judge should endeavour to determine which basis the jury accepted. We, therefore, tentatively propose that, in such cases, the judge should direct the jury in the summing-up to consider on which ground the verdict is based. When the verdict is rendered in such a way that the ground accepted is not clear, the judge should first ask the foreman whether the jury reached a unanimous view as to which ground it accepted. If the foreman affirms that the jury was unanimous on this issue, the judge should then ask which ground was accepted. The judge should then be bound, in sentencing, by the jury's view of the facts.

VII. FINALITY OF THE VERDICT

9.18 In New South Wales a jury's acquittal is final and conclusive and cannot be overturned on appeal. However, a verdict of guilty might, on appeal by the accused, be found to be unreasonable, internally inconsistent or against the evidence.[55] In each case there is a certain minimum of evidence which the law requires and a verdict that is not supported by some evidence will be set aside on appeal.[56] For example, the prosecution might make out no case in law or the prosecution case might be rebutted by overwhelming proof of innocence. On appeal from a conviction on indictment in New South Wales, the court will allow the appeal

> if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice ...[57]

9.19 Australian courts are generally reluctant to overturn the verdict of a jury which has been properly instructed. The majority in the High Court in Ross noted:

> ... if there be evidence on which reasonable men could find a verdict of guilty, the determination of the guilt or innocence of the prisoner is a matter for the jury and for them alone, and with their decision based on such evidence no Court or Judge has any right or power to interfere.[58]

In Crooks in the Supreme Court of New South Wales, Chief Justice Jordan stated after quoting the above from Ross:

> If there is no evidence of guilt, or only such a faint scintilla that reasonable men could not act upon it, the trial judge may direct a verdict of not guilty ... and if he refrains and the jury convict, it is the duty of the Court of Criminal Appeal to set aside the conviction. If evidence is given which, if accepted, is sufficient to justify a conviction, and a verdict of guilty is challenged on the ground that the preponderance of evidence is the other way, it is necessary to establish that the evidence pointing to innocence is of such kind that reasonable men could not have failed to accept it, and is so overwhelming that reasonable men could not have failed to act on it ... But the fact that a transcript contains what appears to be strong evidence for the defence does not entitle a Court of Criminal Appeal to substitute trial by three judges who have not seen the witnesses for trial by twelve jurymen who have.[59]

More recently, in Chamberlain, Mr Justice Brennan in the High Court of Australia stated:

> It is not easy to conceive of a miscarriage of justice arising from the state of the evidence where the evidence, viewed reasonably is sufficient to support the verdict. After all, the jury is the constitutional tribunal for deciding whether an accused person is guilty or not guilty, and if there is evidence sufficient to support a verdict of guilty, it is for the jury to say whether that verdict should be returned.[60]

A successful appeal can have one of a number of results:

* a conviction of a lesser offence can be substituted as the proper verdict;
* a re-trial can be ordered; or
* a verdict of not guilty can be substituted as the proper verdict.[61]

9.20 Thus, a jury's guilty verdict will be quashed on appeal if a miscarriage of justice occurred in the course of the trial. Some miscarriages arise from the behaviour of jurors or juries themselves. Guilty verdicts have been quashed where members of the jury have breached the rule that a jury must not separate or communicate with the public while deliberating, for example.[62] Other trials falter due to some procedural defect affecting the jury, such as where a jury takes "evidence" at a view from a witness in the absence of the accused.[63] Where inadmissible material prejudicial to the accused has been obtained by the jury the trial will usually miscarry.[64]

VIII. RETRIAL AFTER JURY DISAGREEMENT

9.21 The meaning of a failure to agree and the propriety of a re-trial after a jury has been unable to agree have been the subject of recent debate. The English position seems to be

that, after a hung jury, the accused person may be tried again although the prosecution is not obliged to proceed further.[65] There is also some authoritative support for the view that if the second jury disagrees the prosecution should formally offer no evidence at a third trial.[66] Thus a second disagreement is considered "tantamount to an acquittal".[67] While failure to agree is not the equivalent of an acquittal, it has been argued that, "[i]f a jury disagrees, surely that means that the prosecution has failed to prove its case beyond reasonable doubt to the satisfaction of the jury...".[68] It has even been argued that "it does not follow from the rule that the jury must be agreed before there can be a conviction... that they must also be agreed before there can be an acquittal".[69]

> The jury's purpose is to decide whether the prosecution has proved the accused's guilt beyond reasonable doubt. If the jury is not thus satisfied of guilt then, it is submitted, the prosecution has failed and the verdict should be that the accused is not guilty.[70]

9.22 The failure of a jury to reach agreement, however, may be caused by a single perverse, corrupt or credulous juror who refuses to join in the majority's decision. The dissenting juror may dissent for reasons uninfluenced by considerations of evidence and standard of proof. Should the achievement of finality be frustrated by such people? The introduction of a rule denying the right of the prosecution to conduct a second jury trial would boost arguments in favour of majority verdicts. The Commission does not suggest that retrial after one jury has failed to reach a unanimous verdict should be

prohibited. We propose, however, that if a second jury fails to agree there should not be a third trial. We understand that this is in fact the policy of prosecuting authorities in New South Wales.[71]

IX. DISCHARGING THE JURY

9.23 The jury's task is complete when it delivers its verdict. Some judges, however, make a practice of detaining the jury while sentence is passed. There is no doubt that jurors who wish to observe the sentencing process are entitled to remain in the court room as members of the public. The Commission is aware that, in certain circumstances, forced detention can cause distress to jurors. We also consider that it is unfair to read an accused's record in the presence of the jury because of the chance that those jurors will, in the future, suspect that accused people have a record which has not been revealed. We invite submissions as to whether juries should be discharged immediately upon the delivery of the verdict or whether this matter should be left, as at present, to the discretion of the presiding judge. If discharged, members of the jury could be advised that they are entitled to remain in the public areas of the court while sentence is passed.

X. TENTATIVE PROPOSALS

9.24 In this Chapter we have described the law relating to the verdict of a jury. We propose the following reforms.

1. Each member of a jury in a criminal trial should be polled to ensure that the verdict is unanimous (paragraph 9.4).
2. Where alternative factual bases for a conviction are left to the jury, the judge should direct the jury to consider on which ground its verdict is based. When the verdict is rendered in such a way that the ground accepted is not clear, the judge should first ask the foreman whether the jury reached a unanimous view as to which ground it accepted. Only if the jury's view is unanimous should the judge ask which ground was accepted. The jury's answer should be binding on the judge when sentencing (paragraph 9.17).
3. Where both the first jury and the second jury have failed to reach agreement after being asked to deliberate upon a verdict, statute should provide that there will not be a third trial (paragraph 9.22).

9.25 The Commission also invites submissions on the other questions raised in this Chapter. They are:

* whether the jury should continue to have the prerogative to recommend mercy and, if so, whether it should be informed of this in the summing-up (paragraph 9.5);
* whether the rule requiring a jury's verdict to be unanimous should be retained (paragraph 9.10);
* whether the judge in a criminal trial should have a discretion to request the jury to return a special verdict and, if so, in what circumstances (paragraph 9.14); and
* whether juries should be discharged immediately they have delivered their verdicts or whether the matter should remain at the discretion of the presiding judge (paragraph 9.23).

Footnotes

1. H. Kalven and H. Zeisel, The American Jury (Chicago University Press, 2nd ed., 1971), at pp.318ff.

2. P. Devlin, Trial by Jury (Stevens and Sons Ltd., 1956), at pp.156-157.

3. Id., at p.160.

4. W.R. Cornish, The Jury (Penguin, London, 1968), at pp.127-139.

5. A.P. Bates, T.L. Buddin and D.J. Meure, The System of Criminal Law (Butterworths, 1979), at p.176.

6. Section 23(2). See also, s.163, larceny is an alternative to embezzlement; s.52A(5), culpable driving an alternative to manslaughter; s.329, false swearing an alternative to perjury.

7. Griffiths v. The Queen (1976-77) 137 C.L.R. 293, at pp.301-302 per Barwick C.J.; R. v. Meany (1862) Le. & Ca. 213; R. v. Crisp (1912) 28 T.L.R. 296. Compare R. v. Larkin [1943] K.B. 174 and R. v. White [1961] Crim. L.R. 59.

8. R. v. McKenna [1960] 1 All E.R. 326.

9. Raphael v. Bank of England (1855) 4 W.R. 10; R. v. Roads [1967] 2 All E.R. 84.

10. Ellis v. Deheer [1922] 2 K.B. 133.

11. The Queen v. Eyers (1978) 19 SASR 244; The Queen v. Cefia (1979) 21 S.A.S.R. 171.

12. Palmer v. Crowle (1738) 95 E.R. 445; R. v. Atkinson and Clutton (1907) 7 S.R. (NSW) 713. Compare Dardarian v. Schneider [1956] 3 D.L.R. (2d) 292.

13. A. Turner, "Polling the Jurors" [1979] New Zealand Law Journal 155.

14. Id., at p.156.

15. R. v. Whittaker (1928) 41 C.L.R. 230.

16. R. v. Black [1963] 1 W.L.R. 1311.

17. Law Reform Commission of Canada, The Jury (Report 16, 1982), at p.70.

18. Jury Act, 1977, s.56. See also Juries Act 1967 (Vic.), s.46(1); Criminal Code 1899 (Qld.), s.628; Criminal Code 1983 (N.T.), s.368; Juries Ordinance 1967 (A.C.T.), s.38.

19. Newell v. The King (1936) 55 C.L.R. 707, at p.713.

20. Jury Act, 1977, s.22.

21. Juries Act 1927 (SA), s.57 (since 1927); Juries Act 1957 (WA), s.41 (since 1960); Jury Act 1899 (Tas.), s.48 (since 1936); Criminal Justice Act 1967 (UK), s.13 (since 1967).

22. R. Hastie, S.D. Penrod and N. Penington, "What Goes on in a Jury Deliberation" (1983) 69 American Bar Association Journal 1848, at p.1850.

23. P. Duff and M. Findlay, "The Jury in England: Practice and Ideology" (1982) 10 International Journal of the Sociology of Law 253, at p.263.

24. Ibid.

25. Apodaca v. Oregon 406 U.S. 404 (1972), at pp.410-411.

26. Burch v. Louisiana 47 L.W. 4393 (1979).

27. A.V. Sheehan, "Criminal Procedure in Scotland and France" (H.M.S.O., 1975), at p.160.

28. Administration of Justice (Scotland) Act 1933 (U.K.), s.19.

29. R. v. Hill, NSW Court of Criminal Appeal, 28 February 1980 (unreported).

30. See, for example, J. Willis, "Jury Disagreements in Criminal Trials - Some Victorian Evidence" (1983) 16 Australian and New Zealand Journal of Criminology 20, at p.28.

31. A. Samuels, "The Jury - Any Case for Reform?" (1982) 146 Justice of the Peace 465, at p.467.

32. Criminal Justice Act 1967 (U.K.), s.13(3).

33. H. Kalven and H. Zeisel, "The American Jury: Notes for an English Controversy" (1967) 48 Chicago Bar Rec. Record 195, at p.200.

34. Law Reform Commission of Canada, The Jury in Criminal Trials (Working Paper 27, 1980), at pp.28-29.

35. D.M. Downie, "And is that the Verdict of You All?" (1970) 44 Australian Law Journal 482, at p.490. And see J.V. Ryan, "Less than Unanimous Jury Verdicts in Criminal Trials" (1967) 58 Criminal Law Comments and Abstracts 211; G. Maher, "Reasonable Doubt and the Jury" [1983] Scots Law Times 97. The argument was rejected by the United States Supreme Court in Johnson v. Louisiana 406 U.S. 356 (1972), at p.362.

36. Law Reform Commission of Queensland, Working Paper on Legislation to Review the Role of Juries in Criminal Trials (W.P. 28, 1984), at pp.29-32.

37. Law Reform Commission of Canada, The Jury (Report 16, 1982), at p.78.

38. Report of the Departmental Committee on Jury Service (Cmnd.2627, 1965), para.357.

39. R. v. Shipley (1784) 4 Doug. 171; Chandler v. D.P.P. [1964] A.C. 763, at p.804.

40. Criminal Appeal Act, 1912, s.6.

41. Woolmington v. D.P.P. [1935] A.C. 462, at p.480 per Viscount Sankey L.C.

42. Chandler v. D.P.P. [1964] A.C. 763, at p.804.

43. P. Devlin, note 2 above, at p.90.

44. H. Kalven and H. Zeisel, "The American Jury", New Society 25 August 1966, at p.290.

45. Ibid.

46. R.J. Walker, "The Finality of Jury Verdicts" (1968) 118 New Law Journal 866, at p.867; Supreme Court Act, 1970, s.90.

47. R. v. Bourne (1952) 36 Cr. App. Rep. 125, at p.127.

48. Charles v. Hendrick (1921) 15 Cr. App. Rep. 149.

49. Mental Health Act, 1983, ss.428Z, 428ZB. A similar provision in Canada further requires the presiding judge to make clear that the legal consequences should not affect the jury's deliberations: Criminal Code 1970 (Canada), s.542(1).

50. Thompson v. The Queen (1975) 11 S.A.S.R. 217; R. v. Harris [1961] V.R.256; R. v. Kane [1974] V.R. 759.

51. Andrew Stosiek (1982) 4 Cr.App. R. (S.) 205.

52. Id., at p.206.

53. R.J. Walker, note 46 above.

54. Veen v. The Queen (1978-1979) 143 C.L.R. 458, at p.466. See also Petroff [1980] 2 A. Crim. R. 101.

55. A special inquiry may be ordered where any doubt or question arises as to guilt, any mitigating circumstances or any portion of the evidence. After such an inquiry, by a Justice, the matter can be disposed of as appears just: Crimes Act, 1900, s.475.

56. P. Devlin, note 2 above, at pp.62-63.

57. Criminal Appeal Act, 1912, s.6(1).

58. (1922) 30 C.L.R. 246, at pp.255-256.

59. (1944) 44 S.R. (N.S.W.) 390, at p.393.

60. Chamberlain v. The Queen (1984) 58 A.L.J.R. 133, at p.169.

61. Criminal Appeal Act, 1912, ss.6(2), 7(2), 8.

62. R. v. Ketteridge [1915] 1 K.B. 467.

63. R. v. Screen (1924) 41 W.N. 20; R. v. Ashton (1944) 61 W.N. 134.

64. Duff v. The Queen (1979) 39 FLR 315.

65. M. Cohen, "Retrial After a Hung Jury" (1983) 12(3) Anglo-American Law Review 174, at p.176, citing R. Arguile, Criminal Procedure (1969, Butterworths), at p.160, D. Devlin, Criminal Courts and Procedure (2nd ed., 1967, Butterworths), at p.156, and others.

66. M. Cohen, note 65 above, at p.177, citing P,. Devlin, note 2 above, at p.48, D. Devlin, Criminal Courts and Procedure (2nd ed., 1967, Butterworths), at p.156, and others.

67. P. Devlin, note 2 above, at p.48.

68. Mr. Weitzman, MP cited by M. Cohen, note 65 above, at p.178.

69. M. Cohen, note 65 above, at p.178.

70. Id., at pp.178-179.

71. This has not always been the case. In Craig v. The Queen (1933) 49 C.L.R. 429, the applicant had been convicted at his third trial on a charge of murder after the jury had been unable to agree at each of his two previous trials. See also Demirok v. The Queen (1977) 137 C.L.R. 20, at pp.38-39 per Murphy J.

Chapter 10

The Special Problems of Long and Complex Trials

I. INTRODUCTION

10.1 Long and complex criminal trials present problems for the jury system which might adversely affect the administration of criminal justice and which motivate some to call for the abolition of jury trials in such cases. The length of cases increases the risk of diminution of the jury by illness, pregnancy or other reasons. In a long case the greater chance that prejudicial material will be introduced or that jurors will be suborned also increases the risks of a mistrial. In a complex case there is the danger that the jury will be confused by the welter of information and unable to understand technical evidence with the result that the verdict may be unreliable. There is also concern that the strain imposed upon jurors by evidence beyond their grasp and months of hearing and deliberation time is intolerable and unfair. To be fair, just and efficient, the jury system must not only function fairly as far as the accused and the community are concerned but also for the jurors involved.

10.2 The issue of the effectiveness of juries in long and/or complex trials has been the subject of much public debate in recent times. For example, a recent Queensland fraud trial had lasted some twenty months when the jury was discharged after thirteen days of deliberation due to the illness of a juror.[1] The contemplation of a failure to agree by a jury in

such a case in the future led the Queensland Law Reform Commission to reverse its previous opposition to majority verdicts.[2]

10.3 The Federal Director of Public Prosecutions is reported to have said recently that, while juries can comprehend straightforward cases, such an understanding might not be possible in a major fraud trial or one involving complex technical evidence.[3] Some of the jurors who convicted Edward Splatt in South Australia, chiefly on the basis of forensic evidence, have, since his release, publicly admitted that they did not understand that evidence.[4] Recommending Splatt's release, Royal Commissioner Shannon reportedly said that problems as complex as those involved in the Splatt case are "so detailed and convoluted that the jury needs to be furnished with considerable assistance".[5] In the Chamberlain case, Chief Justice Gibbs and Justices Mason and Murphy found that expert evidence on the traces of blood in the accuseds' car was at a level of difficulty and sophistication above that at which a juror or a judge might subject the opinions to critical evaluation. The result was that the jury could not eliminate reasonable doubt on the question.[6]

10.4 These statements, and many others of the same kind, give rise to considerable disquiet as to the propriety of jury trials in long and complex criminal cases. Many suggestions have been made to correct the current situation, ranging from the abolition of the jury altogether in these cases to

tinkering with the jury system to avert some of the more obvious risks and adopting procedural reforms to give greater assistance to juries faced with complicated matters. We consider first the suggestion that juries should be abandoned in cases involving complex evidence and the various proposals that have been made as to the constitution of an alternative tribunal. Ways of assisting juries to better organise for themselves, and to better understand, complex evidence are then discussed. Finally some proposals for averting mistrials due to diminution of the jury are considered.

II. ALTERNATIVES TO JURY TRIAL

10.5 A number of commentators in the United Kingdom, the United States and Australia argue that juries should not be used in particular types of cases or in cases where particular types of evidence are adduced. For example:

> Whatever may be thought of a jury as a tribunal in criminal cases, it is probably adequate for the trial of simple, albeit serious, cases. In any event, it is extremely unlikely that public opinion would favour the complete abolition of trial by jury in criminal cases. There can be little doubt, however, that some criminal cases are quite unsuited for trial by a jury. One only has to think of complicated fraud and embezzlement cases, trials involving several accused, trials involving a large number of charges, to realize that such cases exist.[7]

Much recent attention has focussed on commercial prosecutions, particularly in the United Kingdom where a committee has been established to consider how the conduct of fraud trials could be improved.[8] Levi has suggested that the abolition of jury trial for corporate offences and frauds might be acceptable

because "fraud is not seen as an ordinary (or even 'real') crime" and abolition of juries in fraud cases is not seen as "infringing basic principles of criminal justice".[9] Others have noted that, even if juries were abolished only in fraud trials, some anomalies would remain.

> ... if a man with a gun robs a bank, he has the opportunity to be tried by a jury and to be judged by the standards of honesty of the ordinary citizen ... a man who stole from the same bank using a computer would not.[10]

It could, on the other hand, be argued that the discarding of jury trials may be acceptable because fraud crimes are not perceived to be as serious as other offences.

10.6 Fairness is essential to criminal trials and an impartial and capable fact finder is central to the fairness of a trial. The Jury Act, 1977 attempts to ensure that issues of fact are not submitted to jurors who are incapable of understanding the issues for elementary reasons: children cannot be jurors, for example, nor can the deaf, nor those who do not understand English. There may even be a discretionary jurisdiction to discharge an incompetent jury and to empanel a new one in the interests of justice.[11] Technological developments, however, have contributed to the development of such complex factual situations that many have argued that trial by any jury in such cases cannot be fair.

A. Trial by Judge Alone

10.7 It has been suggested that,

> The problem could be solved by providing that the court
>
> (a) shall, with the consent of the prosecutor and of all the accused and
>
> (b) may, upon the application of the prosecutor or of one or more of the accused and upon cause being shown by any such applicant,
>
> find that a case is unsuitable for trial by a judge and jury and direct that it shall be heard by a judge sitting alone.[12]

In civil trials, the Supreme Court of New South Wales is empowered to order that all or any issues of fact be tried without a jury where "any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury".[13] Thus the Court can override the statutory right to a jury trial in cases of defamation, malicious prosecution, false imprisonment or seduction or where fraud is alleged in civil litigation.[14] There are also certain serious criminal offences, most usually committed by corporate bodies and attracting severe financial penalties which are usually only tried summarily. A summary jurisdiction was conferred on the Supreme Court in 1967 and certain offences under the Clean Air Act, 1961, the Clean Waters Act, 1970, the Noise Control Act, 1975 and the Prices Regulation Act, 1948, among others, can be proceeded with in that jurisdiction.

10.8 It has been argued that the jury is inappropriate in criminal commercial fraud trials because the technical, legal and economic concepts that arise are beyond the experience and understanding of the average juror. In 1979 a Bill was introduced into State Parliament providing for the prosecution of certain offences under the Companies Act, 1961 and the Securities Industry Acts, 1970 and 1975, among others, in the summary jurisdiction of the Supreme Court. This Bill would have abolished the right to jury trial for people accused of these "white collar" offences. Such was the public outcry that the Bill was amended to provide that the summary jurisdiction of the Supreme Court can only be used at the election of the accused.[15] A very small number of accused have elected this form of summary trial and to date only one such trial has actually gone ahead.[16]

10.9 All criminal trials in the higher courts in South Australia can, since October 1984, be tried without a jury at the election of the accused. The judge must first be satisfied that the accused received legal advice before making such an election.[17] This reform was first suggested in 1975 by the Criminal Law and Penal Methods Reform Committee which suggested two reasons why an accused might prefer trial by a judge alone. An accused might feel that a judge would "perceive more clearly the validity of the defence" than would a jury. Secondly, a judge's findings of fact would be open to appeal.

It was anticipated that a majority of accused people would elect to be tried without a jury.[18] In fact to June 1985, not one accused person had elected to be tried in this way.[19]

10.10 Advocates of the judge-only trial argue that this is the only way to ensure a reliable verdict which can be tested on appeal.

> ... the most compelling grounds for advocating trial by a judge without a jury are that, in complicated cases at least, it is more probable that he will arrive at a true verdict in accordance with the law, that he will give reasons for his decision, that those reasons will be made public and, if his reasons are unsound in law, his verdict can be set aside by the Court of Criminal Appeal.[20]

In contrast, others have argued that "there is no empirical evidence that judges, per se, are more competent than juries, per se, to determine complex factual issues".[21]

> Furthermore, juries have been praised for bringing elements to their decisions that judges alone cannot provide.[22]

10.11 Evidence to the British Committee examining fraud trials from the National Council for Civil Liberties, from Justice and from a number of police forces, has favoured retention of the jury in these trials.[23] The National Council for Civil Liberties submitted that:

> The decision to be made in fraud trials is: in common sense and common honesty was it a swindle? Twelve ordinary citizens using their experience and common sense with guidance on the law are best equipped to answer that question.[24]

There is also the difficulty of "entrusting a man's liberty ... effectively to the decision of one man".[25] One answer to this is to provide trial by a panel of three judges. The same criticism, however, can be made of this proposal: that ordinary citizens are best equipped to assess witnesses and determine facts. Moreover, it is unlikely that the system could afford the time and expense of three judges for every serious trial.

B. Judge and Assessors

10.12 A number of commentators have suggested that in complicated commercial prosecutions, the issues would be more fairly tried if heard before a mixed tribunal of a judge and two lay people giving reasoned judgments and with an unlimited right of appeal.[26] It has been proposed that the assessors should be chosen from a panel of "citizens of experience and distinction in the commercial world",[27] or of "persons having commercial and financial experience".[28] The use of assessors has been criticised, however, on the ground that "it would be virtually impossible to ascertain the extent of formal and informal input to a judgment which an assessor may make".[29] In our view, the proper place for experts is in the witness box, where their credentials and opinions can be tested. There would be some concern that an assessor would make a judgment on the basis of his or her own knowledge and views rather than on the evidence, including expert evidence, presented to the court. Preconceived notions of any kind are unwelcome where guilt is at issue. One Australian suggestion might overcome this particular problem. It is that assessors should be, not

accountants and people in business, but practising commercial lawyers "capable of assessing expert and often complex evidence".[30] Yet another suggestion is that the judge should sit with two assessors with no special qualifications. Such assessors could be chosen for each case from a small pool of people. Non-expert assessors could represent the community in a way which experts would not, but they would not be necessarily more competent than a jury of twelve. A panel of two such assessors sitting with a judge would lack the broad range of experience and background found on a jury of twelve.

C. Special Juries

10.13 An alternative mode of trial in complex cases is the special jury. The original special jury was a social elite. Originally, even common jurors required a property qualification and special jurors were additionally required to hold a high social ranking.[31] Modern proposals for the reintroduction of special juries would determine qualification somewhat differently. For example, a South Australian committee has proposed that special jury lists should be drawn up composed of people with certain basic educational or occupational qualifications in the fields of science and of commercial transactions. The special jury would not consist of people who had special property qualifications or community standing, but of people whose education or training in a particular field enabled them to follow evidence in certain cases better than those who had not received such education or training. It was recommended that a judge should be empowered,

either on his own motion or upon the application of the Crown or of the defence, to order that a special jury be empanelled for any case in which there were difficult questions which required an understanding of expert evidence.[32]

10.14 In the United States, where trial by jury is a right under the Constitution in civil cases as in criminal cases at the Federal level, it is in the civil area that alternatives to the jury are being mooted. In this context the special jury has been advocated.

> A jury composed of particularly qualified individuals could understand sophisticated concepts that might be beyond the ability of either a judge or a traditional jury. Jury confusion would be less of a problem than it is with jurors who are unfamiliar with the technical, financial and legal issues involved in much of today's complicated litigation. There also would be less likelihood of an irrational verdict because the special jurors would be able to make a reasoned decision based on their understanding of the facts and the law.[33]

The special jury, however, has been criticised because of its "implications of class justice".[34] It "can give the appearance of being undemocratic".[35] Critics have also suggested that it would be impracticable.

> We do not think it would be easy to devise acceptable qualifications for entry in a special jurors list which would be consistent with the principle of the random selection of jurors, and we doubt whether a jury so selected would in practice turn out to be any more satisfactory than the ordinary jury.[36]

On the other hand, it could be argued that jurors having some acquaintance with the subject area of a charge are more accurately described as the peers of the accused than are jurors who are more typically empanelled.

10.15 The Commission considers that juries as currently selected are best equipped to determine serious criminal allegations including those involving allegations of fraud, those requiring assessment of complex technical or scientific evidence, and those which are lengthy. As we have discussed in Chapters 5 and 6, jurors can readily be assisted to perform more effectively and efficiently even in very difficult cases. We discuss some of the extra measures which could be adopted in long and complex trials below. We consider that the jury as an institution is such a crucial and fundamental symbol and component of democracy that it should not be surrendered until first, it is clearly shown that it operates so incompetently as to deny other democratic rights and second, that no amount of procedural tinkering can overcome this incompetence. We do not consider that this stage has been reached. We adopt the view expressed on this matter by the Chief Justice of Australia, Sir Harry Gibbs:

> For my own part, I would prefer that a determined effort should be made to remould the rules of criminal procedure rather than that there should be further encroachments on the right to trial by jury. It seems particularly necessary to find a way to shorten the length of trials by more clearly defining the real issues, and in some way relieving the prosecution of the necessity to present full and detailed proofs of matters that are not really in dispute.[37]

We discuss some of these matters in greater depth in our Discussion Paper on Procedures Before Trial.

III. PRESENTING A COMPLEX CASE TO A JURY

10.16 Some commentators have insisted that no case is so complex that it cannot be presented to a jury in a comprehensible way. Some techniques which would improve juror comprehension have been discussed in Chapter 6. These techniques may not be adopted in every trial but could be particularly useful in a complex trial. Pre-trial hearings to define and confine the issues in dispute could reduce the amount of information to be presented to the jury. Where the trial is expected to be long and/or complex the pre-trial hearing should, among other things, settle a written summary of the facts in issue and discuss the need for additional jurors (see paragraph 9.23). The former Director of Public Prosecutions of Victoria suggested that a written summary of the facts in issue should be given to each juror and be available throughout the trial. It should convey to each juror those matters in the trial which are in dispute and those which are not. It could also include, either by consent of the parties or by decision of the judge, a glossary of relevant technical terms and their meanings.[38] In a complex case the judge's introductory directions to the jury are also most important to introduce the jury to the case in a way that enhances their understanding of it.

10.17 Suggestions for presenting particularly complex evidence to juries have included the suggestion from the former Victorian Director of Public Prosecutions that technical and scientific witnesses should be allowed to read their main

evidence from a prepared document. This document would set out the expert witness' qualifications, experience, the work done in the particular case and any conclusions or opinions reached.[39] The obligation on scientific witnesses to be clear about their assertions and opinions has recently been recognised in South Australia, where the judge investigating the reliability of the conviction for murder of Edward Splatt, commented in his report:

> The vital obligation which lies upon the testifying scientists is that they spell out to the jury, in non-ambiguous and precisely clear terms, the degree of weight and substance and significance which is or ought properly to be attached to the scientific tests and analyses and examinations as to which they depose; and specifically the nature and degree of any limitations or provisos which are properly appended thereto.
>
> ...
>
> And the critical responsibility which rests upon legal persons is to ask such detailed and probing questions of the scientists as are most likely to elicit the type of evidence just mentioned.[40]

The Commission considers that the evidence of technical and scientific witnesses should, if the presiding judge considers it would assist the jury, be capable of being given by reading a document of the kind proposed by the former Victorian Director of Public Prosecutions. In some circumstances, the parties may agree that reading is not necessary and the judge may consider the jury would be best assisted if the document were simply tendered in evidence as an exhibit. We propose that such a method of receiving the evidence of technical and scientific witnesses should be acceptable, provided the witness is available to give evidence if required and the judge

considers it would assist the jury. The question whether either procedure is to be adopted should be settled at a pre-trial hearing.

10.18 Where the complexity of a trial is due to a large number of accused and/or multiple charges, consideration should be given to instructing the jury separately in respect of each. The jury could then be asked to consider its verdict in relation to each accused, or each charge, independently of the others. This approach, in appropriate cases, could simplify the jury's task of properly digesting the various parts of the summing-up and giving it due consideration in reaching a verdict in the case. The Queensland Court of Criminal Appeal affirmed in Fong that "the procedure whereby the summing up was split and the verdicts taken was lawful".[41] The Commission considers that the power of the presiding judge, in his or her discretion, to instruct the jury on individual charges and individual accused and to require the jury to deliberate separately on each should be affirmed. Another procedure for dealing with the complexity of multiple charges or even of alternative verdicts to a single charge is to provide the jury with a written statement setting out the various counts in the indictment and the alternative verdicts available. This method has been approved by the New South Wales Court of Criminal Appeal.[42] Such a statement could give some order to the jury's deliberations and would go some way towards ensuring that a complete consideration of the issues is made and that a formally correct verdict is rendered. The Commission considers

that the power of the presiding judge, in his or her discretion, to provide to the jury a written statement setting out the alternative verdicts available should also be affirmed.

IV. AVOIDING DIMINUTION OF THE JURY

10.19 In trials which are likely to run for an extended period of time, it is essential that prospective jurors be given fair warning that those selected may be required to serve for a lengthy period. This would give them the opportunity to make an application to be excused on the ground that long service as a juror would cause an unreasonable degree of disruption to their employment or to their private lives. The Commission tentatively proposes that, where people are summoned to a jury panel (as opposed to a jury pool) for a long trial, a letter should be sent with the Jury Summons advising the predicted length of the trial and inviting written applications for excusal. In this way potential jurors whose reluctance to serve is based on reasonable grounds can be excused without being required to attend the court personally.

A. Reducing the Stress of Long and Complex Cases

10.20 A criminal jury trial can continue even though a juror dies or is discharged by reason of illness or for any other reason, providing the jury is not reduced below ten. If three or more jurors are discharged, the trial can only continue if both the Crown and the accused consent in writing.[43] It is clearly a desirable ideal, however, that the full complement of jurors should hear the whole case and return a verdict. This

is consistent with the Commission's view that the twelve-member jury should be retained, it being an optimum number which can represent a fair cross-section of the community. It is also consistent with the argument that the unanimity rule should be retained so that twelve people must be convinced of guilt before an accused person can be convicted.

10.21 A number of the proposals made in Chapter 6 for presenting a case to juries, and the proposals made above for clarifying and explaining complex evidence to juries, would have the added advantage of removing some of the stress which a long trial imposes upon jurors. The inordinate burden which can fall upon jurors is illustrated by the case of Miller, in which a juror was convicted of contempt of court for refusing to continue in a long and complicated rape trial. The juror had argued that he had been confused by the speeches of counsel, felt inadequate to make a decision and after two weeks of hearings, had panicked.[44] The stress of a long and complex case can take its own toll of the health of jurors. This occurred after thirteen days deliberation in the Russell Island Case in Queensland, with the result that the jury was discharged without rendering a verdict. All due precautions will not avoid the possibility that, especially in a long trial, jurors will become ill, or even die, become pregnant, or request to be discharged for pressing family or business reasons. If a long trial must be aborted because the number of jurors falls below the statutory minimum, the financial loss to the State, as well as the financial and emotional strain upon

the accused, would be enormous. One solution to this dilemma could be to permit the judge alone to decide whether a trial should continue with fewer than ten jurors. The Commission invites submissions as to whether doing away with the requirement of the parties' consent is desirable, and, if so, whether this measure should complement the additional juror procedure proposed below or substitute for it.

B. Extra Jurors

10.22 Two Australian jurisdictions have adopted systems of reserve jurors to cope with the problems of long trials. In Queensland and Western Australia reserve jurors are selected after the jury of twelve is empanelled. The reserve jurors take part in the trial in the same way as does the actual jury. If a member of the jury is discharged during the course of the trial, the first of the reserve jurors takes his or her place. Both States provide that the judge may order up to three reserve jurors to be selected. Reserve jurors who have not replaced an original juror are discharged immediately before the jury retires to consider its verdict and, therefore, are not available to replace any juror discharged during deliberations.[45] New Zealand's Royal Commission on the Courts in 1978 considered the Western Australian model but determined that the evidence was not sufficiently compelling to warrant the making of a provision for reserve jurors. Broadening of the power to continue a criminal trial with fewer than twelve jurors was considered to be a sufficient answer to the problems of long trials.[46] A South Australian inquiry in 1975, on the

other hand, recommended the adoption of the reserve juror procedure.[47] This recommendation has not yet been implemented in South Australia.

10.23 An alternative procedure has been adopted in the United States. It is called the "additional juror" method. Again the judge has a discretion whether to empanel extra jurors and, if so, how many, up to a maximum of three. The difference is that the "extras" are not identified, but the jury sits as a larger jury until the time comes for deliberation. A further ballot is then held to choose the twelve who will form the final jury. Those not selected are then discharged. The American Bar Association has noted some advantages of the additional juror procedure over the Australian model:

> A preference for the additional juror system has sometimes been stated on the ground that it is undesirable to give a juror who may be involved in deciding the case second class standing during some or all of the trial. That is, one who is labelled an alternate at the outset might not take his job as seriously as the regular jurors as the chances of substitution are not great. On the other hand, where one or two additional jurors are selected each member of the thirteen or fourteen man group knows that even if no juror is excused for cause he nonetheless has a very substantial chance of being involved in the deliberations.[48]

It could be argued that all jurors who have not been discharged by the time the jury retires should be permitted to join in the deliberation and rendering of the verdict. The excluded juror(s) will have given conscientious attention to the case over a long period. He or she may even have been chosen as foreman. The excluded juror(s) may have a valuable

contribution to make to the deliberation and would probably feel frustrated by his or her chance exclusion. On the other hand, the larger the jury, the more difficult it will be to achieve unanimity. This factor will bolster arguments in favour of majority verdicts, especially in cases where the majority required is twelve to one, two or three. On balance the Commission favours the additional juror procedure and considers it is probably preferable that "extra" jurors be discharged before deliberation. The Commission understands that amendments to the Jury Act, 1977 in accordance with the additional juror model are being considered by the New South Wales Attorney General's Department. One modification to this model which might be considered is the exemption of the foreman from the balloting process.

C. Reducing Trial Length

10.24 Counsel can play a vital role in keeping hearing times to a minimum. The English Court of Appeal in Turner invited "the attention of both judges and counsel to the need to keep trials as short as is consistent with the proper administration of justice."[49] Pre-trial procedures, if effective, will go some way to reducing the length of trials. Samuels has suggested that there should be fewer defendants; that

> the prosecution should concentrate upon the principal villains and not worry too much about the minor characters, who could probably be dealt with subsequently without difficulty in the magistrates' courts following the determination of the principal issue.[50]

He has also proposed that there should be fewer charges on each indictment and that conspiracy charges should be tightly controlled.[51]

10.25 The presentation of cases can, it is argued, also be refined.

> Fewer witnesses and fewer exhibits should still enable the prosecution properly to prove the case. Documents should be limited, and too much detail in the examination of witnesses should be avoided...[52]

It was stated in Fisher that,

> ... in these difficult fraud cases judges and counsel should co-operate in an endeavour to shorten the hearing by limiting the number of documents put in evidence and avoiding too much detail in the examination of witnesses.[53]

Samuels also criticises the multiple repetition of arguments to the jury. He argues that speeches by counsel "are based on the premiss that the jury are stupid and accordingly the matters in issue must be put to them repeatedly". He suggests restricting prosecuting counsel to a time limit, or even requiring counsel to choose between making an opening or a closing speech, and also proposes that a single counsel should represent co-accused where there is no possibility of a conflict of interest.[54]

V. TENTATIVE PROPOSALS

10.26 The Commission does not underestimate the problems raised by both long and complex criminal trials. At the same time, we do not underestimate the abilities of modern juries. We note that our political system is based on the assumed competence of common people to function in a democracy. The

denial of the competence of jurors, even in a limited range of cases, raises doubts about the viability of the democratic system. We believe that a jury chosen at random and representing a fair cross-section of the community is a fundamental right of all accused people, irrespective of the nature of the offence charged. Moreover, such a jury is competent, we consider, to understand the complex issues which may arise, even in modern commercial prosecutions, when these issues are clearly presented. Our proposals, therefore, are concerned to suggest ways in which the jury can be assisted to assimilate and assess complex evidence. Our proposals are also directed towards ensuring, so far as possible, that juries are not diminished in the course of lengthy trials.

1. Trial by a jury of twelve citizens randomly selected from the general community should be retained for all serious criminal cases (paragraph 10.15).

2. The evidence of technical and scientific witnesses should, if the presiding judge considers it would assist the jury, be capable of being given by:

   (a) reading a document; and/or

   (b) tendering the document, provided that the witness is available to give oral evidence, if required.

   The question whether either procedure should be adopted should be settled at a pre-trial hearing (paragraph 10.17).

3. The power of the presiding judge, in his or her discretion, to instruct the jury as to individual charges and individual accused and to require the jury to deliberate separately on each should be affirmed (paragraph 10.18).
4. The power of the presiding judge, in his or her discretion, to provide to the jury a written statement setting out the alternative verdicts available should be affirmed (paragraph 10.18).
5. When a trial is expected to be lengthy, the summons to the jury panel should include a notice to this effect inviting potential jurors to apply to the Sheriff for excusal where necessary (paragraph 10.19).
6. The additional juror procedure should be introduced in New South Wales by an amendment to the Jury Act, 1977. At the end of the evidence, if the remaining jurors exceed twelve, twelve only should be ballotted to form the deliberating jury (paragraph 10.23).

10.27 One other issue has been raised in this Chapter about which we have not made a tentative proposal. That is whether the minimum allowable size of a jury should be less than ten at the judge's discretion and irrespective of the consent of the Crown and the accused (paragraph 10.21).

Footnotes

1. The Russell Island Case (R. v. Nichols, Dickinson and Others), District Court of Queensland, 20 July 1981 to 9 March 1983 (unreported)).

2. Queensland Law Reform Commission, Working Paper on Legislation to Review the Role of Juries in Criminal Trials (W.P. 28, 1984) at p.138.

3. "Some Jury Trials 'Could be Abolished'", The Age 15 October 1984.

4. Stewart Cockburn, "When law and science collided", Canberra Times 5 August 1984, pp.1, 9.

5. P. Willoughby, "Method of aiding jury 'needs improvement'", Adelaide Advertiser 2 August 1984.

6. Chamberlain v. The Queen (1984) 58 A.L.J.R. 133.

7. J. Law, "Criminal Jury Trials" (1967) Scots Law Times 173.

8. Home Office Committee on Fraud Trials, chaired by Lord Roskill.

9. M. Levi, "Blaming the Jury: Frauds on Trial" (1983) 10(2) Journal of Law and Society 257, at p.268.

10. Justice, Fraud Trials (London, 1984), at p.27.

11. R. v. Kirke (1909) 43 Irish Law Times Reports 130.

12. J. Law, note 7 above.

13. Supreme Court Act, 1970, s.89(1)(a).

14. Id., s.88.

15. Crimes Act, 1900, ss.475A, 475B.

16. Attorney General of New South Wales v. Chambers, Supreme Court of New South Wales, Criminal Division (Roden J), 24 June 1983 (unreported).

17. Juries Act 1927-1984 (S.A.), s.7.

18. Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at pp.92-94.

19. B. Powell, "The State of the Jury" (1985) 7(5) Law Society Bulletin 139.

20. J. Law, note 7 above, at p.174.

21. R.S. Kuhlman, G.C. Pontikes and W.J. Stevens, "Jury Trial, Progress, and Democracy" (1980-81) 14 John Marshall Law Review 679, at p.683.

22. "The Case for Special Juries in Complex Civil Litigation" (1980) 89 Yale Law Journal 1155, at p.1159.

23. F. Gibb, "Reform group of lawyers defends trial by jury", The Times 11 December 1984, at p.2; Legal Affairs Correspondent, "NCCL backs trial by jury for fraud cases", The Times 12 December 1984, at p.2; S.Tendler, "Police chiefs in favour of jury trials in fraud cases, but urge reforms", The Times 21 December 1984, at p.5.

24. Legal Affairs Correspondent, "NCCL backs trial by jury for fraud cases", The Times 12 December 1984, at p.2.

25. G.F.K. Santow, "Regulating Corporate Misfeasance and Maintaining Honest Markets" (1977) 51 Australian Law Journal 541, at p.550.

26. Lord Hailsham, (1974) 48 Australian Law Journal 351, at p.353; Lord Chief Justice Lane in F. Gibb, "Reform long jury trial" The Times 21 March 1983, at p.3.

27. M. Sherrard, "Juries and Fraud Cases" (1970) 60 Law Guardian 9, at p.11.

28. R.M. Jackson, The Machinery of Justice in England (Cambridge University Press, 7th ed., 1977), at p.504.

29. J. Phillips, "Complex commercial prosecutions - should juries be retained?" (1983) Law Institute Journal 1214, at p.1215.

30. G.F.K. Santow, note 25 above, at p.550.

31. (1832) 2 William IV., No.3, ss.II, XXIV.

32. Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at pp.101-102.

33. "The Case for Special Juries in Complex Civil Litigation" (1980) 89 Yale Law Journal 1155, at p.1159, footnote omitted.

34. R.M. Jackson, note 28 above, at p.504.

35. J. Phillips, note 29 above.

36. Justice, note 10 above, at p.23.

37. "Keynote Address at the Opening of the Third International Conference of Appellate Judges", 5 March 1984, New Delhi, at pp.6-7.

38. J. Phillips, note 29 above, at p.1215.

39. Director of Public Prosecutions, Victoria, Annual Report (1983-1984), at p.18.

40. Royal Commission Report Concerning the Conviction of Edward Charles Splatt (South Australia, 1984), at p.52.

41. R. v. Fong [1981] Qd. R. 90. See also R. v. Mitchell [1971] V.R. 46; R. v. Turner (1980) 70 Cr.App. R.256.

42. R. v. Petroff (1980) 2 A. Crim. R. 101.

43. Jury Act, 1977, s.22(a).

44. R. v. Miller, Central Criminal Court, Melbourne Victoria, 28 February 1977 (unreported).

45. Jury Act 1929 (Qld.), s.17; Juries Act 1957 (W.A.), s.18.

46. Royal Commission on the Courts, Report (New Zealand, 1978), paras.374-375.

47. Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence (Third Report, 1975), at p.107.

48. American Bar Association, Projects on Minimum Standards for Criminal Justice: Standards Relating to Trial by Jury (1968), at p.80.

49. R. v. Turner (1975) 61 Cr. App. Rep. 67, at p.76, per Lawton L.J.

50. A. Samuels, "Shortening Jury Trial" (1976) 126 New Law Journal 988, at pp.988-989.

51. Id., at p.989.

52. Ibid.

53. R. v. Fisher (1974) 60 Cr. App. Rep. 225, at p.227 per Cairns L.J.

54. A. Samuels, note 50 above, at p.990.

Appendix

The Commission's Empirical Research Programme

INTRODUCTION

In the course of preparing this Working Paper, the lack of empirical information on the functioning of the jury system in New South Wales became apparent. In consequence, the Commission was hampered in a number of areas in assessing the current situation and investigating options for improvement. The need for a comprehensive survey of the jury system was clear. The Commission approached the Law Foundation of New South Wales to obtain funds to conduct the major aspects of the research project. The Commission is fortunate that the jury system continues to be a major topic of interest for the Law Foundation. Our application was approved and the generous grant which the Commission has been given will enable us to conduct the comprehensive research projects that are required to discover the way in which the jury system works in practice. It is proposed that the range of the survey should cover the following broad issues:

* the way in which the jury represents the community;
* communication with juries;
* the role of the jury in criminal trials; and
* perceptions of the jury's role.

The Commission, with its consultant statistician, Ms. Concetta Rizzo, has designed a series of projects to obtain the thorough and detailed profile of the jury system which is required.

Project I: Collection of Statistics on Jury Selection

Initial inquiries have revealed that an average of 50 per cent of people advised of their inclusion on draft jury rolls are ultimately deleted from certified (final) jury rolls. The first stage of this project will determine the specific reasons for these deletions. As explained in Chapter 3 of this Working Paper, the draft jury roll for each jury district is compiled at random from the relevant electoral rolls and all people chosen are notified of their inclusion. Certain categories of people, however, are disqualified or ineligible for jury service or may claim an exemption as of right. Such people, on being notified of their inclusion on a draft jury roll, must apply to the Sheriff to be deleted from the final jury roll. The Commission is concerned to know which categories of disqualification, ineligibility and exemption account for significant numbers and proportions of deletions from jury rolls. This part of Project I will enable the Commission to assess the desirability of the categories of deletion and to propose viable alternatives.

Method: Three jury rolls which are due to be renewed during 1985 have been chosen because of the diversity of their geographical and demographical makeup: Penrith, Newcastle and Dubbo. As the applications for deletion are received, they will be categorised. The Commission expects to examine some 20,000 forms distributed as follows:

Penrith:	8,500
Newcastle:	8,500
Dubbo:	2,000-3,000

The second stage of this project will ascertain the proportions of people included on a certified jury roll and subsequently summoned for jury service who apply to be excused by the Sheriff from answering the summons. Applications to be excused are generally accompanied by a statutory declaration and the reasons given and accepted will be analysed. Categories of excusal are not listed in the Jury Act, 1977. The Sheriff has a discretion to excuse people "for good cause". This part of Project I will enable the Commission to assess the exercise of that discretion and the suitability of the broad expression in the Jury Act, 1977.

Method: The same three jury districts will be used. The new jury rolls for Penrith and Newcastle will be in use by October 1985. All people summoned to attend courts in those districts during October, November and December 1985 and who apply to be excused will be the subjects of this survey. Their applications will be examined and categorised. The new jury roll for Dubbo will be operational early in 1986 and a three month period will then be chosen during which to examine applications for excusal by the Sheriff.

Project II: Survey of Jury Pools and Panels

This project will complement the collection of statistics on the selection of jurors, and the deletion of people both from the jury roll and by excusals, by collecting information as to the socio-demographic composition of jury pools and panels. As described in Chapter 4 of this Working

Paper, people are summoned to constitute pools and panels from which juries are then selected. This project will also assess the information available to people before they respond to a summons and the adequacy of that information as perceived by them. Pre-service attitudes to jury service and to the concept of juries will also be examined.

Method: A sample of people attending courts to constitute jury pools and panels throughout the State in October, November and December 1985, will be invited to complete an anonymous questionnaire before any jury is empanelled.

Project III: Survey of Jurors

The first two projects will also be complemented by a survey of people who have just been discharged from jury service. Again socio-demographic information will be collected and jurors will be questioned about their attitudes to jury service and about their experiences as jurors. Jurors will be invited to suggest how the administration of the jury might be improved. This project will assist the Commission to assess the efficiency of juror usage by New South Wales courts as well as to gauge the representativeness of juries.

Method: Jurors who have been discharged at the close of a trial will be invited to complete a short anonymous questionnaire before leaving the court. All jurors serving in criminal trials commencing in October, November and December

1985 will be surveyed subject to the permission of the presiding judge. The Commission expects that about 2,400 questionnaires will be completed.

Project IV: Survey of Criminal Trials

This project will complement the survey of jurors by providing a different view of the very same criminal trials in which the jurors surveyed will have served. In addition, much useful information will be obtained about the ways in which juries are used in courts, the efficiency of their use, and the effects their presence has on trials. The results of this project will assist the Commission in making recommendations to improve trial procedures where a jury is present.

Method: Judges' associates will be asked to complete detailed information sheets on each criminal jury trial commenced during October, November and December 1985. The Commission estimates that there will be about 200 criminal jury trials in New South Wales in this period. Information recorded will include:

* excusal of jurors by the judge;
* the use of challenges by counsel;
* discharge of jurors in the course of the trial;
* time spent out of court by the jury and the reasons;
* the length of each trial;
* reasons for mis-trial, if any;
* length of the jury's deliberation;

* questions asked by the jury during the trial and the deliberations;
* whether a view was requested or conducted; and
* the outcome of the case.

Project V: Survey of Judges

Judges in New South Wales were surveyed during July 1985 to discover their practices in relation to juries, their attitudes to some proposed reforms and their views of jury trial generally.

Method: Some 60 judges who preside at criminal trials were invited to complete an anonymous questionnaire. The response has been very encouraging with an overwhelming majority of judges returning detailed replies containing useful material. The information and ideas we have obtained are an invaluable aid to our work in this area.

Project VI: Jury Instructions

As explained in Chapter 6 of this Working Paper, the validity and acceptability of the jury system depends to a large extent upon the jury's ability to comprehend and apply the law as interpreted for it by the judge to the facts it finds to have been proved in the case before it. Judges in New South Wales decided some time ago to draw up a set of standard jury instructions to assist judges when summing-up on the law. These instructions would be accurate statements of the law which should also be comprehensible to jurors. The judges

sought the assistance of the Australian Institute of Criminology in testing the ease with which the instructions which had been drafted could be understood by lay people. Preliminary testing by the Institute's researchers found that the instructions were poorly understood. They recommended a further gradual process of empirical testing of progressively refined instructions. The Commission has determined to undertake this project with the Institute. In doing so we have the full support of the Chief Justice of New South Wales, Sir Laurence Street, K.C.M.G. The project will involve

* analysing the language used in the draft instructions and substituting common words and less complicated phrases where possible;

* referring re-written instructions to judges to check that accuracy is maintained; and

* empirical testing of re-written instructions to determine whether one form is easier to understand than another.

Related studies will test for memory, in order to determine how much information delivered orally can reasonably be retained, and for differences between oral instructions alone and oral instructions supported by written instructions.

Project VII: Survey of Crown Prosecutors

The Attorney General authorised the Commission to make inquiries of the prosecuting authorities. Crown prosecutors were surveyed during June 1985 to discover, among other things, their practices with respect to juries and their attitudes to some proposed reforms.

Method: Some 40 Crown prosecutors were invited to complete an anonymous questionnaire. Jury-related questions concerned:

* the use of the Crown's right to make peremptory challenges;
* the content of the Crown's opening address to the jury;
* the prosecutor's opinion on orientation of the jury by the presiding judge;
* the use of visual aids; and
* enhancing jurors' comprehension in complex cases.

Whilst the response was far from overwhelming, more than half the Crown Prosecutors responded to the survey. The information we obtained will prove to be of assistance in relation to certain important issues.

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COMMENT SHEET

The Commission invites submissions on the issues raised in this Discussion Paper. A Comment Sheet may be found at page 269. We would be pleased to receive replies in this form. Submissions and comment sheets should reach us by 31 December 1985. All inquiries and comments should be directed to:

Mr. John McMillan,
Secretary,
N.S.W. Law Reform Commission,
P.O. Box 6, G.P.O.
SYDNEY 2001

CHAPTER 3 TENTATIVE PROPOSALS

Tick Appropriate Respon

1. All electoral subdivisions should be allocated to jury districts pursuant to section 9(2) of the Jury Act, 1977: paragraph 3.18.

   Agree ___
   Disagree ___
   Agree with reservations ___

2. The only ground for exemption as of right should be hardship to the applicant or to others. Schedule 3 to the Jury Act, 1977 should accordingly be repealed: paragraph 3.22.

   Agree ___
   Disagree ___
   Agree with reservations ___

3. Commonwealth Public Servants, Divisions 3 and 4, should be available to perform jury duty in New South Wales courts. Clause 16 of Schedule 2 to the Jury Act, 1977 should be repealed: paragraph 3.30.

   Agree ___
   Disagree ___
   Agree with reservations ___

ISSUES RAISED

* Whether spouses of people in ineligible occupations, or some of them, should be liable to perform jury service. Currently the spouses of Judges, Masters, Members and officers of the Parliament, Magistrates, police officers, Crown Prosecutors, Public Defenders and prison officers are ineligible for jury service: paragraph 3.20.

   All liable ___
   Some liable ___
   None liable ___

* Whether people given non-custodial sentences should be disqualified from jury service. Currently a person who has been:

  (a) convicted of an offence which may be punishable by imprisonment;

  (b) bound by recognizance to be of good behaviour or to keep the peace;

  (c) the subject of a probation order; or

  (d) disqualified from holding a licence to drive for a period in excess of six months,

  is disqualified for five years: paragraph 3.21.

  Should be disqualified —

  Not disqualified —

* Whether people aged between 65 and 70 should be required to perform jury service. Currently people of or above the age of 65 may claim an exemption as of right: paragraph 3.25.

  Should be exempt —

  Not exempt —

* Whether people of or above the age of 70 should be ineligible for jury service. Currently such people are qualified but may claim an exemption as of right: paragraph 3.25.

  Should be exempt —

  Not exempt —

  Disqualified —

* Whether measures should be taken to encourage people with the responsibility for caring for young children to make themselves available for jury service. Currently people having the care, custody and control of children aged under 18 may claim an exemption as of right: paragraph 3.26.

Measures should be taken ___
Unnecessary ___
Undesirable ___

* Whether mobility-impaired people should be considered to be ineligible for jury service by reason of illness or infirmity. Currently such people are deleted from the jury roll on this ground if they so request: paragraph 3.28.

Eligible ___
Ineligible ___
Exempt as of right ___

* Whether the ability to read English should be a necessary qualification for a juror. Currently those unable to read English are ineligible for jury service: paragraph 3.29.

Should be a qualification ___
Unnecessary ___
Undesirable ___

CHAPTER 4 TENTATIVE PROPOSALS

1. It should be an offence for the Sheriff to permit inspection of the jury panel before the first day of the trial: paragraph 4.19.

Agree ___
Disagree ___
Agree with reservations ___

2. The number of peremptory challenges in all cases, including murder, should be reduced to three or four for each accused and a total of three or four for the Crown irrespective of the number of co-accused: paragraph 4.20.

Agree ___
Disagree ___
Agree with reservations ___

ISSUES RAISED

* Whether counsel should be provided with further information about prospective jurors to assist the making of challenges, and, if so, on what conditions: paragraph 4.22.

Should be provided ___
Unnecessary ___
Undesirable ___
Conditions: _____

* Whether the full name or the surname only of each prospective juror should be read in court: paragraph 4.22.

Full name ___
Surname ___

* Whether the juror's oath should be simplified and the text of the oath read aloud by each juror: paragraph 4.23.

Should be simplified ___
Unnecessary ___
Undesirable ___

Should be read aloud ___
Unnecessary ___
Undesirable ___

CHAPTER 5 TENTATIVE PROPOSALS

1. The Notification of Inclusion on a Draft Jury Roll should:

   (a) include an explanation in major languages other than English as to the import of the Notification;

   (b) advise that people unable to read or understand English are ineligible for jury service;

   (c) include a brief explanation of the nature of jury service;

   (d) advise recipients that a penalty can be imposed for failure to respond as and where appropriate; and

   (e) advise recipients that the Sheriff has a discretion to excuse people from jury service for good cause:

   paragraphs 5.7–5.8.

Agree ___
Disagree ___
Agree with reservations ___

2. The Jury Summons should:

   (a) advise recipients that applications to be excused may be made to the Sheriff;

   (b) advise recipients that application to be excused may be made in person to the presiding judge on the day on which attendance is required:

   paragraph 5.9.

Agree ___
Disagree ___
Agree with reservations ___

3. An Explanatory Booklet should be prepared and distributed to every person summoned for jury service. This Booklet should discuss the nature of a juror's responsibilities, the jury's role, the conduct of trials and explain common concepts which will be used: paragraph 5.10.

Agree ___
Disagree ___
Agree with reservations ___

4. The Jury Act, 1977 should, for the sake of certainty, be amended to provide that jurors have a right to be provided with reasonable refreshment and standard amenities during adjournments of a trial: paragraph 5.14.

Agree ___
Disagree ___
Agree with reservations ___

5. The presiding judge should advise the jury panel as to the estimated length of the trial and should excuse those who apply to be excused because they would be likely to be adversely affected if required for that period: paragraph 5.16.

Agree ___
Disagree ___
Agree with reservations ___

6. Jury fees should be raised to the level of male average weekly earnings. Jurors who continue to receive a wage or salary while performing jury duty should not be entitled to claim the jury fee: paragraph 5.22.

Agree ___
Disagree ___
Agree to Part 1 only ___
Part 2 only ___

7. Jurors should be entitled to claim compensation for personal injury sustained during a period of jury service in the same way and on the same basis as claims can be made under the Workers' Compensation Act, 1926: paragraph 5.25.

Agree ___

Disagree ___

Agree with reservations ___

ISSUES RAISED

* Whether a videotaped film explaining the jury's role, court procedures and common concepts used in criminal trials should be shown to prospective jurors before any jury is empanelled: paragraph 5.11.

Should be shown ___

Unnecessary ___

Undesirable ___

* Whether the jury should be permitted to separate after it has been charged to consider its verdict: paragraph 5.17.

Should be permitted ___

Unnecessary ___

Undesirable ___

* Whether travelling expenses should be paid to jurors and, if so, what form they should take: paragraph 5.25.

Expenses should be paid ___

Should not ___

Form _____

_____

* Whether publication of jurors' identities should be permitted and, if so, in what circumstances: paragraph 5.29.

CHAPTER 6 TENTATIVE PROPOSALS

1. Procedures should be formulated to ensure that the trial judge addresses jurors at the commencement of the trial on the following topics:
   * the course the trial will take;
   * the role of the jury; and
   * the law on matters such as the standard and burden of proof and the presumption of innocence: paragraph 6.3.

Agree ___
Disagree ___
Agree with reservations ___

2. Each juror, at the discretion of the trial judge, should be provided with a file containing the following documents:
   * a copy of the indictment: paragraph 6.4;
   * a copy of the documentary exhibits: paragraph 6.11; and
   * a document setting out the alternative verdicts available to the jury: paragraph 6.31.

Agree ___
Disagree ___
Agree with reservations ___

ISSUES RAISED

* Whether the jury, at the commencement of the trial, should be provided with a written statement of the facts to be proved by the Crown or of the elements of the offence(s) charged: paragraph 6.5.

Should be provided ___
Unnecessary ___
Undesirable ___

* Whether defence counsel should be permitted to open to the jury at the end of the Crown opening: paragraph 6.7.

Should be permitted ___
Unnecessary ___
Undesirable ___

* Whether the jury should be provided with a glossary of legal terms: paragraph 6.8.

Should be provided ___
Unnecessary ___
Undesirable ___

* Whether counsel should be permitted briefly to introduce each witness by referring to the element(s) of the offence to which his or her evidence relates: paragraph 6.9.

Should be permitted ___
Unnecessary ___
Undesirable ___

* Whether jurors should, as a matter of course, be provided with notebooks and pens and told of their right to take notes: paragraph 6.16.

Should be provided ___
Unnecessary ___
Undesirable ___
Should be at judge's discretion ___

* Whether detailed instructions on the relevant law should be given at the commencement of the trial: paragraph 6.20.

Should be given ___
Unnecessary ___
Undesirable ___

* Whether judges should be required to use standard forms to instruct juries on relevant law where such forms are available: paragraph 6.30.

Should be required ___
Should be discretionary _
Undesirable ___

* Whether directions of law should be provided to the jury in writing: paragraph 6.30.

Should be provided ___
Unnecessary ___
Undesirable ___

CHAPTER 7 TENTATIVE PROPOSALS

1. Judges should request Crown counsel to outline for the jury panel the nature of the case and the identity of the accused and likely witnesses. The judge should then request people who feel they would be unable to give impartial consideration to the case to come forward: paragraph 7.6.

Agree ___
Disagree ___
Agree with reservations ___

2. The court officer responsible for the jury should be required to take an oath when being put in charge of the jury, undertaking to shield the jury from outside influences; paragraph 7.9.

Agree ___
Disagree ___
Agree with reservations ___

3. Pre-trial hearings should be used, where possible, to resolve disputes as to the admissibility of evidence, both to avoid interrupting the trial with voir dires for this purpose and to reduce the risk that the jury will hear inadmissible evidence: paragraph 7.15.

Agree ___
Disagree ___
Agree with reservations ___

4. Where there has been substantial pre-trial publicity, the judge should invite people who feel they have been prejudiced by this to apply to be excused: paragraph 7.16.

Agree ___
Disagree ___
Agree with reservations ___

ISSUES RAISED

* Whether additional measures should be taken to ensure that corrupted jurors do not serve on juries: paragraph 7.8.

Additional measures necessary ___
Unnecessary ___

* Whether trial judges should, at their discretion, allow a trial which has been affected by the publication of prejudicial material to continue to its conclusion (instead of discharging the jury) on the understanding that a verdict of guilty would be quashed because of the irregularity: paragraph 7.9.

Discretion desirable ___
Undesirable ___

* Whether judges should be empowered to order that members of the social or peer groups of the accused should be included on the jury: paragraph 7.12.

Should be empowered ___
Unnecessary ___
Undesirable ___

* Whether the judge's instruction limiting the use to which prejudicial information can be put is a sufficient guarantee that the jury will not be prejudiced: paragraph 7.15.

Sufficient ___
Insufficient ___

* Whether the contempt laws in relation to the publication of material likely to prejudice a jury are adequate and appropriate: paragraphs 7.21-7.22.

Adequate ___
Inadequate ___

* Whether, in cases where pre-trial publicity has been extremely prejudicial, the accused should be entitled to apply for trial by a judge sitting without a jury: paragraph 7.23.

Should be entitled ___
Unnecessary ___
Undesirable ___

CHAPTER 8 TENTATIVE PROPOSALS

1. It should be a universal practice for the jury to be advised of its right both to ask questions of the judge and to have any part of the evidence read from the transcript: paragraph 8.5.

Agree ___
Disagree ___
Agree with reservations ___

2. The minimum deliberation period before a jury can be discharged without verdict should be reduced from six hours: paragraph 8.17.

Agree ___
Disagree ___
Agree with reservations ___

ISSUES RAISED

* Whether juries should ever be denied access to certain exhibits and, if so, on what grounds: paragraph 8.3.

Should never be denied ___

Should be possible ___

Grounds _____

* Whether multiple copies of documentary exhibits should be provided to the jury: paragraph 8.3.

Should be provided ___

Unnecessary ___

Undesirable ___

* Whether the jury should be provided with a transcript of all or part of the evidence either as a matter of course, at its request, or at the discretion of the presiding judge: paragraph 8.4.

On request ___

At judge's discretion only ___

Not at all ___

* Whether jurors should be prohibited by statute from disclosing their deliberations: paragraph 8.12.

Should be prohibited ___

Unnecessary ___

Undesirable ___

* Whether the publication of disclosures by jurors about their deliberations should be an offence: paragraph 8.13.

Should be an offence ___

Unnecessary ___

Undesirable ___

* Whether the evidence of jurors about the jury's deliberations should be admisible in subsequent legal proceedings and, if so, in what circumstances: paragraph 8.14.

Should be admissible ___

Should not be admissible ___

Circumstances ___

* Whether any change to the current practice whereby the jury is advised to elect a foreman as early as possible is necessary: paragraph 8.15.	Necessary	___
	Unnecessary	___
	Undesirable	___

CHAPTER 9 TENTATIVE PROPOSALS

1. Each member of a jury in a criminal trial should be polled to ensure that the verdict is unanimous: paragraph 9.4.	Agree	___
	Disagree	___
	Agree with reservations	___
2. Where alternative factual bases for a conviction are left to the jury, the judge should direct the jury to consider on which ground its verdict is based. When the verdict is rendered in such a way that the ground accepted is not clear, the judge should first ask the foreman whether the jury reached a unanimous view as to which ground it accepted. Only if the jury's view is unanimous should the judge ask which ground was accepted. The jury's answer should be binding on the judge when sentencing: paragraph 9.17.	Agree	___
	Disagree	___
	Agree with reservations	___

3. Where both the first jury and the second jury have failed to reach agreement after being asked to deliberate upon a verdict, statute should provide that there will not be a third trial: paragraph 9.22.

Agree ___
Disagree ___
Agree with reservations ___

ISSUES RAISED

* Whether the jury should continue to have the prerogative to recommend mercy and, if so, whether it should be told of this in the summing-up: paragraph 9.5.

Should have it and should be told ___
Should have it but should not be told ___
Should be abolished ___

* Whether the rule requiring a jury's verdict to be unanimous should be retained: paragraph 9.10.

Should be unanimous ___
Should be by majority ___

* Whether the judge in a criminal trial should have a discretion to request the jury to return a special verdict and, if so, in what circumstances: paragraph 9.14.

Should have a discretion ___
Unnecessary ___
Undesirable ___

* Whether juries should be discharged immediately they have delivered their verdicts or whether the matter should remain at the discretion of the presiding judge: paragraph 9.23.

Should be discharged ___
Should be discretionary ___

CHAPTER 10 TENTATIVE PROPOSALS

1. Trial by a jury of twelve citizens randomly selected from the general community should be retained for all serious criminal cases: paragraph 10.15.

Agree ___
Disagree ___
Agree with reservations ___

2. The evidence of technical and scientific witnesses should, if the presiding judge considers it would assist the jury, be capable of being given by:

(a) reading a document; and/or
(b) tendering the document, provided that the witness is available to give oral evidence if required.

The question whether either procedure should be adopted should be settled at a pre-trial hearing: paragraph 10.17.

Agree ___
Disagree ___
Agree with reservatoins ___

3. The power of the presiding judge, in his or her discretion, to instruct the jury as to individual charges and individual accused and to require the jury to deliberate separately on each should be affirmed: paragraph 10.18.

Agree ___
Disagree ___
Agree with reservations ___

4. The power of the presiding judge, in his or her discretion, to provide to the jury a written statement setting out the alternative verdicts available should be affirmed: paragraph 10.18.

Agree ___
Disagree ___
Agree with reservations ___

5. When a trial is expected to be lengthy, the summons to the jury panel should include a notice to this effect inviting potential jurors to apply to the Sheriff for excusal where necessary: paragraph 10.19.

Agree ___
Disagree ___
Agree with reservations ___

6. The additional juror procedure should be introduced in New South Wales by an amendment to the Jury Act, 1977. At the end of the evidence, if the remaining jurors exceed twelve, twelve only should be ballotted to form the deliberating jury: paragraph 10.23.

Agree ___
Disagree ___
Agree with reservations ___

ISSUE RAISED

* Whether the minimum allowable size of a jury should be less than ten at the judge's discretion and irrespective of the consent of the Crown and the accused: paragraph 10.21.

Should be less than 10 ___
Unnecessary ___
Undesirable ___