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**LAW REFORM  
COMMITTEE**

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# Jury Service in Victoria

**FINAL REPORT**

**Volume 3**

**DECEMBER 1997**

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PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

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# Jury Service in Victoria

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FINAL REPORT

VOLUME 3

REPORT ON RESEARCH PROJECTS

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# FUNCTIONS OF THE COMMITTEE

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## PARLIAMENTARY COMMITTEES ACT 1968

- 4E.** The functions of the Law Reform Committee are —
- (a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;
  - (b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

## TERMS OF REFERENCE

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Pursuant to section 4F (1) (a) (ii) of the *Parliamentary Committees Act 1968* the Governor in Council refers the following matters to the Law Reform Committee—

1. To review and make recommendations on the criteria governing ineligibility for, and disqualification and excusal from, jury service under sections 4 and 5 of the *Juries Act 1967*.
2. To review and make recommendations in respect of the compilation of jury lists under Part II and the pre-selection of jurors under Part III of the *Juries Act 1967*.
3. To review and make recommendations in respect of the preparation of jury panels and the summoning of jurors under sections 20, 20A, 21, 23, 24, 25, 26 and 27 of the *Juries Act 1967*.

Under section 4F (3) of the *Parliamentary Committees Act 1968* the Governor in Council specifies 31 October 1996 as the date by which the Committee is required to make its final report to the Parliament on this matter.

Dated: 12 June 1996

Responsible Minister: JAN WADE, MP  
Attorney-General

*Victoria Government Gazette*, G24, 20 June 1996, pages 1567–1568

## INTRODUCTION

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On the 20 September 1994 the Victorian Law Reform Committee received a reference from the Governor in Council to review and make recommendations concerning the categories of exemption from jury service under the *Juries Act 1967* (Vic.) and other matters relating to the administration of the jury system in Victoria.<sup>1</sup> These terms of reference were amended in February 1995 to include a review of the practice of jury vetting.<sup>2</sup>

On 5 March 1996 the Parliament was dissolved for the State election and the Committee's reference lapsed. Following the election a new Committee was appointed on 14 May 1996 consisting of two former members and seven new members, including a new Chairman. The Committee has previously recorded its appreciation for the substantial contributions made by its former members. Terms of reference for the current inquiry were published in the *Victoria Government Gazette* on 20 June 1996. They are in identical form to those as amended in February 1995.<sup>3</sup>

The Law Reform Committee is a Joint Investigatory Committee of the Victorian Parliament with a statutory power to conduct investigations into matters concerned with legal, constitutional and parliamentary reform or the administration of justice.<sup>4</sup> The Committee's membership, which includes lawyers and non-lawyers, is drawn from both Houses of the Victorian Parliament and all political parties are represented.

In November 1996 the Committee published its recommendations on the following matters:

- a. the criteria governing ineligibility for, and disqualification and excusal from, jury service under sections 4 and 5 of the *Juries Act 1967*;
- b. the compilation of jury lists under Part II and the pre-selection of jurors under Part III of the *Juries Act 1967*; and

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<sup>1</sup> Victoria, *Government Gazette*, G 39, 29 Sept. 1994, p. 2343.

<sup>2</sup> Victoria, *Government Gazette*, G 5, 9 Feb. 1995, p. 311.

<sup>3</sup> Victoria, *Government Gazette*, G 24, 20 June 1996, p. 1567.

<sup>4</sup> *Parliamentary Committees Act 1968* (Vic.), s. 4E.

- c. the preparation of jury panels and the summoning of jurors under sections 20, 20A, 21, 23, 24, 25, 26 and 27 of the *Juries Act 1967*.<sup>5</sup>

During the Inquiry the Committee commissioned three research papers on topics of particular importance for a complete understanding of the varied and complex issues raised by the reference. These papers are now published as volume three of the Committee's report. They are:

1. *Jurisprudential and Historical Aspects of Jury Service in Victoria* by Rebecca Waechter (April 1995)
2. *Juries and Complex Trials* by Mark T. Cowie (November 1995)
3. *Gender Issues, Multiculturalism and the Victorian Jury System* by Angelene Falk (August 1995)

It should be noted that the papers were prepared in order to inform members of the Committee on issues relevant to the Committee's Inquiry, and they were not originally intended for public dissemination. However, in recognition of the great deal of effort that has gone into researching and writing them, the present Committee believes that they should be published to a wider audience.

The delay in making this material publicly available has arisen because of the need to devote the Committee's full resources to its active references on the Legal Liability of Health Service Providers and Regulatory Efficiency Legislation. The Committee's reports on these Inquiries were tabled in the Victorian Parliament in May and October 1997 respectively. A consequence of this delay is that the material presented in this volume is not entirely up to date. Nonetheless, the Committee believes that it is important to make the material which has been generated during its Inquiry available in the present Report.

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<sup>5</sup> See Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria – Final Report*, vol. 1, Government Printer, Melbourne, *passim*.

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# JURISPRUDENTIAL AND HISTORICAL ASPECTS OF JURY SERVICE IN VICTORIA

BY REBECCA WAECHTER

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## Introduction

1.1 As part of its inquiry into Jury Service in Victoria the Law Reform Committee has commissioned this research paper to provide its members and staff with background information on the social, philosophical and historical circumstances surrounding the introduction of the jury system. The paper considers the introduction of the jury system, first, into England, next, into the Colony of New South Wales, and finally, into the Colony of Victoria. The evolution of the system in Victoria up to 1900 is also discussed.

1.2 The importance of understanding the rationale underpinning this institution and its historical background cannot be overstated. As Lord Devlin opined in his seminal work on *Trial by Jury*, 'it is impossible to understand any English institution of any antiquity unless you know something of its history'.<sup>6</sup> It may be added that it is impossible to adequately reform a legal institution unless you understand it.

1.3 This paper is divided into two sections: the first deals with the jurisprudential rationale for the jury as an institution within the civil and criminal justice system; and the second deals with the historical aspects of jury service.

1.4 In the first section the role of the jury system, its importance to the administration of justice, its strengths and weaknesses, the erosion of trial by jury and modern threats to the continuance of the system, are discussed.

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<sup>6</sup> Sir Patrick Devlin, *Trial by Jury*, 3rd edn., Stevens and Sons Ltd., London, 1966, p. 4. (Hereafter cited as Devlin, Jury).

1.5 The second section examines the early development of the jury system in England and its subsequent evolution up to the mid-nineteenth century, the introduction of the jury system into the Colony of New South Wales and its evolution up to 1851, the introduction of the jury system into the Colony of Victoria and its evolution up to 1900. Within this framework the following important concepts are discussed: the meaning of trial 'by the country' and trial 'by one's peers', as well as special juries and the nature of jury trial in Victoria.

## Section 1

### **The Jurisprudential Rationale for the Jury as an Institution Within the Civil and Criminal Justice System**

#### Role of the Jury

1.6 The jury in criminal and civil cases has the role of determining the facts and then applying the law, given by the judge, to those facts in order to reach a verdict. This division of functions in the trial – with the jury deciding on the facts and the judge deciding the law – is regarded as fundamental to the jury system. Accordingly, in every criminal trial the judge must give a general direction on the separate functions of the judge and jury. Without this direction the judge's summing up will be inadequate and the trial will miscarry.<sup>7</sup> A good example of this direction is that found in *R v Ali Ali*<sup>8</sup>, where Street CJ said to the jury:<sup>9</sup>

I cannot stress too strongly that the decision in this case on all questions of fact, the inferences to be drawn from the facts and the ultimate verdict to be returned, is yours and yours alone; and so much is that so that if in the course of summing up I appear to indicate that I have a view of the facts...you are bound to disregard that apparent indication, because you have one function and I have another. You do not intrude into mine and I do not intrude into yours.

#### Importance of the Jury System

1.7 The importance of jury trial to the administration of justice is found in the constitutional principle that no person should be imprisoned for a serious crime unless he/she has been found guilty by his/her peers. Over the years

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<sup>7</sup> Glissan J. & Tilmouth, S., *The Right Direction : A Casebook of General Jury Directions in Criminal Trials*, Butterworths, Sydney, 1990, p. 1.

<sup>8</sup> (1981) 6 A Crim R 161.

<sup>9</sup> *ibid*, p. 164.

many writers have expressed strong approval of the use of the jury system in criminal and civil cases. The jury system is seen both as a means of ensuring an impartial trial by one's peers and of giving people the 'qualities and character of a judge', with the added benefit of being 'one of the great instruments for the education of the people'.<sup>10</sup>

1.8 The phrase 'trial by one's peers' requires that the jury be representative of the community. Yet, the phrase is ambiguous:<sup>11</sup>

In one sense a representative selection is merely a reflection or reproduction on a smaller scale of some larger entity...but in another sense, one who is representative may take himself[or herself] to have a duty of protecting or supporting the interests of the section or group that he [or she] is considered to represent.

Moreover, problems relating to the fairness of the trial may arise when the accused, being a member of a minority group, is not tried by a jury consisting of people from his/her group, but by one which is representative of the general community and therefore reflects the views and prejudices of that community.<sup>12</sup> Consequently, in these circumstances there may be conflict between the values of representativeness of the jury and impartiality. The meaning of the phrase 'trial by one's peers' will be discussed in detail later.<sup>13</sup>

1.9 Nevertheless, supporters of the jury system have claimed that it protects the liberty of the individual which may be threatened from three fronts:

1. **The Executive** – As observed by Lord Devlin:<sup>14</sup>

The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of

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<sup>10</sup> Forsyth, W.M.A. *History of Trial by Jury*, 2nd edn., rev. J.A. Morgan, Burt Franklin, New York, 1971 (1878), pp. 355–356.

<sup>11</sup> Marshall, G., 'The judgement of one's peers: some aims and ideals of jury trial' in *The British Jury System*, Papers presented at the Cropwood Round-Table Conference December 1974, ed. N. Walker, Institute of Criminology, Cambridge, 1975, p. 8.

<sup>12</sup> In response to allegations that Aborigines were denied fair representation on juries, the Queensland Director of Prosecutions in 1988 issued a guideline to Crown Prosecutors. It provided that the power of Prosecutors to stand aside a prospective juror should be exercised only in order to ensure a fair trial, and not with regard to racial or ethnic background, unless it is reasonably likely to cause the prospective juror to be prejudiced unfairly in favour of or against the defendant. See, Queensland Office of the Director of Prosecutions, *Annual Report for the Year 1993*, p. 89.

<sup>13</sup> See paras. 1.53–1.59.

<sup>7</sup> Devlin, *Jury*, p. 164.

justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

2. **The Judiciary**—Jeremy Bentham claimed that only real justification for the existence of juries is the threat which may be posed by judges who have been exposed to temptation and corruption. He suggested that 'if judges were not exposed to corruption and temptation juries should be abolished'.<sup>15</sup> Alternatively, it may be said that juries provide a protection for the liberty of the individual because they may take a more lenient view of the law in certain circumstances. As observed by another commentator, 'juries may, acting on their opinion, take a more lenient view of the law and stretch it to limits that judges would not themselves have countenanced'<sup>16</sup>.
3. **The Legislature**—The jury system protects the liberty of the individual by preventing unpopular laws from flourishing.<sup>17</sup> These laws can take the form of statute law or common law. The jury is the custodian of the community's conscience. For this reason, it has been suggested that under the jury system:<sup>18</sup>

No one is likely to suffer of whose conduct they [juries] do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions.

1.10 However, the extent to which the jury is really able to protect the liberty of the subject has been criticised. This criticism is directed to the lack of protection juries tend to afford to minorities and their opinions (because juries tend to express the opinion of the majority). Additionally, has been suggested that judges may do a far better job of protecting individual liberty than juries. As observed by Professor Glanville Williams:<sup>19</sup>

Most of the great pronouncements on constitutional liberty from the eighteenth century onwards have been the work of judges either sitting in appellate courts or giving directions to juries, and the assumption that political liberty at the present day depends upon the jury is "merely folk lore".

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<sup>15</sup> Bentham, J., *The Art of Packing Juries*, Works edn., vol. v, Bowring, London, 1843, quoted in Marshall, op. cit., p. 1.

<sup>16</sup> English, P., 'What did section three do to the law of provocation', [1970] *Crim L R* 249, 255.

<sup>17</sup> Marshall, op. cit., p. 1.

<sup>18</sup> *United States ex rel. McCann v. Adams*, 126 F.(2d) 774, 775 per Learned Hand J.

<sup>19</sup> Williams, G., *The Proof of Guilt*, London, 1955, p. 197.



## Strengths and Weaknesses in the Jury System

### *Strengths of the Jury System*

1.11 The importance of the jury system to the administration of justice should be assessed in light of its strengths and weaknesses. According to Devlin, the real strength of the jury system lies in the fact that, unlike the judge, the jury can apply a popular or ordinary person's standard rather than a professional standard.<sup>20</sup> The jury in applying its standard may decide on an acquittal in circumstances where the judge would find it unreasonable. It is this prospect of 'perversity', as Devlin called it, which justifies the jury's existence. Consequently, he has suggested that this feature should not be seen as a weakness:<sup>21</sup>

What makes them [juries] worth while is that they can see things differently from the judges, that they can water the law, and that the function which they filled two centuries ago as a corrective to the corruption and partiality of the judges requires essentially the same qualities as the functions they perform today as an organ of the Disestablishment.

1.12 Furthermore, the decision to acquit when the jury should condemn—which may be motivated by pity towards the accused or anger at the nature of the punishment—has been described by W. M. A. Forsyth as a valuable feature of the jury system. He depicted it as 'an error at which humanity need not blush: it springs from one of the purest instincts of our nature, and is a symptom of kindliness of heart which as a national characteristic is an honor.'<sup>22</sup> Similarly, Lord Atkin, referred favourably to this 'sentiment', when possessed by a judge, by saying: 'There is no greater virtue in a judge.'<sup>23</sup>

1.13 The jury has also been seen as the most suitable body to determine the facts, because its decision is based only on the individual case before it, and without regard to whether or not it is making bad law. Consequently, Sir William Holdsworth observed that: 'their findings create no precedent...they can decide hard cases equitably without making bad law.'<sup>24</sup> A further benefit

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<sup>20</sup> Lord Devlin, *The Judge*, Oxford University Press, Oxford, 1979, p. 176. (Hereafter cited as Devlin, Judge).

<sup>21</sup> *ibid*, p. 131.

<sup>22</sup> Forsyth, *op. cit.*, p. 367.

<sup>23</sup> Evatt, H.V., 'The jury system in Australia', (1936) 10 A. L. J.Supp. 57, 71, citing Lord Atkin, 182 L. T. Jour. 69.

<sup>24</sup> Holdsworth, Sir William, *A History of English Law*, vol. I, eds. Goodhart A.L. & Hanbury H.G., Methuen & Co., & Sweet & Maxwell, London, 1938, p. 348.

of jury trial is that the jury's decision is not influenced by past experience of the court's operations.<sup>25</sup>

1.14 As mentioned above, trial by jury has been praised as a means of educating the people. Jurors are educated because they are given a precise statement of the law by the judge. According to De Tocqueville, the strength of the jury system is in its education of the jurors as to the administration of justice, which encourages a respect for the law, a sense of duty to society, and an understanding of legal rights.<sup>26</sup> Significantly, judges are also educated by the jurors' influence upon the rules of law, in terms of their influence ensuring that the laws remain intelligible and in touch with the common facts of life.

1.15 A further strength of the jury system is that the use of juries leaves judges free from the obligation of deciding upon facts. The interpretation given to the facts of a case may vary. Consequently, if judges had to decide on the facts then the public's respect for them might deteriorate in cases where the public have formed a different view. The benefit resulting from this system is summarised thus: '[the judge] merely expounds the law, and declares its sentence; and in the performance of this duty, if he does not always escape criticism, he very seldom can incur censure.'<sup>27</sup>

### *Weaknesses of the Jury System*

1.16 The weaknesses of the jury trial compared to trial by judge alone have centred on both the jury's supposed incompetence and bias against some classes of disputants (for example, large corporations). These problems lead to a weakening of the law and inconsistency in its application.<sup>28</sup> Not surprisingly, jury trial has been criticised as lacking predicability; this criticism is particularly relevant because predicability in the administration of justice is highly valued.<sup>29</sup> These problem may reflect the fact that the jury may consist of twelve people who have 'neither the desire nor the capacity to weigh the evidence, or to arrive at a conclusion upon the facts in issue.'<sup>30</sup>

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<sup>25</sup> Cornish, W.R., *The Jury*, Allen Lane The Penguin Press, London, 1968, p. 9.

<sup>26</sup> Holdsworth, op. cit., pp. 348-349, citing De Tocqueville, *Democratie en Amerique*, vol II, p. 190.

<sup>27</sup> Forsyth, op. cit., p. 378.

<sup>28</sup> Marshall, op. cit., p. 4.

<sup>29</sup> Devlin, *Jury*, p. 157.

<sup>30</sup> Holdsworth, op. cit., pp. 347-348.

1.17 A further potential weakness in the system may result from the actual size of the jury. As observed by Holdsworth, twelve jurors may be too many for a sense of individual responsibility for the decision to operate.<sup>31</sup>

1.18 These potential weaknesses, which focus on the jury's ability to determine the facts competently and fairly, as well as to understand the directions given by the judge, cannot be evaluated because of the secrecy surrounding jury room deliberations.

## The Erosion of Trial by Jury

1.19 Several commentators have observed that trial by jury is being eroded by a number of factors. The causes of erosion of jury trial in Australia were aptly described by J. Willis, who wrote:<sup>32</sup>

The jury seems to be under attack on a number of fronts. One can instance the great increase in the number of summary offences, the increased powers given to courts of summary jurisdiction to deal with more serious offences, and the claims that juries are inappropriate bodies for determining facts in more complex trials, such as trials for white collar crimes. It seems clear that the jury is in decline in Australia.

Any proposal to change the jury system should therefore be considered against this background of erosion of trial by jury.

1.20 However, those who are critical of the jurors' ability to understand the legal matters placed before them may be neglecting the real issue, which is the adequacy and clarity of the law itself. As observed by Devlin, the educated jury of today is in a position where:<sup>33</sup>

It is not likely to be dumbfounded by statements of law on particular topics [so that] one of the worthwhile by-products of the jury system is that the criminal law has to be such as can be understood by the average citizen; if it were such as to confuse the modern jury, there would be something wrong with the law.

Claims that jurors are not able to understand the legal matters placed before them can be addressed by presenting the law in a clear and succinct fashion.

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<sup>31</sup> *ibid.*

<sup>32</sup> Willis, J., 'The declining role of the jury' in *The Criminal Injustice System*, eds. Basten, J. Richardson M., Ronalds C. & Zdenkowski G., Australian Legal Workers Group, Sydney, 1982, p. 226.

<sup>33</sup> Devlin, Judge, p. 147.

1.21 The use of civil juries is also under attack. According to A. Castles, this attack has even extended to matters where the use of civil juries has been long-accepted:<sup>34</sup>

Civil juries where they remain in Australia and England are often under attack, even in carrying out a long-accepted role in defamation suits, once regarded...as an essential component of making visible community standards once a better acknowledged bulwark of protecting freedom of expression.

### *Modern Threats to the Continuance of the System*

1.22 Recently the use of the jury trial for both serious and less serious criminal offences has been heavily criticised.<sup>35</sup> In serious cases there are a number of factors which threaten the suitability of juries. These are listed by the Constitutional Commission as being:<sup>36</sup>

- (a) The high rate of acquittals in jury trials, perhaps resulting from perverse verdicts;
- (b) The increased cost resulting from the extra time taken to explain the law and the rules of evidence to jurors;
- (c) The fact that the judge's sentence is only consistent with the jury's verdict and not based upon it;
- (d) The high incidence of retrial;
- (e) The alleged inability of the jury to cope with complex fraud trials;
- (f) The fact that only a small amount of criminal cases are by jury trial;
- (g) The present methods of jury selection may be inadequate because selection is arguably no longer random. According to Mr Temby, the jury tends to be comprised of a limited selection of people: 'housewives and unemployed men';
- (h) The doubts about whether the jurors understand the judge's directions; and

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<sup>34</sup> Castles, A.C., 'Now and then: the unmarked bicentennial of jury usage in Australia and some consequences of its decline', (1990) 64 A. L. J. 509. (Hereafter Castles, A.L.J.).

<sup>35</sup> Constitutional Commission, *Australian Judicial System Advisory Committee, Report 22*, May 1987, pp. 96-97.

<sup>36</sup> *ibid.*

- (i) An accused may not wish to be tried by jury, because of the extra cost involved in jury trial and the possibility of bias.

1.23 Further threats to the viability of the jury system exist. These threats result from the danger that the media may publish prejudicial material leading up to the trial, the potential that the prosecutor may push for a conviction (therefore failing to observe the principle of fairness), the affect of delays, lengthy trials and the lack of adequate representation for the accused.<sup>37</sup>

1.24 Jury trial is under threat in less serious criminal cases by the magistrate's power to hear certain classes of case where the accused has so chosen. There has been an extension of the summary jurisdiction of magistrates in criminal matters. The extension reflects the tendency of State legislatures to make less use of the jury trial,<sup>38</sup> based on an acceptance that magistrates should have the power to imprison.<sup>39</sup>

1.25 According to H.V. Evatt, there are four problems which arise from this increased use of summary procedure.<sup>40</sup> First, magistrates are likely to lack the competence of the Judge, in relation to questions of law. Secondly, magistrates may not give the same attention as a jury to the presumption of innocence. Thirdly, magistrates may not scrutinise police witnesses to the extent that a jury might. And finally, the benefit that a jury may be less likely to wrongfully convict is lost. This benefit reflects the fact that proceedings before a jury are heard more slowly than those before a magistrate.

1.26 Threats to the jury system are not new. They are just as potentially destructive today as they were in Blackstone's time, when he issued the following warning:<sup>41</sup>

[L]et it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally

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<sup>37</sup> Murphy, L.K., 'Trial by jury: the scope of section 80 of the Constitution' in *The Jury*, Proceedings of a Seminar on the Jury 20-22 May 1986, ed. Challenger D., Australian Institute of Criminology, Canberra, 1986, pp. 18-19.

<sup>38</sup> *ibid*, p. 18.

<sup>39</sup> Constitutional Commission, *op. cit.*, p. 96.

<sup>40</sup> Evatt, *op. cit.*, p. 57.

<sup>41</sup> Blackstone, Sir William, *Commentaries on the Laws of England*, vol iv, 21st edn., ed. Hargrave J., Sweet S., & Maxwell A. & Son, & Stevens V. & R., & Norton G.S., London, 1844, p. 350.

opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

## Section 2

### Historical Aspects of Jury Service

#### Introduction

1.27 According to F.W. Maitland and F. Pollock a jury is defined as ‘a body of neighbours [who are] summoned by some public officer to give upon oath a true answer to some question’.<sup>42</sup> This definition should be kept in mind when looking at the origin and early development of the trial by jury in England. After all, this is the nature of the jury as it then existed and from which the modern jury later developed. There are several features which distinguished the early jury from its modern counterpart. The nature of the earlier jury was such that it has been described as being:<sup>43</sup>

an instrument of royal prerogative, a purchasable royal favour, not a popular right. It was a body sworn to tell the truth about something it knew or had investigated, rather than being a body called to give a verdict solely on the evidence presented to it. Finally, it was a body which represented some community, whether it be a vill, a hundred, or a county—in a wider sense, the *patria*, the country—in a far more meaningful way than any modern jury.

1.28 The nature of the jury in England has changed dramatically over a long period of time; from jurors acting as witnesses, to their being the judges of fact. How the judges came to allow the jury, which had been used merely to provide the judges with facts, to become the judges of the worth of these facts remains unclear.<sup>44</sup> Nevertheless, there are three identifiable stages in the jury's development, according to Devlin.<sup>45</sup> The first stage was where the court had no evidence other than what was within the jurors' knowledge, so that the verdict depended on what they knew. At the second stage the jurors heard evidence, but also relied on their own knowledge. The third stage was where jurors who wished to rely on their own knowledge had to advise the court of their intention and then become sworn witnesses.

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<sup>42</sup> Maitland F.W. & Pollock F., *History of English Law*, vol 1, 2nd edn., Cambridge University Press, London, 1952, p. 138.

<sup>43</sup> Barlow F., *The Feudal Kingdom of England 1042-1216*, Longmans, London, 1961, p. 318.

<sup>44</sup> Devlin, Judge, p. 118.

<sup>45</sup> *ibid.*, p. 117.

## Early Development of the Jury System in England and its Subsequent Evolution up to the Mid-Nineteenth Century

### *The Origin of the Jury Trial in England*

1.29 The origin of the jury system in England has been a matter of dispute. There is some support for the proposition that the system of trial by jury originally developed in Anglo-Saxon England.<sup>46</sup> However, the generally accepted view is that the system is of Frankish origin, having been brought over to England with the Norman Conquest.<sup>47</sup>

1.30 Trial by jury was unknown to the Anglo-Saxons before the Norman Conquest, because the principle of intervention by the jury did not exist there before the Conquest. The Anglo-Saxons had not used a body of people, separate from the court and summoned to attend, to decide the facts of a disputed case. Nevertheless, there were elements in their judicial system which eased the introduction of the jury system into England. According to W.M.A. Forsyth, these elements were as follows:<sup>48</sup>

1. At the time, courts existed which were presided over by a reeve, who had no input into the decision. Frequently, there would also be twelve people (or a multiple of twelve) who sat as judges.
2. A party's assertion was regarded as conclusive when supported by the oaths of compurgators; usually twelve compurgators were required for important matters.
3. When determining questions of general concern, the neighbourhood's testimony was relied upon.
4. Each district had its own appointed sworn witnesses, who had the role of attesting to private bargains and transactions in case a dispute later arose.
5. Transactions were kept as publicly visible as possible.

1.31 Consequently, the jury system in England has its origins in the inquisition, which was used by the Franks, and established by Charlemagne

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<sup>46</sup> Blackstone, *op. cit.*, vol iii, p. 588., fn.(z); Cornish, *op. cit.*, p. 11.

<sup>47</sup> Stubbs W., *Constitutional History of England : in its Origin and Development*, vol. 1, 6th edn., Barnes & Noble, New York, 1903, pp. 655-656.

<sup>48</sup> Forsyth, *op. cit.*, pp. 76-77.

(Charles the Great) by 780 A.D. The inquisition was used to settle factual disputes where the Crown had an interest.<sup>49</sup> It could only be called in exercise of the Crown prerogative and for the benefit of the Crown. A judge, at his discretion, summoned a number of men from the neighbourhood whom he assumed had a knowledge of the matter in question and demanded that they promise to declare the truth upon the question at issue: 'after the promise comes the judicial putting to the question, "Inquisitio".'<sup>50</sup> Only the most trustworthy freemen of the neighbourhood were summoned; and the number of men selected was determined by the officer undertaking the inquisition.<sup>51</sup>

### *Early Use of Jury Trials in England*

1.32 In England, inquests involved the "recognitors" (or people sworn for the inquests) being *compelled* to take an oath by the King. Compulsion by the royal authority of the Norman Kings was necessary to enforce compliance because the English people saw the inquest as repugnant.<sup>52</sup> The King used the inquest to obtain information for administrative purposes;<sup>53</sup> examples of which included the Domesday Book, an extensive survey of the country on fees which was conducted during the 1080's, and the Hundred Rolls.

1.33 The recognitor differed from today's juror in two key ways.<sup>54</sup> He was not involved in the administration of justice, and had to have a special local knowledge of the facts at issue.<sup>55</sup> Although his knowledge of the facts may have been obtained from informants, it was not the informants' oath but that of the recognitor which was used to prove the facts. Accordingly, only the recognitor could be found guilty of perjury. Cases where the jury's verdict was against the King's wishes resulted in the procedure of attain. This

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<sup>49</sup> Moore L.E., *The Jury : Tool of Kings, Palladium of Liberty*, W.H. Anderson Co., Cincinnati, 1973, p. 13.

<sup>50</sup> *ibid.*, p. 14, citing Brunner H., *The Origin of Juries*, Berlin, 1872, p. 98.

<sup>51</sup> *ibid.*, p. 15.

<sup>52</sup> Devlin, *Jury*, p. 6.

<sup>53</sup> *ibid.*, See also, Evatt, *op. cit.*, p. 54.

<sup>54</sup> A third way in which the early jury was unlike today's jury is in regard to gender. The qualifications for jury service excluded women from all juries except for one rare form of special jury; the jury of matrons. This jury consisted entirely of women. Consequently, reference is often made to the masculine without including the feminine.

<sup>55</sup> Forsyth, *op. cit.*, p. 90.



procedure was used to punish a false verdict and involved a second jury hearing the evidence given in court and reaching a verdict upon it.<sup>56</sup>

### *The Development of the Jury Trial into a Means of Administering Justice*

1.34 It was not until a century after the Norman Conquest that trial by jury was used as a means of administering justice. King Henry II used the jury of accusation to report on, and try, neighbours whom the jury suspected had committed certain crimes, there would then follow a trial by ordeal.<sup>57</sup> The trial by ordeal was regarded as being the judgement of God. Thus, the following enactment was made during the reign of Henry II:<sup>58</sup>

[that if a person was accused of] murder, robbery, arson, coining, or harbouring of felons, by the oaths of twelve knights of the hundred, or in default of knights, by the oaths of twelve free and lawful men, and of four of each vill of the hundred, he was to undergo the water-ordeal, and if the result was unfavourable he would lose a foot.

The grand jury and the bill of indictment originated from this procedure.<sup>59</sup> The use of juries in criminal suits followed the use of the jury of accusation.

1.35 Jury trial was also used to decide disputes relating to questions of seizen (rightful ownership) of land, right to an advowson ('advowson' being the patronage of an ecclesiastical office or religious house), or villenage (the civil status of an individual as a peasant occupier or cultivator subject to a lord or attached to a manor).<sup>60</sup> Accordingly, where a plaintiff sought to recover lands of which he had been disseised the defendant did not have to accept trial by combat, and instead could chose trial by assize (jury).<sup>61</sup>

### *Early Resistance to the Introduction of Trial by Jury*

1.36 Before discussing the resistance to the use of trial by jury as a method for administering justice, it is necessary to outline the earlier methods of trial.

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<sup>56</sup> Stephen, Sir James Fitzjames, *A History of the Criminal Law of England*, vol. 1, Burt Franklin, New York, 1883, p. 255.

<sup>57</sup> Devlin, *Jury*, p. 9.

<sup>58</sup> Forsyth, *op. cit.* p. 162.

<sup>59</sup> This procedure was contained in the *Assize de Clarendon* 1166. Devlin, *Jury*, p. 9.

<sup>60</sup> Forsyth, *op. cit.*, p. 115. Villeins were not allowed to leave their lords without permission, nor keep property. However, they had the right to sue (other than their lords) and be protected by their lords against injuries. See, Bird, R., *Osborn's Concise Law Dictionary*, 7th edn., Sweet and Maxwell, London, 1983, p. 340. Definition of the above terms are also provided in *The Oxford English Dictionary*, 2nd edn., eds. Simpson J.A. & Weiner E.S.C., Clarendon Press, Oxford, 1989.

<sup>61</sup> Forsyth, *op. cit.*, p. 103.

These methods involved a competition between the disputants in order to prove who was the better man. They included: the trial by battle and the trial by ordeal (which were seen as involving the intervention of God in settling the dispute); and the trial by the swearing of oaths.<sup>62</sup> The latter involved each man collecting neighbours (compurgators) to swear as to the truth of his oath, with the dispute being decided according to who had the greater number of oaths.<sup>63</sup> The substitution of these earlier methods of trial by the jury system was a slow process. The recognition, or jury trial, began as a purchasable favour. Later, although jury trial was used more frequently, the accused could still refuse to be tried in this manner. Finally, jury trial was forced upon even an unwilling accused.

1.37 Although the earlier methods lacked a rational judgment, the use of jury trial was still resisted by the accused in criminal cases. The reason for this resistance was that the jury trial was viewed as a mechanism whereby the government extracted information, rather than as a way to protect the liberty of the subject. For example, during the reign of James II, jury trial was not seen as protecting the rights of the accused, because the Crown would frequently severely punish jurors who brought a verdict against its wishes, and jurors were locked away without food or drink until they brought down the desired verdict.<sup>64</sup> Similarly, during the reigns of Henry VIII, Mary and Elizabeth I, the Star Chamber, a criminal court with draconian powers, was used to punish jurors. Where the Star Chamber regarded an acquittal to be against the evidence, and therefore corrupt, fines, imprisonment and torture were used to obtain a confession.<sup>65</sup> It was therefore not surprising that the accused in criminal cases sought as of right the traditional trial by ordeal.

1.38 However, by 1268 the defendant had no choice other than to consent to trial by jury, even when he/she wished to be tried by battle. This was because 'by his plea [of not guilty] he hath put himself upon God and the country which country ye are'.<sup>66</sup> As time passed, further incentives were invoked to obtain consent to trial by jury; refusing trial by jury would mean punishment

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<sup>62</sup> For a vivid discussion of the use and nature of each of these earlier forms of trial, see Gleisser, M., *Juries and Justice*, Barnes and Company, New York, 1968, pp. 31-35.

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*, pp. 40-41. It should be noted that an unanimous verdict was required because jurors were witnesses and twelve witnesses were required to swear to the accused's guilt before he could be convicted: Stephen, *op. cit.*, p. 304.

<sup>65</sup> Moore, *op. cit.*, p. 75.

<sup>66</sup> Devlin, *Jury*, p. 10.

involving 'pain, hard and long'.<sup>67</sup> Even as late as 1772, men who refused trial by jury might literally be pressed to death. This situation led Maitland to conclude that 'all this takes us back to a time when the ordeal seems the fair and natural mode of ascertaining the guilt and innocence, [and] when the jury is still a new-fangled institution'.<sup>68</sup>

1.39 A major advance in the independence of the jury occurred in 1670. The jury in *Bushell's Case*<sup>69</sup> refused to find William Penn and William Mead guilty of preaching to an unlawful assembly, as demanded by the Crown. This position was taken despite the jury having been fined and locked up without food for two nights. Chief Justice Vaughan held that the jury was no longer obliged to follow the direction of the court and was now free of external influence and punishment.<sup>70</sup> The jury was then released. As a result of this famous case the jury began to be seen as a means of protecting the accused's liberty.<sup>71</sup>

#### *Rationale for the Introduction of Trial by Jury*

1.40 The rationale underlying Henry II's introduction of the jury trial was to extend from the conduct of litigation his royal jurisdiction, royal power and royal purse.<sup>72</sup> The introduction of jury trial could be achieved by the King because he alone had the power to compel the giving of an oath. Even in a criminal case the accused was initially not entitled to jury trial as of right, but could purchase it by presenting the King with a gift or money. According to Professor Julius Stone, jury trial gained momentum because of the following factors:<sup>73</sup>

1. The Crown's insistence on jury trial when it was involved in litigation with its subjects.

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<sup>67</sup> Moore, op. cit., pp. 54-55.

<sup>68</sup> Maitland, F.W., 'Outlines of English legal history' in *The Collected Papers of Frederic William Maitland*, ed. Fisher H.A.L., Cambridge University Press, Cambridge, 1911, p. 456.

<sup>69</sup> *Bushells Case*, (1670) Vaug 135 (124 E.R. xxx).

<sup>70</sup> Vodanovich, I. M., *The criminal jury trial in Western Australia*, PhD thesis, University of Western Australia, 1989, p 15.

<sup>71</sup> Moore, op. cit., p. 89.

<sup>72</sup> Devlin, Jury, p. 7.

<sup>73</sup> Stone, J., *Evidence its History and Policies*, Butterworths, Sydney, 1991, pp. 16-17.

2. The Crown's granting of jury trial to individual litigants and later to litigants in specific classes of cases, for example, seising of land.
3. Later, the use of hard and strong prison to ensure that the accused agreed to trial by jury.

1.41 Jury trial was fully adopted when, after the meeting of the Lateran Council of the Catholic Church in November 1215, Pope Innocent III withdrew religious support for the trial by ordeal. A statute forbidding the use of the ordeal was enacted in 1219.<sup>74</sup> The resulting gap was filled by trial by jury.<sup>75</sup>

### *The Jury as Witnesses*

1.42 The jury was initially selected from the neighbourhood where the dispute arose. The reason for this was that jurors were expected to know about the facts at issue, either from first hand knowledge or by having informally consulted with people who knew of the events.<sup>76</sup> In this regard, the jury system differed greatly from that used today, where jurors have no prior knowledge of the dispute.

1.43 The manner in which jurors were selected was specified in the *Assize de Clarendon* 1166 and later in the *Statute of Northampton* 1176. Under these enactments, in a country and through each hundred (meaning a hundred families with a mutual responsibility for each other's good conduct) the jury was comprised of twelve "lawful" men of the hundred and five "lawful" men of the township.<sup>77</sup> In order to satisfy the basic qualification for jury service, these men had to be free and own property. The jury was selected according to the following procedure: the sheriff, acting according to a writ, summoned four knights from the neighbourhood where the disputed property existed, they were sworn and then chose twelve lawful knights who best knew the facts.<sup>78</sup>

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<sup>74</sup> Stone, op. cit., p. 10.

<sup>75</sup> Devlin, *Jury*, p. 9.

<sup>76</sup> Mitnick, J.M., 'From neighbor-witness to judge of proofs: the transformation of the English civil juror', (1988) 32 *American Journal of Legal History* 201, 204–205.

<sup>77</sup> Evatt, op. cit., p. 54.

<sup>78</sup> Forsyth, op. cit., p. 104.

1.44 The defendant was given an opportunity to exclude for reason any of the twelve knights who had been chosen. The reasons which would justify exclusion were the same as those which might justify an objection to a witness in the Ecclesiastical courts.<sup>79</sup> Thus, the following causes would justify a person being disqualified from sitting on the jury: a perjury conviction, serfdom, being related to a party by blood or marriage, hatred or close friendship. Exceptions to individual jurors could also be taken where the juror was a lord of parliament, alien born, or a person considered to be infamous by reason of his having been convicted of an offence which affected his credit.<sup>80</sup>

1.45 Furthermore, an objection could be raised against the whole array of jurors if they were selected by a person who was not disinterested in the dispute. This would be the case where either the sheriff who summoned them was a party, or was related to the parties. Additionally, a challenge to the array could be made where none of the jurors had come from the area where the action was said to have arisen; or, as a matter of discretion, where there were circumstances which founded a suspicion of bias in the returning officer.<sup>81</sup> In civil trials there was the same right of challenge to ensure the impartiality and fairness of the trial.

1.46 The knights who were selected stated, on oath, which of the disputants were entitled to the land. Their decision was based on what they had seen and heard by trustworthy information. This, in effect, meant that they had the option of ignoring the evidence given in court.<sup>82</sup> Those knights who lacked knowledge of the relevant facts were removed and others summoned. Where no agreement on the facts could be reached, other knights were summoned until at least twelve had agreed on a set of facts favourable to one of the parties. Their verdict was then final.<sup>83</sup> At this early stage in the development of the jury trial, custom and convenience allowed the number of knights who testified to vary, although twelve was the usual number.

### *The Jury as Judges of Evidence*

1.47 The evolution of the jury, from a body of witnesses to a body that exercised independent judgement according to the evidence presented in

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<sup>79</sup> *ibid*, pp. 104, 113–114.

<sup>80</sup> *ibid*, pp. 148–149.

<sup>81</sup> *ibid*, pp. 147–148.

<sup>82</sup> *ibid*, p. 107.

<sup>83</sup> *ibid*, pp. 104–105.

court, resulted from the existence of an exception to the rule that the jury be comprised of witnesses. This exception existed for cases where deeds were disputed. In such cases witnesses were summoned to testify for either side, in addition to the usual twelve jurors.<sup>84</sup> Thus, in these cases there were witnesses who were separate from the jurors. As time passed and juries were used more frequently, witnesses generally began to give testimony before them—in the same way as witnesses had done earlier for cases involving disputes about deeds. A further impetus for this change in the jury's nature was the need to sometimes address a preliminary question before the jurors could consider the matter for which they had been summoned. In order for jurors to be informed about this preliminary issue, evidence was given by witnesses.<sup>85</sup>

1.48 By the eleventh year of Henry IV's reign (1409–1410) the jury was required to consider only the evidence given in court, and not any material given by one side privately.<sup>86</sup> However, since the jurors still came from the neighbourhood where the dispute arose, they were entitled to rely on their own personal knowledge of the facts. It was not until the reign of Henry VI (1422–1461) that juries tended to consist of men who were not informed about the facts in dispute, with those who had such knowledge being used as witnesses.

1.49 The manner in which jurors were selected reflected this change in the jury's nature. The sheriff acting under the king's writ would summon from the area where the facts were alleged to have occurred twelve good and lawful men who had *no relation* to either of the parties. Additionally, in civil cases, when some of the jurors failed to appear in court, suitably qualified bystanders were selected. These emergency jurors were called talesmen. This procedure was later applied to criminal cases by the statute 35 Hen. VIII. c. 6 (1543).<sup>87</sup>

1.50 Each party was allowed to challenge the jury in order to ensure that the sheriff in summoning it had not acted partially. The nature of the jury required that the jurors be indifferent to the dispute, and where any of them were shown by the oaths of two of the men thereon not to be indifferent, a

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<sup>84</sup> *ibid*, pp. 127–128.

<sup>85</sup> Stone, *op. cit.*, pp. 261.

<sup>86</sup> Forsyth, *op. cit.*, pp. 131.

<sup>87</sup> *ibid*, p. 143.

new jury was called.<sup>88</sup> A new panel was also necessary where a potential juror was corrupt or malicious. This new panel was selected by two of the clerks in the court, who each gave an oath as to the indifferent nature of the panel.<sup>89</sup> Each party could then challenge individuals on the panel for cause, such as where the juror was related to a party, or where a juror possessed an interest in the dispute.

### *Trial 'by the Country'*

1.51 Following the abolition of trial by ordeals of water and fire (after a writ issued by Henry III early in 1219), an accused had a choice between trial by ordeal of battle and 'putting himself upon his country for trial'. 'Trial by the country' refers to jury trial. It is so called because the jury, chosen not by the accused but by the justices, consisted of any twelve of those representing each hundred.<sup>90</sup> The jury was therefore representative of the county where the dispute arose, and the accused in accepting trial by jury had agreed to abide by the verdict of his neighbours; that is, the opinion of the country.<sup>91</sup> This is to be contrasted with trial by ordeal, where the accused submitted to the judgment of God (*judicium Dei*).

1.52 The requirement that jurors be representative of the area where the dispute arose was initially very important. The jurors, as witnesses, were required to base their decision on their personal knowledge of the alleged facts, and it was a ground of challenge if the jurors were not hundredors of the district in which the dispute arose.<sup>92</sup> However, when the character of the jury changed (so that it was no longer comprised of witnesses) the principle that the jury have personal knowledge weakened. It became sufficient for the jury to have two hundredors in it (under the Stat.27 Eliz. ch.6), and then that jurors merely be good and lawful men of the body of the country (6 George IV. ch.50).<sup>93</sup>

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<sup>88</sup> *ibid*, pp. 132–133.

<sup>89</sup> *ibid*, p. 132.

<sup>90</sup> *ibid*, p. 170.

<sup>91</sup> Pollock and Maitland explain the term "trial by country" in this way: 'the voice of the twelve men is deemed to be the voice of the country-side, often the voice of some hundred or other district which is more than a district, which is a community'. See Pollock & Maitland, *op. cit.*, vol. ii, p. 624.

<sup>92</sup> Forsyth, *op. cit.*, p. 138.

<sup>93</sup> *ibid*.

### *Trial 'by One's Peers'*

1.53 According to *The Oxford English Dictionary*, the word 'peer' means 'an equal in civil standing or rank; one's equal before law'.<sup>94</sup> The only way in which trial by jury could be said to be 'by one's peers' was in the sense that jurors were not government servants or holders of regular office.<sup>95</sup> At the start of the nineteenth century, the jury was not representative of the community as a whole. The jury pool was restricted to lawful knights who, as members of the local community, had personal knowledge of the facts in dispute and who owned property as a result of their position and rank. Since the arrival of the assize judge was seen as being a significant social event, most jurors were selected from the upper classes.

1.54 The representativeness of the jury was weakened further by the tendency for some sheriffs to act partially in the exercise of their broad discretion in selecting potential jurors. This undesirable situation was remedied in part by the introduction of the *Juries Act 1825*, which stated that to qualify for jury service as a common juror the person must have property to the annual value of at least twenty pounds.<sup>96</sup> The franchise continued to be unrepresentative of the community as a whole. Accordingly, even as late as 1956, Lord Devlin described the typical juror as being 'male, middle-aged, middle-minded and middle-class'.<sup>97</sup>

1.55 Nevertheless, there was a type of jury trial by one's peers for inquests involving allegations of high treason and felony against barons and earls. In these cases, a special jury consisting of a select body of twenty-three peers (barons and earls) chosen by the Lord High Steward was summoned. It seems, therefore, that the accused could not elect to be tried by a jury selected in the usual way, that is, as for a commoner.<sup>98</sup>

1.56 Article 39 of the Magna Carta (1215) includes a reference to 'trial by one's peers'. It provides that:

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<sup>94</sup> *The Oxford English Dictionary*, 2nd edn., eds. Simpson J.A. & Weiner E.S.C., Clarendon Press, Oxford, 1989.

<sup>95</sup> Cornish, *op. cit.*, p. 26.

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*, p. 28.

<sup>98</sup> Oldham, J.C., 'The origins of the special jury' (1983) 50 *University of Chicago Law Review* 137, 159.



No freeman shall be taken or imprisoned or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him **unless by the lawful judgment of his peers, or by the law of the land.**

In the original Latin the words which are in bold type read *nisi per legale iudicium parium suorum vel per legem terræ*. These words have been the subject of much discussion.

1.57 In 1765 Sir William Blackstone regarded these words as providing a guarantee of trial by jury. He concluded that:<sup>99</sup>

The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which as the grand bulwark of his liberties, is secured to him by the great charter.

1.58 However, it is now generally accepted that Article 39 does not provide such a guarantee. According to Professor F.W. Maitland, this is because in 1215 the word  *pares* (peers) did not refer to jurors. Instead, it was used to mean equals. The phrase means that a free man is not to be judged by villeins; and in feudal courts the vassal is not to be judged by sub-vassals. Maitland warned against applying the wrong meaning to the phrase *nisi per legale iudicium parium suorum vel per legem terræ*. He observed that:<sup>100</sup>

[R]eference to trial by jury; the verdict of a jury, the testimony of a body of neighbour witnesses, was in no sense a **judicium**. *The demand [made of King John by the barons] is of quite different kind; the barons want a court of their equals – they are to be judged by barons.* [italics added]

1.59 Forsyth also concluded that the phrase 'trial by peers' as it appears in *Magna Carta* did not refer to jury trial. He gave three reasons for reaching this conclusion:<sup>101</sup>

1. The words *iudicium parium* (judgment of one's peers) were used well before 1215. In the *Leges Henrici Primi* (1100–1135) the phrase referred to trial before members of the county and other courts who discharged the function of judges, rather than trial by jury. These words were themselves taken by the compiler of the laws of Henry I from the capitularies of Louis IX of France,

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<sup>99</sup> Blackstone, Sir William, *Commentaries on the laws of England*. Clarendon Press, Oxford, 1765.

<sup>100</sup> Maitland, F.W., *Constitutional History of England*, Cambridge University Press, Cambridge, 1908, p. 169.

<sup>101</sup> Forsyth, *op. cit.*, pp. 91–95.

where, as Forsyth points out, no institution such as a jury existed until the First Revolution (1792).

2. It is doubtful whether the words *judicium parium* could ever have applied properly to the verdict of a jury in the early stages of its development. This is because jurors were merely witnesses on facts with which they were acquainted. They could not in any relevant sense be said to pronounce a judgment (*judicium*) on those facts.
3. Although, there are a number of instances prior to the *Magna Carta* where the office of trier and witness were intertwined, there is no evidence of the intervention in the legal process of a body of third parties corresponding to a jury.

### *The Development and Role of Special Juries*

#### Types of Special Jury

1.60 There were two types of jury: the special jury and the common jury. The development and role of common juries has been dealt with above. The special jury, as used in civil trials, consisted of jurors with a higher property qualification than the common juror. In 1450 to qualify as a special juror a person had to live in the relevant shire and have lands of a yearly value of £ 20.<sup>102</sup> The application of a specific property qualification was thought to reduce the chance of corruption and therefore perjury by the juror. A wealthy juror was presumed to be immune from bribery. Later the special jury list was extended to include esquires, and persons of a higher degree than bankers and merchants and just below that of a knight.<sup>103</sup>

1.61 Between 1645 and 1646 a jury of merchants was used for disputes between two merchants. This type of jury was thought to have a better knowledge of complex commercial matters being disputed, than would a jury of persons outside the profession. Other examples of special juries included juries of cooks, fishmongers, booksellers, printers and, in the case of alleged forgery of writs, juries of clerks and attorneys.<sup>104</sup>

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<sup>102</sup> *ibid.*, p. 143.

<sup>103</sup> Statute 6 Geo. IV. ch. 50.

<sup>104</sup> Forsyth, *op. cit.* p. 144. See also, Thayer, J.B., *A Preliminary Treatise on Evidence at the Common Law*, Little, Brown, and Co., Boston, 1898, pp. 94–95.

1.62 Generally, these special qualifications were intended to ensure that intelligent persons served on juries and that "men of quality" did not avoid jury service.<sup>105</sup> Furthermore, special juries were necessary as corrupt sheriffs were accepting payment from those who wished to be excused from jury service. This in turn meant that only the poor and ignorant tended to serve on juries. In 1607 this problem resulted in James I making the *Proclamation for Jurors*, which provided:<sup>106</sup>

[Jury service] oftentimes resteth upon such as are either simple and ignorant, and almost at a gaze in any cause of difficultie, or else upon those that are so accustomed and inured to passe and serve upon Juries, and they have almost lost that tenderesses of Conscience, which in such cases is to bee wished, and make the service, as it were an occupation and practice.

1.63 Accordingly, the special jury was either comprised of people of higher social status than those in the common jury, or alternatively, of persons with a specialist knowledge in the relevant field. This knowledge was useful because the verdict was based on the jurors' knowledge of the disputed facts. Hence, the rationale for the use of special juries was that a special juror would be duly qualified in all aspects of his office, which, in turn, would improve the administration of justice.<sup>107</sup> Although the actual date when the special jury originated is not known, it is said to have developed from custom.

1.64 The special jury was also used in criminal cases. During the late seventeenth century it consisted of men with a high social status. However, in this instance the lack of any definite qualification led to jury fixing by the government.<sup>108</sup>

1.65 A further, though rare, form of special jury was the jury of Matrons. It consisted only of women. In criminal cases where capital punishment could result, this jury was used to determine whether a woman was pregnant. A finding of pregnancy could lead to a stay of sentence at least until after the birth.<sup>109</sup>

#### Selection of Special Jurors

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<sup>105</sup> Oldham, p. 140-141.

<sup>106</sup> *ibid.*, p. 142 citing A Proclamation for Jurors by King James I (Oct. 5, 1607).

<sup>107</sup> Forsyth, *op. cit.*, p. 143.

<sup>108</sup> *ibid.*

<sup>109</sup> Oldham, *op. cit.*, p. 171.

1.66 The procedure governing the selection of special jurors (or the 'struck jury' as it was called) differed to that for used for common jurors. The names on the special jury list were placed into a box and forty-eight randomly selected. Either party could object to any of these names after giving a reason, and if their objection was substantiated, the name was discarded and another drawn. The next step involved twelve further names being removed by each party, without giving a reason. The remaining twenty-four men were summoned.<sup>110</sup>

#### Use of Special Juries

1.67 Special juries were originally introduced in trials at the bar (that is, trials before the Full Court comprised of several judges). The sheriff brought the jurors to the Court of Westminster from the county where the dispute arose.<sup>111</sup> As mentioned above, the procedure was used where 'causes were of too great nicety for the discussion of ordinary freeholders'.<sup>112</sup> Special juries were also used for cases where the sheriff was suspected of being biased, but not to an sufficient extent to form the basis for taking an exception to him.

1.68 By 1730 either party in a criminal or civil case could request the use of special juries, provided they paid for the additional cost. By requesting this form of jury, the parties would benefit not only by obtaining a better class of juror, but more importantly, by being able to choose the jurors. However, the use of a special jury was not an automatic right.<sup>113</sup>

1.69 By the end of the nineteenth century, the special jury had largely fallen into disuse except in one particular type of case. The remaining form of special jury which was used at this time was called the City of London Special Jury; it was abolished in 1971 by *The Courts Act 1971*.<sup>114</sup> In 1949 it was abolished by the *Juries Act*.<sup>115</sup>

#### *The Jury de Medietate Lingua*

1.70 The jury *de medietate lingua* (or party jury) originated in 1302/03. Pursuant to a charter of Edward I, foreign merchants involved in pleas had

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<sup>110</sup> Forsyth, op. cit., p. 145; Oldham, op. cit., pp. 176–209.

<sup>111</sup> Thayer, op. cit., p. 95; Blackstone, op. cit., vol iii, p. 383; Oxford English Dictionary.

<sup>112</sup> Blackstone, op. cit., p. 357.

<sup>113</sup> Thayer, op. cit., p. 97.

<sup>114</sup> *The Courts Act 1971*, ch.23, s.42. See Oldham, op. cit., p. 210.

<sup>115</sup> Statutes 12 & 13 Geo 6, ch 27, ss.18–19. *ibid*.

the right to request that half the inquest be comprised of foreign merchants living in the relevant city. These foreign merchants did not have to come from the same country as the parties in dispute. The other half of the inquest would be comprised of local men. If six foreign merchants were not available, then other merchants were used.<sup>116</sup> Initially, under the *Statute of the Staple* the party jury applied only to civil cases. However, it was extended to criminal cases by *28th Edward III., cap.13*.<sup>117</sup> Later, provision was made in civil cases where the parties in dispute were both foreign merchants, for the jury to be comprised only of foreigners.<sup>118</sup>

1.71 Considerations of policy and fairness motivated the use of the party jury, rather than a desire that the jury be well-informed.<sup>119</sup> This type of jury was also used in university and ecclesiastical courts.<sup>120</sup> However, by the late eighteenth century the party jury was scarcely used, because there were too many instances where it was unavailable. For example, it was not used in cases involving Egyptians, treason trials, actions relating to importing and exporting which were governed by statutes, grand juries and in criminal cases where the defendant had pleaded not guilty, thereby requiring the use of a common jury.<sup>121</sup>

### *Coroner's Jury*

1.72 The coroner's jury was established by *De Officio Coronatoris*, 4 Edw. I. st. 3 (1276). The coroner, at the request of the bailiffs of the King or honest men of the county, would go to where someone had recently died or was wounded, and then summon an indeterminate number of jurors from the nearest towns. The jurors were required to inquire on oath into the relevant facts; such as the location where the deceased had been killed, who was present and who was responsible.<sup>122</sup> Later, in order for there to be an inquest finding, it became necessary for at least twelve of the people summoned to agree on the facts. The parties charged could only then be tried by a petty jury.

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<sup>116</sup> Forsyth, op. cit., p. 189.

<sup>117</sup> *R. v Valentine* (1871) 10 N.S.W. R. (L) 113, 119 per Stephen C.J.

<sup>118</sup> Forsyth, op. cit., p. 190.

<sup>119</sup> Oldham, op. cit., p. 167.

<sup>120</sup> *ibid.*, p. 169.

<sup>121</sup> *ibid.*, p. 170.

<sup>122</sup> Forsyth, op. cit., pp. 187-188.

## Introduction of the Jury System into the Colony of New South Wales and its Evolution up to 1851

### *Introduction of the Jury System*

1.73 The introduction of the jury system into Australia did not simply involve the early colonists importing the English system. Instead, the introduction of the jury system was a gradual process, with many modifications.<sup>123</sup> Before the introduction of the jury system into New South Wales, an inquisitorial tribunal of six military or naval officers, together with the Deputy Judge Advocate, determined allegations relating serious criminal offences. The adoption of the criminal jury trial occurred over time, while the adoption of the civil jury trial was an even slower process.<sup>124</sup>

### *The First English-Style Jury in Australia*

1.74 The English-style jury was first used in New South Wales in November 1789, this was at a time when the use of trial by jury was generally forbidden. The case concerned Anne Davis, who claimed to be pregnant. A jury of matrons was summoned in a manner which accorded with English law. It therefore consisted of twelve of the 'discreetest women' among the convicts who had been mothers.<sup>125</sup>

1.75 Later, during the first decade of the nineteenth century, another form of jury trial was used, this time for coronial inquests. The sheriff would summon as a jury twenty-four 'good and lawful men of the country, freed men as well as free' to act as a coroner's jury.<sup>126</sup>

### *The Campaign for Trial by Jury*

1.76 The introduction of jury trial into the colony of New South Wales faced much resistance from the British Government, and was only obtained after many years of campaigning. Two significant concerns motivated the campaign for the introduction of trial by jury.<sup>127</sup> First, there was concern about the threat to judicial independence posed by the British Government's

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<sup>123</sup> Evatt, op. cit., p.52.

<sup>124</sup> *ibid.*, p. 53.

<sup>125</sup> Castles, *A.L.J.*, p. 506.

<sup>126</sup> *ibid.*, p. 507.

<sup>127</sup> Neal, D.J., *The Rule of Law in a Penal Colony : Law and Power in Early New South Wales*, Cambridge University Press, Cambridge, 1991, p. 168.

power to dismiss colonial judges. Secondly, concern arose because the panel of military officers and assessors of the Civil Court had shown partiality in cases involving the military. At that time there was no right of challenge, and no opportunity to challenge the array or individual officers.

1.77 The campaign for trial by jury was taken up by free settlers (as early as 1791) and various governors; including, Hunter (1812), King (1801), Bligh (1807) and Macquarie (1810). Macquarie (who supported the ideas of Judge-Advocate Bent), favoured the establishment of an English-style jury on the grounds that, once a convict had become a free man, he should be on equal footing with every other man in the colony, and therefore, able to serve on a jury.<sup>128</sup>

1.78 Apparently, the campaign was resisted on the basis that there were far more convicts than free settlers in the colony:<sup>129</sup>

It was a matter of doubt whether, in a Society so constituted as that of New South Wales, Individuals might not bring with them into Court Passions and Prejudices ill fitted for the discharge of their duty as Jurymen, and it was also feared that, if Free Settlers...were to sit in Judgement on Convicts, and that too in Cases where Settlers might be parties, the principle of Jury trial that a Man should be tried by his Peer could not fairly be acted upon.

1.79 John Thomas Bigge, who at this time was conducting a Royal Commission of Inquiry into Macquarie's administration, did not support the efforts of the emancipists in seeking to establish a right to jury trial. Bigge, in his report on the state of the legal system in New South Wales, sought to discredit and censure Macquarie and his administration.<sup>130</sup> The Bigge's Report stated that: 'the period is not yet arrived at which the system of trial by jury can be safely or advantageously introduced into the civil and criminal proceedings of the colony'.<sup>131</sup> This report provided the British Government with a justification for refusing to act upon the petitions it had received.<sup>132</sup> Significantly, the Bigge's report was based upon a reply from Justice B. Field (which had been requested by Bigge). The reply indicated that the jury system

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<sup>128</sup> Bennett, J.M., 'The establishment of jury trial in New South Wales', (1959–1961) 3 *Sydney Law Review* 463, 464–465. (Hereafter Bennett, *S.L.REV.*).

<sup>129</sup> *ibid.*, p. 465, citing Earl Bathurst, *Historical Records of Australia*, series IV, vol. i, p. 171.

<sup>130</sup> Bennett, J.M., 'The establishment of jury trial in New South Wales', (1963) *Australian Police Journal* 295.

<sup>131</sup> Bigge, J.T, *The Report on the Judicial Establishments of New South Wales and Van Diemen's Land*, 21 February 1823, (Cmnd. 33).

<sup>132</sup> Bennett, *S.L.REV.*, pp. 466–467.

would be unworkable at this time. The period of time was characterised as being such that:<sup>133</sup>

[T]he local government preferred the convict to the freeman and caused a struggle for rights and privileges against those mere creatures of pardon and indulgence, who hold and sue for property by the mere sufferance and bounty of those laws which they have violated.

1.80 Moreover, according to the report, there were three main reasons for rejecting the jury system; namely:<sup>134</sup>

1. There was too much class distinction (or factionalism) between the free settlers and the freed settlers for the system to operate impartially.
2. There were insufficient numbers of competent jurors to implement the system.
3. Serving on the jury would greatly inconvenience people.

1.81 However, according to Edward Edgar, the reality of the situation was quite different.<sup>135</sup> He observed that the petitions for jury trial showed that the petitioners were serious about their request and were unified in their support for the right to trial by jury. The contention that there was a lack of competent jurors was wrong, because it ignored traders and merchants who satisfied the necessary property qualification.<sup>136</sup> Furthermore, the inconvenience of serving on a jury would be no greater than that which applied in England.<sup>137</sup>

### *Statutory Progress in Obtaining Jury Trial*

1.82 Statutory progress in obtaining the jury trial was slow. The first step occurred in 1823 with the enactment by the Imperial legislature of the *New South Wales Act 1823*.<sup>138</sup> Before this enactment, the judicature system in New South Wales had denied the right to trial by jury. The Act provided for a judge and jury of seven commissioned officers, nominated by the Governor, to try criminal issues before the Supreme Court.<sup>139</sup> However, due to the fact

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<sup>133</sup> *ibid.*, p. 467.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*, pp. 468–469.

<sup>136</sup> *ibid.*

<sup>137</sup> *ibid.*

<sup>138</sup> Statute 4 Geo. IV, c.96

<sup>139</sup> Statute 4 Geo. IV, c.96, s. 4. See the discussion of this Act by Evatt, *op. cit.*, p. 53.



that only commissioned army and navy officers were ever nominated, there was no real jury trial (by one's peers).<sup>140</sup> In civil cases provision was made, by section 6 of the Act, for a tribunal system. It stated that in civil matters a Judge and two assessors, being Justices of the Peace nominated by the Governor, would determine the case. They could be challenged on the grounds that they were directly interested in the case.<sup>141</sup> Where property valued at £ 500 or more was involved and both parties agreed to trial by jury, a jury trial could occur. Under this system, a wrongdoer was able to prevent a jury being called.<sup>142</sup>

1.83 The next step towards obtaining jury trial resulted from the interpretation given by the then Chief Justice of New South Wales, Forbes, to section 19 of the *New South Wales Act 1823* in the decision *R v Magistrates of Sydney*.<sup>143</sup> In response to the question: Are Sydney magistrates required to empanel grand and petit juries for the trial of free settlers at the Quarter Sessions? he answered "yes". Consequently, the section was able to be used to introduce jury trial into the Court of Sessions. His Honour found that, although Parliament had not intended jury trial to occur in the Supreme Court, the lack of words excluding jury trial from the Courts of Sessions meant that the law and practice of England applied, including trial by jury.<sup>144</sup> In so doing, he emphasised the value of trial by jury in terms of its constitutional necessity for trials of serious criminal offences, in the absence of legislation to the contrary.<sup>145</sup> Two years later petitioners argue for an extension of the use of jury trial, based on the effective operations of the Court of Sessions compared to that of the Supreme Court.

1.84 The *Administration of Justice Act 1828*<sup>146</sup> was then enacted by the British legislature. It gave the Governor-in-Council the power to 'extend and apply' the manner and form of proceedings by Grand and Petty juries, as well as to fix the qualifications and numbers of the jurors.<sup>147</sup> Pursuant to this power the colonial authorities enacted an *Act for regulating the constitution of Juries for the*

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<sup>140</sup> Bennett, *S.L.REV.*, p. 469.

<sup>141</sup> Forgie, S., 'Challenge to the Array', (1975) 49A. *L. J.* 528, 534.

<sup>142</sup> Evatt, op. cit., p. 53.

<sup>143</sup> Castles, A.C., 'The judiciary and political questions: the first Australian experience, 1824-1825', (1973-1976) 5 *Adelaide Law Review* 294, 295 (hereafter Castles, *A.L.Rev.*) citing *Sydney Gazette*, 21st October, 1824, vol.XXII, no. 1092; Bennett, *S. L. R.* 470.

<sup>144</sup> Castles, *A.L.Rev.*, p. 304.

<sup>145</sup> Castles, *A.L.J.*, p. 508.

<sup>146</sup> Statute 9 Geo. IV., c. 83

<sup>147</sup> Bennett, *S.L.Rev.* 472.

*Trial of Civil Issues in the Supreme Court 1829.*<sup>148</sup> However, this Act merely preserved the status quo relating to jury trials for civil issues. There remained no jury of twelve in criminal cases. In December 1831 the enactment expired.

1.85 The power to extend and apply the form and manner of proceedings by grand and petty juries was then given to the Legislative Council by the British Parliament, under an Order in Council dated 28 June 1830.<sup>149</sup> Nevertheless, this concession towards jury trial did little good as the Council opposed extending the jury system.

### *The Jury Trial in New South Wales*

1.86 In 1832 the Legislative Council of New South Wales, with much prompting from Governor Bourke, passed an Act which prescribed that trials of all civil matters were to be heard before a civil jury of twelve. Every male resident in the County of Cumberland, subject to exemptions, aged between twenty-one and sixty who had real estate producing an income of at least thirty pounds annually, or a personal estate worth three hundred pounds, was a competent juror. Esquires and persons of higher degree, Justices of the Peace, merchants and bank directors were eligible to serve as special jurors.

1.87 Significantly, the Act also allowed limited use of trial by jury for criminal trials. Where the accused proved that the Governor or a member of the Executive Council was the person against whom the offence was alleged to have been committed, or that he had a personal interest in the result of the prosecution, or that the personal interest or reputation of any officer stationed in the Colony would be affected by the result of the prosecution, the accused was to be tried by a jury of twelve civil inhabitants of the Colony.<sup>150</sup>

1.88 The next development occurred in 1839 with the enactment of the statute 3 Vic. No. 11 which abolished military trials, and allowed criminal issues of fact to be determined by a jury of twelve.<sup>151</sup>

1.89 Trial by assessors was finally abolished in 1844 by the statute 8 Vic. No. 4, following the efforts of Alfred Stephen, a Supreme Court judge. The

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<sup>148</sup> Statute 10 Geo. IV, No.8

<sup>149</sup> Bennett, *S.L.Rev.* 473.

<sup>150</sup> Statute 2 Wil. IV, No.3; *ibid.*, pp. 473–474.

<sup>151</sup> *ibid.*, p. 476.

assessors were replaced by a jury of four in civil cases, and the parties had the option of seeking a jury of twelve.<sup>152</sup>

1.90 These developments became permanent features of the administration of justice in the Colony of New South Wales with the enactment in 1847 of *An Act to amend the Laws relative to Jurors and Juries in New South Wales*.<sup>153</sup> Thus, the campaign for full jury trial was ultimately successful.

## The Introduction of the Jury System into the Colony of Victoria and its Evolution up to 1900

### *The Situation Leading up to the Establishment of the Victorian Supreme Court*

1.91 From their foundation, the eastern states of Australia formed part of the colony of New South Wales. From 1836 to 1850 what was later to become the colony of Victoria was known as the Port Phillip District of New South Wales. Accordingly, the administration of justice, including trial by jury, initially was controlled by New South Wales legislation. Only after the introduction of responsible Government in Victoria in 1851 was Victorian legislation, which was similar to that in New South Wales, enacted.

1.92 The Port Phillip District of New South Wales became the colony of Victoria as a result of the enactment of the *Australian Constitution Act 1850 (Imp)*.<sup>154</sup> Before the establishment of the Supreme Court of Victoria in 1852, Victoria was dependent upon the Supreme Court of New South Wales.<sup>155</sup> The campaign for both the independence of the Colony of Victoria from New South Wales, and the establishment of the Supreme Court of Victoria, is discussed below. This campaign resulted in the evolution and development of the Victorian jury trial.

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<sup>152</sup> *ibid.*, p. 481.

<sup>153</sup> Statute 11 Vic. No. 20

<sup>154</sup> Statutes 13 & 14 Vict. c.510. See, Law Reform Commission of Victoria, *The Role of the Jury in Criminal Trials*, Background Paper No. 1, Appendices, [Law Reform Commission of Victoria], [Melbourne], 1985, p. 119.

<sup>155</sup> See *Supreme Court (Constitution) Act 1852*. The court was called the 'Supreme Court of New South Wales for the District of Port Phillip Now called as and Being the Colony of Victoria'. In 1852 the Supreme Court of Victoria was established by the Colonial Act. See, Law Reform Commission of Victoria, *op. cit.*, pp. 119-120.

### *The Campaign for the Establishment of Law Enforcement*

1.93 In June 1836 a public meeting was held in the District of Port Phillip. The meeting sought the appointment of a resident magistrate to enforce the laws of New South Wales in the district. Shortly thereafter, the Colonial Secretary, Lord Glenelg, approved New South Wales Colonial Government control of the colonising enterprises.<sup>156</sup> As a consequence, Governor Burke sent William Lonsdale, together with 33 soldiers and three constables, to the District. Lonsdale established a police magistrate's court, and by 1837 he was being assisted by military subalterns acting as justices of the peace. In 1838 police magistrates were appointed to the Werribee River and Geelong areas.<sup>157</sup>

1.94 The establishment of official rule at Melbourne had been mainly in order to provide a way to settle disputes among the squatters, and to discipline convict servants. In Geelong, the appointment of a magistrate followed the requests of the settlers for protection against alleged assaults by aboriginal tribes on shepherds and flocks. However, the protection of Aborigines was said to have been a main reason for the magistrate's appointment.<sup>158</sup> The magistrates applied traditional principles of British justice, as modified by the New South Wales legislature.<sup>159</sup>

1.95 However, only minor criminal cases were able to be heard locally by the police magistrate. The most serious criminal cases had to be referred to Sydney for trial.<sup>160</sup> For hearings of serious criminal cases and civil cases there was a fourteen day journey to Sydney. This journey, together with delays on arrival, meant that hearings were quite an ordeal for those involved.<sup>161</sup>

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<sup>156</sup> Cannon, M., *Old Melbourne Town Before the Gold Rush*, Loch Haven Books, Main Ridge, Victoria, 1991, p. 132.

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.* Cannon & Jones, P., *I Historical Records of Victoria*, vol. 1, *Beginnings of Permanent Government*, Victorian Government Printing Office, Melbourne, 1981, p. 218.

<sup>159</sup> Cannon & Jones, *op. cit.*, p. 263.

<sup>160</sup> Castles, A.C., *An Australian Legal History* (Sydney: Law Book Co., 1982), pp. 230-231, 238. (Hereafter Castles, *Legal History*).

<sup>161</sup> Law Reform Commission of Victoria, *op. cit.*, p. 117.

## *The Establishment of the Court of Quarter Sessions and the Early Use of Jury Trials*

1.96 The establishment of the Court of the Quarter Sessions in Melbourne in May 1839 enabled trials of serious criminal offences, other than those punishable by death, as well as appeals against decisions of the magistrates' court, to be heard in Melbourne and on circuit in other settlements.<sup>162</sup> Edward Jones Brewster, an Irish-born barrister, was appointed as the Court's first chairman. In the first sessions civilian and military juries were used for cases.<sup>163</sup> Thus, on 14 May 1839 the first criminal jury was empanelled in Victoria to hear a charge that the accused had stolen a pair of trousers with a shilling in the pocket. He was found not guilty by reason of insanity.<sup>164</sup>

1.97 Jury trial, along the lines of that used in the Supreme Court of New South Wales, was provided for by *An Act to provide for Trial by Jury at the Courts of Quarter Sessions to be held at Melbourne and Port Macquarie*.<sup>165</sup> Twelve jurors were selected from the District's inhabitants who resided within 50 miles of the each of the court towns. The same qualifications, exemptions and disqualifications relating to the selection of jurors in the Supreme Court of New South Wales were applied.<sup>166</sup>

1.98 All civil disputes and criminal offences which were punishable by death were required to be heard in Sydney.<sup>167</sup> In order to draw attention to the need for courts with greater criminal jurisdiction and civil jurisdiction in Melbourne, the New South Wales Attorney General, J.H. Plunkett, commented on the inconvenience associated with travelling to Sydney. He observed that:<sup>168</sup>

The length of time that must unavoidably be consumed by witnesses in coming to Sydney and returning, is looked on as so great a hardship upon them that the ruinous effect it is calculated to have on their private affairs is enough to deter any person from coming forward to make themselves liable to it, and may eventually be of very pernicious consequences to the peace and tranquillity of that place.

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<sup>162</sup> Cannon & Jones, *op. cit.*, p. 273.

<sup>163</sup> The use of military juries ceased in 1840.

<sup>164</sup> Castles, *Legal History*, pp. 236–237.

<sup>165</sup> Statute 2 Vic. No.5

<sup>166</sup> Cannon & Jones, *op. cit.*, pp. 278–279.

<sup>167</sup> Castles, *Legal History*, p. 138.

<sup>168</sup> Cannon & Jones, *op. cit.*, p. 274.

### *Developments in the 1840's*

1.99 After further campaigning, the New South Wales legislature enacted legislation to enable a single judge of the Supreme Court to reside at Port Phillip. The first person to hold this position was Judge John Walpole Willis, who was appointed in 1841 as Resident Judge to hear all civil and equitable cases as well as serious criminal cases—including those punishable by death—in Melbourne and Geelong. However, this proved to be an unsatisfactory situation, because the workload was too great for one judge, and the litigants were spread throughout the colony.<sup>169</sup>

1.100 Acting pursuant to British legislation,<sup>170</sup> the New South Wales legislature established in 1840 the Court of Requests to hear civil cases in Melbourne.<sup>171</sup> Following this and other experiments with civil juries, the New South Wales *Juries Act 1847* was passed.<sup>172</sup> The Act applied to the Port Phillip District and was consistent with the earlier New South Wales legislation relating to juries. It provided for trial by a common jury consisting of free men with an income of £ 30 per year or property worth £ 300, provided that they were otherwise eligible.<sup>173</sup> Provision was also made for the use of a special jury in criminal cases—other than treason and felony—at the request of either of the defendant, the Attorney-General or the Crown Prosecutor.<sup>174</sup> Depending on the type of case, these special juries consisted of esquires, persons of a higher degree, Justices of the Peace, Merchants, Bank Directors or members of the Council of the City of Sydney or the Town of Melbourne.<sup>175</sup>

### *The Establishment of the Victorian Supreme Court*

1.101 It was not until 1852 that the Supreme Court of Victoria was established in response to a report to the Governor by the Attorney-General, William Stawell and the Solicitor-General, Redmond Barry. The report

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<sup>169</sup> Statute 4 Vic. No.22. Law Reform Commission of Victoria, op. cit., p. 119., citing an official report September 1851 by the then Attorney-General W.F. Stawell and Solicitor-General Redmond Barry. See also, *ibid.*, p. 117.

<sup>170</sup> Statute 10 Geo. IV c. 83

<sup>171</sup> Statute 3 Vic., No.6. See also, Cannon & Jones, op. cit., p. 291.

<sup>172</sup> Statute 11 Vic. 20.

<sup>173</sup> Law Reform Commission of Victoria, op. cit., p. 120.

<sup>174</sup> Sections 10 & 18 of the *Juries Act 1847*, with later Acts also providing for special juries, for example, *Juries Act 1857*, *Juries Statute 1865*, *Juries Statute 1876* and *Juries Act 1890*. See, Law Reform Commission of Victoria, op. cit., p. 133.

<sup>175</sup> *ibid.* Special juries were not abolished in Victoria until in 1956 the *Juries Act 1956* consolidated the law relating to juries and failed to provide for them.

referred to the need for a judicial establishment which was independent of the Colony of New South Wales. This position was taken because a single judge of the New South Wales Supreme Court residing in Port Phillip was insufficient to deal with the workload.<sup>176</sup>

### *Juries in Civil Cases*

1.102 The final major change to occur in relation to the Victorian jury system prior to 1900 was the decline in use of juries in civil cases, after the enactment of the *Judicature Act 1883* (Vic). This Act limited the right to jury trial to civil cases where the right had existed at that date, subject to the Court being able to decide to exercise its discretion to grant a jury trial.<sup>177</sup>

## The Nature of the Right to Jury Trial in Victoria

1.103 The right to jury trial in Victoria is a statutory right only. Section 2 of the *Constitution Act 1975* (Vic) provides that:

All laws which at the commencement of this Act are in force within Victoria shall remain and continue to be of the same force authority and effect as if this Act had not come into force except in so far as the same are repealed or varied by or under this or any subsequent Act.

1.104 The applicability to Victoria of Imperial Legislation is governed by section 3 of the *Constitution Act* which states that:

- (1) Subject to the **Imperial Acts Application Act 1922** [now 1980] all laws and statutes in force within the realm of England on the 25th day of July, 1828 (not being inconsistent with any law now in force) shall be applied in the administration of justice in the courts of Victoria, so far as they can be applied within Victoria.

Where doubt exists as to whether an Imperial Act is in force in Victoria, section 3(2) empowers the Victorian Parliament to 'declare whether such laws or statutes shall be deemed to extend to Victoria, and to be in force within Victoria'.

1.105 The schedule of the *Imperial Acts Application Act* includes the Magna Carta, so that it may form part of the law in Victoria, provided that it has not

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<sup>176</sup> Law Reform Commission of Victoria, *op. cit.*, 119-120. The Supreme Court of Victoria was established by the Victorian *Supreme Court (Constitution) Act 1852*.

<sup>177</sup> Section 38 of the *Judicature Act 1883*; See, Law Reform Commission of Victoria, *op. cit.*, p. 122.

been impliedly or expressly repealed by any Act in force in Victoria. The Magna Carta has arguably come to confirm the right to jury trial. As observed by Lord Devlin, the basis for saying that the right to jury trial is confirmed by the Magna Carta depends on a popular misreading of it that has 'nurtured a custom that is now three centuries old'.<sup>178</sup>

1.106 However, in light of the High Court's decision in *Jago v District Court of New South Wales*,<sup>179</sup> the significance of the *Magna Carta* as a basis for the confirmation of rights generally must be doubted. In this case, even if the *Magna Carta* was re-enacted as contemporary legislation by the jurisdiction's *Imperial Acts Application Act* (namely, the New South Wales statute of 1969), the High Court denied that the right to a speedy trial was recognised in the *Magna Carta*. Two key reasons were given for this conclusion. First, the words of the *Magna Carta* which, according to Coke, provided a confirmation or restitution of the common law, were taken as stating aspirations and not law. Secondly, according to Toohey J, even if chapter 29 had been re-enacted as a part of local law in New South Wales, the actual language of that part of the Charter is ambiguous to the point that no principle of the right to a speedy trial can be based upon it.

1.107 If the *Magna Carta* is to provide the basis for the right to jury trial then similar arguments to those relating to its inability to be used as a means of guaranteeing speedy trial must be overcome. Additionally, it may be necessary to address the contention that this right may have been impliedly or expressly amended or repealed by legislation which erodes the right to jury trial by increasing the jurisdiction of magistrates. This second point arises out of the case of *Clarkson v Director-General of Corrections*.<sup>180</sup> In this case the Victorian Supreme Court found that section 6 of the *Habeas Corpus Act 1679* could not, after undue delay, be used to discharge a person alleged of having committed an offence.<sup>181</sup> This was because section 6 of the Act was inconsistent with legislation which gave judges a discretion as to the time and place of criminal trials.

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<sup>178</sup> Lord Devlin, 'Trial by Jury for Fraud' (1986) 6(3) *Oxford Journal of Legal Studies* 312.

<sup>179</sup> *Jago v District Court of New South Wales* (1989) 168 CLR 23.

<sup>180</sup> *Clarkson v Director-General of Corrections* [1986] V.R. 425.

<sup>181</sup> Fox, R., *Victorian Criminal Procedure*, 7th edn., Monash Law Book Co-operative, Clayton, Victoria, 1992, p. 183.



# JURIES AND COMPLEX TRIALS

BY MARK T COWIE

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## Introduction

There is no room in the criminal law for the idea that a case could be too complicated for a jury to understand.<sup>182</sup>

If the price of liberty be eternal vigilance we must surely be eternally vigilant about an institution on which our liberty is founded.<sup>183</sup>

2.1 The touchstone of a democratic society is the administration of its criminal justice system. At the heart of the Anglo-Australian system of criminal justice is the jury. 'Trial by jury has been a dynamic concept since it replaced trial by ordeal, battle and compurgation'.<sup>184</sup> Naturally the role of the jury as 'masters of facts' or the 'finders of fact' requires careful and deliberate specification, and the expectations for its consequences need to be declared.<sup>185</sup> The foundation and strength of the ideology and dynamism of the jury is reinforced by the significant jurisprudential formulation of granting lay people the latitude to apply their minds and senses of morality diligently to the resolution of a legal dispute.

2.2 Before proceeding, it is worth considering briefly some of the more obvious and legitimating value judgements associated with jury service. First, the jury is considered the *conscience of the community* ('jurors are bound to feel morally responsible for verdicts'<sup>186</sup>), because twelve randomly selected jurors represent the ethics of the community at large, as well as signify its independence from the state. Secondly, the jury is a *function of democracy* ('a

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<sup>182</sup> Devlin, P.(Lord) 'Trial by jury for fraud', (1986) 6 *Oxford Journal of Legal Studies* 3, 311.

<sup>183</sup> Connor, X, 'Trial by jury – can it survive?', *Law Institute Journal*, August 1987, 818.

<sup>184</sup> Law Reform Commission of Victoria, *The Role of the Jury in Criminal Trials*, Background Paper No. 1, Government Printer, Melbourne, Nov. 1985, p. viii.

<sup>4</sup> This position arises because the fact finding role is often defended on the ground that jurors collectively are better equipped than any judge to select relevant facts and to determine issues such as subjective intent or dishonesty.

<sup>186</sup> Dashwood, A., 'Jury and angry brigade', (1973) 11 *Western Australia Law Review*, 274.

little parliament'<sup>187</sup>, 'a microcosm of democratic society'<sup>188</sup> or 'the voice of the people'), because 'the use of juries keeps the criminal justice system in step with the standards of ordinary people'<sup>189</sup>; and because the community supports the criminal justice system as twelve of their number participate in it. Thirdly, the jury is a *safeguard against oppression* and *political interference* because it refuses to convict when the law is regarded as oppressive according to present community standards, or when improprieties in the investigation or prosecution are suspected, and because it minimises the effect of political influence and the advantages of wealth. Fourthly, it acts as *protection against corruption* and as a *safeguard against judges* who 'cease to be impartial',<sup>190</sup> or who are socially prejudiced or politically tainted. In short, trial by jury has been called, among other things: 'the citadel of freedom', 'the lungs of liberty', 'the conscience of the community', the 'cornerstone of our judicial process', and 'the touchstone of contemporary common sense'.

2.3 Throughout its history, as a noted English historian argued, the jury system 'seems to reveal a society at home with the notion that law and right are changeless truths discoverable by lawyers and laymen alike'.<sup>191</sup> In other words, 'the lifeblood of the jury system is that citizen participation is the epitome of a free society'.<sup>192</sup> From an Australian perspective, this rationale has recently been reiterated by the High Court:<sup>193</sup>

The essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being unbiased and detached.

2.4 While another justice of the High Court extended this principle by arguing strongly in favour of the retention of juries on the basis:<sup>194</sup>

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<sup>187</sup> Devlin (Sir), P., *Trial by Jury*, Hamlyn Lecture No. 8, 3rd. edn., Stevens and Sons, London, 1966, p. 164.

<sup>188</sup> Lord Simon in the debate over the unsuccessful Juries Amendment Bill in 1982, *Parl. Rep.* (House of Lords), vol. 346, coll. 611.

<sup>189</sup> New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper No. 12, 1985, p. 50.

<sup>190</sup> Dashwood, *op. cit.*, p. 247.

<sup>191</sup> Nelson, W., 'The eighteenth century background of John Marshall's constitutional jurisprudence', (1978) 76 *Michigan Law Review*, 904-917.

<sup>192</sup> Harding, R.W., 'Jury performance in complex cases', ed., Challenger, D., *The Jury*, Seminar Proceedings No. 11, Australian Institute of Criminology, Canberra, 1986, p. 256.

<sup>193</sup> Deane J, *Brown v The Queen*, (1986) 160 CLR 171 at 202.

<sup>194</sup> Murphy, L.K., 'Trial by jury: the scope of section 80 of the constitution', ed., D. Challenger, *The Jury*, Seminar Proceedings No. 11, Australian Institute of Criminology,

Our freedoms are too precious to be left to the discretion of legislators and judges. The safeguard of the people's freedom is the people themselves. The means by which they can preserve freedom from unjust laws and from injustice within the law is by their participation through the jury in the administration of justice. In the future the extent to which the jury system is used will be a clear measure of freedom in our society.

2.5 In common law, it is routinely stressed that the jury system is the 'best and fairest', and that any alternative system presents a lesser variant of justice. 'The jury is said to prevent oppression and authoritarianism by legislature, executive and judiciary alike.'<sup>195</sup> Its virtue lies in its ability to cushion the authority of governments' by forbearing to convict when the laws seem out of step with community sentiments, and by providing ordinary citizens in a democracy with a direct voice in the administration of justice. In other words, it is the principal safeguard against arbitrary power inherited from the common law.

2.6 The *right*<sup>196</sup> of an accused to receive a *fair trial* according to law is a fundamental element of our criminal justice system and is expressly recognised by the High Court of Australia.<sup>197</sup> However, *the notion or guarantee of trial by jury*<sup>198</sup> in Australia is a somewhat more controversial matter.<sup>199</sup> Although it is not a formally entrenched declaration (evident by the lack of legislative support from the states and territories<sup>200</sup>), it is, to a certain degree, enshrined in Australia's Constitution as a conscious adoption of that ideal (*Brown v The Queen* <sup>201</sup>).<sup>202</sup> This is a somewhat unsatisfactory situation (in that

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Canberra, 1986.

<sup>195</sup> Law Reform Commission of Victoria, (1985), op. cit., p. 154.

<sup>196</sup> The *right* is manifested in rules of law and of practice, designed to regulate the course of the trial; see *Bunning v Cross* (1978) 141 CLR 54; *R v Sang* [1980] AC 402.

<sup>197</sup> *McKinney v The Queen* (1991) 171 CLR 468 at 478; see also *MacPherson v The Queen* (1981) 147 CLR 512, per Gibbs CJ and Wilson J, at 523, 524–525, and *Jago v District Court (NSW)* (1989) 168 CLR 23, per Mason CJ, at 29; Deane J, at 56; Toohey J, at 72; Gaudron J, at 75.

<sup>198</sup> Mason CJ and McHugh J, of the High Court of Australia have claimed that the right to a fair trial ('being a central pillar of our criminal justice system') is ingrained in the Australian legal system by the arguments defined in *Dietrich v The Queen* (1992) 109 ALR 385, 429.

<sup>199</sup> Sallmann P.A. and Willis, J., *Criminal Justice in Australia*, Oxford University Press, Melbourne, 1988.

<sup>200</sup> At the state and territory level, there is no legislative restriction on adopting measures whose aim or effect is to limit the role of the jury. Within the definition of s. 80, there is effectively no constitutional or legal restriction imposed on any government in Australia limiting the creation of serious criminal offences which can be heard summarily.

<sup>201</sup> (1986) 160 CLR 171.

<sup>202</sup> In a sense the constitutional antecedents of s. 80 go back to the famous clause 29 of the

the right to trial by jury depends on the nature of the charges or the basis on which they were brought), as well as being a reflection or imitation of the position in Britain, where trial by jury 'is protected only by the reluctance of Parliament to interfere with what is seen as a venerable institution still ... necessary or at least highly desirable to protect individual liberty'.<sup>203</sup> (It is more strongly and creatively expressed in the 'due process' clauses of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America,<sup>204</sup> as well as the *Canadian Charter of Rights and Freedoms*.<sup>205</sup>)

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*Magna Carta 1215*, which provided that no person should be condemned 'but by lawful judgment of his peers, or by the law of the land'. The wording of section 80. (1) of the Australian Constitution provides that trial *on indictment* of any offence against the law of the Commonwealth shall be by jury. However, and unlike the Constitution of the United States, there is no provision in Australia, corresponding to the Fifth Amendment, that all capital or infamous crimes must be tried on indictment. Furthermore, s. 80, which might have appeared to *guarantee* the right to a jury trial in serious cases, has been effectively deprived of any such effect by decisions of the High Court of Australia. The High Court has consistently held that s. 80 is inapplicable to offences which are triable summarily under Commonwealth law. The effect of the established interpretation—as borne out in *R v Federal Court of Bankruptcy, Ex parte Lowenstein* (1938) 59 CLR 556—is that: 'The Commonwealth Parliament can, at its discretion, provide that offences shall be triable summarily or on indictment. It is only when the trial takes place on indictment (not when the offence is an offence which might have been prosecuted on indictment) that s. 80 applies' (Latham CJ). Thus, as pointed out in *R v Archdall and Roskrige, Ex parte Carrigan and Brown* (1928, 41 CLR 128), 'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment' (Higgins J). The effect of these and subsequent decisions has been to treat, as expressed by Barwick CJ, 'what might have been thought to be a great constitutional guarantee [as] a mere procedural revision' (*Spratt v Hermes*, (1965) 114 CLR 226). In addition, the following decisions of the High Court also support this interpretation of s. 80: *R v Bernasconi* (1915) 19 CLR 86; *Zarb v Kennedy* (1967) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182. Against this background, the recommendations in the late 1980s of the Australian Judicial System Advisory Committee (AJSAC), an advisory committee to the Constitutional Commission, in its *Statement of Preliminary Views* are of some interest. The AJSAC recommended that s. 80 of the Constitution be amended to require trial by jury in any case where the defendant is liable upon conviction to capital or corporal punishment or to imprisonment for more than two years. The AJSAC also recommended that s. 80 should cover not only Commonwealth offences, but also state and territory offences.

<sup>203</sup> Devlin, *op. cit.*, p. 311.

<sup>204</sup> In order to prevent possible future interference with the right to trial by jury, the Sixth Amendment of the Constitution of the United States contains a provision that all persons accused of a crime have the right to be tried by an impartial jury. The Sixth Amendment right to trial by jury binds the States through the operation of the 'due process of law' clause in the Fourteenth Amendment, as well as the requirement that the 'accused shall enjoy the right to a speedy trial'. These rights are also contained in all State constitutions and statutes.

<sup>205</sup> s. 11(f), s. 11(d) and s. 52(1), respectively, of the *Charter* provides that: (a) except in respect of offences under military law tried before a military tribunal, any person charged with an offence having a maximum punishment of imprisonment for five years or more, has the right to the 'benefit of trial by jury'; (b) any person charged with

As such, it is established that the jury's primary function in all of these criminal justice jurisdictions is to serve as the state's fact finder.<sup>206</sup> The claim is supported by Australia's particular history and by comparison with regimes in Europe (for example, France) which have abolished lay participation in the criminal justice system.

## Juror Competence and Comprehension

Jurors are rarely brilliant and rarely stupid, but they are treated as both at once.<sup>207</sup>

2.7 A lengthy trial places extraordinary demands on all aspects of the justice system. Connected with this assumption is the suggestion that jurors in lengthy and/or complex trials have a somewhat different experience from that of jurors in shorter trials. To return an accurate verdict, the jury in a complex trial must listen to, understand and remember details from extended presentations of information that may be complex, unfamiliar, and possibly confusing. This raises concern about the possibility of straining the abilities of jurors to make competent factual determinations. From this arises the question: How capable are jurors of absorbing such information over extended periods of time? As a result of these concerns (and before commencing detailed discussion on issues surrounding complex litigation, and more particularly the anatomy of complex cases), it is pertinent to view some of the positions relative to juror competence and comprehension. Such insights will enable a broader analysis of the structural aspects of complex cases.

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an offence has the right to be presumed innocent until proven guilty, in a fair and public hearing, by 'an independent and impartial tribunal'; and, (c) any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect. As the Canadian Department of Justice states in its Working Document, 'these *Charter* provisions set out minimum standards for the availability of jury trials in Canadian criminal cases and confirm the basic essential characteristics of independence and impartiality that the jury 'tribunal' (along with the presiding judge) must display. In effect, they prohibit Canadian legislative bodies from attempting to undermine these standards and basic characteristics' (Pomerant, D., *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, Department of Justice Canada, Ottawa, April 1994, p. 9).

<sup>206</sup> Devlin, op. cit., p. 150.

<sup>207</sup> Urbom, W.K., 'Toward better treatment of jurors by judges', 61 *Nebraska Law Review*, 425.

## Issues of Competence

2.8 The debate over jury competence, like many other jury issues, often invokes strongly expressed opinions by academics, the legal fraternity, the judiciary, and even the public. There are those who hold the cynical view that jurors routinely fail in their efforts to assess and comprehend detailed information,<sup>208</sup> while there are those who believe the system of trials is enhanced by the fact finding abilities of jury's.<sup>209</sup> Due, however, to a lack of reliable empirical information regarding the 'competence' of the jury system, the basis of many of these arguments is speculative.

2.9 Talk about a jury's competence usually means reference to 'its ability to achieve mastery over the information needed to make a rational decision'.<sup>210</sup> In short, the definition of a jury's competence is determined by its ability to place and assess the necessary facts and evidence accurately and fully. Conversely, when jurors are unable to master the detail of evidence their judgements become directed by a plethora of often irrelevant and unpredictable factors. Immediately, a couple of important questions come to the fore: At what point does a jury's level of competence fail to meet a minimum threshold requirement? And, when does a case cross that critical but arbitrary line from being just plain 'complex' to 'too complex' for achievable competency? These are not just legal questions but psychological ones.

2.10 One of the fundamental principles, it would seem, of analysing jurors' competencies and their ability to participate in the criminal justice process is that the trial system must be constructed to fit the capacities of the integral players. Simply, there is a need to simplify and demystify the laws of evidence, and as the English Roskill Fraud Trials Committee (hereafter referred to as 'the Roskill Committee') eventually concluded in 1983: 'the rigidity and artificiality of the present rules [of evidence are] an obstruction to the just and expeditious disposal of fraud cases'.<sup>211</sup> To ignore this important

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<sup>208</sup> See, for example, Osbor, C., *The Mind of the Juror*; J. Frank, *Courts on Trial: Myth and Reality in American Justice*, Princeton University Publishing, Princeton, 1949.

<sup>209</sup> Kalven H. and Zeisel, H., *The American Jury*, Little, Brown and Company, Boston, 1966.

<sup>210</sup> Kassin S.M. and Wrightsman L.S., *The American Jury on Trial: Psychological Perspectives*, Hemisphere Publishing, New York, 1988, p. 120.

<sup>211</sup> Roskill Fraud Trials Committee (Lord), *Fraud Trials Committee Report*, Her Majesty's Stationery Office, London, 1985, para. 5.1.

principle of simplification invites some undesirable consequences, of which the following is the most important:<sup>212</sup>

The more frequently the demands imposed on members of a jury in a criminal trial exceed their capacities the greater the probability that the jury's verdict is based on non-evidentiary matters, the more likely the occurrence of a miscarriage of justice.

2.11 Although jury trials of extreme duration are generally rare, there are concerns over the burden on jurors and their ability to competently consider the evidence which arises in trials lasting longer than a few weeks. As a consequence of the increase in the number of lengthy trials in most jurisdictions,<sup>213</sup> a common criticism of the jury system questions the intellectual or experiential competence of the jury, either to discharge its task at all, or to do so in particular types of cases. To this point, the following criticism has been delivered <sup>214</sup>

It is often suggested that the jury is a corrective to the individual attitudes of particular judges. This may or may not be the case. It is also not the point. The point is that any human institution is bound to be only as good as the people who comprise it. There is no reason to suppose that a more or less random selection of ordinary people is going to have any less impressive an array of prejudices than a judge.

2.12 This position was further endorsed by the Roskill Committee which, despite taking jury incompetence as an article of faith rather than as an outcome of empirical evidence, argued:<sup>215</sup>

There is no accurate evidence ... that there has been a higher proportion of acquittals in complex fraud cases than in fraud cases or other criminal cases generally. Nevertheless, we do not find trial by a random jury a satisfactory way of achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth.

2.13 The same Committee also noted that there are occasions where more serious charges are not brought against an individual because of a lack of confidence in the competence of the jury. In such cases 'the difficulty of

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<sup>212</sup> Thomson, D.M., 'Beyond reasonable requirements: the jury and its task', Paper presented at the First Melbourne Criminal Justice Symposium, Melbourne, Mar. 1987, p. 3.

<sup>213</sup> Cecil, J.S. Lind E.A. and Bermant G., *Jury Service in Lengthy Civil Trials*, Federal Judicial Center, Washington, 1987, p. 6; For example, in Victoria in 1994, there were only three trials in the Supreme Court which lasted more than four sitting weeks (the average length of the 39 Supreme Court trials being 8.7 days); while in the County Court there were eight trials which lasted more than four sitting weeks (the average length of the 308 County Court trials being 6.7 days).

<sup>214</sup> Howard, C., 'Weak link in justice chain', *Adelaide Advertiser*, 2 Aug. 1985.

<sup>215</sup> Roskill Committee, op. cit., para. 8.35.

presenting a complex case often result[s] in a decision to opt for less serious charges than the offences warranted'.<sup>216</sup>

2.14 But one must be careful of the position portrayed by such committees and agencies because it could be argued 'the debate [is] a contrived one, deriving not so much from documented inadequacy of the jury system as from ideology'.<sup>217</sup> Again, the question of jurors' competencies is a bothersome one. Bothersome in the sense that there is the implication that competence is an intrinsic characteristic of juries *per se*, and that complexity is an intrinsic characteristic of trials *per se*. This is not necessarily the case and, as if to reinforce the scepticism about such inadequate empirical conclusions, a comparative study of almost five hundred jurors (in ordinary and lengthy civil trials) in the United States by the Federal Judicial Center found only weak support for the hypothesis that long trials attract jurors assumed to be incompetent.<sup>218</sup> In short, competence and complexity are not fixed but malleable characteristics dependent on extraneous factors.

2.15 In conclusion, perhaps 'before we decide to apply competency tests to the jury, it is only fair and democratic that we should apply them also to lawyers and judges'<sup>219</sup>, because the technocratic arguments appear to be more appealing in the abstract than they are in the concrete. This is further reinforced by the number of jury studies and inquiries which have examined the jury decision making process, compared it with the views and opinions of judges, lawyers and police personnel, and ultimately confirmed the jury's strength as a fact finder.<sup>220</sup>

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<sup>216</sup> *ibid.*, para. 8.36.

<sup>217</sup> Harding, *loc. cit.*

<sup>218</sup> Cecil, J.S., *Demographic Characteristics of Jurors in Protracted Civil Trials*, Federal Judicial Centre, Washington, 1982.

<sup>219</sup> Levi, M., 'The role of the jury in complex cases', eds., M. Findlay and P. Duff, *The Jury Under Attack*, Butterworths, Sydney, 1988, p. 110.

<sup>220</sup> See Duff, P. Findlay, M. Howarth C. and Chan, T.F., *Juries: A Hong Kong Perspective*, Hong Kong University Press, Hong Kong, 1992; Lord Runciman, *Report of the Royal Commission on Criminal Justice in the United Kingdom*, Her Majesty's Stationery Office, London, 1993; McCabe S., and Purves R., *The Shadow Jury at Work*, Basil Blackwell (Oxford University Penal Research Unit), Oxford, 1972; J. Baldwin, and M. McConville, *Jury Trials*, Clarendon Press, Oxford, 1979; Broeder, D.W., 'The University of Chicago Jury Project', (1959) 38 *Nebraska Law Review*; Kalven H., and Zeisel, H. *op. cit.*; Sallmann P.A., (Victorian Bar Council Shorter Trials Committee), *Report on Criminal Trials*, Australian Institute of Judicial Administration, Melbourne, 1985.



## Issues of Comprehension

Whilst the assault upon the system of jury trial comes from many quarters, one criticism which cannot be ignored is that jurors may not understand the proceedings to a degree sufficient for them to carry out the task which they are charged to perform. This criticism applies particularly to complicated cases which rely upon highly technical evidence and also to cases that call for quite elaborate instructions upon the law.<sup>221</sup>

2.16 A juror is, of course, not expected to know what the law is except as they are advised by the instructions of the court, but questions are raised nevertheless about their ability to comprehend. The hypothesis that the jury does *not* understand the case has loomed large in the debate over the system of jury trials. There are a number of observers who are concerned about the jury's ability to endure the intricacies of either long and/or complex cases. Do they understand the evidence put before them? Upon what general experience do they rely in evaluating evidence? How do they allow factors not strictly part of the evidence to influence their judgement? These questions acknowledge criticisms about the ability and characteristics of juries in complex cases.

2.17 To some extent these concerns about juror comprehension are confirmed by research conducted by the London School of Economics with mock juries (where groups of people listened to shortened tape recorded versions of a real trial),<sup>222</sup> the now defunct Oxford University Penal Research Unit's work on shadow juries (where people sat in court and listened to an actual, but short, trial),<sup>223</sup> and the Australian Institute of Judicial Administration's (AIJA) study of New South Wales juries.<sup>224</sup> These studies show that deliberation on the same facts does not always lead to the same conclusion on those facts. For example, as one juror outlined to the media after the *Maheer* trial:<sup>225</sup>

Most people, especially those selected for jury duty, don't often discuss complex issues as a matter of daily life. It is a mechanism they have never developed, and they have to try to do it for the first time. After a few days in that room, there is no logical

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<sup>221</sup> Potas, I., 'Juror comprehension and standard jury instructions', Paper presented at the First Melbourne Criminal Justice Symposium, Melbourne, Mar. 1987, p. 1.

<sup>222</sup> London School of Economics Jury Project, 'Juries and the rules of evidence', [1973] Crim LR 208, and 'Jurors and their verdicts', [1973] MLR 496.

<sup>223</sup> McCabe S. and Purves R., *The Jury at Work*, Basil Blackwell (Oxford University Penal Research Unit), Oxford, 1972.

<sup>224</sup> Findlay M., *Jury Management in New South Wales*, Australian Institute of Judicial Administration, Melbourne, 1994.

<sup>225</sup> Loane S., 'Psychological warfare in the jury room', *National Times*, 18-24 Oct. 1985.

discussion—it becomes psychological warfare, where people start thinking of tactics to change other people’s minds.

2.18 Yet, this research and the debate surrounding comprehension in complex litigation masks a fundamental avoidance of the nuances of *what* is complex and *who* is competent to try such matters. Furthermore, an important starting point for any analysis of juror comprehension is that which is to be understood. Tied to this are the questions of juror’s relevant experience and education and the correlation between these and their task of understanding complex and technical information. Such concerns push the comprehension debate in the direction of case presentation. The nature, form, content and the manner in which evidence is presented requires ongoing analysis and modification so as to maximise the clarity of its reception by all parties to the trial process.<sup>226</sup>

2.19 In complex criminal cases and civil litigation the presence of the jury is intended to force the parties to speak plain English, to make the process understandable and concise. In a survey of jurors in New South Wales by the Law Foundation, it was found that over 90% of the jurors said they found the evidence and proceedings understandable.<sup>227</sup> In a recent survey of jurors in Hong Kong, a similar position existed: ‘It seems that jurors themselves and other participants in the trial process consider that jurors understand a large proportion of the trial, although the comprehension of jurors is clearly thought to be less than perfect’.<sup>228</sup> However, this question is a rather moot point given that the jury’s understanding of the issues in either of these two jurisdictions cannot be measured and nor can the basis for the verdict be analysed because the jury room is sacrosanct.<sup>229</sup> Yet, in the United States, it has been found that ‘jurors in long trials found the evidence to be more

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<sup>226</sup> Findlay, *op. cit.*, p. 10. In America, the Federal Judicial Center has noted a number of procedures which can be adopted in order to ease the task of the jury. These range from the use of expert witnesses, the use of charts, graphs and other demonstrative evidence, better case management by the judge, and various technological aids to the jury (Cecil *et al*, *op. cit.*, 1987, p. 8).

<sup>227</sup> Law Foundation of New South Wales, *Jurors in New South Wales*, unpublished report, Sydney, Jun. 1983.

<sup>228</sup> Duff *et al*, *op. cit.*, p. 84.

<sup>229</sup> Interestingly, the Hong Kong Court of Appeal has not shied away from examining juror comprehension, even going so far as to establish precedent by challenging a verdict. In November of 1989, the Chief Justice and two fellow justices upheld an appeal against a conviction on the grounds that the verdict was made unsafe by lapses in the comprehension and attention of certain jurors (Duff *et al*, *op. cit.*).

difficult than did jurors in short trials'.<sup>230</sup> However, this interpretation does not insist that jurors were unable to comprehend matters, despite their apparent complexity.

2.20 Nonetheless, the nature of the presentation and the type of information delivered (pertinent or extraneous) has an enormous bearing on issues of comprehension. Psychological research in the United States<sup>231</sup> and Australia<sup>232</sup> has documented the fact that the role of extraneous information increases inversely in proportion to the availability of clear, unambiguous information. There has also been the suggestion that jurors', faced with mountains of complex and conflicting evidence as well as having to deal with problems of remembering all the critical evidence, will fall back on unreliable extraneous information such as demeanour of the witness.<sup>233</sup> Ultimately though, this is not just an issue for jurors in long and complex trials:<sup>234</sup>

[I]t appears that technical and scientific terms, legal topics, and problems with presentation of evidence cause difficulties whether they occur in long trials or in short trials.

2.21 While not the first to do so, the Law Reform Commissioner of Tasmania (LRCT) raised the issue of juror memory and has suggested that the trial process is 'a real test of memory for them [the jury] to recall and give proper weight to all the evidence'.<sup>235</sup> All things considered, it is not difficult to appreciate that jurors will have forgotten a significant amount of the evidence by the time they retire to consider their verdicts. This is supported by research findings in the United States which indicate that protracted trials may interfere with retention and as the volume of exhibits and testimony increases, comprehension levels will drop. In other words, the more difficult it is to comprehend the information, the more rapid the rate of forgetting. This

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<sup>230</sup> Cecil *et al*, *op. cit.*, p. 28.

<sup>231</sup> *ibid.*, p. 29

<sup>232</sup> Thomson, *op. cit.*

<sup>233</sup> *ibid*; there is every possibility that the outcome of the Chamberlain trial is an accurate reflection of this state of affairs.

<sup>234</sup> Cecil *et al*, *op. cit.*, p. 30.

<sup>235</sup> Law Reform Commissioner of Tasmania, *Alternative Methods of Trial in Complex Criminal Cases*, Report No. 63, Government Printer, Hobart, 1990, p. 9; see also, Bekerian, D., Conway M. and Dennett J., 'Improving jurors' understanding and memory for evidence by pre and post evidence summaries', Research Study No. 4, eds., MRC Applied Psychology Unit (Cambridge), *Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies*, Her Majesty's Stationery Office, London, 1986, pp. 53-61.

appears to be the case even more so in trials where the evidence places an emphasis on understanding issues of economics.<sup>236</sup>

2.22 Some additional literature emanating from the United States has expressed divergent and interesting positions on juror comprehension. These concerns were heightened in the 1970s when it was felt that an array of civil litigation was so complex and protracted that there was genuine concern regarding the ability of juries 'to understand the issues and decide them accurately'.<sup>237</sup> In one such case, the judge went as far as to say that 'the magnitude and complexity of the present law suit render it, as a whole, beyond the ability and competency of any jury to understand and decide rationally'.<sup>238</sup> As mentioned briefly in the earlier discussion regarding the United States' Seventh Amendment and the right to trial by jury, courts in the United States have the ability to determine that presentment of certain types of litigation are beyond the comprehension of any potential jury and therefore a motion to strike will be granted. Since it is not possible for the presiding judge to actually determine the juror's capacity to comprehend, the motion to strike is granted on the basis of *a priori* prediction. In other words, the courts rely on three principal indicators: duration or length of trial, difficulty in understanding facts, and the conceptual difficulty of substantive issues.

2.23 Other research conducted in the United States also poses some interesting findings. First, there is the acceptance that the decision making capabilities of twelve minds assists with deliberations as 'any lack of comprehension on the part of individual jurors may be corrected through group discussion'.<sup>239</sup> This is supported by the findings of two 1970s English studies<sup>240</sup> and one Australian study<sup>241</sup> which indicate that the outcome of the trial possibly depends on the constitution of the jury to a certain extent. However, the results of some extensive research in the United States into 1,191 complex trial cases corroborates the hypothesis that the jury follows the

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<sup>236</sup> Austin A.D., *Complex Litigation Confronts the Jury System: A Case Study*, University Publications of America, Maryland, 1984, p. 1.

<sup>237</sup> Campbell J.S., 'The current understanding of the seventh amendment: Jury trials in modern complex litigation', Paper presented at Washington University School of Law Conference, Center for Judicial Studies, 1987, p. 63.

<sup>238</sup> *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash., 1976).

<sup>239</sup> Abramson, J. We, *The Jury: The Jury System and the Ideal of Democracy*, Basic Books, New York, 1994, p. 185.;

<sup>240</sup> London School of Economics Jury Project, op. cit.; McCabe and Purves, op. cit.

<sup>241</sup> Findlay, op. cit.

direction of the evidence.<sup>242</sup> Secondly, the nexus between comprehension and common sense is important 'and usually ends up at the same place as the law intended it to be'. Thirdly, those difficulties encountered usually arise from 'the instructions rather than with the jurors'.<sup>243</sup>

2.24 In conclusion, the words of a former Commissioner of the New South Wales Law Reform Commission (NSWLRC) and a recent decision by the Appeal Division of the Supreme Court of Victoria are as good a place to leave this particular debate. The former argued:<sup>244</sup>

The lack of juror comprehension in complex cases has not been adequately demonstrated. On the contrary, it would appear that the collective wisdom and experience of juries has enabled the jury system to adapt and meet the demands placed on it by trials involving complicated evidence.

2.25 While the Court, with regard to the appeal, considered:<sup>245</sup>

[T]he Judge erred in finding that juries suffered from a limited attention span and difficulty in following lengthy cross-examination from documents and tape-recordings.

## Juries and Complex Trials

[T]he absence from the jury box in a complex case, except by chance, of persons with the qualities [necessary to understand complex issues] seriously impairs the prospect of a fair trial.<sup>246</sup>

The case against juries in complex civil litigation is based entirely on speculation. Some trials are plainly overwhelming in their appearance. As such, they are assumed by many to exceed the jury's capacity.<sup>247</sup>

Nobody would seriously deny the claim that juries are sometimes overwhelmed by the intricacies of complex civil cases. But that is not reason enough to altogether abandon their use for an entire, ill-defined category of cases.<sup>248</sup>

2.26 Many of the initiatives associated with reforming and streamlining jury trial procedures have concerned the hearing of complex cases. In short, for the

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<sup>242</sup> Kalven and Zeisel, *op. cit.*

<sup>243</sup> Hans V.P., and Vidmar N., 'Jury competence: twelve people of average ignorance?', eds., Hans V.P. and Vidmar N., *Judging the Jury*, Plenum Press, New York, 1986, p. 121.

<sup>244</sup> Byrne P., 'Jury reform and the future', eds., Findlay and Duff, *op. cit.*, p. 199.

<sup>245</sup> *Michael Rozenes QC and the Director of Public Prosecutions Victoria (Vic) v. Boris Beljajev, Sonya Szajntop, Leslaw Franceszek Kunz, Larry Wade Lambert and His Honour Judge Kelly of the County Court.*

<sup>246</sup> Roskill Committee, *op. cit.*, paras. 8.23–8.24.

<sup>247</sup> Kassin and Wrightman, *op. cit.*, p. 124.

<sup>248</sup> *ibid.*, p. 125.

purpose of this research exercise, complex litigation is regarded as ‘the product of the friction between the adversarial legal system and a post-industrial society’,<sup>249</sup> and as a consequence of its existence the debate about the role of the jury (and its ability to function as an effective conflicts resolution mechanism) in the criminal justice system has intensified in recent years.<sup>250</sup> Common law judges for centuries have felt justified ‘in the intermediate area of applying the law to the facts to decide whether to allow the jury full sail or to keep it close-hauled’.<sup>251</sup> At issue is the capability of juries to render intelligent and informed verdicts in complex cases; central to this is the capacity of the jury to comprehend and synthesise complicated evidence sufficiently to orchestrate a rational decision. Such assertions are invariably based on the notion that jurors are incapable of understanding the evidence presented in complex cases—the validity of such assertions must be questioned.

2.27 The jury has always had its critics. There is, in the opinion of the LRCT, ‘good reason to believe that the community itself has considerable reservations about the ability of the jury to adjudicate in matters involving long and/or complex scientific and technical questions’.<sup>252</sup> This has been supported by the judgment of the High Court of Australia:<sup>253</sup>

There is, for example, obvious force in the argument that a jury of ordinary men and women selected at random from the community lacks the knowledge and experience necessary to sit in responsible judgment upon the type of scientific dispute between specialists that may arise in the course of a criminal trial or upon the detailed technical questions which may be involved in the trial of white-collar and computer crime.

2.28 Doubtless to say, according to such arguments in the negative, the complexity of massive detail of some cases must throw an intolerable burden on to the powers of concentration of any jury. As a former justice of the Victorian Supreme Court concluded: ‘No Judge, sitting alone, is required to

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<sup>249</sup> In other words, today’s economic environment is characterised by rapidly evolving technology and science-intensive industries. The new competition is in information, theory, and ideas. As a consequence, the amount of knowledge is increasing at an exponential rate.

<sup>250</sup> Austin, *op. cit.*, p. 1.

<sup>251</sup> Cornish, W.R. *The Jury*, Allen and Lane, London, 1968, p. 106.

<sup>252</sup> Law Reform Commissioner of Tasmania, (1990), *loc. cit.*

<sup>253</sup> Deane J, *Kingswell v The Queen* (1985) 60 ALJR 17 at 32.

perform the feats of memory and comprehension required of a jury in a long trial involving complex issues'.<sup>254</sup>

2.29 The notion of jury capability was strained some time ago by the opinion of the learned writer Mannheim who argued the jury, because of the ineptitude of jurors, should be substituted by some other tribunal.<sup>255</sup> Almost two decades later, English scholar Glanville Williams continued this critical focus with his assertion that 'it is an understatement to describe a jury ... as a group of twelve men of average ignorance'.<sup>256</sup> In fact, he went as far as to describe the average jury as comprising 'unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental persons'.<sup>257</sup> A few years on, Jennings thought that 'a jury is small protection for minority opinion'.<sup>258</sup> While not nearly as harsh about the individual characteristics of jurors as some of these critics, sentiments expressed by a justice of the New South Wales Supreme Court in 1981 indicate that there are critics of juries in Australia who believe that the rules governing the criminal law and procedure have become excessively complex and artificial, if not at times altogether incomprehensible for general jury consumption.<sup>259</sup> This has also been supported by some argument in the United States which states 'that jurors are not competent to decide the complex legal and factual issues germane to many trials'.<sup>260</sup>

2.30 This is all the more interesting given the stature of the Constitution of the United States of America (1789), and in particular the Seventh Amendment (1791) which provides for the fundamental right to jury trial. As such, it stipulates: 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. However, over the past ten to fifteen years a number of cases appearing before the courts in the United States have raised the possibility that jury incompetence 'may limit the range of suits subject to the seventh

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<sup>254</sup> Marks, K.H., 'Making the task of the jury easier', Paper presented at the First Melbourne Criminal Justice Symposium, Melbourne, March 1987, p. 1.

<sup>255</sup> Mannheim, H., *Criminal Justice and Social Reconstruction*, MacMillan, London, 1946, p. 46.

<sup>256</sup> Williams, G., *The Proof of Guilt*, 3rd. edn., Stevens, London, 1963, pp. 271-272.

<sup>257</sup> *ibid.*, p. 237.

<sup>258</sup> Jennings (Sir) I., *The Law and the Constitution*, 5th. ed., Oxford University Press, London, 1959, p. 268.

<sup>259</sup> Roden, A., 'Criminal evidence—the law and the gobblegook', *Criminal Evidence Law Reform*, Proceedings of a Seminar, Institute of Criminology, Sydney, 1981.

<sup>260</sup> Hans. and Vidmar, *op. cit.*, p. 121.

amendment'.<sup>261</sup> A 1969 opinion from the United States Supreme Court points to this, when it suggested that 'the practical abilities and limitations of juries' might provide grounds for a complexity exception to that right.<sup>262</sup> In fact, the same court has held that a jury unable to perform its responsibilities infringes due process, justifying a due process limitation on the Seventh Amendment.<sup>263</sup> In other words, when litigation exceeds the capacity of the jury to decide the facts in an informed and capable manner, there is no Seventh Amendment guarantee. This has proven to be a controversial legal principle.

2.31 In Australia, and specifically Victoria, it has been recorded that the criminal justice system is finding it harder 'to cope ... properly and carefully, with due responsibility for the need for a very high standard in the conduct of court trials'.<sup>264</sup> With regard to some of these concerns, it is noted: 'Trials are now longer and more complex because of the significant increase in the number of complicated commercial fraud cases and conspiracies involving financial or property transactions.'<sup>265</sup> Generally the jury deals with more complicated cases, often with a multiplicity of accused<sup>266</sup> or of counts,<sup>267</sup> with trials lasting sometimes several months.<sup>268</sup> Whatever the merits of the jury system, an awareness has grown, particularly in complicated matters, that the jury may be swamped with documents, technical or medical evidence, computer print outs, accounts, business ethics, and the like. In brief, this has

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<sup>261</sup> Austin, *op. cit.*, p. 5; see *Boise Cascade Securities Lit* 420 F Supp 99 (W.D. Wash, 1976); *Berstein v Universal Pictures Inc* 79 FRD 59 (SDNY, 1978).

<sup>262</sup> *Ross v Bernhard* 396 US 531, p. 538.

<sup>263</sup> Vinson, D., 'The shadow jury: an experiment in litigation science', (1982) 68 *American Bar Association Journal* 1243-1244.

<sup>264</sup> Victorian Bar Council Shorter Trials Committee, cited in Victorian Parliamentary Legal and Constitutional Committee's *Preliminary Reports on Delays in Court*, Victorian Government Printer, Melbourne, Apr. 1984, p. 10.

<sup>265</sup> Law Reform Commission of Victoria, (1985), *op. cit.*, p. 131.

<sup>266</sup> For example, the 'Bikies Shootout Trial' (the Milperra Massacre) in New South Wales in the mid 1980s involved more than thirty defendants charged with a series of offences arising out of a single incident (see Roden, 'The anatomy of a long and complex criminal trial', *op. cit.*).

<sup>267</sup> In the presentment of a large number of charges, there is undoubtedly complexity and difficulty in the task of the jury to obey the instruction that each count should be considered separately. This style of exercise means that the jury are obliged to perform an intellectual task which is very difficult in the best of circumstances. See *R v Smart* [1983] VR 265.

<sup>268</sup> For example, in Victoria in 1994 there were seven trials in the County Court which sat for a total of 352 days, at an average of fifty days each. In the Supreme Court, the longest trial for the year lasted twenty-five days (Victorian Sheriff's Office, 1995).



contributed to the notion that in a number of well known Australian cases, the juror's ability to comprehend complex cases has been doubted.<sup>269</sup>

2.32 How is this position of doubt arrived at? It is assumed that the more intricate and complex a trial, the more difficult it will be for the average person to comprehend; but within, this the criminal justice system must consider a cluster of factors in determining complexity of the case, wherein the type and depth of charges and the length of the trial are of critical importance. Furthermore, there is the problem of obtaining jury representativeness in such cases. This arises because such trials produce an unrepresentative jury profile culled from a small section of the community whose occupation (for example, unemployed, student, retired, home duties) permits them the freedom to serve. The result is that such juries do not constitute a representative cross-section of the community and consequently a basic purpose of the jury, the determination of facts by impartial minds of diverse backgrounds, is defeated if a significant portion of society is excluded from jury service. A justice of the New South Wales Supreme Court paints this position as such: 'Those best qualified, by training and experience, to understand the evidence, are inevitably excused in the process of jury selection, leaving a jury which risks being neither representative or fitted for the task ahead'.<sup>270</sup>

2.33 In addition, other concerns generated by such jury construction have centred on the lack of juror experience with commercial affairs, technology or scientific information. There is also the concern that extended or protracted jury service may tend to gradually alienate jurors from the task at hand as they begin to feel more and more socially isolated and personally disadvantaged. But in trying to formulate some sort of conclusion as to the nebulous issue of juror comprehension of complex matters, the best that can be said at this point is that the lack of understanding of jurors has not been adequately defined or empirically demonstrated. In fact, to the contrary, it would appear that the collective wisdom and experience of juries has enabled the jury system to adapt and meet the demands placed on it by trials involving complicated evidence.

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<sup>269</sup> *R v Van Beelen* (1972) 6 SASR 534; *Chamberlain v The Queen* (1983) 51 ALR at 290; *Report of the Royal Commission Concerning the Conviction of Edward Charles Splatt*, Government Printer, Adelaide, 1984.

<sup>270</sup> J. Woods J, 'A time for change—but how much?', eds., National Crime Authority, *Complex White Collar Crime*, Australian Government Publishing Service, Canberra, 1993, p. 154.

## The Anatomy of Complex Cases

[T]he point at which a jury's limitation exceeds its abilities is not precise nor is it easy of definition.<sup>271</sup>

There is, for example, obvious force in the argument that a jury of ordinary men and women selected at random from the community lacks the knowledge and experience necessary to sit in responsible judgment upon the type of scientific dispute between specialists that may arise in the course of a criminal trial or upon the detailed technical questions which may be involved in the trial of white-collar and computer crime.<sup>272</sup>

### Definitions of Complexity

2.34 It has been argued recently that some criminal and civil trials will take longer than others to complete simply by virtue of the complexity of the managerial, factual and legal circumstances of the alleged offences.<sup>273</sup> It is here that the issue of *complexity* is raised. The term *complexity* has multiple, ambiguous meaning and carries evaluative connotations in addition to its apparent descriptive meaning. In the first instance, complex cases fall into two categories: complex 'witness cases' which are generally criminal in their content; and, complex 'document cases' which are more common in complex civil actions.<sup>274</sup> In the second instance, the three dimensions of a trial already noted contribute to its total or collective complexity. These three facets often, but not always, operate in some form of combination. All create potential hazards for effective and efficient trial processes. Simply explained, 'managerial complexity grows with the number of parties and the geographical distance between their home bases'; factual complexity 'increases with the amount of evidence adduced at trial and with the technical depth or difficulty of the evidence'; while legal complexity 'presents the decision maker with multiple, overlapping, or ambiguous legal issues'.<sup>275</sup>

2.35 The definitional process becomes even more critical when it is considered that the criminal and civil law is becoming increasingly refined

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<sup>271</sup> Austin, *op. cit.*, p. 6.

<sup>272</sup> Deane J, *Kingswell v The Queen* (1985) 60 ALJR 17 at 32.

<sup>273</sup> Corns, C., 'Anatomy of Long Criminal Trials: A Preliminary Review', Paper presented at the 14th Australian Institute of Judicial Administration Conference, Canberra, Aug. 1995, p. 5.

<sup>274</sup> Greenleaf G. and Mowbray, A. *Information Technology in Complex Criminal Trials*, Australian Institute of Judicial Administration, Melbourne, 1993, p. 5.

<sup>275</sup> Bermant, G. Cecil J.S., Chaset A.J., Lind A. and Lombard P. A., *Protracted Civil Trials: Views from the Bench and the Bar: A Report to the Subcommittee on Possible Alternatives to Jury Trials in Protracted Court Cases*, Federal Judicial Center, Washington, 1981, pp. 3-5.

and for quite some time, arguments regarding the desirability of juries deciding complex cases such as ‘white collar crimes’<sup>276</sup> or commercial/corporate crimes have been debated at length in many criminal justice systems across the world. The Victorian Parliamentary Legal and Constitutional Committee expressed concern about the value or otherwise of juries in cases of a complex nature – ‘particularly those involving complicated fraud matters or highly specialised forensic evidence’.<sup>277</sup> However, much of the discussion and debate concerning appropriate decision making in trials takes the conceptualisation and measure of complexity as given.<sup>278</sup> Such attacks against the jury on this territory rarely stray from the realm of truisms. In England, the Roskill Committee, for instance, failed to distinguish between criminal and civil trials in its debate over questions of complexity and, even more critically, avoided the possibility of confusing its impressions with substantiated facts. Even in the words of its own report, the Committee stated:<sup>279</sup>

There has been no accurate evidence that there has been a higher proportion of acquittals in complex fraud cases than in fraud cases or other criminal cases generally. Nevertheless we do not find trial by a random jury as a satisfactory way of

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<sup>276</sup> The term was introduced by E.H. Sutherland, in his sociological discussion on this particular aspect of criminal behaviour in: ‘White collar criminality’, (1940) 5 *American Sociological Review* 1. The Complex White Collar Trials Working Party of the National Crime Authority had this to say about defining ‘white collar crime’: ‘Although originally the term was understood to mean crime committed by persons of respectability and high social status in the course of their employment, a continuing debate among criminologists and the varied use of the term in the popular media, attests to a lack of certainty as to what is meant by ‘white collar crime’ is mentioned. The term today seems to be thought to apply to an ever broadening range of activities and conduct, not all of which are strictly speaking criminal. It is often used interchangeably with other terms like ‘economic crime’ and ‘corporate crime’. It is clear that the types of activity referred to have broadened significantly with the expansion of the regulation of commercial activities, the growing availability of high technology in the general community and the change in community expectations.’ (National Crime Authority, Complex White Collar Trials Working Party Team, ‘Streamlining the investigation and preparation of briefs of evidence in complex white collar crime cases’, *Complex White Collar Crime*, Australian Government Publishing Service, Canberra, 1993, p. 10.)

<sup>277</sup> Victorian Parliamentary Legal and Constitutional Committee, *Preliminary Report on Delays in Courts*, Victorian Government Printer, Melbourne, Mar. 1984, p. xxvi.

<sup>278</sup> This position is all the more interesting when it is considered that Australian criminal justice jurisdictions have all struggled with the anthropomorphology of corporations in the criminal environment. None have established a satisfactory basis for holding corporations liable for crimes – that is, outside the ambit of crimes of absolute liability: and even in that context, the rationale of the proof of *actus reus* by corporations is jurisprudentially suspect.

<sup>279</sup> Roskill Committee, *op. cit.*, para. 8.35.

achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth.

2.36 But critics have attacked the presentment of the Roskill Committee's position as being 'more like an article of faith than the consequence of empirical reasoning'.<sup>280</sup> As Lord Devlin remarked five years earlier: 'All we have at present is a very general idea that some of the cases in which juries have delivered apparently unsatisfactory verdicts must have been too complicated for them to understand'.<sup>281</sup> More realistically, any attempt to isolate what makes a trial complex is a subjective venture. It needs to be pointed out, that not all detailed or involved trials utilising forensic, scientific or commercial evidence are complex; not all complex cases involve such issues; and, not all juries are incapable of understanding the intricacies of the case.<sup>282</sup>

2.37 Then there are complex cases involving matters of fraud, expert testimony, forensic, scientific or medical questions. The associated variables may affect the complexity (and hence comprehension) of a trial, and these include the nature of the charges, the number of accused, the duration of the trial, the style and content of the evidence, the involvement of witnesses (particularly expert), the trial procedures employed, and the case management aspects of the trial.

2.38 The challenge for the court and its principal participants lies in how to make complex cases understandable to jurors. This question has been much debated in recent times in the United States because it has been felt that 'much of the difficulty they present to jurors flows from the way they are tried'.<sup>283</sup> There has been a growing disenchantment with trials which some have claimed 'leave jurors floundering in a mass of disconnected and obscure evidence and legal mumbo jumbo'.<sup>284</sup>

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<sup>280</sup> Findlay, M., 'Juror comprehension and complexity: strategies to enhance understanding', Paper presented at the National Crime Authority National Conference on The Presentation of Complex Corporate Prosecutions to Juries, Melbourne, 1991, p. 2.

<sup>281</sup> Devlin, *op. cit.*, p. 315.

<sup>282</sup> Harding, *loc. cit.*

<sup>283</sup> Schwarzer, W.W., *Reforming Jury Trials*, West Publishing, Minnesota, 1991, p. 575.

<sup>284</sup> *ibid.*, p. 576.

## Commercial Cases

2.39 The Complex White Collar Crimes Trials Working Party<sup>285</sup> (hereafter referred to as 'the Trials Working Party') argued that commercial cases, 'because of their size and complexity, tie up the court's, jury's, counsel's, and the accused's time for many months and often result in an unnecessary profusion of issues being put to the jury for consideration'.<sup>286</sup>

2.40 Although it is sometimes regarded that charges emanating from commercial crimes may in themselves be rather straightforward, the evidence necessary to establish these may involve matters and processes requiring specialist knowledge. Such perceptions, coupled with notions of trials not being conducted expeditiously and juries being confused, has led to heightened interest in the streamlining of complex commercial trials.

2.41 As mentioned, in England, disquiet in relation to jury trials in commercial fraud cases led to the establishment of the Roskill Committee. This Committee was asked:<sup>287</sup>

to consider in what ways the conduct of criminal proceedings in England and Wales arising from fraud can be improved and to consider what changes in existing law and procedure could be desirable to secure the just, expeditious and economical disposal of such proceedings.

2.42 The Committee felt that there was one particular class of crime that needs special treatment by the criminal justice system: 'that is the fraud case of such complexity and difficulty that it cannot reasonably be expected to be understood by a jury selected at random'.<sup>288</sup> At the publication of its findings, the Committee recommended that there should be an alternative to jury trial in fraud cases, and it adjudged trial by judge alone or judge and assessors as being the most expedient way of dealing with such matters. Furthermore, the *English Criminal Justice Act 1987*<sup>289</sup> and the *Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988*, both of which arose as a result of the considerations of the Roskill Committee, endeavoured to introduce a number

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<sup>285</sup> The Trials Working Party was established by the former chairman of the National Crimes Authority in 1991 and comprises persons from all Australian States and the Northern Territory.

<sup>286</sup> Complex White Collar Crime Trials Working Party, 'Expediting complex white collar crime and making them more understandable to juries', *Complex White Collar Crime*, Australian Government Publishing Service, Canberra, 1993, p. 113.

<sup>287</sup> Roskill Committee, op. cit.

<sup>288</sup> *ibid.*, para. 1.6.

<sup>289</sup> Amended in 1988.

of procedures which would eliminate or reshape some of the extraneous, time consuming factors that are so apparent in long and complex trials. As the AIJA argued: 'The basic policy behind the Roskill scheme as adopted in England, was to get complex cases before a judge as soon as possible. As a matter of case management from the court's perspective, the tactic had a lot to recommend it'.<sup>290</sup> In similar fashion to its English counterparts, Victoria also re-introduced legislation encapsulated in the *Crimes (Fraud) Bill 1991* which created certain special procedures to assist with the framework and management of complex trials.<sup>291</sup>

2.43 But this belief that commercial trials are beyond the comprehension of jurors is not shared by all who have examined this problem. For instance, in its 1985 background paper on juries, the Law Reform Commission of Victoria made the following statement:<sup>292</sup>

It may be considered odd that complicated commercial cases are singled out for attention, as somehow distinct or apart from other complex cases of a non-commercial nature: there is no reason to believe that tangled commercial matters are more difficult to understand than labyrinthine conspiracy cases, or cases of another nature involving convoluted fact situations and perplexing evidence of various types. It is not immediately evident why it should be accepted wisdom in some quarters that juries are incompetent to deal with such matters, and that to leave these cases to judges would be preferable, or non-problematic.

2.44 It would seem the problems of the complexity of commercial fraud or computer crimes, as two examples, are not confined to juries but also present as a real problem for judges and appeal courts. Finally, notwithstanding those arguments in the negative, a judge of the Victorian County Court

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<sup>290</sup> Aronson, M., *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, Australian Institute of Judicial Administration, Melbourne, 1992.

<sup>291</sup> 'The special procedure consists of a series of directions hearings, rather than 'preparatory hearings'. The court *must* hold at least two directions hearings—a 'preliminary' directions hearing, and at least one more directions hearing. The preliminary directions set the timetable for the remainder of the directions process. The Victorian scheme requires the prosecution's case statement to include the following: a concise account of the facts; the inferences sought to be drawn from those facts (this is not explicitly covered in the English model); copies of the statements of the witnesses (including expert witnesses) whom the prosecution intends to call; a list of exhibits, and copies of any documentary exhibits, that the prosecution intends to produce. *The requirement to provide copies is not in the English model and is regarded by this Report as an improvement. A separate provision gives to the defence a right of inspection of all exhibits. This provision is also regarded by this Report as an improvement of this English model;* propositions of law on which the prosecution proposes to rely; any other document as ordered by the court at a directions hearing.' (Aronson, *ibid.*, p. 25).

<sup>292</sup> Law Reform Commission of Victoria, *op. cit.*, pp. 177–178.

recently argued: 'I do not accept the proposition that there are commercial cases, particularly, that are too complex for a jury'.<sup>293</sup>

## Expert Evidence<sup>294</sup>

As science extends the frontiers of human knowledge ... the already significant role of the scientific and technical witness is likely to assume increasing importance in the trial of issues in the criminal courts. These expert witnesses frequently play a critical role in the outcome of a trial, especially in those cases where there is complete or substantial reliance by the Crown upon circumstantial evidence, and forensic evidence is called in aid to link a suspect to a crime.<sup>295</sup>

2.45 As complex cases increasingly involve issues calling for scientific, technical, or other specialised knowledge, and judges and juries are confronted with conflicting and contradictory opinions from opposing experts, interest in this area has grown.<sup>296</sup> This position raises some interesting points and underlines the special problems about understanding and comprehension which arise when there is a conflict of party appointed expert testimony.

2.46 Some consider there are real problems with expert witnesses introduced by the respective parties, not the least being the problems caused to principles of impartiality by the adversary system.<sup>297</sup> Then there is the notion of the extent to which experts should be able to express opinions not generally or even widely accepted by their colleagues. Furthermore, how likely is it that juries made up of ordinary men and women believe experts

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<sup>293</sup> P. Mullaly J, Evidence presented to the Victorian Parliamentary Law Reform Committee's *Inquiry into Jury Service*, Minutes of evidence, Melbourne, 10 Apr. 1995, p. 214.

<sup>294</sup> 'At present, experts employed by the state in Victoria and South Australia can work for the defence. In the Northern Territory, although experts employed by the state have not in practice ever worked for the defence, it is thought that subject to the consent of the Commissioner of Police there would be no objection to them so doing. In New South Wales and Queensland, experts employed by the state cannot work for the defence. In Western Australia, experts employed by the state cannot work for the defence, but will answer questions put to them by the defence' (The Royal Commission on Criminal Justice, *Criminal Justice Systems in Other Jurisdictions*, eds., Osner N., Quinn A. and Crown G., Her Majesty's Stationary Office, London, 1993, p. 11).

<sup>295</sup> Phillips J.H., and Bowen J.K., *Forensic Science and the Expert Witness*, The Law Book Company, Sydney, 1985, p. vii.

<sup>296</sup> Federal Judicial Center, *Manual for Complex Litigation, Third*, US Government Printing Office, Washington, 1995, p. 109.

<sup>297</sup> In France, the problem of partial expert witnesses is dealt with by the *Code of Criminal Procedure* whereby experts are to be appointed by the court. They are to be objective and not serve one of the parties in the proceedings (The Royal Commission on Criminal Justice, op. cit.).

who are called before them to testify? To this matter, some attention has been paid: 'The difficulty is that when the two sides provide different interpretations of a situation, a person who previously knew nothing about the issue may have little basis for choosing between them'.<sup>298</sup>

2.47 It would seem then, one of the more important lessons in looking at the anatomy of complex litigation and its nexus with expert witnesses is the evaluation of the role of the expert in the court room and a reappraisal of ways in which the court's task may be made easier when it is confronted by complex, esoteric and conflicting evidence from expert witnesses. On the one hand, experts are seen as the elite of the technological age because of access to the narrow systems of knowledge and they are considered 'the lifeblood of complex litigation', contributing abstruse testimony and obfuscation.<sup>299</sup> But, on the other hand, as if to contradict or dismiss the relevance or significance of this position, Lord Devlin remarked: 'A mass of expert evidence to be considered and appraised does not necessarily make the case unsuitable for trial by jury'.<sup>300</sup> (In fact, further anecdotal experiences also suggest jurors are not necessarily – or the only ones – confounded by such testimony: 'Juries are not always confused by expert evidence. As a rule when they are, so is everyone else'.<sup>301</sup>) Given the uncertainty about this position, it is possible juries have no more rational basis for deciding between expert witnesses than they do for deciding matters between other witnesses who reach opposite conclusions on matters about which the jurors were previously ignorant.<sup>302</sup>

2.48 There has also been some support in the academic literature for the capacities of juries dealing with complex issues raised by experts:<sup>303</sup>

[J]urors play an active role in assimilating and assessing testimony. Jurors [do] not simply adopt the view of a witness they rate high on expertise... Rather, consistent with deeper processing of information which produces attitude change when the listener is highly involved, ... jurors appear to consider and evaluate the content of what the expert [is] presenting, and [are] less likely to be persuaded if they [do] not feel that they [understand] it.

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<sup>298</sup> Lempert R.O., 'Civil juries and complex cases: taking stock after twelve years', ed., Litan R.E., *Verdict: Assessing the Civil Jury System*, The Brookings Institute, Washington, 1993, p.192.

<sup>299</sup> Austin, op. cit., p. 2.

<sup>300</sup> Devlin, op. cit., p. 315.

<sup>301</sup> Marks, op. cit., p. 7.

<sup>302</sup> Lempert, op. cit., p. 193.

<sup>303</sup> Diamond, S.S. and Casper, J.D., 'Blindfolding the jury to verdict consequences: damages, experts, and the civil jury', (1992) 26(3) *Law and Society Review*, 513-563.



2.49 Such studies suggest that concerns about jurors' uncritical willingness to accept expert evidence may be overstated. Nonetheless, the fundamental issue of whether there is a means of further rendering expert evidence amenable to informed and effective court room analysis remains. Herein lies an important challenge to the presentation and understanding of complex evidence, whereby:<sup>304</sup>

[e]very effort should be made to reduce the comprehension gap in the courtroom between experts and lay participants in the trial process, to use the benefits of modern technology and to encourage experts to place before the tribunal of fact all information relevant to the case in as natural and clear a way as can be contrived.

2.50 If this is not possible, another mechanism must be devised to give to the 'tribunal of fact' a selection of data which it can handle. To this latter point, the proposals of the NSWLRC recommended the full and early disclosure of all expert and scientific evidence – names of witnesses, details of samples, methodology, reports, and the like.<sup>305</sup>

2.51 Perhaps some of the now recognised miscarriages of justice would not have occurred had this procedural practice been in place. It is undeniable that such Australian cases as *Splatt* and *Chamberlain* have firmly placed the spotlight on how the jury views the expert's role in the court room. For instance, in recommending the eventual release of Charles Splatt from prison, the South Australian Royal Commission of Inquiry said problems as complex as those involved in this case are 'so detailed and convoluted that the jury needs to be furnished with considerable assistance'.<sup>306</sup> In the *Chamberlain* case, three justices of the High Court of Australia found expert evidence was at a level of difficulty and sophistication above that at which a juror or a judge might subject the opinions to critical evaluation.<sup>307</sup> The LRCT in commenting on this issue confirmed the concern of the High Court:<sup>308</sup>

There have been cases in my experience ... where the ability and willingness of the jury to absorb and weigh expert evidence has been open to serious question. In such cases, it is possible that too much weight is given to one closing address or to the summing up, or that disproportionate weight has been given to the expert's opinions.

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<sup>304</sup> Freckelton, I., 'Trial by confusion: the expert's contribution', Paper delivered at the First Melbourne Criminal Justice Symposium, Melbourne, Mar. 1987, p. 22.

<sup>305</sup> New South Wales Law Reform Commission, *Procedure from Charge to Trial: A General Proposal for Reform*, 1985, pp. 30-32.

<sup>306</sup> Willoughby, P., 'Method of aiding jury needs improvement', *Adelaide Advertiser*, 2 Aug. 1984.

<sup>307</sup> *Chamberlain v The Queen* (1984) 58 ALJR 133.

<sup>308</sup> Law Reform Commissioner of Tasmania, loc. cit.

2.52 In light of these two Australian arguments, there is some suggestion that jurors are quite likely to take into account irrelevant factors and extraneous information and fail to take into account relevant ones. Thus, the expert whose status or credentials seem the more impressive in examination-in-chief or whose demeanour is the more appealing or whose articulateness is the more impressive will be preferred. Some research in the 1970s highlighted this dilemma and suggested in these circumstances the chances of a 'correct' assessment or even a thoroughly reasoned assessment of the data placed before an audience becomes progressively more random as the data becomes more complex or the more conflicting.<sup>309</sup> Indeed, the presentation and appearance of the expert in these circumstances has the potential to carry an importance way beyond what it deserves.

2.53 The eventual outcome of such cases is that many critics have looked at means of circumscribing the role and influence of expert testimony. In the United States, it has been suggested that:<sup>310</sup>

there is no evidence that psychiatric opinions and terminology clarify rather than confuse the issues in a civil commitment proceeding, and there is good reason to believe that judges and juries could function quite adequately in a civil commitment proceeding without 'expert' opinion testimony.

2.54 Just as wilfully in Australia, it has been suggested that the difficulties suffered by expert witnesses in adapting to the demands of the court is 'to very largely remove the ... witness from the court room'.<sup>311</sup> In other words, the role of the expert witness in the trial proper is one so pregnant of the possibility of misleading and confusing juries that it would be better if they did not participate at all. In a similar vein, the former manager of the Police Complaints Authority of Victoria commented in the late 1980s that:<sup>312</sup>

there is a real danger that juries will simply be confused by the language and the conflicting claim of experts. There is a high probability of a comprehension gap between the lay person and the expert. A number of features of experts' language contribute to making it awkward and alienating for the lay person to come to terms with ... More so, of course, the subject matter on which experts are asked to testify can be more than challenging.

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<sup>309</sup> Naftulin, A., Ware, J., and Donnelly, F., 'The Dr Fox lecture: a paradigm of education seduction', (1973) *Journal of Medical Education* 48.

<sup>310</sup> Ennis, B.J. and Litwack T.R, 'Psychiatry and the presumption of expertise: flipping coins in the court room', (1974) 62 *California Law Review* 693, 696.

<sup>311</sup> Bartholomew, A., *Psychiatry, the Criminal Law and Corrections*, Wileman Publications, Melbourne, 1986, p. 87.

<sup>312</sup> Freckelton, op. cit., p 8.

2.55 In its 1987 *Evidence* report, the Australian Law Reform Commission (ALRC) approached this difficult position by recommending an easing of the rules of expert evidence so that experts could testify on matters of common knowledge and in some circumstances on the ultimate issue. In other words, the ALRC has paved the way for the increased utilisation of expert testimony by recommending that 'the evidence, if relevant, should be admissible' and that 'no rule of exclusion should apply'.<sup>313</sup>

2.56 In an effort to combat the problems arising from expert evidence, criminal justice systems throughout the United States have adopted the approach whereby it is the responsibility of the courts to focus upon the potentially confusing or misleading nature of a piece of expert evidence, or of a series of expert witnesses, and only to exclude such material when it is manifest that it would be dangerous to proceed with it being presented to the jury. The task should be to assist the tribunal of fact to rely upon increasing 'expert resistance' and discernment as well as upon the chief benefit of the adversary system, the safety net of cross-examination. As such, it is, or ought to be, the duty of the trial judge to ensure that the evidence of an expert is coherent and properly within the purported expertise of the witness. Changes to the rules of evidence and procedure can assist this process. The courts must have a discretion to exclude evidence if they adjudge it unduly misleading, confusing or time consuming. This is a discretion to be exercised only in extreme circumstances.

2.57 Anytime there is discussion about expert testimony, the issue of court appointed experts arises. It is considered that such experts may serve a number of purposes: 'to advise the court on technical issues, to provide the jury with background information to aid comprehension, or to offer a neutral opinion on disputed technical issues'.<sup>314</sup> For example, in New Zealand the Law Commission proposed that the court should be able to appoint an expert if it considered that the evidence would help the court or jury to understand other evidence in the proceedings or to ascertain any fact that was of consequence to the determination of the proceeding.<sup>315</sup> In the United States, the courts have a 'broad discretion to appoint such an expert, *sua sponte* or on

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<sup>313</sup> Australian Law Reform Commission, *Evidence*, Report No. 38, Australian Government Publishing Service, Canberra, 1987, p. 84, s. 151 (b).

<sup>314</sup> Federal Judicial Center (1995), *loc. cit.*

<sup>315</sup> New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence*, Government Printer, Wellington, 1992.

request of the parties'.<sup>316</sup> Such appointments may be used in various ways and for various purposes; they may be witnesses, consultants, examiners, fact finders, or researchers among other things. Yet, it is essential that the presiding judge determine in advance of any appointment, after consultation with both counsel, exactly what purpose the expert is to serve, how the expert is to function, and the extent to which the expert will be subject to discovery.<sup>317</sup>

2.58 On the one hand, the appointment of a neutral expert, agreed upon by the parties who believe the individual's fairness and expertise cannot reasonably be challenged, could have the benefit of putting a different and allegedly unbiased perspective on issues causing difficulty for the court and the jurors. Some jurisdictions in the United States have increasingly appointed neutral experts for their knowledge in particular fields, such as accounting and finance or the science or technology involved in the litigation, and have generally found such appointments to be beneficial.<sup>318</sup>

Court-appointed experts can have 'a great tranquillising effect' on the parties' experts, reducing adversaries and potentially clarifying and narrowing disputed issues. They may facilitate settlement or at least stipulations. They can help the court and jury comprehend the issues and the evidence.

2.59 In these jurisdictions, a court appointed expert is also not limited when forming opinions to information presented by the respective parties during the case and, as such, is subject to discovery with respect to their opinions.

2.60 On the other hand, the downside to this, however, suggests there is a danger when the court becomes involved in calling such witnesses it may descend too far into the actual area of conflict. These dangers are exemplified by *Titheradge v R*.<sup>319</sup> where the trial judge found himself calling a number of witnesses as a result of his first incursion into the practice. In addition, there is the distinct possibility that the court appointed expert could assume an excessive aura of judicial approval which could have undue or unwarranted influence over the jury. As has been claimed, attention needs 'to be paid to avoidance, so far as that is possible, of giving the jury the impression that the

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<sup>316</sup> Federal Judicial Centre (1995), loc. cit.

<sup>317</sup> *ibid.*, p. 62.

<sup>318</sup> *ibid.*, p. 110; see also Prettyman, E.B., *Proceedings of the Seminar on Protracted Cases for United States and District Judges*, (1957) 21 FRD 395,469

<sup>319</sup> (1917) 24 CLR 107.

so-called expert is clad in the approved garb of the court'.<sup>320</sup> Ultimately, the concern about court appointed experts is underlined by the notion that such practices possibly lead the court to become involved in the conduct of litigation, a responsibility that for all intents and purposes should remain with the parties.

2.61 After considering whether there are adequate alternatives to that of court appointed expert witness—such as directing counsel to have their expert witnesses clarify, simplify and narrow the issues—the criminal justice system could endeavour to deal with the problematic nature of expert testimony with the introduction of court appointed 'assessors'. The role and duties of such court appointed experts would be primarily limited to public cross-examination of experts called by the parties and not to the giving of any information or opinions. The introduction of such assessors could be a useful step in unusual cases towards assisting the court and the jury. The option of court assessors appears to have a number of possible benefits for the litigation process. First, such a format should encourage experts produced by the respective parties to be accountable to their peers in advancing views and opinions. Secondly, the court assessor would be in a position to assist the expert witness to provide explanations of complex and technical data in language comprehensible and accessible to jurors. The opposite view contends that assessors, as they sit on more and more cases, eventually become part of the system and are therefore unable to act with total impartiality.

2.62 Additional options considered by the criminal justice systems of the United States include the formulation of a standard jury instruction<sup>321</sup> on the way in which jurors should deal with expert evidence. In part this instruction says the following:<sup>322</sup>

A person's training and experience may make him a true expert in a technical field. The law allows that person to state an opinion here about matters in that particular field. Merely because ... has expressed an opinion does not mean, however, that you must accept this position. The same with any other witness, it is up to you to decide whether you believe his testimony and choose to rely upon it.

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<sup>320</sup> Freckelton, *op. cit.*, p. 20.

<sup>321</sup> The issue of standard jury instructions are discussed in greater detail later in this paper.

<sup>322</sup> American Federal Judicial Centre, *Committee to Study Jury Instructions, Pattern, Criminal Jury Instructions*, American Federal Judicial Centre, Washington, 1982, p. 34.

## Forensic Evidence

2.63 In Australia there has been considerable debate, more so than with complex fraud cases, with regard to the impact of forensic evidence on juries.<sup>323</sup> It is said 'the more complex the scientific concept and the more technical the means of ascertaining or measuring a scientific fact, the less accessible it is to the average juror'.<sup>324</sup> To this point, the South Australian Mitchell Criminal Law and Penal Methods Reform Committee (hereafter referred to as 'the Mitchell Committee') regarded it as axiomatic that 'special juries' should be empanelled for such trials:<sup>325</sup>

In the long run we believe that the fact that jurors have certain basic knowledge concerning the matters in respect of which expert evidence will be called will save time of counsel in addressing and will save a good deal of time in the examination and cross-examination of experts.

2.64 Others have argued that where forensic evidence is part of a more complete jigsaw of other evidence, the jury can comprehend its significance:<sup>326</sup>

When such evidence is presented in conjunction with other direct evidence, such as witness identification, confessions, demeanour and opportunity, it is seldom suggested that the jury lacks competence to comprehend it. (original emphasis)

In addition, it seems apparent that high quality forensic investigation tends to lead to the discovery or disclosure of other, more accessible, evidence—confessions or physical evidence, for example.<sup>327</sup>

2.65 Given the notion that jurors are able to comprehend technical or complicated forensic evidence when it is part of a wider group of evidence it can be seen that difficulties arise in the presentation and comprehension when this type of evidence is the sole basis of the Crown's case, or the defence's rebuttal. The Law Reform Commission of Victoria encapsulated this issue

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<sup>323</sup> The cases of *van Beelan* (1972) 4 SASR 353; *Splatt*, op. cit.; *Chamberlain* (1984) 51 ALR 225 are just three examples which in their different ways were *causes celebres*.

<sup>324</sup> *Harding*, op. cit., p. 248.

<sup>325</sup> Mitchell J., R., *Court Procedure and Evidence*, Report No. 3, Criminal Law and Penal Methods Reform Committee of South Australia, Government Printer, Adelaide, 1975, p. 102.

<sup>326</sup> *Harding*, R.W., 'Jury performance in complex cases', eds., Findlay, M. and Duff, P., *The Jury Under Attack*, Butterworths, Sydney, 1988, p. 83; see also the Australian case of *Bradley* which is an example of this ability to comprehend technical information.

<sup>327</sup> Thorwald, J., *Crime and Science: The New Frontier in Criminology*, Harvest Books, New York, 1966, pp. 359–382.

when it argued that the 'elimination of juries would not solve the problem, as judges are not necessarily well versed in matters of forensic medicine, nor immune from partisan persuasion of experts'.<sup>328</sup> This stance has received the following support: '[I]n this area *jury malfeasance is invariably a direct function of legal or scientific malfeasance*' (original emphasis).<sup>329</sup>

2.66 Ultimately, there are a number of broad issues arising from the debate concerning forensic evidence. They include: the mode of presentation of forensic evidence; the present role and professionalism of forensic scientists in Australia; and, the capacity of the legal profession and judiciary to control and direct the evidence of forensic experts and witnesses. It is only in the light of such factors that the question of jury competence can properly be addressed.

2.67 The forensic expert is an integral part of the trial process and should remain so, but some attention must be paid to the level and type of impact such evidence and expert testimony has on the jury's collective ability to comprehend complex matters put before the court.

## Scientific/Medical Evidence

2.68 Nowhere has the advance of scientific knowledge presented greater difficulties than in the realm of medical (including psychiatric) and scientific evidence. The mental state of an accused person is a typical example which amplifies this concern. The test in law of whether an individual was insane at the time of committing a crime is extremely difficult to satisfy. Moreover, medical classifications of mental abnormality provide no convenient dividing line which the law could adopt in order to distinguish between those who are responsible for their conduct and those who are not. The differences are of degree only, and medical opinions about the accused's mental health must, in the main, be speculative and imprecise. The responsibility of this task befalls the jury. How far a jury is capable of appreciating the significance of any instructions given to them on the law as opposed to medical or scientific evidence criteria is debatable.

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<sup>328</sup> Law Reform Commission of Victoria, (1985), *op. cit.*, pp. 174–175.

<sup>329</sup> Harding, (1988), *loc. cit.*

2.69 As noted, scientific evidence is generally regarded as a matter entirely for the jury,<sup>330</sup> although it would appear that sometimes ‘the jury is not the ideal forum for debating and resolving [conflicts about scientific opinion]’.<sup>331</sup> The South Australian Royal Commission of Inquiry, in examining and ultimately rectifying a miscarriage of justice, recommended that evidence of a scientific and technical nature should be presented to juries in a manner which maximises the prospect of the evidence being understood by the jury:<sup>332</sup>

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 deserve; and specifically the nature and degree of any limitations or provisos which are properly appended thereto.

2.70 A year later, this view also received some support from the High Court of Australia.<sup>333</sup> Research conducted in the United States, which questioned trial court judges about the difficulties that jurors had in complex scientific or medical cases, found judges cited comprehension of medical testimony as a recurrent problem, particularly in situations where jurors were faced with ‘reconciling totally conflicting expert testimony from highly qualified medical witnesses’.<sup>334</sup>

2.71 As a consequence of these types of problems and difficulties, it is important that scientific and technical matters relevant to the issues before a jury ‘be placed before them in proper sequence and in such a way as to be readily understood by them’.<sup>335</sup>

## **Alternatives to Existing Methods of Trial by Jury in Complex Cases**

Not surprisingly, a plethora of recommendations have been made by various bodies and a range of strategies developed in an attempt to minimise the length of criminal trials in general, and the mega-trials in particular. The recommendations and strategies have included changes to the rules of evidence and procedure (particularly

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<sup>330</sup> Dixon J, *Hocking v Bell* (1945) 71 CLR 430, 496.

<sup>331</sup> *Chamberlain v The Queen* (1983) 51 ALR at 290 per Brennan J.

<sup>332</sup> Shannon, C.(Royal Commissioner), *Report of the Royal Commission of Inquiry into the Conviction of Edward Charles Splatt*, Government Printer, Adelaide, 1984, p. 52.

<sup>333</sup> Deane J, *Kingswell v The Queen* (1985) 60 ALJR 17 at 32.

<sup>334</sup> Goodman, J., Greene, E. and. Loftus, E.F, ‘What confuses jurors in complex cases’, *Trial*, 21, 1985, p. 66.

<sup>335</sup> Phillips and Bowen, op. cit., p. 14.



disclosure obligations on both the prosecution and the defence), the utilisation of electronic technology in court rooms, the abolition of committal proceedings, the abolition of juries, and reform of the substantive criminal law itself.<sup>336</sup>

2.72 Almost ten years earlier, the Law Reform Commission of Victoria in considering the alternative options available argued:<sup>337</sup>

If alternatives to the jury are to be considered objectively, it must be kept in mind that a different trial method does not necessarily provide a lesser option, and can dispense justice equally fairly. The jury system is merely one trial method where rules are fair and rights of the accused, victim and witnesses are safeguarded. The question of whether the jury remains an adequate and efficient problem solver is becoming increasingly insistent for complex trials.

2.73 This statement continues to have poignancy and reflects the recent attention on jury trials which has focussed in particular on complex commercial prosecutions. There has been the suggestion 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 commercial cases or civil cases is not seen as 'infringing basic principles of criminal justice'.<sup>338</sup> However, this does not account for those anomalies which would remain and, in the same year as its southern colleague, the NSWLRC was a little more cautious when expressing its opinion about this matter:<sup>339</sup>

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.

2.74 The Law Reform Commission of Victoria also tentatively lent its support to the *status quo*:<sup>340</sup>

It may be considered odd that complicated commercial cases are singled out for attention, as somehow distinct or apart from other complex cases of a non-commercial nature: there is no reason to believe that tangled commercial matters are more difficult to understand than labyrinthine conspiracy cases, or cases of another nature involving convoluted fact situations and perplexing evidence of various types. It is not immediately evident why it should be accepted wisdom in some quarters that juries are incompetent to deal with such matters and that to leave these cases to judges would be preferable, or non-problematic. No doubt judges may have a difficult time understanding knotty commercial matters: not all are well versed in

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<sup>336</sup> Corns, C., 'Anatomy of Long Criminal Trials: A Preliminary Review', Paper presented at the 14th Australian Institute of Judicial Administration Annual Conference, Canberra, Aug. 1995, p. 6.

<sup>337</sup> Law Reform Commission of Victoria (1985), *op. cit.*, p. 155.

<sup>338</sup> Levi, M., 'Blaming the jury: frauds on trial', (1983) 10(2) *Journal of Law and Society* 268.

<sup>339</sup> New South Wales Law Reform Commission, (1985) *op. cit.*, p. 239.

<sup>340</sup> Law Reform Commission of Victoria, (1985) *op. cit.*, pp. 177-178.

commercial law. Not all, even if expert in some or many commercial law areas, need be without any difficulties in handling decision making in this area, as in other areas of complexity in criminal trials.

2.75 A little over a year later, the Commissioner of the New South Wales Independent Commission Against Corruption also acknowledged that 'the jury system is not perfect', yet accepted that until 'an alternative which is better than the present system' could be found then 'critics of the jury system ... should not be heard unless they are able to proffer an alternative'.<sup>341</sup>

2.76 Before moving onto an assessment of four major initiatives proposed as alternatives to trial by jury, some words of caution are in order. There is an assumption implicit in many discussions that other forms of trial would not suffer the same error rate as the jury trial. This is questionable, and overlooks the fact there will always be difficult cases which will be found formidable by any tribunal or fact finding mechanism, and there will always be perverse decisions made by judges.

## Judge Alone Trials

The guarantee of s.80 of the Constitution was not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid base in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment. In the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government.<sup>342</sup>

2.77 Accepting that there has been very little empirical research that relates to the actual levels of competence of juries in complex litigation matters also requires an acceptance that virtually none of the research bears on the competence of the judge. Accordingly, it has been argued that before a decision to apply competency tests to the jury, it is just as appropriate that such tests should be applied to counsel and judges.<sup>343</sup>

2.78 Having said this, it seems that whenever the issue of an alternative to jury trials is raised, the single most popular option considered is that which entails judge alone trials. In the United States, the viability and desirability of

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<sup>341</sup> Temby, I., 'Journalists and jurors: contempt of court', Address to the Media Law Association of Australia, 12 Feb. 1986.

<sup>342</sup> Deane J, *Kingswell v The Queen* (1985) 159 CLR 264, later received general approval of the majority of the High Court judges in *Brown*.

<sup>343</sup> Levi,(1988), op. cit., p. 110.

jury trial in complex litigation has been an issue since the 1970s, where it has been argued 'that trying an extraordinarily complex and protracted case to a jury acceptably increases the risk of an erroneous decision as compared with the readily available alternative of a bench trial'.<sup>344</sup> Furthermore, arguments of the impact of complex trials on the Due Process Clause of the Fifth Amendment have been noted by the courts, whereby 'trial by jury may be refused in a case of such complexity that the jury cannot likely achieve a reasonable understanding of the relevant and applicable legal rules'.<sup>345</sup>

2.79 The 'complexity exception' position has been debated widely in the American domain,<sup>346</sup> whereby it boils down to an interpretative wrestle concerning the intentions of the Seventh Amendment: on the one hand, the desire to satisfy principles of due process in complex matters demands 'improvement' in the jury's performance; while the other perspective states that the reality of the amendment dictates that judges strike jury trials in such cases.<sup>347</sup> Ultimately, it is considered that the decision is moulded by the claim that a party is denied due process if their rights are decided by a jury unable to understand the case and decide it rationally. On this basis the Due Process Clause of the Fifth Amendment overrides the Seventh Amendment when the two are in conflict.<sup>348</sup> To highlight the difficulties inherent in this conflict:<sup>349</sup>

The Federal Circuit Court of Appeals have split over the acceptability of these various arguments for the 'complexity exception'. The Ninth Circuit has rejected all of the arguments and held that there is no complexity exception [In re U.S. Financial Securities Litigation, 609 F. 2d 411 (1979)]. The Third Circuit rejected the historical argument and the argument from the *Ross* footnote [the pre-merger of law and equity custom], but accepted, in a guarded form, a complexity exception based on the due process argument [In re Japanese Electronic Products Antitrust Litigation, 631 F. 2d 1069, 1088 (3rd Cir. 1980)]. Finally, the Fifth Circuit has expressed no opinion on whether there can be a complexity exception, but has held that if such exception exists, it cannot reach a case where the trial court finds only that 'it would be most difficult, if not impossible, for a jury to reach a rational decision' [*Cooten v Witcon Chemical Corp.*, 651 F. 2d 274, 276 (5th Cir. 1981)]. It is obvious that this is an issue that the Supreme Court will ultimately have to resolve. But to date, the Court has

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<sup>344</sup> Campbell, op. cit., p. 66.

<sup>345</sup> *Zenith Radio Corp. v Matsushita Elec. Indus. Co.*, 631 F. 2d 1069 (3rd. Circ. 1980).

<sup>346</sup> Johnson and Wiggins, 'Drawing on the experiences of alternative decision makers: Can we preserve the jury in complex litigation', (1994) 12 *Behavioural Sciences and the Law* 161; Lempert, R., 'Civil juries and complex cases: Let's not rush to judgement', (1981) 80 *Michigan Law Review*. 68; Lord Devlin, 'Jury trial of complex cases: English practice at the time of the Seventh Amendment', (1980) *Columbia Law Review* 43.

<sup>347</sup> Campbell, op. cit., p. 70.

<sup>348</sup> Advice presented to the Victorian Parliamentary Law Reform Committee by Mr Don Anton, Lecturer, Faculty of Law, University of Melbourne, 28 Oct. 1995.

<sup>349</sup> *ibid.*

chosen to refrain from considering the matter, perhaps to allow a more thorough discussion of the issue in the lower courts.

2.80 Having paid cursory attention to the position of bench trials<sup>350</sup> in the United States, it is time to consider the position of judge alone trials in Australian jurisdictions. Over fifteen years ago, a major report tabled in the New South Wales Parliament recommended that trial by jury in civil matters no longer be mandatory in relation to certain corporate or 'white collar' offences.<sup>351</sup> It was proposed that trials of persons charged with such an offence be held before a Supreme Court judge sitting without a jury. This proposal was not adopted.<sup>352</sup> Similarly, such a provision was considered in Victoria in the early 1980s as a means to facilitate the efficiency of the process of criminal trials, however political expediency meant that the notion was not pursued.<sup>353</sup> Half a decade later, it has been noted that 'the right of an accused charged with a commonwealth offence in Australia to elect to be tried before a judge alone has divided the High Court'.<sup>354</sup> The High Court in *Brown v The Queen* found by the barest of majority's that trial by jury could not be traded for judge alone trials. Yet, a dissenting judgement 'supported a free and informed choice by an individual to elect to be tried by judge alone, and in doing so cited the caution of Justice Frankfurter in *Adams v United States ex. rel. McCann*<sup>355</sup> in that to deny such a choice would be to 'prison a man in his privileges and call it the Constitution''.<sup>356</sup> In part the dissenting judgement said:<sup>357</sup>

Provided that the accused has a fair trial according to law by a tribunal of his choice, the public interest is likely to be satisfied. There is no reason why the verdict of the jury should attract and hold the confidence of the community any more than the decision of a judge when the method of trial by judge alone has been freely chosen by the accused person and the choice expressed in the manner prescribed by law.

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<sup>350</sup> The American colloquium for judge alone trials.

<sup>351</sup> New South Wales Criminal Law Review Division, *Report on Summary Prosecution in the Supreme Court of Corporate and 'White Collar' Offences of an Economic Nature*, Government Printer, Department of the Attorney-General and Justice, 1978.

<sup>352</sup> However, s. 475A of the *Crimes Act 1990* was passed enabling the summary trial of 'corporate offences with the consent of the accused person.

<sup>353</sup> Willis, J., 'Paying lip service to juries', ed., D. Challenger, *The Jury: Proceedings of a Seminar on the Jury*, Australian Institute of Criminology, Canberra, 1986, p. 29.

<sup>354</sup> Harrison, C., 'Redefining justice?: Trial by judge alone', Department of Criminology, University of Melbourne, Unpublished, Undated, p. 4.

<sup>355</sup> (1942) 317 US 269.

<sup>356</sup> Harrison, loc. cit.

<sup>357</sup> Wilson J, *Brown v The Queen*, (1986) 60 ALJR 257 at 265.

2.81 Then a few years later in 1989, the Attorney-General's Department of New South Wales, in looking at certain reforms of the criminal justice system in that state, recommended that the accused should be given the option of electing trial by judge alone in relation to all criminal matters in the District Court and the Supreme Court, although the procedure had to have the consent of both parties to the action.<sup>358</sup> As if to underline this, the Queensland Criminal Justice Commission's (QCJC) 1990 inquiry into allegations of jury interference was told that 'accused people should have the right to trial simply by a judge'.<sup>359</sup> Whilst there seems to be considerable support for this proposal, it is also frequently objected to, chiefly on the ground that it is the 'thin edge of the wedge' which could ultimately lead to the abolition of the use of juries in serious criminal cases.

2.82 Trials without a jury would not be a new feature of the law. A number of jurisdictions have a long experience with the summary trial. For instance, in the mid-1970s in England, the James Committee recommended the removal of the right of the accused to choose jury trial for certain categories of 'minor' offences (these included theft and related offences of dishonesty involving less than £20).<sup>360</sup> In Singapore, the system of trial by jury was completely abolished by the Criminal Procedure Code (Amendment) Act 1969,<sup>361</sup> while in Canada, under Criminal Code, for almost 40 years the accused has had a right to elect for trial by judge alone on most charges.<sup>362</sup> Closer to Australia is the New Zealand jurisdiction, subject to a judge ordering trial by jury, an accused has been entitled since 1979 to elect for judge alone in all but the most serious charges.<sup>363</sup>

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<sup>358</sup> Attorney-General's Department of New South Wales, *Reforms to the Criminal Justice System*, Discussion Paper, Government Printer, Sydney, May 1989.

<sup>359</sup> Queensland Criminal Justice Commission, *The Jury System in Criminal Trials in Queensland*, Issues Paper, Research and Co-ordination Division, Toowong, 1991, p. 42.

<sup>360</sup> James Committee, *The Distribution of Criminal Business between the Crown Court and Magistrates Courts*, Cmnd. 6323, Her Majesty's Stationery Office, London, 1975, para. 87.

<sup>361</sup> Advocates of abolition cited the reluctance of the jury to convict in certain cases because of the mandatory death penalty. It was also argued that, due to the cultural mix of the Singaporean population, trial by jury did not mean trial by one's peers but trial by the 'English educated'.

<sup>362</sup> Canadian Criminal Code RSC 1970, c. C-34 s. 430; Canadian Criminal Code 1953-54, s. 483 provides that the jurisdiction of a Provincial Court Judge to try an accused is absolute in certain cases; see also, *Martin's Criminal Code 1984*, pp. 398, 467, 484 ff.

<sup>363</sup> Under the *Judicature Amendment Act (No. 2) 1955*, the general rule was 'except as provided in section two of this Act every action shall be tried by a judge without a jury'. This was updated with the introduction of the *Crimes Act 1961*, ss. 361A-361C. Also, the judge who hears the accused's application for a judge alone trial has a discretion to disregard the election of the accused if the judge considers, in the interests

2.83 In relation to the position in Australia, trial by judge alone has been possible in some of the state jurisdictions for varying lengths of time. In Queensland it has been available for some years, particularly in relation to SP bookmaking<sup>364</sup> and other similar offences.<sup>365</sup> Although rarely used, summary trial by judge alone for a range of corporate crimes—as modified under the *Crimes Amendment Act 1979* and the *Supreme Court (Summary Jurisdiction) Act 1967*—has been available in New South Wales for over fifteen years.<sup>366</sup> More recently in New South Wales the Law Reform Commission in 1986 reported on the performance and desirability of jury trials and recommended that accused persons should have the right to make an application that the trial be conducted by a judge sitting without a jury. The NSWLRC recommended that applications of this kind should be determined by a number of criteria.<sup>367</sup> In 1990, these recommendations were implemented in the *Criminal Procedure Act 1986* when—with the consent of the prosecution—the option of judge only trials became law.<sup>368</sup> Similar provisions enabling an accused person committed for trial on indictment to elect to be tried by judge alone came into being in 1995 in the Australian Capital Territory.<sup>369</sup> Trial by judge alone has been available in South Australia since the amendment of s. 7 of the *Juries Act 1927*<sup>370</sup> by the controversial *Juries Amendment Act 1984*<sup>371</sup>. All criminal trials in

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of justice, that the accused should be tried before a judge with a jury.

<sup>364</sup> SP is the acronym for *Starting Price* betting.

<sup>365</sup> *Racing and Betting Act 1980–1983*, s. 218 (2); *R v Caldwell and Kinross, Ex parte Makin* (1986) 2 Qd R 397.

<sup>366</sup> New South Wales Criminal Law Review Division, loc. cit. The report recommended that trial by jury no longer be mandatory in relation to certain corporate or commercial types of offences. What followed as a consequence of this report was the *Crimes (Amendment) Act 1979*.

<sup>367</sup> '(a) The application should not be entertained unless the judge hearing it is satisfied that the accused person has either obtained legal advice on the matter or understands the nature and consequences of the application; (b) The onus should be on the accused person to show that there are legitimate grounds for dispensing with the jury; (c) The decision as to whether the trial should be conducted without a jury should be made by a judge at a pre-trial hearing; (d) The Crown should be represented at such a hearing and entitled to be heard on the merits of the application; and (e) The accused person should have the right, with the leave of the court, to withdraw the election to be tried by judge alone' (New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No. 48, NSWLRC, Sydney, 1986, xxiv).

<sup>368</sup> s. 32.

<sup>369</sup> Heenan J., D.C., 'Trial by judge alone', (1995) *Journal of Judicial Administration* 4.

<sup>370</sup> Section 7 of the Act reads as follows: '7(1) Subject to this section, where, in a trial of any indictable offence before the Supreme Court or a District Court—(a) the accused elects in accordance with the rules of the court, to be tried by judge alone; and (b) the presiding judge is satisfied that the accused before making the election sought and received advice in relation to the election from a legal practitioner, the trial will proceed

higher courts in that state are able to be tried without a jury at the election of the accused, as long as they have sought the proper legal advice as to this option.<sup>372</sup> Moreover, the trial of civil actions by jury was abolished completely in 1984 whereby 'no civil inquest shall be tried by a jury'.<sup>373</sup> In Tasmania, the court has a discretion to order a trial without a jury in common law actions 'where prolonged examination of documents or accounts is required or where any scientific or local investigation is necessary which cannot be conveniently undertaken with a jury'.<sup>374</sup> In the same jurisdiction the *Justices Act 1959* provides for summary trial of certain crimes upon the election of the accused.<sup>375</sup> In Victoria, the possibility of judge alone trials does not exist and judges may only 'determine any question of fact that may be determined lawfully by a judge alone without a jury'.<sup>376</sup>

2.84 When civil cases are added to the equation, it would seem that judges have considerable experience in dealing with cases of substantial complexity and lengthy duration without a jury as fact finders. To this point, a Victorian Supreme Court judge observed in the lengthy and complex case, *R v Reid, Krantz, Ouseley, and Waugh*: that '[h]ad this trial been presided over by a judge

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with a jury. (2) No election may be made under subsection (1) where the accused is charged with a minor indictable offence and has elected to be tried in the District Criminal Court. (3) Where two or more persons are jointly charged, no election may be made under subsection (1) unless all of those persons concur in the election. (4) Where a trial proceeds without a jury in pursuance of this section, the Judge may make any decision that could have been made by a jury on the question of guilt of the accused, and such a decision shall, for all purposes, have the same effect as the verdict of a jury.'

<sup>371</sup> 'When the South Australian Labor Government introduced the Juries Amendment Bill, there was strong opposition from the Liberal Party and also from the Law Society of South Australia which regarded the proposed legislation as the 'thin edge of the wedge to gradually remove juries from certain cases' (Clisby, M., 'Concern over jury trial changes', (1991) 13(11) *Law Society Bulletin* 22). These fears were well founded, it seems, because several years later, in 1991, the same Government's Justices Act Amendment Bill actually proposed the complete removal of the right to trial by jury for accused persons facing charges for offences carrying a maximum sentence of two years imprisonment. This proposal was not passed into law' (Harrison, op. cit., p. 5).

<sup>372</sup> *Juries Act 1927*, s. 7; *Juries Rules 1974-1984*, rr. 14-24.

<sup>373</sup> *Juries (Amendment) Act 1984*, s. 5.

<sup>374</sup> This provision appears to be based upon the proposition that certain investigations are too detailed to enable a proper presentation of the issues under the rules of a jury trial; See Order 39, Rule 7 of the *Rules of the Supreme Court 1965*.

<sup>375</sup> Part VIII.

<sup>376</sup> Under s. 5 (b) of the amending *Crimes (Criminal Trials) Act 1993*, the closest the higher courts come to being sole arbiters is in relation to the determination of facts. As the Act specifies, on the application of a party or on its own motion, the presiding judge is in the position to determine such questions of fact without a jury.

sitting alone ... the length of the trial would have been halved'.<sup>377</sup> Questions have been raised in the United States about jurors' abilities to participate in such cases and, as a result, it is often considered by critics of juries that trial by judge alone should be available (or even mandatory) in cases of great complexity, or where there is doubt about the possibility of empanelling an impartial and/or competent jury.<sup>378</sup> However, there are some polemic concerns about this particular concept.

2.85 There are two well defined and contrary positions on judge alone trials. On the one hand, the position of critics opposed to the jury can be distilled to this:<sup>379</sup>

A judge, who has formal training and experience in law and in the logic of evidence, is far more likely than twelve men and women taken off the street to be able to decide a case accurately and according to the law.

2.86 Indeed, in its investigation of criminal trial juries in New South Wales, the Law Reform Commission also voiced a similar standpoint whereby it felt that there was a strong and positive potential for judges on their own to expeditiously dispense with the trial because of the judge's ability to focus on and assess the relevant evidence in a shorter time. On the other hand, judge alone trials are not considered by all to be the panacea for problems faced by juries in complex trials. In fact, there is some consideration to the notion that judges presiding on their own are just as vulnerable to the problems of complexity as are jurors.

2.87 Several years ago, the LRCT also examined aspects of the jury system and raised the argument that the jury system 'encourages unmeritorious defences and prolonged grandstanding advocacy', which in turn adds considerably to the cost of litigation and court time.<sup>380</sup> Furthermore, there has also been the suggestion that a judge sitting alone is less likely to allow the trial to miscarry as a result of the wrongful admission or rejection of evidence than is the case in a jury trial.<sup>381</sup> As a measure to deal with these matters, the LRCT postulated that '[i]n a trial by judge alone, the latter [grandstanding

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<sup>377</sup> Beach J, [1980] 23 September, cited in Levi, (1988), op. cit., p. 98.

<sup>378</sup> Spry (Sir), J., 'Problems of jury trials in small jurisdiction', (1986) *Commonwealth Law Bulletin*, Apr., 575; Levi, (1988), op. cit., p. 99.

<sup>379</sup> Hans, and Vidmar, op. cit., p. 115.

<sup>380</sup> Law Reform Commissioner of Tasmania, loc. cit.

<sup>381</sup> Hale, J., 'Juries: the Western Australian experience', (1973) 11 *Western Australian Law Review* 99.



advocacy] would be severely discouraged'.<sup>382</sup> There are also some additional advantages to this concept: speedy determination of issues; no need for committal proceedings; more efficient and practical way of resolving complicated issues; likely to reduce trial length; the financial cost of trials would be reduced; fairer to accused; no need to over simplify complicated issues; access by the decision maker to transcript and exhibits; unlimited time for deliberations.<sup>383</sup>

2.88 In addition to these notions, one of the strongest arguments that can be presented in support of this mode of trial is that the judge's legal knowledge and experience means that they are better able to perceive subtle distinctions in the rules of evidence, that they know the importance of various arguments and legal positions, and that they are better equipped to understand the law that is to be applied.<sup>384</sup> Following on from this, advocates of the judge only trial option also argue that this is the only way to ensure a reliable verdict which can be tested on appeal.<sup>385</sup>

[T]he most compelling grounds for advocating trial by 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.

2.89 This latter position has been supported by a former Judge of the Supreme Court of Western Australia, who stated:<sup>386</sup>

A judge sitting alone is expected to give reasons for his decision. Those reasons are of legitimate interest to the people affected by the decision: but more importantly it is easier (in spite of dicta to the contrary) to correct on appeal a judge's finding of fact than the verdict of a jury.

2.90 In contrast, the argument for judge alone trials has been met with disapproval by a number of international and national statutory bodies, many of which have agreed that twelve minds are better than one, and that 'there is no empirical evidence that judges, *per se*, are more competent than juries, *per se*, to determine complex factual issues'.<sup>387</sup> As the Law Reform Commission of Victoria argued:<sup>388</sup>

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382 *ibid.*

383 New South Wales Criminal Law Reform Division, *loc. cit.*

384 Willis, *op. cit.*, p. 39; Harrison, *op. cit.*, p. 16.

385 Law, J., 'Criminal Law Trials', *Scots Law Times*, 1967.

386 Hale, *loc. cit.*

387 Kuhlman, R.S., Pontikes, G.C. and Stevens, W.J., 'The case for special juries in complex

Even if the jury so selected is 'bad', it makes a mistake only in one case, which is better than a 'bad' judge blundering throughout a career on the bench. Familiarity of the judge with the wickedness of human nature constantly paraded in court may make for cynicism and scepticism. The jury is untainted by courtroom experience (but not necessarily from cynicism and scepticism thereby).

2.91 There are also additional considerations. These critical arguments suggest that the impact of such legislation entertaining judge alone trials redefines the traditional roles of the participants involved in the trial process, as well as altering the fundamental procedural and structural parameters of trials. As was noted in *Brown v The Queen*, to accept that one player (the judge) can assume a role fundamentally designed for two (judge and jury) undermines the overriding principle which has always endeavoured to guarantee the highest possible standard of justice in the conduct of trials.<sup>389</sup> Furthermore, at the time this judgment of the High Court was being formulated, a South Australian Supreme Court judge also noted:<sup>390</sup>

Whatever the reasons for opting for trial by judge alone in complicated fraud and commercial cases where conflicting forensic evidence might bemuse a jury, none of these considerations are sufficient, in my opinion, to supplant trial by jury.

2.92 Ultimately, the primary question remains: Does such legislative change in the direction of judge only trials advance the administration and perceptions of justice to warrant such intervention? This question becomes even more paramount in light of the belief in many circles that the jury is an important means of preserving freedom from unjust laws while at the same time maintaining direct links between the justice system and the community.<sup>391</sup> This standpoint has been more recently supported by the LRCT which argues that such a proposal takes the administration of and participation in justice away from the people and that it becomes elitist (or is at least perceived to be so) because the trial is presided over by one appointed official who is almost always chosen from a particular group and class of people: 'It is single in number and therefore incapable of registering or giving effect to a minority dissent. The feature of unanimity or majority present in a jury trial is absent'.<sup>392</sup> This view of the jury's status within the justice system – whilst possibly symbolic in its emphasis – is nevertheless a powerful one.

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civil litigation', (1980) 89 *Yale Law Journal*, 1159.

<sup>388</sup> Law Reform Commission of Victoria, (1985), op. cit., pp. 55–56.

<sup>389</sup> Brennan J, *Brown v The Queen*, (1986) 60 ALJR 257 at 267.

<sup>390</sup> White J, *R v Marshall*, (1986) 43 SASR 448.

<sup>391</sup> Murphy J, cited in Willis, op. cit., p. 19.

<sup>392</sup> Law Reform Commissioner of Tasmania (1990), op. cit., p. 12.

2.93 Interestingly, sharing some similar concerns as the LRCT about the distancing of the community from direct involvement in the workings of justice, the judge who presided over the first murder trial conducted in the Supreme Court of South Australia voiced deep reservations toward judge alone trials:<sup>393</sup>

[T]he values of the community are so deeply involved in the many value-judgements which have to be made in the course of the trial and the sophisticated evidentiary rules and procedures have been so deeply developed in order to enshrine those values in their interstices, that trial without a jury ... will be in danger, in my opinion, of becoming quite a different legal process than it has been traditionally. The values are too important; and the burden on the trial judge is oppressive.

2.94 Even more recently, the QCJC has postulated:<sup>394</sup>

There is risk that if judges continually hear cases without juries they will be hardened by it. Additionally, they suffer the loss of the fresh outlook of ordinary people who are representative of the community. While hearing cases alone would be an unenviable task for judges, the loss of community input and anonymity of the jury could threaten a loss of public confidence in the administration of the criminal law.

2.95 Recent evidence presented to the Victorian Parliamentary Law Reform Committee also supports the general thrust of these concerns about judge alone trials:<sup>395</sup>

I would prefer not to be tried by people I think do not have the width of experience collectively or individually that I trust the jury does have, which is really one of the best things going for the jury system. They can have enormous collective experience of the world, its affairs and individual idiosyncrasies, and I think they are more tolerant of them than judges are. Judges tend to become impatient. There is enormous pressure on them to resolve things and, as a consequence, there are significant dangers with a judge alone trial.

2.96 In conclusion, the bulk of the anecdotal evidence about this possible reform highlights that 'there are no guarantees that juries will understand the technical evidence in a complex case or decide such cases correctly, so there are no guarantees that judges will get everything right'.<sup>396</sup> But, possibly more importantly, the concept of jury trial incorporates both the right of the

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<sup>393</sup> White J, *R v Marshall* (1986) 43 SASR 448 at 499.

<sup>394</sup> Queensland Criminal Justice Commission, *op. cit.*, p. 44.

<sup>395</sup> van de Weil, R., *Minutes of evidence*, Victorian Parliamentary Law Reform Committee's Inquiry into Jury Service, Melbourne, 1 May 1995, p. 255.

<sup>396</sup> Lempert, *op. cit.*, p. 216; In addition, the concerns over the unpredictability and inconsistency of jurors verdicts are ameliorated on the one hand by research which demonstrates that judges would have reached the same verdicts jurors in the vast majority of cases, even in difficult cases (see Kalvan and Zeisel, *op. cit.*). Of the differences that do exist, discrepancies have been attributed to juror sentiments about the law or the defendant (see Hyde, *op. cit.*).

accused person and the right of the community to have serious cases dealt with in a manner which ensures that the standards of the community have been applied in the determination of guilt. Such determinations are met by the institution of jury trials. The presence of the jury ensures a publicly comprehensible exposition of the case.<sup>397</sup> One cannot also forget the distinct possibility of the serious risk of trial by judge alone leading to a situation where legislators abolish juries altogether. Then there is another serious danger of judge alone trials:<sup>398</sup>

the more they are utilised, the more the law is going to become accountable only to itself, and the more distanced it will become from the community ... The gravest concern of all is that efficiency will take precedence over individual rights and thus verdicts will be based on rules and not equity.

## Trial by Bench of Judges

2.97 Another option considered by law reformers is trial by a bench of judges. A number of judges (the optimum is generally considered to be three) sitting together would reduce the strain on a single judge and the decision would have greater credibility than one judge sitting alone.

2.98 For example, in the inquisitorial style of criminal justice in the Netherlands,<sup>399</sup> the concept of a bench of three judges is considered both highly satisfactory and flexible. In Hong Kong, a judge will sit with two commercial adjudicators who are full members of the court. A retrial will follow where a unanimous decision cannot be reached by the three members of the tribunal.<sup>400</sup> In the Republic of Ireland, the Special Criminal Court is activated and deactivated by proclamation of the government when it is 'satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order'.<sup>401</sup>

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<sup>397</sup> Byrne, P., 'The jury system: some suggestions for reform', *The Jury in Criminal Trials*, Discussion Paper No. 68, University of Sydney, Sydney, 1986, p. 13. Furthermore, the High Court of Australia held in *Brown v R* (1986) 60 ALJR 257 that, in proceedings for federal offences, a provision which gives the accused the right to elect for trial by judge alone is in breach of s. 80 of the Australian Constitution.

<sup>398</sup> Harrison, *op. cit.*, p. 20.

<sup>399</sup> This means that the Bench is bound by the presentment drawn up by the prosecutor and that the rights of the prosecution and accused are carefully balanced during the trial, but the Bench initiates the questioning of accused and witnesses after reading the dossier compiled by the Crown.

<sup>400</sup> Duff, P. Findlay, M. and Howarth, C., 'The Hong Kong jury: a microcosm of society?', (1990) 39 *International and Comparative Law Quarterly*.

<sup>401</sup> *Offences Against the State Act 1939* (Part V).

The present Special Criminal Court was brought into operation in 1972, and usually consists of three members: a High Court Judge, a County Court Judge and a Magistrate, who sit without a jury. The verdict is the opinion of the majority of the members of the court, there being no provision for dissenting or separate opinions.

2.99 It has been argued that trying complex and protracted cases before a jury tends to increase the risk of specious decisions being entered as compared with the ability of a bench of judges. The disadvantage of this alternative, namely the demands it places on judicial time seems to be the main objection. To this point, the LRCT has commented that trial 'by a bench of judges would place too great a strain on our Court especially if a retrial were ordered'. In addition, the Law Reform Commission of Victoria has similarly argued:<sup>402</sup>

changes in the procedure through more reliance on prepared documents and by concentrating on crucial evidence only (in other words, the introduction of some inquisitorial traits for reasons of expediency and common sense) would have to be considered to achieve this result.

2.100 Ultimately, the two principal advantages expressed about this alternative are the collective decision making process by professional judges, skilled in the art of evaluating evidence in the light of differing viewpoints; and the shared responsibility for the judgment, accompanied by written reasons. However, such a practice would place tremendous strain on the courts.

## Trial by Judge and Assessors

2.101 Historically, in Australia 'the trial judge sitting with assessors comes from the colonial era when they did not think the community was sufficiently developed to allow for a jury system.'<sup>403</sup> In Victoria, the original *County Courts Act 1852* made no provision for trial by jury, wherein s. 17 stipulated that for claims above a certain amount (£10) trial was to be by judge and two assessors. However, this use of lay persons as assessors did not survive for very long, being abandoned by the *Victoria County Courts Act 1869*.<sup>404</sup> Yet,

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<sup>402</sup> Law Reform Commission of Victoria, (1985), op. cit., p. 160.

<sup>403</sup> Mullaly J, op. cit., p. 226.

<sup>404</sup> Section 72 of this Act provided that trial should be by judge alone where the amount claimed did not exceed £20 and in cases where the claim exceeded this figure either party could require a jury of four (s. 75) and, later on, of six (*Juries Amendment Act 1878*).

almost ninety years later, the *County Court Act 1958* reinstated this provision in s. 48A(1):

The Court may in any civil proceeding call in the assistance of one or more specially qualified assessors and hear the proceeding wholly or partially with their assistance but shall not be bound by their opinion or findings.

2.102 The Victorian Supreme Court also underwent similar changes. Before being consolidated and partially repealed by the *Supreme Court Act 1986*, s. 110 of the *Supreme Court Act 1958* empowered judges in their discretion:

in any cause or matter (other than a criminal proceeding by the Crown) in which it or he thinks it expedient so to do call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors, but the Court or Judge shall not be bound by the opinion or finding of any such assessors.

2.103 At the time, there was also further provision for the assistance of experts in s. 112 of this Act, which stated:

The court or any judge thereof in such way as it or he thinks fit may obtain the assistance of accountants merchants engineers actuaries or other scientific persons the better to enable such Court or Judge to determine any matter at issue in any action or proceeding, and may act upon the certificate of such persons.

2.104 A review of *Hansard*<sup>405</sup> provides little insight into the reasons for the removal of s. 112 (other than the statement, 'to repeal obsolete provisions of the *Supreme Court Act*'), but speculation about the repeal of this Act in 1986 amounts to the view that the court is a passive forum and that the provisions of the 1958 Act contradicted this notion with its powers to call and use experts, assessors and arbitrators. In addition, the practice entailing considerable and varied provisions for assistance and referral to lay persons were rarely used, thus expediting the push to modify these sections in the 1986 Act. In accordance with this, s. 77 (1) of the 1986 Act states:

The Court may in any proceeding call in the assistance of one or more specially qualified assessors and hear the proceeding wholly or partially with their assistance but shall not be bound by their opinions or findings.

2.105 More recently, there has also been much consideration by a number of commentators, practitioners and academics who have suggested that in complicated litigation, the issues would be more fairly tried if heard before a mixed or composite tribunal of a judge and assessors (lay members of the

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<sup>405</sup> Victorian Parliamentary Debates (Hansard), Legislative Assembly, 23 Oct. 1986, pp. 1502-1506.

community who act as adjudicators)<sup>406</sup> – similar to administrative bodies such as the Trade Practices Commission – which seems to operate satisfactorily in many civil law countries (for example, Sweden<sup>407</sup>, Denmark<sup>408</sup>, Italy<sup>409</sup> and Germany<sup>410</sup>). For instance, in England, Lord Hailsham suggested in 1974 that complicated financial frauds:<sup>411</sup>

should be better tried, and possibly more favourably, to both sides if heard before a mixed commission of a High Court judge and two distinguished laymen with reasoned judgements and unlimited right of appeal.

2.106 The Roskill Committee directed its attention to this matter and favoured the suggestion that the jury should be replaced by a Fraud Trials Tribunal, being a specialist tribunal of a judge and two lay members, the latter regarded as either experts or being people well versed in and with the capacity to understand intricate evidence in the genre of forensic science, financial transactions and corporate structures.<sup>412</sup> At about the same time, the

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<sup>406</sup> Wilson, R.D., 'The jury system in relation to white collar crime', University of Western Australia, Perth, 1976; Lord Hailsham of St Marylebone, 'Oration at Great Hall', (1974) 48 *Australian Law Journal* 351; Jackson, R.M., *Machinery of Justice in England*, 6th edn., Cambridge University Press, Cambridge, 1976; Levi, (1983), op. cit., p. 257;

<sup>407</sup> In Sweden, in the district court, in more serious cases, one qualified judge sits with three lay judges. Lay judges are elected for three years by local representative councils from a roster of eligible local citizens. When lay judges are elected, the aim is to give the collective of lay judges an all-round representative composition with regard to age, sex and profession. The lay judges deliberate with the judge on points of law and the sanctions to be imposed (The Royal Commission on Criminal Justice, op. cit., pp. 188–189); see also, Molin, L., 'Some information about the role of lay assessors in Swedish courts', eds., Walker N. and Pearson, A., *The British Jury System*, Papers presented to the Cropwood Round-Table Conference, University of Cambridge Press, Cambridge, 1975, pp. 82–89.

<sup>408</sup> In Denmark, in the lower court cases are heard by one legal judge and two lay judges. In the High Court, when it sits as an appeal court for cases from the lower court, three legal judges and three lay judges hear the cases (Royal Commission on Criminal Justice, op. cit., pp. 78–79).

<sup>409</sup> In the most serious cases (e.g. homicide, kidnapping, terrorism) the Italian Court of Assizes has two judges who deliberate together with a panel of six lay assessors, recruited at random. All eight members of the panel have to decide points of fact and points of law. They each have a vote and decide by simple majority (Royal Commission on Criminal Justice, op. cit., p. 140).

<sup>410</sup> In Germany, in the Lay Judges Court, a single judge sits with two lay judges. In complex cases, on application from the prosecution, an extra judge can be added to form a Special Lay Judges Court made up of two professional and two lay judges (Royal Commission on Criminal Justice, op. cit., p. 98).

<sup>411</sup> Lord Hailsham, op. cit., p. 351.

<sup>412</sup> Roskill Committee, op. cit., para. 1.6; some of the Committee's recommendations have been implemented in the United Kingdom by the *Criminal Justice Act 1987*, in relation to the new procedures relating to investigation and preparatory hearings in complex criminal fraud trials.

Law Reform Commission of Victoria also believed that this alternative was worthy of consideration:<sup>413</sup>

It contains many of the advantages of a professional bench of three judges such as shared responsibility and a collective decision making process with those described for summary trial as well as providing expertise and a non-legal or lay input.

2.107 With regard to expert witnesses, it is considered that juries make incorrect judgements because of their lack of expertise in certain relevant areas. This consideration has given rise to proposals for such models as 'science courts or the use of expert panels to resolve the esoteric scientific issues that arise in litigation'.<sup>414</sup> One author has gone as far as to suggest that this would allow:<sup>415</sup>

greater control over the way in which lay members conducted their deliberations and much of the aura of uncertainty that presently surrounds juries in this regard would be lifted. With the judge actually sitting with the lay members as the chairman, discussion would be kept relevant. There would be little risk of the applicable legal principles being overlooked or forgotten, as must frequently happen in a jury trial where jurors are locked away after a long summing up and given directions by the judge.

2.108 However, the importance of lay input must not be over-estimated. Some thirty years ago, the Morris Departmental Committee on Jury Service (hereafter referred to as 'the Morris Committee') in England rejected suggestions favouring the creation of expert-type juries either in general or for particularly difficult cases.<sup>416</sup> The Committee's recommendations on jury service were based upon their assessment of the qualities which they thought were required of jurors:<sup>417</sup>

It is necessary to have on a jury men and women who will bring common sense to their task of exercising judgment; who have knowledge of the ways of the world and the ways of human beings; who have a sense of belonging to a community; who are actuated by a desire to see fair play; and above all who strive to come to an honest conclusion in regard to the issues which are for them to decide.

2.109 More recently, this particular issue has been debated by a judge of the Western Australian Supreme Court who stated: 'Deciding guilt in serious criminal cases involves the application of the community's standards of what

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<sup>413</sup> Law Reform Commission of Victoria, (1985), *op. cit.*, p. 163.

<sup>414</sup> Martin, J.A., 'The proposed 'science court'', (1977) 75 *Michigan Law Review* 1058-91.

<sup>415</sup> Ricketson, S., 'Trial by jury: section 80 of the Commonwealth Constitution', Paper delivered at the Australian Constitutional Convention, Canberra, Mar. 1983, p. 29.

<sup>416</sup> Morris Departmental Committee on Jury Service (Lord), *Report of the Departmental Committee on Jury Service*, Her Majesty's Stationery Office, London, 1965, para. 343.

<sup>417</sup> *ibid.*, para. 53.



is fair and just. It is a task which, I suggest, is too important and too difficult for experts but for which the jury system is ideally suited'.<sup>418</sup> In other words, the notion that juries are incapable of dealing with complex matters and that such cases are better suited to presentation before lay assessors and experts is not supported by all sections of the judiciary.<sup>419</sup>

2.110 About a decade ago, as a result of concern about the suitability of trial by jury for complicated commercial fraud cases, a Trial of Commercial Crimes Bill was introduced in 1985 which proposed a system of trial by judge plus three commercial adjudicators in the more difficult commercial cases. The Bill empowered the Chief Justice to order trial by judge and three assessors on the application of the defendant or prosecution where, *inter alia*, the court was satisfied that the evidence to be heard is likely to be too difficult to comprehend and understand because of its volume or technicality.

It was proposed that all matters of law and procedure would be exclusively decided by the judge; and the commercial adjudicators would be full members of the court and equal with the judge in deciding questions of fact. Before retiring, the judge would direct the adjudicators in open court on the law and sum up the evidence. The verdict of the court would be the verdict of a majority and would be announced in open court by the judge without any reasons being given.<sup>420</sup>

2.111 Some three years later, the Bill was enacted with substantive amendment as the *Complex Commercial Crimes Ordinance 1988* which introduced extensive pre-trial procedures with wider powers of discovery. However, the traditional mode of trial by jury was retained.

2.112 More recently in Australia, the LRCT, in investigating alternatives to the jury system, expressed some concerns about this type of tribunal as an alternative to jury trials because of the fear or suspicion such assessors 'may act on, or provide the judge with hidden and untested theories'.<sup>421</sup> The present Chief Justice of the Victorian Supreme Court has expressed concern also about the use of assessors 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'.<sup>422</sup> Similar concerns have been echoed in Sweden where lay assessors, originally chosen for their ability or possible

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<sup>418</sup> Heenan J., D.C., 'Trial by judge alone' (1995) *Journal of Judicial Administration* 240.

<sup>419</sup> White J, *R v Marshall*, (1986) 43 SASR 448.

<sup>420</sup> Law Reform Commissioner of Tasmania, (1990), *op. cit.*, p. 20.

<sup>421</sup> *ibid.*, p. 10.

<sup>422</sup> Phillips, J.H., 'Complex commercial prosecutions—should juries be retained?', (1983) *Law Institute Journal*, 1215.

tendency to neutralise the court's rigidity in the application of the law, could 'be regarded as having lost some part of their lay status, at least in comparison with the members of a jury'.<sup>423</sup> Likewise, the Chief Justice of St. Helena cast a critical eye over this position:<sup>424</sup>

The employment of assessors would not always be satisfactory, because in an atmosphere of excitement or prejudice, the assessors might be subject to the same influences as the panel of jurors, or might be thought to be tainted with the same prejudice.

2.113 Even more recently, a Victorian County Court Judge has suggested that such an alternative to trial by jury would be 'a retrograde step'.<sup>425</sup> There has also been the issue emanating from research which suggests a large proportion of the deliberation time spent by this mixed tribunal is devoted to the penalty aspect on a finding of guilt.<sup>426</sup> In Victoria, the Chief Justice has also made remarks concerning his uncertainty as to the benefits of such a system and 'cannot see that appreciable time and cost savings would be achieved'.<sup>427</sup>

## Special Juries

The case for special juries in complex civil cases depends upon acceptance of a rather straightforward proposition: All people are not equally capable of learning about new concepts and applying them to the solution of difficult problems. The jury itself is premised on a similar assumption, and seeks to avoid the shortcomings of individuals through reliance upon the collective wisdom and judgment of a small group.<sup>428</sup>

2.114 There has been considerable discussion in recent years about the continued use of juries in trials, particularly those which are long or which involve complex issues or evidence, wherein it is considered that 'ordinary' jurors experience difficulty in grasping points and may, in fact, fail to comprehend or give up the attempt to do so.<sup>429</sup> Such discussion invariably

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<sup>423</sup> Molin, *op. cit.*, p. 88.

<sup>424</sup> Spry, *loc. cit.*

<sup>425</sup> Mullaly J, *op. cit.* p. 226.

<sup>426</sup> Casper, G., and Zeisel, H. 'Lay judges in German criminal courts', (1971) *Journal of Legal Studies*.

<sup>427</sup> Phillips, J.H., 'Can the jury cope?', (1987) 61 *Australian Law Journal* 479, at 480.

<sup>428</sup> Luneburg W.V. and Nordenberg M.A., 'Specially qualified juries and expert non-jury tribunals: alternatives for coping with the complexities of modern civil litigation', (1981) 67 *Virginia Law Review* 900.

<sup>429</sup> The Law Reform Commission of Victoria, the New South Wales Law Reform Commission, the Law Reform Commissioner of Tasmania, the Criminal Law Review Committee, the Victorian Bar, the Australian Institute of Judicial Administration, the

leads to consideration of the use of 'special juries' in complex cases, where juries are drawn from a group of people who have particular or specific qualifications, education or experience which make it more likely that they will understand to a much greater degree the evidence to be presented. This position is reinforced by the following:<sup>430</sup>

If one ignores the difficulties that may be experienced by jurors in understanding and complying with the purely legal matters that may be involved in any case, for example concerning burden of proof, rules of evidence, points of law, and concentrates instead simply upon the difficulties that jurors may experience in respect of understanding the facts of the case and the issues with which it is concerned, it is easy to appreciate the desire by a party to a case that the jury, or at least some of them, should consist of individuals who are like himself in that they have a similar background or similar skills knowledge to his own which will ensure so far as possible that they will be able to understand the points he is making and the facts that he is seeking to establish.

2.115 This is not a new proposal to the trial process, for historically there seems always to have existed the power to select from amongst those eligible, jurors especially qualified for a given service. As Blackstone stated:<sup>431</sup>

special juries were originally introduced into trials at Bar when the causes were of too great nicety for the discussion of ordinary freeholders; or where the Sheriff was suspected of partiality though not upon such apparent cause as to warrant an exception to him.

2.116 The special jury transformed into a social elite, and as Lord Devlin has found juries in civil cases,<sup>432</sup> at first, often consisted of persons with special qualifications, professional or trade for determining the issue to be tried.<sup>433</sup> Thus, special juries generally consisted of persons of a particular trade or technical qualification who were perceived to have better knowledge of the matters in dispute, and who were considered suitable and capable of settling the issues fairly and to a level of general satisfaction.<sup>434</sup> Such a jury panel was

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Kingdom Home Office Committee on Fraud Trials have all considered this matter.

<sup>430</sup> Dickey A., 'Trial by one's peers', (1973) 11(2) *Western Australian Law Review* 219–220.

<sup>431</sup> Blackstone (Sir), W., *Commentaries on the Laws of England*, vol. 3, Her Majesty's Stationery Office, London, 1783, p. 357.

<sup>432</sup> With regards criminal cases—it is not known exactly when special juries were first used, but mention of them can be found as early as 1450 in the case of *Dot Pare V* 213 (29 Hen 6), which was a petition for a special jury to try a plea of abatement on a bill of appeal of murder.

<sup>433</sup> Devlin, *op. cit.*; 'Indeed, such a practice appears to have been quite common from the late Middle Ages until at least the end of the nineteenth century, especially in respect of matters which could be understood only by persons who followed the same occupation as the accused' (Dicket, *op. cit.*, p. 212).

<sup>434</sup> In London in the middle ages, juries of cooks and fishmongers were summoned to try persons accused of selling bad food. Juries of merchants were used to settle commercial

a natural result of the practice of drawing juries from those who held a high social status or would have most knowledge and experience of the matter in dispute. Such juries, then, were intended to ensure that those who served on juries were people of intelligence and that 'men of quality' did not abrogate their responsibility to jury duty.<sup>435</sup>

2.117 The right to be tried before a special jury was installed in the United Kingdom by the provisions of the Special Juries Act 1898<sup>436</sup> and existed right up until 1949 (though they had long lost their popularity<sup>437</sup>) when they were finally abolished—except in London City<sup>438</sup>—by the Juries Act 1949 (UK).<sup>439</sup> In most other international jurisdictions, special juries diminished to the point that their utilisation has been gradually eroded or abolished during the course of the century.<sup>440</sup> In New Zealand, special juries were common in civil cases, with the criteria being where 'the court is of the opinion that difficult questions concerning scientific, technical, business, or professional matters are likely to arise'.<sup>441</sup> In the United States, cases of unusual intricacy, importance or publicity required the utilisation of special juries, where jurors were subjected to interviews, tests of intelligence and understanding of English. This, however, caused much controversy due to the unrepresentativeness of this rather elitist approach. Matters of this nature stood until the civil rights

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disputes. Where aliens were being tried, half the jury could be composed of aliens.

<sup>435</sup> Oldham, J.C., 'The origins of the special jury', (1983) 50 *The University of Chicago Law Review* 137, 159.

<sup>436</sup> This enabled rules of court to be made with respect to special juries.

<sup>437</sup> Cornish, *op. cit.*

<sup>438</sup> While s. 18(1) abolished special juries in the United Kingdom, its abolition did not apply to the City of London where it was stipulated that 'special jurors may be summoned, empanelled and returned for the trial of any such issue, in all respects as if this Act had not passed.

<sup>439</sup> See chapter 27 of the Act, s. 18(1) which says, in part, that 'no person shall be summoned to serve as a special juror'. The same section also stipulates that 'no issue or question shall be tried or determined by a special jury and no person shall be cited or summoned to serve as a special juror for the trial or determination of any issue or question, and any enactment requiring the preparation of a roll of special jurors or of a special jury book or the inclusion in a jury of special jurors shall cease to have effect'. The 1949 Act left one remaining special jury in place. This applied to the City of London special jury which dealt with causes in the commercial list for trial at the Royal Courts of Justice in the King's Bench Division of the High Court. This remaining example of a special jury was abolished by section 40(1) of the Courts Act 1971 (UK).

<sup>440</sup> Blake, N., 'The case for the jury', eds., Findlay, M., and Duff, P., *The Jury Under Attack*, Butterworths, Sydney, 1988.

<sup>441</sup> Burns, P.T., 'A profile of the jury system in New Zealand', (1973) 11 *Western Australian Law Review* 110.

movement of the 1960s impacted on the jury.<sup>442</sup> The introduction of the Jury Selection and Service Act 1968 abolished this elite style of jury and mandated random selection procedures.

2.118 In Australia, legislation in the various jurisdictions which abolished special juries in civil cases also abolished special juries in criminal trials. Special juries were abolished in Victoria in 1956 by deleting all reference to them in the consolidating statute, the *Juries Act 1956*. In Queensland, special juries were abolished by the *Jury Act Amendment Act 1934* and in New South Wales by the *Jury Act (Amendment) Act 1947*. No provision is made for special juries in the relevant legislation in Western Australia (having been abolished with the passing of the *Juries Act 1957*), the Northern Territory or the Australian Capital Territory. However, under the Tasmanian *Jury Act 1899* (incorporating some earlier amendments from 1834, 1854 and 1857–58) all juries in civil trials must be special juries.<sup>443</sup> The same Act also provides for the preparation of a special jury list in trials<sup>444</sup> (and, in some cases, the Chief Justice may make inquiries regarding the character, education and intelligence of any person whose name is on the jury list<sup>445</sup>). In South Australia in the 1970s, the Mitchell Committee recommended the reintroduction of a special list of jurors of certain educational or occupational qualifications to sit in judgement over certain types of cases:<sup>446</sup>

In the long run we believe that the fact that jurors have certain basic knowledge concerning the matters in respect of which expert evidence will be called will save time of counsel in addressing and will save a good deal of time in the examination and cross-examination of experts.

2.119 As it presently stands, no other jurisdictions in Australia permit special juries in either criminal or civil trials.

2.120 The increasing incidence and sophisticated nature of modern offences of white collar crime and commercial fraud – which are potentially unfamiliar and beyond the comprehension of even the well informed and educated lay

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<sup>442</sup> Abramson, *op. cit.*, p. 117.

<sup>443</sup> s. 40 of the *Jury Act 1899* provides: 'The Supreme Court, or any judge, is hereby empowered on motion or application made on behalf of the Crown, or by any prosecutor or defendant in any criminal case pending in the Court, to order that any such case shall be tried by a jury consisting of persons whose names are on any special jury list; and, where such an order is made, that case shall accordingly be so tried'.

<sup>444</sup> *ibid.*

<sup>445</sup> ss. 10 (1), (2) and (3).

<sup>446</sup> Mitchell, *op. cit.*, p. 102.

person—promotes consideration of the proposition of reintroducing special juries. This has been the case recently in the United States where alternatives to the jury, particularly in civil matters, are being mooted: ‘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’.<sup>447</sup> As such, the principal argument for the retention of the special jury in criminal cases is that such a jury is better able to follow complex evidence. Of some interest in this regard is the notion that jurors with appropriate expertise and experience could be ‘more accurately described as the peers of the accused than are jurors who are more typically empanelled’.<sup>448</sup> It is further argued that counsel need to spend less time cross-examining expert witnesses and addressing the jury where that jury is composed of those better able to follow and understand the arguments.

2.121 This model would also probably be the easiest to implement, being closest to the present system. It has been explained that:<sup>449</sup>

Under this procedure trial by jury would in the usual run of cases remain but in cases of particular complexity trials would be conducted with special juries drawn from panels of persons with appropriate specialist qualifications. Thus in a case involving detailed accounting evidence, a jury of accountants or financial managers could be used: again, in cases under securities legislation, the jury could consist of share brokers or merchant bankers.

2.122 Modern proposals for the reintroduction of special juries would also determine qualification somewhat differently to its predecessors:<sup>450</sup>

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.

2.123 However, there are a number of potential dangers and practical difficulties with this sort of proposal. Thirty years ago, the Morris Committee raised such questions as: Which cases are to be tried by a special jury? What

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<sup>447</sup> ‘The case for special juries in complex civil litigation’, (1980) *Yale Law Journal* 1159, cited in New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Discussion Paper, Government Printer, Sydney, 1985, p. 238.

<sup>448</sup> *ibid.*

<sup>449</sup> Rickeston, *op. cit.*, p. 30.

<sup>450</sup> New South Wales Law Reform Committee, (1985), *op. cit.*, p. 237.

are the necessary and precise technical and educational qualifications for the jurors? Would such jurors be available in sufficient numbers? Ultimately the Committee rejected suggestions for the reintroduction of special juries, maintaining that 'a jury should represent a cross-section drawn at random from the community'<sup>451</sup> and that any other procedure is inconsistent with this principle. In an Australian context, the New South Wales Criminal Law Review Division, despite some recommendations favourable towards the *special jury model*, considered its reintroduction 'to be impractical and [was] doubtful whether there would be sufficient people with sufficient expertise readily available to make up such a 'special jury' panel'.<sup>452</sup> In addition, similar argument put forward by the LRCT describes the selection procedure as being unable to guarantee that the jurors actually selected will have an enhanced ability to understand the issues or the evidence in complex cases.<sup>453</sup> The use of special juries also denies the body of thought which expresses the view that the average jury today is able to cope even with long and difficult cases. The Law Reform Commission of Victoria also rejected the mooted reintroduction of special juries on the grounds that the advantages to be obtained by the use of such juries could be better achieved by the implementation of reforms to the rules of criminal procedure.

2.124 Because of the narrow structural framework of special juries and the contemporary emphasis on being judged by one's peers, concerns have also been raised about the representativeness and democratic nature of such juries (even though those who favour retention argue that it does not matter if the process is undemocratic so long as it is an effective method of resolving disputes). To this point, the special jury has been criticised because of its 'implications of class justice'<sup>454</sup> and because it 'can give the appearance of being undemocratic'.<sup>455</sup> Put another way, the notion of a specially qualified jury is inconsistent with the principle that the jury should be representative of the whole community. There may therefore be a public apprehension of bias by special jurors, or even a real tendency (deliberate or otherwise) for the specialists to be more sympathetic to the accused, since they may come from

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<sup>451</sup> Morris Committee, *op. cit.*, paras. 343 and 53.

<sup>452</sup> Department of the Attorney-General and of Justice, Criminal Law Review Division, *op. cit.*, p. 9.

<sup>453</sup> Law Reform Commissioner of Tasmania, (1990), *op. cit.*, p. 22.

<sup>454</sup> Jackson, R.M., *The Machinery of Justice in England*, 7th. edn., Cambridge University Press, London, 1977, p. 504.

<sup>455</sup> Phillips, *op. cit.*, p. 1215.

the same types of social, economic and political backgrounds. There are also problems in determining the specific qualifications required of special jurors. With this point in mind, the LRCT investigated the possibility of incorporating such specialist juries into its trial process. Ultimately, the notion of introducing special juries in Tasmania was dismissed on the basis that they are 'elitist, haphazard (in that special jurors may not have any greater ability to understand complex issues or evidence than common jurors), and difficult to implement (due to the limited pool of potential special jurors)'.<sup>456</sup>

2.125 There is also the matter of credibility, whereby there is a strong possibility that any such decisions made would be 'accompanied by the lingering doubt that it was based on some theory or analysis of the evidence which had not been subjected to the scrutiny and criticism of counsel and/or the presiding judge'.<sup>457</sup> Another consideration is the subject of difficulty in determining selection criteria for members of such a jury which would supply decided views on complex issues to the lay jury. The probability would be that a fairly selected special jury would rarely come to a consensus. Furthermore, the presence of a special jury would give every incentive for the courtroom to become the venue for indeterminable dispute among experts propounding different theories and techniques of various degrees of reliability and novelty in an effort to secure supremacy or acceptance. From an Australian perspective, there are some problems with this concept:<sup>458</sup>

In a case like the *Chamberlain* or *Splatt*, too, in both of which a number of different scientific issues were in dispute, either a number of special juries would be required or a range of experts from different disciplines for the special jury, this would take away much of its effectiveness. Those expert in foetal blood analysis would be no better qualified than the lay person in assessing evidence of dingo behaviour.

2.126 Ultimately, the LRCT submitted that:<sup>459</sup>

the special jury system is undemocratic; that it is class oriented; that it is at least potentially likely to lead to employer-bias; and that in the light of the experience of the other parts of Australia and of the United Kingdom, no case can be made for its retention.

2.127 Putting the case of special juries aside momentarily, it would seem there is still much that can be done to assist ordinary jurors to understand

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<sup>456</sup> Law Reform Commissioner of Tasmania, (1990), op. cit., p. 15.

<sup>457</sup> *ibid.*, p. 11.

<sup>458</sup> Law Reform Commission of Victoria, (1985), op. cit., p. 23.

<sup>459</sup> Law Reform Commissioner of Tasmania, *Report on Special Juries in Civil and Criminal Trials*, Report No. 58, Government Printer, Hobart, 1989, p. 22.



complex cases by refining and focusing the issues, improving the presentation of the Crown case, and by judges exercising greater control over counsel. Finally, an initiative utilised in New South Wales of using a group of expert witnesses requires some further examination. In 1985, the New South Wales Supreme Court allowed five experts to give group evidence.<sup>460</sup> Each witness was sworn and by consent questions were asked of the witnesses by counsel for both parties and by the presiding judge. The witnesses were able to comment on and dissent from each other's testimony, enabling the issues to be drawn out and explored. The judgment noted that the technical problems were successfully addressed by these techniques and the hearing was substantially reduced because of this method. In the end, it is argued that this style of approach to hearing expert testimony can only make the task of the jury easier.

This initiative, although it intrudes at the edges of the traditional approach to the adversary system, is to be commended because its informality makes it much more likely that the courts' and the experts' time will be spent on the issues that are genuinely in dispute. As well, it makes it more likely that the experts' testimony will be less stilted and inhibited by the unwonted atmosphere of the courtroom.<sup>461</sup>

2.128 Conclusions would suggest that a tribunal of this type or sort would be far removed from trial by jury as we understand it and that it would be a misnomer to call it trial by specialist jury. As the LRCT concluded:<sup>462</sup>

In any event it would be extremely difficult to find such a jury and inordinately expensive and inconvenient to the community to keep it engaged for any length of time. Further, the verdict of such a jury would always be accompanied by the lingering doubt that it was based on some theory or analysis of the evidence which had not been subjected to the scrutiny and criticism of counsel and/or the presiding judge.

2.129 But perhaps the final word on special juries should be left to Lord Devlin who comments:

To refer a case for decision to a body of experts or even to men and women of superior mental powers would mean that the person accused might be imprisoned for ten or fifteen years or for life, for reasons which could not be made clear to the average citizen. This is not democracy. This is what trial by jury prevents.

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<sup>460</sup> *Spika Trading Pty Ltd v Royal Insurance Australia Ltd*, 3 Oct. 1985.

<sup>461</sup> Freckelton, *op. cit.*, p. 22.

<sup>462</sup> Law Reform Commissioner of Tasmania, (1990), *op. cit.*, p. 10.

## Aids to the Jury in Complex Cases

Much of the recent debate about the jury has focussed on ways of assisting juries to get on top of the material in a case and so reach a fair and reliable verdict. Part of this is a response to the concern about the increasing complexity of criminal activity, the technical nature of much of the evidence now appearing in trials and the resultant increasing length of trials in general. These factors and others are said to have made the task of the jury more difficult than it used to be and created a need for further assistance to be made available to jurors.<sup>463</sup>

2.130 Complex litigation places differing demands on jurors than other more straightforward criminal or civil matters before the courts. Counsel for the respective parties can make cases appear more or less complex by their approach, while judges, too, can exert an influence over the jury's competence, however, the position of the jury remains passive throughout.

2.131 As has been argued in the United States, '[s]ome of the problems posed by the presentation of evidence in lengthy trials can be overcome by greater use of a number of practices and techniques'.<sup>464</sup> For these very reasons, the AIJA recommended that 'counsel, and the judge, should be encouraged to seek on behalf of juries the use of technical aids wherever possible to assist in the presentation of evidence'.<sup>465</sup> Legislatively, the *Crimes (Criminal Trials) Act 1993*, in an attempt to make trials in Victoria more efficient,<sup>466</sup> addresses some of the concerns surrounding aids to jurors.

### Juror Information and Education

2.132 There is a great deal to be done by way of juror education in the course of a complex trial. For many, the process of being empanelled as a member of a jury can be a thoroughly confusing experience. It is possible that a jury may sit and listen for a number of weeks or months, at first not knowing who is who, trying to remember the substance of the evidence and being asked to separate and use each remembered piece of evidence only in respect to the facts. This position is emphasised by some anecdotal Australian experiences where it is considered, given the length of complex trials, the jury will more often than not comprise of unqualified and usually unemployed persons who

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<sup>463</sup> Sallmann, (1983), op. cit., p. 194.

<sup>464</sup> Cecil, *et al*, op. cit., p. 39.

<sup>465</sup> Findlay, op. cit., p. 179.

<sup>466</sup> In the context of the discussion at hand, this legislation, in part, is directed at: statements of defence; directions hearings; prosecution case statements; defence responses; defence replies; evidence not disclosed pre-trial; jury documents; evidentiary reforms; and, sanctions.

have the time to spare.<sup>467</sup> All the more reason that juror education be given greater consideration. But this is not a new concern. Recognising these problems over thirty years ago in its inquiry into the operation of the courts, the Committee on Court Practice and Procedure in Ireland suggested that ‘a short written summary of instructions should be made available to jurors at the time they are summoned’.<sup>468</sup>

2.133 Upon being empanelled, the jury should receive a thorough orientation by means ‘of stimulating and accessible information on what jurors are meant to do’.<sup>469</sup> In its review of juries in criminal trials, the Law Reform Commission of Canada (LRCC) recommended:<sup>470</sup>

Thoroughly acquainting jurors, prior to their service, with the nature of their responsibilities, the conduct of a judicial trial and the common concepts that will be used throughout it is of utmost importance if the jury is to fulfil its functions ... To overcome problems and to enhance the decision-making abilities of jurors and their respect for the legal system, good quality juror orientation is essential.

2.134 There have been similar expressions made about this position in Australia. In a statement to the Victorian Parliamentary Legal and Constitutional Committee, the then Director of Public Prosecutions of Victoria said there is a need to present jurors with short, clear information prior to their sitting, ‘to obviate any need for judges to enter into lengthy discussions about jurors’ roles, and to cut down on possible confusion arising in jurors’ minds about the procedures followed in trials’.<sup>471</sup> Similarly, it was for these sorts of reasons that the NSWLRC recommended that it would be good practice for an explanatory booklet to be prepared and distributed to every person summoned for jury service which outlined their rights and responsibilities.<sup>472</sup> The QCJC considered there was a strong case for the proposition that prospective jurors should receive an orientation ‘which thoroughly acquaints them with the nature of their duties, trial procedure and

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<sup>467</sup> Rozenes, M., ‘The final address’, Paper delivered at the national conference, ed., National Crime Authority, *The Presentation of Complex Corporate Prosecutions to Juries*, Melbourne, Jul. 1991.

<sup>468</sup> Department of Justice Committee on Court Practice and Procedure, ‘The jury system in Ireland’, (1973) 11(2) *Western Australian Law Review* 114.

<sup>469</sup> Findlay, op. cit., p. 162.

<sup>470</sup> Law Reform Commission of Canada, *Criminal Law: The Jury in Criminal Trials*, Working Paper No. 27, Minister of Supply and Services, Ottawa, 1980, p. 70.

<sup>471</sup> Victorian Parliamentary Legal and Constitutional Committee, op. cit., p. 126.

<sup>472</sup> New South Wales Law Reform Commission, (1986), op. cit., rec. 35.

legal terminology'.<sup>473</sup> More recently, in its survey of jurors in New South Wales, the AIJA also recommended, amongst other things, that jurors be given more practical information before the first day of their service which would lead to a more contented and knowledgeable jury.<sup>474</sup> Typical of the literature on this issue is the maxim: 'The most important part of orientation is to integrate the jury into the fabric of the trial'.<sup>475</sup> Such orientation processes should maximise the likelihood that members of the jury can focus on the issues and evidence for it is important that throughout the duration of the trial jurors are clear as to their roles and responsibilities, as well as the roles of the other participants, in the trial.

2.135 Much has been said also about the judge's role in educating and providing information to jurors. Locally, comment has been made about this matter by a representative of the Law Institute of Victoria who has stated:<sup>476</sup>

It seems to me that perhaps both County and Supreme Court judges need more education, if I can use that term, in explaining the juror's role to the jury either before they are empanelled or after they are empanelled. Some of the judges tend to assume that jurors understand more about the justice system than they do.

2.136 Having said this, judges, generally, will normally establish rapport with the jury by addressing them at the beginning of the trial about certain features of trials, matters related to the general course of the trial, the role of the jury, and on principles of law which the judge considers may assist in better comprehension.<sup>477</sup> The Runciman Royal Commission endorsed this stance: 'We think that this is an important part of the procedure and that judges could do more by way of opening comment than some of them now do to make jurors aware of what they are to expect'.<sup>478</sup> The Royal Commission also suggested: 'In complex cases ... we recommend that the judge should consider whether one or more written documents might with advantage be given to the jury'.<sup>479</sup>

2.137 Jurors should be given an education on the characteristics of the adversarial system and their role as fact finders, and a description of what is

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<sup>473</sup> Queensland Criminal Justice Commission, *op. cit.*, p. 46.

<sup>474</sup> Findlay, (1994), *op. cit.*, p. 63.

<sup>475</sup> Austin, *op. cit.*, p. 101.

<sup>476</sup> Gronow, G., *Minutes of Evidence*, Victorian Parliamentary Law Reform Committee's *Inquiry into Jury Service*, Melbourne, 1 May 1995, p. 249.

<sup>477</sup> *ibid.*, recs. 37, 39 and 40.

<sup>478</sup> Lord Runciman, *op. cit.*, para. 67, p. 134.

<sup>479</sup> *ibid.*, para. 68, pp. 134-135.

expected of them once they begin deliberations.<sup>480</sup> This should commence at the prospective juror stage whereby, as the Morris Committee suggested some thirty years ago, some general guidance about the nature of their duties and also administrative information should be sent at the time of summoning.<sup>481</sup> More recently, similar suggestions arose from a survey of New South Wales' jurors where respondents indicated, 'that more information about the nature of the trial process and about the responsibility of jurors be distributed to prospective jurors along with their summonses'.<sup>482</sup>

2.138 This is fundamental, because research in cognitive psychology suggests that comprehensively informing a person on how to frame information he or she is about to receive not only enhances recall and aids in the interpretation of ambiguous material, but also engenders greater levels of juror satisfaction.<sup>483</sup> In order to establish the level of priority these ideas should be granted, reference is made to some research in the United States in the late 1980s which found jurors who received pre-instructions reported that the pre-instructions helped them in accomplishing such tasks as evaluating the evidence during the trial, applying the law to the facts, and remembering the judge's instructions. Pre-instructed jurors were also found to be more satisfied with the way their trials had been conducted than jurors who had not received the same sorts of assistance and instructions.<sup>484</sup>

2.139 At other times it has been argued that the most important factor is to provide them with procedural suggestions: how to elect a foreperson, ideas for arranging a discussion format, and voting procedures. It has also often been commented upon that it is too late to embark upon the process of juror education at the final address.<sup>485</sup> Ideally, this information should be imparted fully at the initial orientation and again in summary version when the jury begins deliberation. It would possibly eliminate the mystery and confusion that seems to present distinct troubles for jurors.

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480 *ibid.*

481 Morris Committee, *op. cit.*

482 Grabosky P. and Rizzo C., *Jurors in New South Wales*, Law Foundation of New South Wales, Sydney, 1983, p. 63.

483 Smith, V.L., *The Psychological and Legal Implications of Pretrial Instruction in the Law*, Stanford University Press, Stanford, 1987; Smith V.L., 'The feasibility and utility of pre-trial instruction in substantive law: a survey of judges', (1990) 14 *Law and Human Behaviour* 235-248.

484 Heuer L. and Penrod S.D., 'Instructing jurors: a field experiment with written and preliminary instructions', (1989) 13 *Law and Human Behaviour* 409-430.

485 Rozenes, *op. cit.*, p. 6.

## Documentary Evidence

The current law recognises that the judge has a discretion to permit the use of charts or other aids to explain, follow or review the evidence. It also grants to the judge an ill-defined discretion to permit a party to tender charts, summaries or other aids as exhibits. There is a strong case for granting to the judge a discretion to allow the parties to make greater use of summaries. Such a discretion is particularly called for where the evidence to be summarised is so voluminous and complex that a strict adherence to the traditional forms of proof would lessen the chance of the jury understanding the issues. It is also called for where the summary form will save considerable trial time without diminishing the quality of the jury's determination.<sup>486</sup>

2.140 A major trial management problem in any contemporary criminal justice jurisdiction is coping with the avalanche of documentary evidence. While document control is primarily a management burden for court and counsel, if handled badly, it can have a significant adverse affect on juror comprehension. The literature is dotted with complaints of excessive documentation leading to confusion of the jury.<sup>487</sup> Research in the United States has also found that jurors complain about the number of exhibits, the inability to keep up with the constant procession of such documentation, and the failure of the court or counsel to distinguish the important from the irrelevant.<sup>488</sup> The obvious remedy is for the court to impose one of the standard recommendations and require counsel to economise on documentary evidence. Having said this, a complex case cannot simply be thrown at a jury.

The case must be kept within manageable dimensions so that jurors are not buried under a mountain of paper, bewitched by terminology which is meaningless to them, or jargon which is meaningless to everyone. Jurors must not be reduced to verdict by attrition, or even verdict by confusion.<sup>489</sup>

2.141 The LRCT believes that 'the jury system creates a problem with documents'.<sup>490</sup> Additional anecdotal evidence in Australia tends to support this proposition.<sup>491</sup> Most complex litigation has a great volume of primary

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<sup>486</sup> Aronson, *op. cit.*, p. 72.

<sup>487</sup> In some quarters, it has been suggested that this has been a deliberate attempt by counsel to confuse the jury so much that they are unable to determine the actual guilt or innocence of the accused/defendant that they are compelled to return a verdict of 'not guilty'.

<sup>488</sup> Austin, *op. cit.*, p. 100.

<sup>489</sup> Weinberg, M., 'Complex Fraud Trials—reducing their length and cost', Paper presented at the Third Annual Australian Institute of Judicial Administration Oration in Judicial Administration, Melbourne, Nov. 1991, p. 12.

<sup>490</sup> Law Reform Commissioner of Tasmania, (1990), *op. cit.*, p. 14.

<sup>491</sup> Rozenes, *op. cit.*, p. 7.

documents or electronically stored information that may need to be analysed and presented in the course of the trial by the prosecution and by the defence. Given the nature of these complexities, it has been suggested that where the evidence presented, or the law itself, is technical or complex, 'charts or summaries should be freely used to reduce the information into sets of simple terms or propositions'.<sup>492</sup> Research conducted for the AIJA also felt that 'presentation graphics and computer-generated summaries may simplify and summarise complex evidence'.<sup>493</sup> Similarly, the position in the United States has been to broaden the categories of admissible evidence, whilst giving full rights of cross-examination and discovery. By virtue of this attitude, the systems of criminal justice in the United States appear to believe that '[v]oluminous or complicated data should be presented at trial, whenever possible, through summaries, including compilations, tabulations, charts, graphs, and extracts'.<sup>494</sup> There is further support for this position:<sup>495</sup>

With appropriate safeguards, the parties should be able to simplify complexity, and, in the extreme case, even replace it, with charts, summaries and other aids, provided there is adequate notice, and provided the opposing party can explore issues relevant to reliability in cross-examination.

2.142 This process of simplification and clarification has the support of some elements of the New South Wales Supreme Court.<sup>496</sup> In Victoria, the challenge of voluminous or complex evidence has been met by amendments to the *Evidence Act 1958* which stipulates:<sup>497</sup>

If the court is satisfied that particular evidence is to be given in a proceeding by a party is so voluminous or complex that it would not be possible conveniently to assess the evidence if it were given in narrative form, the court may direct the party to give the evidence in a form, specified in the direction, that would aid its assessment of the court.

2.143 This particular method has been pursued in England, where the efforts of the Roskill Committee led to the passage of the *Criminal Justice Act 1987* and the consequent creation of the Serious Fraud Office and preparatory hearings in cases designated as serious frauds. Here, two particular aids

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<sup>492</sup> Potas, op. cit., p. 3.

<sup>493</sup> Greenleaf and Mowbray, op. cit., p. 10.

<sup>494</sup> Federal Judicial Center (1995), op. cit., p. 101.

<sup>495</sup> Aronson, M., 'Keynote address: managing complex trials', eds., National Crime Authority, *Complex White Collar Crime*, Australian Government Publishing Service, Canberra, 1993, p. 184.

<sup>496</sup> Woods J, op. cit., p. 174.

<sup>497</sup> s. 42B.

rendered to the jury were models and drawings. These have been used by counsel and experts to describe and explain the discoveries of forensic pathologists in homicide cases; diagrams have been used to explain the structure and workings of terrorist bombs. More recently, these proposals were supported by the Runciman Royal Commission which stated: 'In complex and lengthy cases ... aids, such as charts or tables that can be shown in colour on visual display units, should always be provided where this would assist in the presentation of complicated facts to the jury'.<sup>498</sup>

2.144 In Australia, there is a clear basis in law for the admission into evidence of charts and documentation which explain complex matters, where their contents have been proved by other evidence.<sup>499</sup> Whether documents stand as evidence in their own right, or as aids to understanding the evidence on which they are based probably is a theoretical rather than practical consideration. The provisions contained in the Commonwealth *Evidence Act 1995* (s. 48), and the New South Wales *Evidence Act 1995* (s. 48) do little more than give statutory recognition to the common law in this regard. The Commonwealth *Evidence Act 1995*, however, goes a step further, in s. 50, so far as it empowers the court to allow evidence to be given in other than a narrative form, where 'it is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume and complexity of the documents in question'.<sup>500</sup> In Victoria, there is a belief that judges have some responsibility to ensure that evidence is presented in a way that will be clear to the jury,<sup>501</sup> however, given the ruling in *The National Coal Board v Jones*, some care is required. Nevertheless, the amended *Evidence Act 1958* provides that 'evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given'.<sup>502</sup> More recently, this has been endorsed by the Trials Working

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<sup>498</sup> Lord Runciman, op. cit., para. 68, p. 135.

<sup>499</sup> In *Smith v The Queen* (1970) 121 CLR 572 the joint judgment of Mason CJ, Brennan J and Deane J, stated that 'the use of such charts and other time-saving devices in complicated trials of this kind is a usual and desirable procedure and is encouraged by the court ... For example, a written document may prove more convenient than oral evidence as a foundation for cross-examination upon its contents or it may be a valuable *aide-memoire* for the jury in a case where precise recollection of words is important'; see also *Butera v Director of Public Prosecutions for the State of Victoria* (1987) 164 CLR 280.

<sup>500</sup> s. 50 (1) (b), p. 50.

<sup>501</sup> Mullaly J, op. cit., p. 218.

<sup>502</sup> s. 42A.



Party which has suggested that such legislation which permits the presentation of evidence in documentary form 'can be of particular assistance to the jury in clarifying complex transactions'.<sup>503</sup>

2.145 Ultimately, the principal purpose behind the use of streamlined presentation of documentation is to enhance the simplification of complex evidence so that it is more understandable to juries. This becomes all the more important when it is recognised that one of the distinguishing features of a complex trial is a multitude of evidence concerning linked documents or events. Recommendations to computerise and/or streamline documentation in trials encourages clearer and better presentation. It also acts as an aid to jury recall and would prove beneficial, as there can be little doubt that the efficient management and retrieval of electronically stored data also makes for a more efficient use of court time.<sup>504</sup> Accordingly, quite apart from seeking to improve the comprehension by the jury of complex matters, the use of courtroom computer technology should significantly affect the length of complex trials, especially those involving commercial fraud.

2.146 In Victoria, the introduction of the *Crimes (Criminal Trials) Act 1993* has addressed the matter of jury access to various court documentation. Section 16 of the Act stipulates the following:

For the purpose of helping the jury to understand the issues, the court may order that copies of any of the following shall be given to the jury in any form that the presiding judge considers appropriate –

- (a) the prosecution case statement and, with the consent of the accused, the defence response;
- (b) any document admitted as evidence;
- (c) any statement of facts;
- (d) the opening and closing speeches of counsel;
- (e) the presiding judge's address to the jury under section 14;
- (f) any schedules, chronologies, charts, diagrams, summaries or other explanatory material;
- (g) transcripts of evidence;
- (h) the presiding judge's summing up;
- (i) any other document that the presiding judge thinks fit.

2.147 The very essence of such legislative initiatives are grounded in the belief that if jurors' comprehension can be assisted by such mechanisms, then '[e]vidence may be presented in the form of charts, summaries and other

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<sup>503</sup> Complex White Collar Crime Trials Working Party, op. cit., p. 131.

<sup>504</sup> Roskill Committee, op. cit.

explanatory material'.<sup>505</sup> Furthermore, the Act, in reference to voluminous or complex evidence, also stipulates:<sup>506</sup>

If the court is satisfied that particular evidence that is to be given in a proceeding by a party is so voluminous or complex that it would not be possible conveniently to assess the evidence if it were given in narrative form, the court may direct the party to give the evidence in a form, specified in the direction, that would aid its assessment by the court.

2.148 The pressing questions remain as to the extent these provisions are utilised by juries, or to what extent do counsel and/or trial judges exercise encouragement of juries to do so.

### Note Taking by Jurors

2.149 Another procedural change that might aid jury comprehension in complex trials is to urge jurors to take notes during the course of the trial. (It could even be considered that they be permitted to take their notes home at the end of the day.) Although the High Court of Australia and the United States Supreme Court have never directly addressed the question, the issue of note taking has long been a source of controversy generating much debate but very little action.

2.150 Permitting jurors to take notes would appear to be an obvious way of lessening jury confusion and furthering the purposes of jury trial. There has also been comment that juror comprehension 'might be improved by encouraging them to take notes ... rather than remaining passive 'receivers' of data'.<sup>507</sup> Yet, despite these thoughts and the evidence which purports higher grades of recall among note takers, as compared with listeners (who do not take notes),<sup>508</sup> jurors in most jurisdictions around the world, it would seem, are neither explicitly encouraged to take notes by being advised to do so, nor implicitly encouraged by the presence of proper facilities to take notes.<sup>509</sup>

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<sup>505</sup> s. 42A.

<sup>506</sup> s. 42B.

<sup>507</sup> Levi (1988), *op. cit.*, p. 110.

<sup>508</sup> Einstein, G.O., Morris, J. and Smith, S., 'Note taking: individual differences for lecture information', (1985) 77 *Journal of Educational Psychology* 522-632; Fisher J.L., and Harris M.B., 'Effect of note taking and review on recall', 65 *Journal of Educational Psychology* 321-325; Peper, R.J. and Mayer, R.E., 'Note taking as a generative activity', 70 *Journal of Educational Psychology* 514-522.

<sup>509</sup> The provision of furniture and materials to facilitate note taking and the provision of a comfortable individual seat would go some way to promoting note taking and this improving the attention span of jury members.

There appears to be the broad attitude that it may well be better for jurors to concentrate on listening, observing and reflecting. Thirty years ago, the Morris Committee confirmed this belief when it stated 'it would be unwise to give any positive encouragement to jurors to embark upon note taking'.<sup>510</sup>

2.151 But, this position is far from confirmed. Contrary to the claims of opponents of juror note taking – which assumes that notes are inaccurate and incomplete, that there is an influence of notes over recollection, that jurors become too preoccupied with pen and paper and not the demeanour of the actual witness, that note takers appear more alert and informed than others and will thus exert undue influence over other jurors, and that the superfluous or trivial over the relevant will dominate – jurors as a rule do not find note taking distracting, and note takers appear to have no greater influence than those jurors who do not take notes.<sup>511</sup>

2.152 Though there is also some speculation that note takers possess feelings of being less well informed (because the assumption about note taking is that they do not require clarification or assistance from the court) and have, perhaps, some difficulty in deciding on a verdict (because the notes create confusion),<sup>512</sup> it seems such concerns about the alleged adverse affects of notes are in essence arrogant and hypocritical. Others have suggested that 'precluding jurors from taking notes is another litigation antique' because the custom derives from times of limited literacy and the concern that note takers would unduly influence the decision making process of illiterate members of the jury who would feel disadvantaged because they would have to rely solely on memory.<sup>513</sup> This problem is not of great a concern in today's society, and as one American jurist noted, 'if there are reasons for note taking by lawyers and judges during a trial, there are at least the same reasons for note taking by jurors'.<sup>514</sup>

2.153 Experimental research in the United States has found that note taking was competently carried out by jurors and that such activity had beneficial

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<sup>510</sup> Morris Committee, op. cit., p. 91.

<sup>511</sup> Hans and Vidmar, op. cit., p. 123; Austin, A.D., 'Why jurors don't heed the trial judge', (1985) 12 *The National Law Journal* 17; Law Reform Commission of Canada (1980), op. cit., pp. 115-118.

<sup>512</sup> Lempert, op. cit., p. 225.

<sup>513</sup> Forston, M., 'Taking note of note-taking', 10 *Columbia Journal of Law and Social Problems* 565.

<sup>514</sup> Urbom, op. cit., p. 415; see also, Schwarzer, op. cit., p. 591.

effects on the outcome of deliberations.<sup>515</sup> To this point, in an extensive analysis of jury service in lengthy civil matters in the United States, it was established that 'a majority of the jurors who took notes rated that practice as 'very helpful''.<sup>516</sup> This is further borne out by the findings of other United States studies,<sup>517</sup> undertaken to test the reactions of counsel and judges regarding the premise that jurors are better decision makers because of their ability to take notes, which indicates that procedures permitting note taking are consonant with the principles of best practice. Just as recently, the NSWLRC carried out a general survey of judges and jurors in relation to note taking, which found that amongst jurors 'almost one half of those who did not take notes stated that notes would have assisted their deliberations'.<sup>518</sup>

2.154 With regard to the positive outcomes of note taking, there are several: taking notes engages jurors in the trial process, such activity permits them to feel more involved and it heightens the level of their attention. It has also been established that the taking of notes by jurors forces the individual to carefully organise the evidence which, in turn, facilitates recall and refreshes memory.<sup>519</sup> Furthermore, in a long and complicated trial, notes act as retrieval cues when members of the jury are in the process of deliberating over their verdict and provides a factual base for their decisions. In the end, it could be argued that the dedication to concentration necessary for note taking will improve attention and recognition of relevant testimony, as well as increase the chances of the juror becoming more involved in the process, thereby elevating comprehension levels. It seems then to be a nonsense that a juror can do his or her job properly without being able to make notes as the case unfolds. Some have even gone as far as to argue, 'even if we faced up to what is really required and provided jurors with transcripts of evidence (at least the

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<sup>515</sup> Heuer, L. and Penrod, S., *A Field Experiment on Improving Jury Communication*, U.S. Publishing Service, Wisconsin Judicial Council Committee on Improving Jury Instructions, 1985.

<sup>516</sup> Cecil *et al*, *op. cit.* p. 30.

<sup>517</sup> Walter-Goldberg, B., *Notetaking by Jurors in the Federal Courts*, Philadelphia Bar Association, Philadelphia, 1985. This research established that judges found no problems with note taking and generally favoured it. The jurors, too, generally favoured it; 70% took notes. 89% had no problem with the accuracy of the information recorded by their peers. Only about a third of the jurors said that note takers led or dominated the deliberations, but those jurors might have done the same had note taking not been permitted. 89% of the note takers said they would do it again.; see also, Flango, V.E., 'Would jurors do a better job if they could take notes?', (1980) 63 *Judicature* 9.

<sup>518</sup> New South Wales Law Reform Commission (1986), *op. cit.*, p. 82.

<sup>519</sup> Thomson, *op. cit.*

crucial evidence), they would still need the noting facility to discharge their sworn responsibilities'.<sup>520</sup>

2.155 Ultimately, concerns over note taking are minimised by the fact that many jurors will not take notes, 'but denying them permission to do so is demeaning and inconsistent with the large measure of responsibility the system places on jurors', and it may hamper their performance.<sup>521</sup> The prevailing attitude now seems to be that note taking is a matter of preference; notes can provide some clarifying assistance to the juror, but they do not appear to have an undue influence over recollection. Perhaps the final word on this issue should be left to the considerations of the LRCC which recommended administrative action be taken to ensure jurors are provided with note taking facilities.<sup>522</sup>

Despite the fears which some have expressed about note-taking distracting jurors and giving undue influence to good note-takers, we think that on balance jurors should be allowed to take notes. Permitting jurors to take notes should lessen jury confusion, diminish the strangeness of the courtroom, and assist jurors in understanding and recalling the evidence. That the advantages of jury note-taking outweigh the disadvantages has been confirmed in a number of jurisdictions in Canada where jurors are routinely given a clip board and pad and invited to take notes.

## Jury Access to Transcripts of Evidence

2.156 In line with the arguments about juror note taking comes the debate about jurors having access to transcripts of evidence. The exercise of presenting documents to jurors which aid juror comprehension of evidence is a controversial one (and is examined in greater detail at a later stage in this analysis). Clearly because of the nature of some trials, the jury will have to be endowed with an extraordinary memory to store all of the oral information presented to the court. In a lengthy trial, judge and counsel can resort to the transcript, but this is not the case with the jury. There are reasons for this.<sup>523</sup>

To give the jury access to the transcript is seen by some as contrary to the role of the jury, which is to obtain a 'feel' for the truth by careful and attentive listening to the evidence as it unfolds. Otherwise juries would rely too much on dissecting the evidence afterwards with the aid of the transcript and the intuitive grasp of the truth would elude them.

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<sup>520</sup> Hill, *op. cit.*, p. 13.

<sup>521</sup> Federal Judicial Center, *op. cit.*, p. 149.

<sup>522</sup> Law Reform Commission of Canada, *The Jury*, Report No. 16, Minister of Supply and Services, Ottawa, 1982, p. 84.

<sup>523</sup> Read, M., 'Trial by jury: the English way to justice', Paper presented at the First Melbourne Criminal Justice Symposium, Melbourne, Mar. 1987.

2.157 Given this position, it should be considered that jurors be advised at the outset of the trial that they should expect to have to rely on their recollection and not assume that a transcript will be available to them.

2.158 Although the higher courts in Victoria have the legislated power to give juries transcripts of evidence<sup>524</sup> and its availability is provided for in clause 21 of the *Crimes (Fraud) Bill 1992*, the '[a]ppellate courts have been firm about the dangers of juries receiving inadmissible material in documentary reform'.<sup>525</sup> There are obvious and well known difficulties regarding the presentation of transcripts to jurors: the transcript contains *all* the evidence, even that heard in a jury's absence;<sup>526</sup> editing processes are complicated and often too slow;<sup>527</sup> usage of transcripts is selective and tends only to emphasise a partial review of the evidence ('because we humans believe documents carry more weight');<sup>528</sup> and, the significant costs involved in producing such numbers of documents daily, are just some of the difficulties which explain the present practices about provision of transcripts.

2.159 Alternatively, there are arguments suggesting jurors' recall of evidence would be greatly enhanced if they could refresh their memory from the transcript.<sup>529</sup> In addition, 'the official transcript would be, at least, as accurate and complete as the juror's own notes, if any'.<sup>530</sup> This has also received some consideration by former members of the Victorian judiciary, and to this point, the comment has been made: 'No judge could be expected to do justice in a long complex case without a transcript. Nor can a jury'.<sup>531</sup> The Victorian Trials Working Party has also weighed in on this particular issue and has supported the provision of transcripts to juries, saying 'such a practice would be helpful

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<sup>524</sup> *Crimes (Criminal Trials) Act 1993*, s. 16 (g).

<sup>525</sup> Mullaly J, *op. cit.*, p. 230.

<sup>526</sup> In 1982, the Victorian Bar Council Shorter Trials Committee (*op. cit.*, pp. 194-195) felt there were a number of problems with providing jurors with transcripts of the evidence. 'The appeal process requires that objections to admissibility of the evidence be exercise of discretion because it would be unfair to the accused to admit it. If a transcript were made available to the jury, the jury would read of the prejudicial things which the judge had been at pains to exclude in the interests of justice.'

<sup>527</sup> Once again the Shorter Trials Committee (*op. cit.*, pp. 194-195), felt that '[i]f transcripts were made available to the jury it would be necessary to have some complicated and expensive system under which one transcript was kept of what occurred in the presence of the jury and another of what occurred in their absence.'

<sup>528</sup> Mullaly J, *loc. cit.*

<sup>529</sup> Law Reform Commission of Canada (1980), *op. cit.*, p. 133.

<sup>530</sup> *ibid.*

<sup>531</sup> Marks, *op. cit.*, p. 7.

in long running trials to avoid losing recollection of important sections of the evidence'.<sup>532</sup> The AIJA has also recommended this proposal:<sup>533</sup>

If it is so available, then in a complex and lengthy trial it may be advantageous to make it available in a computerised form, as jurors may otherwise have extreme difficulty in locating text that they wish to find among such a large body of transcript.

2.160 There is also the simple argument that if the jury are to base their decision on the evidence at the trial, 'one conclusion appears to be inescapable: members of the jury should have copies of the transcripts of evidence available to them'.<sup>534</sup> Naturally, while care must be exercised in furnishing the jury with documents relating to jury instructions, there appears to be ample authority permitting such a course.<sup>535</sup> Those in favour of such a move argue that complex trials can proceed for months and it is a ludicrous exercise to ask any group of people to compare and contrast testimony given by witnesses months apart. Accordingly, the availability of transcripts to the jury is likely to significantly reduce any contamination of and improve the comprehensibility of the evidence presented at trial.

2.161 The LRCC proposed a common sense solution to this controversial matter which addresses the enhanced quality of jury decision making:<sup>536</sup>

[N]ormally the jury should not be given a transcript of the testimony. However to cover the exceptional case in which the judge may decide it would be helpful to the jury to have a copy of the transcript, the recommendation is made permissive. *In determining whether a matter ... should be taken to the jury room the judge shall weigh the probability that the material will assist the jury in reaching a proper verdict against the danger that the jury will be confused or misled by it and the inadequacy of the normal procedure of having the jury return to the courtroom to review the transcript of the evidence.* (emphasis in original)

## Questioning of Witnesses by Jurors

2.162 As if to complete some sort of trilogy, one other important factor to be discussed in relation to comprehension is the freedom of the jurors' to ask questions. Permitting jurors to ask questions during the trial is more controversial than note taking. This also appears to be a topic upon which judges in all jurisdictions have strong differences of opinion. In most

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<sup>532</sup> Complex White Collar Crime Trials Working Party, op. cit., p. 131.

<sup>533</sup> Greenleaf and Mowbray, op. cit., p. 91.

<sup>534</sup> Thomson, op. cit., pp. 8-9.

<sup>535</sup> See for example, *Petroff* [1980] 2 A Crim R 101; *Zikovic* [1985] 17 A Crim R 396.

<sup>536</sup> Law Reform Commission of Canada (1980), op. cit., p. 134.

jurisdictions, the trial judge has discretion over the matter.<sup>537</sup> There are many who believe that nothing or as little as possible should be directed at the jury which may tend to encourage it to ask questions; while on the other hand, other judges believe that instructions should be laid out very clearly and early on in the trial so that such questioning can be properly controlled.

2.163 In analysing the communication process between the judge and the jury, the AIJA survey of judges in New South Wales found that most preferred 'to retain the strict rules of communication ... which require either formal written communication or communication through the foreman'.<sup>538</sup> As it stands, in other words, the current practice of passing questions to the judge via the tipstaff means answers to jurors' questions are often delayed and evidence presented is either not understood or is misunderstood. Having said this, it is of some interest to note that the judges in the survey 'generally recognised the need for jurors to feel free to ask for access to exhibits, or to directions of law, or for answers to questions at any time'.<sup>539</sup> This position was also supported by a large number of the jurors surveyed.

2.164 While it is arguable that the criminal justice system treats juries as passive recipients of information, it is common practice to see presiding judges ask questions of clarification which influence the flow of information from the witness stand. What judge would want to decide a complex case without being able to ask a question? On the other hand, this does not apply for juries and the attitude of the Morris Committee in England typifies the support for the long held belief that there is some peril in encouraging jurors to ask questions.<sup>540</sup> It is for these same reasons that 'the appellate courts [in Victoria] are discouraging jurors from asking questions'.<sup>541</sup> These views are grounded in the conventional wisdom which holds that the lawyers who are

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<sup>537</sup> In the United States case, *De Benedetto v Goodyear Tire and Rubber Co* 754 F.2d 512 (4th Circuit 1985), although the court considered that the 'practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial,' the record revealed no bias in the ninety-five questions asked over a three week long trial; moreover, the court found that 'the vast majority of jurors' questions were technical in nature and reflect a commendable degree of understanding and objectivity by the jury' (Urbom, W.K.. 61 *Nebraska Law Review*, 417).

<sup>538</sup> Findlay, *op. cit.*, p. 129; A typical case in point involves the juror (or the foreman) writing the question out and handing it to the sheriff's office (tipstaff) who hands it onto the judge for consideration.

<sup>539</sup> *ibid.*

<sup>540</sup> Morris Committee, *op. cit.*

<sup>541</sup> Mullaly J, *op. cit.*, p. 215.



familiar with the case are in the best position to determine what questions should be asked. In other words, it is the lawyers' job to present the case, and the jury's to decide it from the evidence received.<sup>542</sup>

2.165 While questions emanating from jurors are not formally prohibited by law, they are usually restricted in practice to written questions which are passed onto the judge, generally when the court is in recess. This arises from the alleged fear that juries shall exert too much control by turning themselves into cross-examiners: that such a process would convert jurors from intelligent listeners to active participants (if not partisans) that repeated questions from the jury box would disrupt the orderly examination of witnesses; that jurors might ask prejudicial or irrelevant questions that could contaminate others on the jury; that counsel would begin to direct their appeals to those jurors who signal their prominence or leadership status by asking questions; and, that objections to improper juror questions would not be made for fear of causing resentment on their part.<sup>543</sup>

2.166 Empirically speaking, these fears have not materialised and lack foundation. To the contrary, both the experimental and anecdotal evidence emanating from Australia<sup>544</sup> and the United States<sup>545</sup> suggests that jurors do not abuse questioning privileges, and questions may give judge and counsel an idea of how well jurors are following the evidence. In addition, the empirical studies conducted in the United States confirm the common sense notion that being permitted to ask pertinent questions of a witness communicating information greatly enhances the probability that the message being communicated will be properly understood.<sup>546</sup>

2.167 Greater opportunity for jurors to ask questions and make relevant points of clarification will facilitate the comprehension process greatly, and 'enable them in some cases to increase their understanding of the evidence and testimony'.<sup>547</sup> Common sense suggests that some jurors at some time during a trial will not fully understand some of the evidence being offered: it may be the meaning of a word, the significance of an exhibit, or part of an

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<sup>542</sup> Schwarzer, *op. cit.*, p. 592.

<sup>543</sup> Guinther, J., *The Jury in America and the Civil Juror*, Facts on File Publications, New York, 1988, p. 68.

<sup>544</sup> Findlay, *loc. cit.*

<sup>545</sup> Guinther, *op. cit.*, p. 295.

<sup>546</sup> Forston, *op. cit.*, p. 628.

<sup>547</sup> Law Reform Commission of Canada (1980), *op. cit.*, p. 119.

answer lost in a moment of distraction. How much more important, then, is it for jurors, to whom the entire process and much of the material may be foreign, to be able to ask questions? The point of such a stance is that: 'If jurors could ask questions of the witnesses, they could clarify complicated issues, explore relevant but previously unanswered questions, and become actively engaged in their own efforts to reconstruct events of the past'.<sup>548</sup> In addition, the Trials Working Party in Victoria felt:<sup>549</sup>

Members of the jury should be encouraged to participate more in the trial process, that is the jury should be encouraged to ask questions to clarify any matter which it has not understood as it [is] thought that once the jury [is] 'lost' they 'switch off'. The danger being then that everything which follows is not understood either.

2.168 Though not comprehensive, some additional yet preliminary research in the United States regarding the matter of jurors asking questions has found that predicted detrimental effects on the trial do not materialise.<sup>550</sup> Other studies have also found that jurors permitted to ask questions during the course of a trial had significantly higher levels of confidence and performance satisfaction, better understanding of the law, greater perceived ease of reaching verdicts, considered counsel in a more positive light, and were more certain about the correctness of their eventual verdict.<sup>551</sup> In other words, the desire to ask questions can also be taken 'as an index of the interest that jurors take in their trials and their desire to get at the truth'.<sup>552</sup> These findings endorse the position promulgated by the educational and psychological fields which has established the important role of questions in the comprehension process and underlines the function of questions as a clarifying and corrective one.<sup>553</sup> This also emphasises the impact or effect a misunderstanding of a small part of the evidence can have on the juror's allocation of relevance and meaning to testimony and evidence. A juror who becomes confused early in the trial may miss the significance of later evidence. Such a juror will not be

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<sup>548</sup> Kassin and Wrightman, *op. cit.*, p. 130.

<sup>549</sup> Complex White Collar Crime Trials Working Party, *op. cit.*, p. 128.

<sup>550</sup> Penrod, S., 'Evaluating techniques to improve juror performance', Paper presented at the American Judicature Society Conference on the American Jury and the Law, Wisconsin, 1985.

<sup>551</sup> Heuer, L. and Penrod, S., 'Increasing jurors' participation in trials', (1982) 20 *American Criminal Law Review* 1.

<sup>552</sup> Guinther, *loc. cit.*

<sup>553</sup> Thomson, *op. cit.*

an effective participant in the deliberations and may be dominated by those who claim to have understood the evidence.<sup>554</sup>

2.169 A final thought on this particular matter concerns the suggestion that there should also be the mechanism whereby additional inquiries of the jury are conducted by the judge, at appropriate times, regarding their level of understanding, and if they have any questions about complex matters which they would like clarified, this should also be encouraged. In other words, why does the court seemingly refuse to utilise the collective mind of the jury?

2.170 It could be argued that the various aids or assistance raised here are, in the end, no more than tools with which the advocate hopes to be able to communicate more successfully difficult concepts and facts to the jury. This could well be the case if they are not properly utilised or incorporated into the overall presentation of the trial. As has been commented on:<sup>555</sup>

In the context of presentation, it has to be appreciated that, if information received and learnt through a combination of visual and oral presentation is to be retained and used, the recipients must be able to manage the information themselves. The same modern research which has shown that people learn visually and pictorially has gone on to show that retention is in part a tactile function. Translated into the forensic environment, this means that jurors (and advocates and judges, for that matter) need to be able to work with 'hard' copies of the documents, graphs and pictures which the advocate uses as presentational tools.

## Courtroom Facilities

2.171 Inevitably, any discussion about complex trials and their impact on jurors turns to the issues of juror comfort (improved leg room in the jury box; better seating), court facilities (placement of the witness box; access to toilets) and physical conditions (space and furniture for note taking in the jury box). The recent AIJA survey of jurors in New South Wales found the following criticisms of facilities for juries: 'the absence of satisfactory refreshments, a desire for better furniture, better television programmes and more to do'.<sup>556</sup> These concerns have been voiced in evidence to the Victorian Parliamentary Law Reform Committee, where it was suggested that 'the facilities under which juries are forced to labour are so inadequate in this state ... We treat our juries worse than dogs, quite frankly ...'<sup>557</sup>

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<sup>554</sup> Schwarzer, loc. cit.

<sup>555</sup> Hill, op. cit.

<sup>556</sup> Findlay, op. cit., p. 74.

<sup>557</sup> van de Weil, op. cit., p. 250.

2.172 A decade before the AIJA survey, the Victorian Bar Council Shorter Trials Committee (hereafter referred to as 'the Shorter Trials Committee') commented in its evaluation of the efficiency of trials, 'that in general there is a crying need for the trial courts to be provided with, and enthusiastically and vigorously embrace, modern technology to assist in the conduct of criminal trials'.<sup>558</sup> Some attention also needs to be paid to the duration of time that jurors are expected to sit in the jury box. Regular breaks or pauses in the proceedings need to be initiated so that juror attention is maintained and not drained. Nor should they be placed in a position where they have to keep their heads constantly turned to watch the proceedings.

2.173 The Shorter Trials Committee also stated that 'courts should be supplied with running transcripts, computers, word processors, television sets, video tape equipment, tape recording machines, overhead projectors – all the paraphernalia which is so much part of modern life outside the courtroom'.<sup>559</sup> Consideration to providing amplifying equipment which solves the problem of poor court room acoustics is also required. Yet, it would seem that most of the presentational aids to the jury outlined in the previous section require the refitting of the standard courtroom and the provision of expensive equipment. The harsh fact is that unless and until there are some sensible designs of courtrooms capable of coping with the demands of complex cases, the efforts of the practitioners to make the issues comprehensible to jurors and judges will be impeded. Even a former justice of the Victorian Supreme Court felt compelled to comment on these factors:<sup>560</sup>

The designs of many courtrooms and facilities reflect little input from judicial experience of the conduct of trials. Courtrooms have often not been adapted to the modern forms in which evidence is given. The delay of standing the court down while preparations are made to show a film or play a tape should not be necessary. It should be possible for a document or photograph which is before a witness in the witness box to be projected to an overhead screen which all can see ... The slow and often ineffective methods which must perforce be used in a conventional courtroom to acquaint the judge, twelve jurors and counsel with what the witness pointed to, would make an efficiency expert weep.

2.174 These remarks also received support from the NSWLRC which was investigating the structure of long criminal cases.<sup>561</sup>

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<sup>558</sup> Sallmann, *op. cit.*, p. 195.

<sup>559</sup> *ibid.*

<sup>560</sup> McGarvie, R, 'The shorter criminal trial', Paper delivered to the Supreme Court Judges' Conference in Hobart, 1985, p. 34.

<sup>561</sup> New South Wales Law Reform Commission, *Long Criminal Trials*, Draft Working Paper, Government Printer, Sydney, 1984.

2.175 In summary, the role, if any, that these environmental factors play on verdict making is unclear, but anecdotal evidence tends to suggest that a jury's haste to finish its task is very much affected by the perceived standard of the conditions endured.

## Procedural Reforms

2.177 There has been considerable speculation and debate as to the ramifications of procedural reforms and the extent of their influence on juror comprehension. The preceding sections of this paper have illuminated some of the problematic areas associated with juries and complex litigation.

## Pre-Trial Procedures

2.176 There can be little doubt that complex or confusing parts of the case need to be made more manageable, and issues in dispute must be clarified and settled in the pre-trial process if the trial is to have any chance of running smoothly and according to the needs of the 'fact finders'.<sup>562</sup> Throughout the world the pre-trial process has been subject to much scrutiny and examination:<sup>563</sup>

The jury trial begins long before the judge seats the last juror and the lawyers make their opening statements. The die is cast during the pre-trial process – what is done, and more often what is not done, during the process largely determines the scope of the issues to be tried, the admission of evidence and the length of the trial.

2.177 The Victorian Trials Working Party gave support to this position and agreed that 'the causes of the problems inherent in complex fraud trials commence during the pre-committal stage and continue up to and throughout the trial'.<sup>564</sup> As a consequence of this type of problem, the AIJA's report on pre-trial activities and managing complex trials recommended that 'a system of pre-trial directions hearings should apply, to supervise (amongst other things) the exchange of the prosecution's 'case statement' and the defence response'.<sup>565</sup> The report also noted that the trial judge should be invested 'with a discretion to hold a series of directions hearings before the jury is empanelled, but as part of the trial itself, for all complex cases, whether or not

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<sup>562</sup> Findlay, *op. cit.*, p. 163; Cowdrey QC, N., 'Making the trial process more effective', eds., National Crime Authority, *Complex White Collar Crime*, Australian Government Publishing Service, Canberra, 1993, pp. 303-308.

<sup>563</sup> Schwarzer, *op. cit.*, p. 576.

<sup>564</sup> Complex White Collar Trials Working Party, *op. cit.*, p. 113.

<sup>565</sup> Aronson, *op. cit.*, p. 26.

fraud is involved'.<sup>566</sup> As such, the *Crimes (Fraud) Bill 1991* (amended in 1992) was introduced to assist with the management and framework of complex trials.

2.178 In line with this, the then Commonwealth Director of Public Prosecutions has made some detailed comments about the problems generated by the presentation of evidence which he believes should be addressed at the committal hearing:<sup>567</sup>

Before a witness is required to attend Court and testify, the accused should be required (through his Counsel) to give an assurance to the Court that some part of the witness' evidence is genuinely disputed, or that the witness is required for some legitimate forensic purpose. Any such assurance should not be given lightly. There should, at least, be cost penalties if witnesses are required unnecessarily to attend court.

A radical change of this nature, presupposes full and timely disclosure by the prosecution of its entire case. As a general rule, no major fraud prosecution should be launched unless the Crown will be in a position, soon after charges are laid, to supply the defence with a complete set of witness statements, copies of all exhibits, and detailed particulars of the offences charged.

2.179 Before proceeding, it is worth examining in brief the existing pre-trial legislation in Victoria. Broadly speaking, the only pre-trial legislation in existence in Australia consists of provisions of a general nature in some jurisdictions allowing a judge to determine some preliminary matters prior to empanelling a jury. In Victoria, s. 391A of the *Crimes Act 1958* allows the court to hear and determine any question with respect to the trial which 'the court considers necessary to ensure that the trial will be conducted fairly and expeditiously'.<sup>568</sup> Further, Order 11 of the *County Court Miscellaneous Rules* allows for a system of pre-trial procedures including the exchange of notices among the defence, Director of Public Prosecutions and Criminal Trial Listing Directorate, service of copy presentments, notification of readiness for pre-trial hearings. It also caters for unrepresented defendants and allows for pre-trial hearings. These pre-trial hearings need to be conducted by the trial judge and directions may be given to trial preparation, readiness for trial, or its conduct as the judge thinks fit in the circumstances.<sup>569</sup> The *Crimes (Criminal*

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<sup>566</sup> *ibid.*, p. 45.

<sup>567</sup> Weinberg, *op. cit.*, pp. 27-28.

<sup>568</sup> Such hearings may occur after the defendant is arraigned and before the empanelling of the jury. Decisions made at hearings have the same effect as if made during the trial. *Crimes Act 1958*, s. 391A.

<sup>569</sup> Trials Working Party, *op. cit.*, p. 115.

*Trials*) Act 1993 provides for directions hearings, so that where a presentment has been filed, the court may determine certain matters; including: any question of law or procedure that arises or is anticipated to arise in the trial, give any direction for the conduct of the proceeding which it thinks is conducive to its prompt and economical determination (such as on the form and manner of giving evidence).<sup>570</sup>

2.180 Both in England and in Victoria there has been a number of factors which are believed to contribute to the excessive length of trials and the developing complexity of case presentation. The importance of these concerns is highlighted by the understanding that the long time periods<sup>571</sup> required for most complex cases are especially disabling for a jury. Trial length is important to the argument against jury trial because lengthy trials raise serious problems of juror memory, are associated with massive amounts of information for the jury to comprehend and mean that large numbers of jurors (including a disproportionate number of those most likely to be especially capable) are excused from jury service.<sup>572</sup> On a more personal level, a long trial can interrupt the career and personal life of a jury member and thereby strain his or her commitment to the jury's task.

2.181 In one instance, it is likely that much of the evidence which the prosecution wishes to lead will, in fact, be uncontested. Such evidence should be capable of being tendered, pre-trial, in the form of written statements, rather than by calling unnecessary witnesses. In line with this, the Shorter Trials Committee favoured the development of procedures enabling a judge to direct at a pre-trial hearing that particular items of evidence may be proved in a manner other than in accordance with the existing rules of evidence.<sup>573</sup> At about the same time, the Roskill Committee was also convinced that changes

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<sup>570</sup> *Crimes (Criminal Trials) Act 1993*, s. 5.

<sup>571</sup> In the mid-1980s, the Shorter Trials Committee observed that not only are trials much longer than those in the eighteenth century when several cases were tried in a single day, but that more recently they have grown even more lengthier (Victorian Bar Council Shorter Trials Committee, *op. cit.*). The evidence required to prove a point is now frequently more extensive, first because of the availability of complex scientific evidence, and secondly, evidence is now more thoroughly tested by counsel than ever before. Cases can also be lengthy because they involve multiple accused or multiple charges (*Vaitos v R* [1981] A Cr R 238), or a large number of documents and complex evidence (*R v Smart* [1983] VR 265; *R v Ray, Anderson and Knudsen*, Victorian Supreme Court Trial, 1985-86). Add to this process the presence of the jury and the duration of time is further extended.

<sup>572</sup> Lempert, *op. cit.*

<sup>573</sup> Sallmann, (1983), *op. cit.*, pp. 176-177.

in the law were required with regard to the way certain evidence is presented to the court.<sup>574</sup> As a consequence of these recommendations, the English legislature enacted the *Criminal Justice Act 1987*, later amended in 1988, in order to deal with the plethora of involved factors that comprise serious and complex fraud cases.

2.182 Reforms in the area of pre-trial activities should parallel some of the recommendations presented by the Roskill Committee in England, the NSWLRC,<sup>575</sup> the AIJA, the Victorian Pegasus Taskforce,<sup>576</sup> and the Victorian Parliamentary Legal and Constitutional Committee. This group of law reform bodies made detailed recommendations to improve pre-trial procedures, of which many are pertinent in a Victorian context, for example:<sup>577</sup>

The Task Force commends a procedure in which, after the Crown opening—and subject to the defence's agreement—the jury would be told of the disputed and undisputed issues for trial. It commends, too, the greater use of 'notices to admit' so that the trial issues are focussed and the Crown [is] not put to needless expense and effort in proving facts that turn out to be undisputed.

2.183 The Victorian Parliamentary Legal and Constitutional Committee stated:<sup>578</sup>

At the pre-trial hearing, the admissibility of evidence and any other significant matters which might affect the proper and convenient trial of a case can be decided. The judge may hear and rule upon any matters of law involved in the subsequent trial and is empowered to make such order or orders as appear necessary to secure the proper and efficient trial of the case.

2.184 Other considerations concerning pre-trial activity involve the use of pre-trial conferences of experts, which could be formal or informal, depending on the requirements of the case. Such a mechanism is designed to reach some level of consensus regarding the areas in dispute so that an agreed statement can be presented to jurors for their assistance and to alleviate some of the confrontations in court so often associated with these matters. This has been used in the United States with some success in trials involving conflicting forensic and other expert evidence, particularly in relation to DNA tests.<sup>579</sup> It is also a procedural technique that has been utilised in New South

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<sup>574</sup> Roskill Committee, *op. cit.*, p 72.

<sup>575</sup> New South Wales Law Reform Commission, (1986), *op. cit.*, paras. 6.28, 10.6 to 10.15.

<sup>576</sup> Victorian Pegasus Taskforce, *Reducing Delays in Criminal Cases*, Government Printer, Melbourne, 1992.

<sup>577</sup> *ibid.*, p. 23.

<sup>578</sup> Victorian Parliamentary Legal and Constitutional Committee, *op. cit.*, p. 149.

<sup>579</sup> *People v Castro* (1985) 545 NYS 2d.



Wales as an alternative to the panel type of presentation in court.<sup>580</sup> As a Justice of the Supreme Court of New South Wales has outlined, such pre-trial procedures can:<sup>581</sup>

(i) lead to consensual statements as to the effect of the forensic or expert evidence; (ii) narrow and clarify the areas of dispute, in a way which may eventually reduce the jury determination effectively to the question whether or not the assumptions on which the conflicting evidence depended, have been made out; (iii) persuade the prosecution that the evidence is not sufficiently reliable, scientifically, to be pursued; or (iv) assist the defence in deciding whether there is any point contesting the issue to which it relates.

2.185 From this particular point of view of the debate, the essence of the recommendations regarding pre-trial hearings is to increase the comprehensibility and diminish the duration of complex fraud trials. Efforts in this direction would boost the capacity of jurors to grasp the crucial issues. These recommendations include:

- a) the pre-trial review or preparatory hearing should be an integral part of the trial itself;
- b) better case management, including legal argument before the empanelling of the jury and pre-trial hearings to conduct the sometimes lengthy *voir dire*s, could be encouraged as a means of avoiding the lengthy inconvenience and expense of having jurors waiting idly before the evidence of the trial commences
- c) the court would decide upon the necessity of these hearings;
- d) the same judge would preside over the entire matter;
- e) presiding judges must be given the opportunity to study relevant documents;
- f) the prosecution should be obliged to supply the outline of its case and all supporting documentation to the court and to the defence;
- g) procedures should be established to enable the defence to make factual admissions;
- h) cases summaries, chronologies and glossaries of legal terms should be drawn up for the benefit of the court, parties and the jury;
- i) contested evidence should be presented in ways which are easier to comprehend than by mere verbal presentation; and,

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<sup>580</sup> *Regina v Tran*.

<sup>581</sup> Woods J, *op. cit.*, p. 170.

- j) admissibility of evidence and points of law should take place before empanelment of a jury.

2.186 Adopting these recommendations would enable issues to be identified and participants to become more familiar with complex factual matters before the confusion of the trial process commences. Such an approach is supported by the Trials Working Party which said that:<sup>582</sup>

the most effective way to overcome the problems in serious and complex fraud trials would be for all Australian jurisdictions to adopt a uniform and discrete legislative scheme providing a process for pre-trial hearings, admission of facts, and resolution of legal questions.

## Presentation of Evidence

[E]vidence of a scientific and technical nature should be presented to juries in a manner which maximises the prospect that the evidence will be understood by the jury ... The responsibility for presenting scientific or technical evidence in a manner which makes it easier for the jury to understand is one which must be shared between the witness giving the evidence and the lawyer asking the questions.<sup>583</sup>

2.187 Although the presentation of the evidence at trial is normally controlled by the strategies and tactics of counsel, complex cases also present other considerations requiring attention and which are primarily concerned with jury comprehension and the length of the trial.<sup>584</sup> The question therefore arises: Do counsel and the judiciary possess the capacity to control and direct effectively the presentation of complex evidence to the jury? In response, using the South Australian *Splatt* case as a point of reference it has been noted:<sup>585</sup>

If the jury system is to be maintained [in complex cases], and ... it should be so, the machinery of assisting the jury to reach a correct verdict on the evidence needs considerable change and improvement.

2.188 Just as poignant is the question of the role of counsel in complex cases. Simply, the presentation of evidence should serve to teach the jury, especially in complex cases, about the facts of the case. As a High Court judge has commented:<sup>586</sup>

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<sup>582</sup> Complex White Collar Crime Trials Working Party, op. cit., p. 132.

<sup>583</sup> Byrne, (1988), op. cit., pp. 202–203.

<sup>584</sup> Federal Judicial Center, op. cit., p. 136.

<sup>585</sup> Shannon, (Royal Commissioner), op. cit., p. 51.

<sup>586</sup> Deane J, *Kingswell v The Queen* (1985) 159 CLR 264 at 301.

In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings.

There is little doubt that complex cases and litigation place great demands on counsel in their dual role as advocates and officers of the court. Also inherent in the complexity of legal and factual issues is that judges are more dependent than ever on the assistance of counsel in the delivery and management of the case.<sup>587</sup> Members of the Australian judiciary have commented on the importance of their role in how evidence is presented before juries in complex matters and have emphasised the need for counsel to assist jurors to understand the matters before them:<sup>588</sup>

Counsel must present the evidence in simple fashion and the judge must state the law in terms which are intelligible to the ordinary layman, dealing with only so much of the law as is necessary on the facts to enable the jury to perform its function. My own experience is that when counsel and judge play their parts effectively, juries cope very well ... Good counsel make complex issues simple enough for the juries to understand them. If the judge understands them the jury will understand them.

2.189 Accordingly, a study conducted in the United States which investigated the disparity of jurors' perceptions regarding the ability of opposing counsel to present complex evidence observed that counsel's ability to develop and present arguments with clarity and succinctness permitted jurors to do the same during deliberations, leading to the conclusion that 'good attorneys make good jurors'.<sup>589</sup> Furthermore, there is the following consideration:<sup>590</sup>

The problem is that there are prosecutors who are incapable of making complex issues understandable to people because they refuse to speak English, or they refuse to prepare simple charts for them [the jury] to have a look at. It becomes a practitioner's problem rather than a jury problem.

2.190 This position is supported by the findings of the AIJA survey on jurors and serves to underline the importance of the presentation of evidence during the trial.<sup>591</sup>

Some jurors in our survey were confused and frustrated by the manner in which evidence was presented during the trial. Others thought that not enough evidence

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<sup>587</sup> Federal Judicial Center (1995), op. cit., p. 24.

<sup>588</sup> Heenan J, op. cit., p. 241.

<sup>589</sup> Hastie, R., Penrod, S.D. and Pennington, N., *Inside the Jury*, Harvard University Press, Cambridge, 1983, p. 40.

<sup>590</sup> van de Weil, op. cit., p. 259.

<sup>591</sup> Findlay, op. cit., p. 163.

was given to them, or that facts they eventually felt would have been important to their deliberations were withheld. Irrespective of whether jurors expect too much of the evidence in their trial, or misunderstand the technical and evidentiary reasons for limitations on evidence, there seems to be little doubt that the manner in which evidence is elicited during trials sometimes hinders comprehension.

2.191 This provides strong credence to the hypothesis that jurors are primarily concerned with evidentiary factors, and that the events of the trial itself (rather than what they hear during empanelment, during opening speeches, and during closing speeches) are the elements crucial to them in reaching a verdict.

2.192 Historically, the presence of a mostly illiterate jury required that all evidence produced in court was given orally, both in civil and criminal trials. Hence, the essence of the traditional criminal trial in common law jurisdictions is that facts must be proved by oral evidence. The very oral nature of the English trial is seen by some within the legal profession as a great advantage. Hearing evidence *viva voce* is thought by many to be the best method of assessing the evidence, and in particular, the demeanour and credibility of witnesses. In other words, supporters of the evidentiary nature of oral testimony consider that because evidence is out in the open and thus subject to cross-examination and public scrutiny, only evidence which is produced openly in court and is subject to cross-examination can lead to the proper determination of facts by the jury.

2.193 Alternatively, there is also the issue of the presentation style or format of evidence, particularly that which is considered complex, which needs to be considered. Sometimes complex cases involve concepts with which the jury is not familiar and on this basis it is considered that the introduction of graphics (such as diagrams or charts) or videotapes enables better comprehension by jurors because 'jurors understand better and remember more when information is presented visually rather than verbally'.<sup>592</sup> Research in the United States has revealed that 'diagrams, models or videotapes make testimony ... more meaningful and less time-consuming'.<sup>593</sup> The general theme of other investigations suggests:<sup>594</sup>

Much evidence becomes more comprehensible when presented with visual aids, such as a chart summarizing data, a chronology, an enlarged picture of an object, a

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<sup>592</sup> Federal Judicial Center (1995), *op. cit.*, p. 136.

<sup>593</sup> Guinther, *op. cit.*, p. 67.

<sup>594</sup> Schwarzer, *op. cit.*, p. 588.

diagram of a building, or a map. Juror surveys have shown that charts and diagrams have a powerful impact.

2.194 This position has been previously endorsed by the South Australian Royal Commission of Inquiry in 1984 which saw the potential and scope for the use of more imaginative but not necessarily more complicated, means of presentation such as diagrams, charts, projectors and other visual aids.<sup>595</sup> These recommendations as to the style of presentation were also supported by the Roskill Committee two years later.<sup>596</sup> Such procedural reform would be substantial and has the support of other courts in Australia which have spoken of the desirability of adopting in complex cases. In the early 1990s this was supported also by the AIJA<sup>597</sup> and the (former) Commonwealth Director Public of Prosecutions, who argued:<sup>598</sup>

The law of evidence should facilitate the use of charts, graphs, and other visual aids as methods of enhancing the comprehension of jurors. The law, as it stands, does not adequately facilitate the admission of such evidence ... There should be a statutory right to use charts, and other visual aids, as summaries of evidence.

2.195 In Victoria it has only been recently the case that the court may order that copies of any documents and evidence be given to the jury.<sup>599</sup> Furthermore, recent amendments to the *Evidence Act 1958* permit the court, if it:<sup>600</sup>

is satisfied that particular evidence that is to be given in a proceeding by a party is so voluminous or complex that it would not be possible conveniently to assess the evidence if it were given in narrative form [to] direct the party to give the evidence in a form ... that would aid its assessment by the court.

2.196 Also, clause 30 of the Victorian *Crimes (Fraud) Bill 1992* proposed the insertion of the following provision:

149D. Despite any rule of law or procedure or any practice to the contrary, charts, summaries or other explanatory material may be used in a criminal proceeding if it appears to the court that the material would be likely to aid its comprehension of evidence given or to be given.

2.197 In addition to these reforms, the *Crimes (Fraud) Bill 1992* contains other provisions which are applicable to serious and complex fraud cases:

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<sup>595</sup> Shannon, (Royal Commissioner), op. cit., p. 231.

<sup>596</sup> Roskill Committee, op. cit., rec. 57.

<sup>597</sup> Aronson, op. cit.

<sup>598</sup> Weinberg, op. cit., pp. 28–30.

<sup>599</sup> *Crimes (Criminal Trials) Act 1993*, ss. 16, 24 & 42.

<sup>600</sup> *Evidence Act 1958*, s. 42B(1).

2.198 For the purpose of helping the jury to understand the issues the Court may, in a proceeding for an offence in relation to which a special procedure notice has been given, order that copies of any of the following shall be given to the jury in any form that the presiding judge considers appropriate.

### Judges' Instructions to the Jury

2.199 Jurors cannot be expected to render an intelligent and considered verdict if the instructions they receive are unintelligible to them. When a trial is complex and protracted, the need for instructions the jury will understand is particularly compelling.<sup>601</sup> The importance of these instructions have been debated extensively in the United States. The form, timing and substance of instructions are areas which judges can affect if juror comprehension is to be improved. This is further underlined by the consideration that, ultimately, 'the ability of a juror to comprehend a given set of instructions ... influences the comprehensibility of the charge'.<sup>602</sup> In summary form, the judge's instructions to a jury might include such matters as the jury's role as fact finder, the burden of proof, assessing the credibility of witnesses, the nature of the evidence, and the jurors' need to rely on their recollection of testimony.<sup>603</sup>

2.200 As the United States Supreme Court put it in 1895 in *Sparf and Hansen v US*,<sup>604</sup> the instructions ('the charge') presented by the presiding judge have the purpose of instructing jurors on the law which they are to 'apply ... to the facts as they find them to be'. These instructions form the framework within which the judge addresses the jury. The judge decides questions of law and gives directions to the jury as to the law to be applied. Judges must not decide any question of fact nor must they withdraw from the jury any question of fact which is in issue. They must tell juries that they alone have to decide the relevant questions of fact. Finally, judges must assist the juries to understand what the relevant issues of fact are and direct their attention to the evidence in relation to the relevant issues. Thus, as the LRCC contends in its review of the jury in criminal trials: 'Jury instructions must therefore, satisfy two conflicting

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<sup>601</sup> Federal Judicial Center (1995), op. cit., p. 150.

<sup>602</sup> Charrow and Charrow, op. cit., p. 1317.

<sup>603</sup> *ibid.*, p. 152.

<sup>604</sup> 156 US 52 (1895), p. 102.

requirements: the need to state accurately the relevant law and the need to state the law so that the jury understands it'.<sup>605</sup>

2.201 Courts in Australia have relatively wide discretion in the phrasing of instructions and have the option of defining issues and allegations, describing rules for evaluating evidence and commenting on evidence and witnesses. Because of this nexus between judges' latitude and the complex nature of the 'charge', it has often been claimed that the problems inherent in jury trials lie with these instructions presented to the jury rather than with the jurors.

2.202 Critics have remained doubtful about the ability of the jury to understand, remember, and apply the legal principles explained by the judge, especially in trials with several defendants or multiplicity of counts.<sup>606</sup> Even sixty years ago there was concern raised about this procedural practice: 'The judicial practice of instructing the jury on matters of law has probably been the most fruitful source of error in our jurisprudence'.<sup>607</sup> It could even be considered that a judge's charge to the jury is an exercise in supreme optimism.<sup>608</sup>

For two or three hours he reads to twelve laymen enough law to keep a law student busy for a semester. Twelve individuals, selected more or less at random, sit there, unable to take notes or ask questions. Somehow, just by listening, it is presumed everything spoken by the judge will take root in their collective intelligence.

2.203 Thus it seems '[t]he most serious problem that jurors encounter in their efforts to get things right appears to be an inability to apply instructions correctly'.<sup>609</sup> (But, it must be said, that this sort of difficulty seems to exist whether cases are complex or simple.) Similarly, though in a slightly different manner, a judge of the New South Wales Supreme Court has observed that the law requires judges to direct juries to achieve certain mental feats which some judges believe even counsel are unable to achieve, and that while the courts themselves may not fall into error because they select the right words

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<sup>605</sup> Law Reform Commission of Canada (1980), *op. cit.*, p. 76.

<sup>606</sup> James (Sir), A., 'What judges say to juries, from the point of view of juries and of the Court of Appeal (Criminal Division)', eds., Walker N. and Pearson A., *The British Jury System*, Papers presented to the Cropwood Round-Table Conference, University of Cambridge Press, Cambridge, 1975, pp. 56-63.

<sup>607</sup> Farley, T., 'Instructions to juries-their role in the judicial process', (1933) 42 *Yale Law Journal* 194.

<sup>608</sup> Samaha, J., *Criminal Justice*, 2nd. edn., West Publishing, New York, 1991, p. 343.

<sup>609</sup> Charrow R.P. and Charrow V.R., 'Making legal language understandable: a psycholinguistic study of jury instructions', (1979) 79 *Columbia Law Review* 165.

when directing juries, nobody can be sure how those words will be interpreted by the jury.<sup>610</sup>

2.204 Such concerns are interesting because there appears to be some supporting empirical evidence emanating from the United States which suggests when juries make mistakes in deciding complex cases, the mistakes seem more often due to problems in understanding judicial instructions or to the errors of the judges or counsel than they are to the difficulty of understanding the implications of complex or massive amounts of evidence.<sup>611</sup> In recent times, this concern has also been shared by a judge of the Victorian County Court: 'It is too easy to say, 'The jury did not understand that' when on a proper analysis it is the fault of one or other of the participants in the case'.<sup>612</sup> Thus there appears to be some sort of link between judicial and jury competence.

2.205 These sorts of criticisms and the results of an Australian Institute of Criminology (AIC) sponsored study on comprehension of jury instructions reinforces the notion that in the course of lengthy trials, vague and complex points of law must be distilled into instructions comprehensible to a jury of lay people.<sup>613</sup> This supports the findings of some earlier studies in the United States which showed that jurors have difficulty with overly complex substantive or procedural instructions, and that unless instructions are presented in a more straightforward fashion there is every possibility that jurors will not understand important elements of the charge by the judge.<sup>614</sup>

2.206 Despite these failings and the level of concern generated about this issue, a number of United States studies have found that not only can juror comprehension be improved in relation to the judge's presentment (utilising charts, diagrams and documents), but it can be done without losing legal accuracy.<sup>615</sup> Some empirical data on jury comprehension of judicial directions

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<sup>610</sup> Roden, op. cit., p. 13.

<sup>611</sup> Lempert, op. cit., p. 205.

<sup>612</sup> Mullaly op. cit., p. 214.

<sup>613</sup> Potas, I., and Rickwood, D., *Do Juries Understand?*, Australian Institute of Criminology, Canberra, 1984.

<sup>614</sup> Charrow, and. Charrow, op. cit., p. 1306.

<sup>615</sup> See Charrow, and Charrow, op. cit.; Elwork, A., Sales, B.D., and Alfini, J., *Making Jury Instructions Understandable*, Michie/Bobbs-Merrill, Indianapolis, 1982; Severance, L., and Loftus, E.F., 'Improving the ability of jurors to comprehend and apply criminal jury instructions', (1982) 17 *Law and Society Review* 153-198 Strawn, P., and Buchanan, T., 'Jury confusion: a threat to justice', (1976) 59 *Judicature* 478; Elwork, A., Sales, B.D.,



on the law has also been collected in studies by the AIC and the AIJA, both of which revealed that jurors' are in fact more than able and capable of making plausible decisions in complex matters if given appropriate and well structured direction from the presiding judge.<sup>616</sup>

2.207 This particular debate raises the pertinent question of presenting final instructions to the jury in a standardised written format; the object being 'to maximise the legal accuracy of instructions ... without confounding jurors with unnecessary technical language'.<sup>617</sup> Also, the use of simplified language in jury instructions has self-evident merit, particularly when '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'.<sup>618</sup> This is supported by research coming out of the United States which has found that with modified language and understandable instructions, there is significant improvement in the quality of jury deliberations.<sup>619</sup> There can also be little doubt that 'reducing complicated issues into an algorithmic format, that is breaking down complex questions into a series of simpler ones, is a sensible way of solving the problem'.<sup>620</sup> Ultimately, the re-fashioning of the style and content of the judge's 'charge' to the jury, so that it is less ambiguous, is analogous with increased juror comprehension.

2.208 Also, the Chief Justice of New South Wales, commenting on the large number of appeals involving misdirections of law, considered the question of whether the provision of *standard or pattern jury instructions* would simplify the instructions process and help ameliorate the situation.<sup>621</sup> A range of

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and Alfini, J., 'Juridic decisions: in ignorance of the law or in light of it?', (1977) 1 *Law and Human Behaviour* 163; Severance, L., Greene, R., and Loftus, E.F., 'Toward criminal jury instructions that jurors can understand', (1984) 75 *Journal of Criminal Law and Criminology* 198, 218.

<sup>616</sup> Potas and Rickwood, *op. cit.*; Findlay, *op. cit.*

<sup>617</sup> *ibid.*, p. 5.

<sup>618</sup> Roden, *op. cit.*, p. 11.

<sup>619</sup> Severance and Loftus, *op. cit.*, pp. 153-198.

<sup>620</sup> Potas, I., 'Instructing the jury and Humpty Dumpty justice', Proceedings of a seminar, *The Jury in Criminal Trials*, Sydney Institute of Criminology, Sydney, 1986, p. 46.

<sup>621</sup> Such a proposal would incorporate regularised instructions on the law, which is wording that could be used in case after case with little or no change. They are precedents which judges may use or adapt when addressing the jury upon the law. They are intended to provide the jury with the proper legal standards for reaching a verdict. Such 'pattern' instructions are based on the theory that employment of uniform wording would avoid instances of judicial bias, would lead to equitable treatment of cases by juries, and would make their verdicts more accurate by improving their understanding of the law.

positive responses from judges in New South Wales to a survey developed by the NSWLRC also underline this interest in standardised instructions.<sup>622</sup> This is also confirmed by a Western Australian survey of jurors' where there was great support for the notion of juries receiving written instructions from the presiding judge.<sup>623</sup> The drafting of such instructions should 'not necessarily be regarded as magic formulae to be followed verbatim',<sup>624</sup> but they are intended, first, to state the law accurately, and second, to state the law in simple or plain English. This reduces the likelihood of misdirections being made by the trial judge and/or misunderstandings on the part of the jury.

2.209 Such an approach has been particularly successful in the United States. In the early 1980s around forty states adopted at least one set of 'pattern' instructions, thus promoting greater uniformity and consistency in approaches by trial judges. In Australia, there is also the example of judges in the Northern Territory who 'give jurors an *aide memoire* which essentially puts in writing briefly what his charge is on each and every charge. Built within that are a variety of cautions and so on which are required'.<sup>625</sup> Furthermore, empirical studies confirm the hypothesis that written instructions increase jury understanding, whereby jurors who were given written instructions engaged in a more efficient and higher quality deliberative process.<sup>626</sup> Caution is expressed, however, about the possible situation where the instructions are so abstract in their wording that juries have difficulty relating them to the case at hand.<sup>627</sup>

2.210 Although the measurement of jury comprehension in any aspect of trials is a rather nebulous test at best, there are other means and options available with regards to standard jury instructions. First, there is the requirement of greater flexibility in procedural rules whereby, depending on the degree of complexity, the judge has express discretion to explain

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<sup>622</sup> Potas and Rickwood, *op. cit.*, p. 7.

<sup>623</sup> Vodanovich, I., *The Criminal Jury Trial in Western Australia*, Unpublished doctoral thesis, University of Western Australia, Perth, 1989, p. 324.

<sup>624</sup> Potas and Rickwood, *loc. cit.*

<sup>625</sup> van de Weil, *op. cit.*, p. 256.

<sup>626</sup> Forston, J., 'Sense and nonsense: jury trial communications', (1975) *Bringham Young University Law Review* 601; Maloney, T., 'Should jurors have written instructions?', (1967) 6 *Trial Judges Journal* 18.

<sup>627</sup> In an effort to ameliorate this problem, there are standing committees of judges, practitioners and academics in most states whose task it is to keep standard directions up-to-date and to develop new instructions where the need arises (see Guinther, *op. cit.*).

procedure and pertinent legal principles (perhaps concerning onus of proof, or the issues in the trial) earlier than final addresses, and at such points on the way as the judge sees fit. Secondly, a need to accept that the development of understandable jury instructions requires a multi-disciplinary approach which utilises the expertise of lawyers (for legal accuracy), psycholinguists (for comprehensibility of language) and psychologists (for testing of comprehension). Thirdly, these instructions should be drafted so as to ensure legal accuracy, and which may mean fewer appeals based on misdirection. Fourthly, they would save research time. Fifthly, they would ensure a degree of uniformity of approach between cases and amongst courts. Sixthly, by drafting them in plain English the use of technical and remote legal language can be avoided.<sup>628</sup> The development of guideline directions of this or a similar type would go a long way to resolving some of the problems jurors encounter at the conclusion of a trial.

## Trial Management

Active judicial management has been attacked by commentators who fear it will undermine the adjudicatory process. But the critics of so-called managerial judges do not appear to have considered the benefits of management in improving the quality of adjudication, and in particular the quality of jury trials.<sup>629</sup>

2.211 However, there is much a judge can do to improve the quality of the trial and reduce its length, cost and complexity. Although the lawyers are responsible for preparing and presenting the case, the judge must always be in control of the courtroom and the proceedings. This is not inconsistent with the adversary process. As has been commented:<sup>630</sup>

The interests of parties, counsel, and jurors are best served by making prompt, firm, and fair rulings, keeping the trial moving in an orderly and expeditious fashion, barring cumulative and unnecessary evidence, and holding all participants to high professional standards. Adhering to these management principles will help reduce the stress and tension of a long trial.

2.212 Sound trial management will improve jurors' performance, promote juror satisfaction with their service, and enhance the courts' public image.<sup>631</sup>

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<sup>628</sup> Potas, (1986), *op. cit.*, p. 3; Law Reform Commission of Canada (1980), *loc. cit.*

<sup>629</sup> Schwarzer, *op. cit.*, p. 577.

<sup>630</sup> Federal Judicial Center (1995), *op. cit.*, p. 135.

<sup>631</sup> Federal Judicial Center (1992), p. 41

## Jury Size and Additional Jurors

The larger the jury, the better the jury's collective memory is likely to be. Courts should routinely seat twelve jurors when cases are likely to be complex. Indeed, in long complex cases where substantial juror attrition is a danger, the court should seek the parties' consent to ignore the limitations of the new rule and seat more than twelve jurors, on the understanding that if more than twelve jurors remain at the end of the trial, excess jurors will be treated as alternates.<sup>632</sup>

2.213 As the costs of the criminal justice system are perceived as becoming increasingly burdensome, many common law jurisdictions have frequently seen the size of juries as impacting on court costs and efficiency. As the LRCC postulated: 'The question, therefore, is whether the evolving functions of the jury, increased knowledge about the psychology of small groups, or new administrative or economic needs justify a reduction in jury size'.<sup>633</sup> There is also much debate about the contention that juries in complex cases are composed of less than ordinary citizens. We have already noted the thoughts of Glanville Williams, Ivor Jennings and others, regarding this point. There is, however, a great deal of speculation that well educated professionals within the *venire* are readily excused and escape jury duty. This process of 'deselection' leads to accusations that jury panels are comprised of a substandard and incompetent collection of individuals. This may have an adverse effect on a jury's ability to comprehend complex matters.

2.214 In the United States, the issue of jury size was a matter of concern for some time. Serious implications for the jury arose with the United States Supreme Court's decision in *Williams v Florida*<sup>634</sup> which sanctioned six member juries in criminal trials. Next came *Apodaca v Oregon*<sup>635</sup> which allowed majority verdicts (at least nine out of twelve votes) in state criminal trials. Then the Chief Justice encouraged the federal district courts to reduce by rule of court the size of juries in civil cases to six jurors. When the constitutionality of these reductions by rule of court was questioned, the Supreme Court in *Colgrove v Battin*<sup>636</sup> upheld the rules. What transpired over this period was a full assault on the essence and character of juries.

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<sup>632</sup> Lempert, *op. cit.*, pp. 228–229.

<sup>633</sup> Law Reform Commission of Canada (1980), *op. cit.*, p. 33.

<sup>634</sup> (1970) 399 US 78.

<sup>635</sup> (1972) 406 US 404.

<sup>636</sup> (1973) 413 US 149.

2.215 Finally in 1978, the Supreme Court stopped the erosion of the jury in *Ballew v Georgia*,<sup>637</sup> where the court ruled that small juries (less than six) were unconstitutional ‘because the purpose and functioning of a jury in a criminal trial is seriously impaired to a constitutional agree’.<sup>638</sup> This ruling also made much of the proposition that reductions in jury size can impair the quality of performance, productivity and decision making. Empirical evidence has established that the verdicts of six member juries are less predictable than those of a full sized jury. The smaller the group, the less reliable its verdicts (ie., the greater the probability that another group of similar size would return a different verdict in the same case).<sup>639</sup> The smaller jury is also bound to be less representative of the community – which is a serious problem for any heterogenous society.

2.216 In line with these arguments, the LRCC, believing that the benefits of twelve member juries far outweigh the negatives, also recommended the jury should be composed of twelve jurors, based on the belief that twelve member juries are more likely to reflect the opinions of a representative cross-section of the community.<sup>640</sup> Yet, almost a decade later, a justice of the Victorian Supreme Court told a criminal justice symposium that ‘there is no magic in the number twelve’, and he reiterated this with the suggestion that ‘justice could be well served if the number of jurors capable of hearing a long and complex fraud trial was reduced to eight’.<sup>641</sup>

2.217 Then there is the matter of additional jurors. In order to increase the probability that twelve jurors (or, six as the case may be in civil cases) would be available to consider their verdict at the completion of a lengthy trial there has been a movement towards the introduction of a system of extending the pool of sitting jurors by appointing additional jurors at the outset of the trial.<sup>642</sup> Such procedures have been introduced in various parts of the United States where the judge has discretion over the seating of alternate jurors.<sup>643</sup> In

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<sup>637</sup> (1978) 435 US 223.

<sup>638</sup> Vodanovich, op. cit., p. 153.

<sup>639</sup> Zeisel, H. and Diamond, S., ‘Convincing empirical evidence on the six member jury’, (1974) 41 *University of Chicago Law Review* 281; Law Reform Commission of Canada (1980), op. cit., p. 35.

<sup>640</sup> Law Reform Commission of Canada, op. cit., p. 35.

<sup>641</sup> Marks, op. cit.

<sup>642</sup> In this case, at the conclusion of the trial reserve jurors in excess of twelve – or six – would be balloted out of the deliberation process, though there has been some consideration to the entire panel being involved in the verdict.

<sup>643</sup> ‘Under Federal Rule of Civil procedure 47(b), the judge has the discretion over the

Victoria, the *Juries Act 1967*<sup>644</sup> permits the court the opportunity to empanel additional or reserve jurors in the case of a complex and lengthy trial. There are some States of Australia where this option is available to the court, but it is rarely utilised.

2.218 The recommendation to implement a system of additional jurors would ensure that, particularly in trials expected to last considerable time (say, more than three months), once a jury is empanelled there will only be a minimum risk that its numbers will diminish to the point where the trial cannot be continued without the consent of the parties. The combination of proposals for additional jurors and minimum jury size is designed in the first place to guarantee that long criminal trials will not need to be abandoned for want of jury members.

2.219 However, the LRCC has raised some concerns about the use of alternate jurors:<sup>645</sup>

With respect to the system of alternate jurors, we were concerned with the burden of requiring extra jurors to sit through long trials and the possibility that alternate jurors, because they may not have to deliberate in the case, will not pay close attention to the evidence.

## Conclusion

The community and the law cannot concede that these cases are too complex, or too lengthy, or too difficult, to be heard and determined, in either the civil or the criminal courts. The challenge is enormous, and it must be met by innovative thought and strategies. The alternatives of ignoring criminality involved, or of responding by measures which deny the accused the fundamental rights recognised in the criminal justice system, are as unacceptable as each other. There will be a need for long and complex trials, but ... the necessity for the factors which lead to that result must be

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seating of alternate jurors in civil cases. Although that rule provides that alternates shall replace regular jurors in the order in which they are called, it does not by its terms preclude seating a jury of more than six in lieu of designating alternates (*Hanson v Parkside Surgery Center*, 872 F.2d 745, 748; *United States v Aguon*, 851 F.2d 1158, 1171; *United States v Rauch*, 574 F.2d 706, 707). If that is done, the parties by stipulation can either retain any jurors in excess of six remaining at the end of the trial, or excuse them by drawing lots. Many judges now use this method, rather than designating alternates at the outset, reasoning that when one of the jurors regard themselves as supernumeraries likely to be excused before deliberations begin, they will all be more attentive and responsible' (Schwarzer, op. cit., pp. 581-582). A very topical example of this is the murder trial of O.J. Simpson where twelve additional or reserve jurors were sequestered and have been brought into the jury box to hear the evidence. They will replace any of the original twelve jurors who may come to be excluded, for whatever reasons, from the jury.

<sup>644</sup> *Juries Act 1967* (Vic.), s. 48A.

<sup>645</sup> Law Reform Commission of Canada (1982), op. cit., p. 57.

questioned. Where appropriate, acceptable measures must be introduced to render the hearing comprehensible, and to keep it within reasonable bounds.<sup>646</sup>

There thus seems to be no good historical foundation for the argument that plaintiffs may be denied the right to a jury trial because their cases are complex.<sup>647</sup>

2.220 A common theme emanating from the literature is the preference for the collective common sense of the jury over that of the technical expertise of so called experts (as set out in proposals covering special juries). It would seem that jurors are the best equipped to work out standards which are regarded as acceptable in this community. They determine guilt or innocence according to those standards. It is accepted that juries confronted with technical and complex information do have some difficulties with comprehension of that information (and they are not the only ones in the system who do), but ultimately they do seem to be able to find their way around such confusion to come to an appropriate verdict. Having considered an array of matters integral to an understanding of juries in complex litigation, it is reasonable, on the evidence available, to state that the case of jury incompetence in complex litigation has not been made out. Quite the contrary. It is noted that where cases are presented properly and the judge and respective counsel play their parts effectively, juries are able to cope with whatever comes their way. The NSWLRC in considering this position, regards:<sup>648</sup>

[J]uries 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.

2.221 This, however, is not to suggest that the involvement of juries in complex litigation is without its difficulties. In fact, many of the alleged weaknesses and difficulties have arisen because the practices and procedures employed in the trial process have not been designed with the needs and capacities of jurors in mind. It would seem that if we are to preserve trial by jury in complex cases we must be willing to take measures which will assist juries in performing their difficult task. Simple changes such as appropriate breaks, the provision of facilities to encourage note taking, improved juror comfort, providing jurors with the opportunity to ask questions of witnesses,

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<sup>646</sup> Woods J, *op. cit.*, p. 175.

<sup>647</sup> Arnold, M.S., 'A historical inquiry into the right to trial by jury in complex civil litigation' (1980) 128 *University of Pennsylvania Law Review* 848.

<sup>648</sup> New South Wales Law Reform Commission, *op. cit.*, p. 239.

and the provision of transcripts would go a long way towards eradicating or lessening the problems. Also, there can be little argument with the notion that the jury system works at a more optimum level when the issues are clearly defined, evidence is presented in manageable proportions, and the case is conducted in a manner which is coherent and well structured.

2.222 Every endeavour must be made to address the issue of jury involvement in complex litigation. The implementation of evidentiary reforms and commonsense procedural changes has the potential to bring about a situation in which juries and judges are in the best possible position to assess informally the increasing amounts of evidence given by experts in our courts. Every effort should be made to reduce the comprehension gap in the courtroom between experts and lay participants in the trial process, to use the benefits of modern technology and to encourage experts to place before the jury all information relevant to the case in as natural a way as can be achieved.



# GENDER ISSUES, MULTICULTURALISM AND THE JURY SYSTEM IN VICTORIA

BY ANGELENE FALK

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## SECTION 1: THE REPRESENTATIVE JURY

### Introduction

3.1 Any analysis of the way in which juries are or should be composed is directly linked to the objective that the jury is set up to achieve. The purpose of this introductory section is to discuss the ideology of the jury in terms of the functions a modern day society expects it to perform. It is only then that we can measure whether or not the current system of selecting jurors is an effective part of the process required to achieve the goals of trial by jury.

### The Role of Trial by Jury

3.2 The jury system has been described by Justice Brennan as 'the fundamental institution in our traditional system of administering criminal justice'.<sup>649</sup> Similarly, Justice Dean identified:<sup>650</sup>

the rationale and essential function of [jury trial as] the protection of the citizen against those who customarily exercise the authority of government: legislators who might seek by their laws to abolish or undermine 'the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England' (per Griffith C.J); administrators who might seek to subvert the due process of law or be, or be thought to be, corrupt or over-zealous in its enforcement; judges who might be or be thought to be, over-remote from ordinary life, over-censorious or over-responsive to authority.

So supporters see the jury system as a basic ingredient of democracy whose function is to protect the citizen.<sup>651</sup>

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<sup>649</sup> *Brown v R* (1986) 60 ALJR 257 at 267.

<sup>650</sup> Dean J, in *Kingswell v The Queen* (1985)159 CLR at 300.

<sup>651</sup> See D Neal 'The Political Significance of the Jury' in D Challenger (ed) *The Jury*, Australian Institute of Criminology, 1986, p 61 and M Findlay and P Duff, *The Jury Under Attack*, Sydney: Butterworths, 1988, p 126.

3.3 Arguably this function of the jury is achieved when the system provides a '*judgment by peers*'; an *impartial* jury which is *representative* of the community. However these concepts are by no means straight forward. They were developed in a homogeneous society specific to their time.

3.4 It is necessary to examine the origins of these concepts and map the historical changes that have occurred to trial by jury. Then the dangers involved in transferring ancient concepts to a modern time can be identified. The task then is to see how the concepts can be defined in modern terms with relevance to our complex society. We can then determine if the composition of juries needs to be changed with reference to this understanding. The central issues are:

- (a) If juries are to be representative, who should they represent- the accused or the community which is to judge the behaviour? ie: if the function of the jury is to protect the 'citizen', is the citizen the accused or the community at large?
- (b) How can these jury concepts be implemented in a society which increasingly recognises diversity in gender, race, religion, culture, class, language and sexual orientation?
- (c) What is the most useful role these concepts can play in defining the jury system today? In other words, who and what do we want our juries to represent now and in the future?

## Historical Basis of Jury Concepts

### Judgement by Peers

3.5 The Australian jury system is based upon the English jury system.<sup>652</sup> In obtaining an English style jury, we also inherited their analysis on the nature of the jury system. The Magna Carta states that:<sup>653</sup>

No freeman shall be seized, or imprisoned, or dispossessed or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the lawful judgement of his peers, or by the law of the land.

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<sup>652</sup> See: J.M Bennett, 'The establishment of Jury Trial in New South Wales' (1959-1961) 3 *Sydney Law Review* , 463.

<sup>653</sup> Geoffrey Hindley, *The Book of the Magna Carta*, London, Constable & Co; 1990; pp.ix-x. See also discussion of the inclusion of the Magna Carta into Victorian Law in the Issues Paper of this Committee, *Jury service in Victoria*, Issues Paper No 1, November 1994 at pp 1-2.

Whether or not the Magna Carta has been incorporated into Victorian Law is debatable.<sup>654</sup> However regardless of its legal standing the concept of jury trial by 'peers' has intrigued legal commentators and has influenced modern day thought as to who the jury should represent.<sup>655</sup>

3.6 Historically judgment by peers did not mean that an accused faced a representative jury or a jury of equals. In fact at the start of the nineteenth century the composition of the British jury was restricted to lawful knights who fulfilled property qualifications.<sup>656</sup> A juror was only an accused's 'peer' in that he was a 'neighbour' of the accused being chosen from the county where the dispute arose and by the fact that the accused had chosen to put himself 'upon his country for trial'.<sup>657</sup> Given the homogenous nature of the society, the accused and the jury would share the same ethnicity. However rarely would they share the same socio-economic background.<sup>658</sup> Even so, the system did recognise that jurors drawn from the same regional area as the accused could be expected to share a common value system.

### Judgement by a Representative Jury

3.7 In nineteenth century Britain the jury was to be 'representative' of the community only in the sense that it was drawn from the place where the crime was committed. This requirement was primarily imposed because jurors were to be used as witnesses, basing their decision on the personal knowledge of the facts of the case.<sup>659</sup> When the jury was no longer comprised of witnesses the requirement that the juror have personal knowledge of the facts lessened and it was sufficient that the jury had two persons from the

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<sup>654</sup> See discussion in *Issues Paper* id., p.2. Note also the discussion of the Magna Carta by the High Court in *Jago v District Court of New South Wales* (1989) 168 CLR 23.

<sup>655</sup> See G Zdenkowski, C Ronalds, M Richardson (eds), *The Criminal Injustice System: Volume Two*, Sydney, Pluto Press, 1987, p 116, Mark Findlay, *Jury Management in New South Wales*, Victoria; Australian Institute Of Judicial Administration, 1994, p6, and Findlay, 'Reforming the Jury: The Common Ground', in *The Jury: Proceedings on a Seminar on the Jury*, Canberra, Australian Institute of Criminology, 1986, p 155.

<sup>656</sup> W.R Cornish, *The Jury*, London: Penguin Press, 1968, p.26.

<sup>657</sup> F. Pollock and F. Maitland, *The History of English Law*, 2nd ed., Cambridge: University Press, 1923, p 624.

<sup>658</sup> See generally Cockburrn and Green (ed.) *Twelve Good Men and True: The Criminal Jury Trial in England, 1200-1800*, New Jersey: Princeton UP, 1988.

<sup>659</sup> W.M.A. Forsyth, *History of Trial by Jury*, 2nd ed., New York: Lenox Hill Publishers, 1971, p 138. See also the discussion by the Uniform Law Conference of Canada, *Proceedings of the Seventy-Fifth Annual Meeting*, held at Edmonton, Alberta: August, 1993, 'Brief to the Uniform Law Conference of Canada: Discussion Document Regarding Reforms to the Jury System in Canada: The cases for uniformity', p 220.

community sitting upon it.<sup>660</sup> Later it was sufficient if jurors were merely 'good and lawful' men of the body of the country.<sup>661</sup>

3.8 In contrast to this historical basis for a jury being chosen from people of the community, modern day analysis views community participation in the jury system as part of a concept of fairness. In Lord Devlin's words 'it is good for a nation when its people feel that in the gravest matters justice belongs in part to them'.<sup>662</sup> The abolition of property qualifications as criteria for jury service in Victoria and automatic exemptions for women recognises that all persons in the society who are citizens above 18 years of age have a right to participate in this important body.<sup>663</sup> Implicit is the assumption that 12 persons chosen randomly from the community have a greater chance of making decisions that are reflective of general views of the community than does a jury composed primarily of persons of one class, gender, age or ethnicity.

3.9 The modern day jury then is seen as the voice of the community conscience, a voice independent of the arms of government and the judiciary, which reflects the values and standards of the community from which it is drawn and judges the accused person accordingly.<sup>664</sup>

3.10 In order for the jury to truly serve as a check upon the use of power in the judicial system, it is essential that it in fact has the potential to reflect the diversity of views in the community. In order for this to be possible the jury needs to be representative of that community. The Victorian Parliament has sought to provide for this by enshrining the principle of random selection in our *Juries Act*.<sup>665</sup>

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<sup>660</sup> Under the Stat. 27 Eliz. ch.6: cited in Forsyth, *ibid*.

<sup>661</sup> Under 6 George IV. ch. 50: cited in Forsyth, *ibid*.

<sup>662</sup> Lord Devlin, 'The Judge' 1979, p176 cited in *Australian Judicial system Advisory Committee Report, op.cit.*, p98.

<sup>663</sup> *Jury Act 1967* s4(1).

<sup>664</sup> Note that in Victoria, jury districts are defined as that area, which as nearly as possible falls within a radius of 32 kilometers of the Supreme or County Court town it serves.

Section 80 of the Australian Constitution also requires the trial to be held '...in the State where the offence was committed, and if the offence was not committed within any state, the trial shall be held at such place or places as the parliament prescribes'.

<sup>665</sup> *Juries Act 1967*, s.8 (2). Note that both categories of excusal under the *Juries Act* and the right of parties to preemptory challenge jurors impacts upon the effectiveness of random selection in ensuring a jury representative of the community. These issues are discussed in sections 2 and 3.

## Problems with the Concept of a 'Representative Jury'

3.11 Should the jury be representative of the wider community in the sense that it is randomly selected from the pool of eligible persons or should it be directly representative of the community of the accused? If the jury is to protect the citizen by providing judgement by 'peers' to an accused, then what does this mean for the composition of juries if the accused person belongs to a minority group in society?

3.12 At the time that the Magna Carta was enacted the jury encompassed the notion of judgement by an accused's neighbours. As discussed, historically given the homogeneous nature of the society from which it was drawn, the jury was likely to be composed of the accused person's peers in the sense that it would share the same racial origin of the accused. In fact, special juries were composed to deal with cases involving 'foreigners'.<sup>666</sup>

3.13 However Australian society today is diverse, being composed of many different racial, cultural and religious groups.<sup>667</sup> Problems arise if we say that an accused from a different racial or cultural background is entitled to be tried by a jury of his/her peers in the sense that persons from that racial group should be represented on that jury. For example, how many persons should be chosen from the particular racial or cultural group to compose the jury? How would we define who is representative of that race or culture? Can a third generation Moslem correctly be seen as a peer of a first generation Moslem?<sup>668</sup>

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<sup>666</sup> See discussion in an article by Jocelyn Scutt, 'Trial by a Jury of one's peers?' (1982) 56 *Australian Law Journal* 209 at p 210 where the author states that 'During the British Mercantile era English courts recognised the right of 'foreigners' to be tried by jurors like themselves: mercantile traders from the continent were tried by juries comprising equal numbers of foreign merchants and native born inhabitants'.

<sup>667</sup> The Australian Bureau of Statistics 1991 lists seven different categories of Main English Speaking Countries and thirty-nine other countries with an additional heading of 'other' in recording the birthplace of Australian residents: See Australia Bureau of Statistics, 1991 Census of Population and Housing, *Expanded Community Profile*, Victoria, statistical division: 05 Melbourne, ABS Catalogue No.2722.2, p.3

<sup>668</sup> These issues will be discussed in detail in the section below entitled 'Ethnicity and the Composition of the Jury'. Note that other jurisdictions have recommended that juries be composed of some persons of the accused or victim's racial background: See Lord Runiciman, *Report of the Royal Commission on Criminal Justice*, London, HMSO, 1993, pp 133-134 and the discussion of the American position below.

3.14 In addition, if the jury is to protect the rights of the 'citizen' then should the jury be representative of the victim's socio-cultural status?<sup>669</sup> Recent cases have emphasised the need to balance the interests of all parties in the criminal justice system in ensuring a fair trial, including the rights of the prosecutor and the public.<sup>670</sup> In Victoria the Government has acknowledged the position of victims and seems to be moving towards providing substantive rights to victims during court proceedings.<sup>671</sup> In the United Kingdom Lord Runiciman has recommended that in appropriate cases a judge may order that up to three persons from ethnic minority communities should be represented on juries where the case has a 'racial dimension' and that one or more of them should be of the same ethnic minority as the victim.<sup>672</sup>

3.15 The need for and implications of any reforms in this area will be discussed in detail in section 3 of this paper.

## Evolution of the Jury

3.16 Historically the jury was not impartial in the sense that we know it today. Jurors were to have personal knowledge of both the facts and the accused. However this requirement evolved and as early as the fifteenth century juries were being described as 'a body of impartial men who came into court with an open mind'.<sup>673</sup> These days it is a ground for challenging a juror 'for cause' if the juror has personal knowledge of the accused. Therefore, the contemporary justice system has embraced the notion that the jury should be an impartial body in the sense that jurors should not be inherently biased for or against an accused.

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<sup>669</sup> A recent article discusses the role of the victim in our criminal justice system and notes the High Court's emphasis upon the need to balance the interests of all parties in the pursuit of fairness: See Sam Garkawe, 'The role of the Victim During Criminal Court Proceedings', (1994) 17 *University of New South Wales Law Journal*, 595 at 603

<sup>670</sup> see *Jago v District Court of New South Wales* (1989) 63 ALJR 640 per Mason CJ and *Dietrich v R* (1992) 67 ALJR 1.

<sup>671</sup> see the Liberal National Coalition Policy, *Law and Justice* (1992), pp 11-13.

<sup>672</sup> Runiciman *op.cit.*, p134.

<sup>673</sup> J.B Post, 'Jury Lists and Juries in the Late Fourteenth Century', in Cockburn and Green *op.cit.*, cited in Uniform Law Conference of Canada, *op.cit.*, p 220.

## The Ideology of the Impartial Jury

3.17 The accepted ideology of the jury encompasses the notion that juries ensure the impartial application of the law and justice.<sup>674</sup> The literal interpretation of this concept is that impartial jurors are capable of bracketing their own interests and preconceptions and of deciding the case solely upon evidence presented in open court.<sup>675</sup>

3.18 This literal interpretation of the nature of jury decisions is incompatible with the ideology of the representative jury which states that jury decisions reflect the application of community standards and conscience. Jurors make decisions based on the facts with reference to their own experiences and beliefs of what is acceptable and unacceptable behaviour. As Findlay states, the very nature of a jury deliberation is partial as it requires the choice between two versions of facts and this choice must in part be dictated by subjective characteristics of jurors.<sup>676</sup>

3.19 If we accept that the subjective nature of jury deliberations is in fact one of the ways in which the jury gains its credibility, can we expect that juries will be impartial? It is submitted that the concept of forming an impartial jury can co-exist with the concept of a representative jury. In fact they are mutually supportive if we view the impartial jury not as one in which there is no prejudice but as one where the balance of prejudices in the community are reflected in the composition of the jury. Deliberations are considered impartial then, when group differences are not eliminated but are invited and represented.<sup>677</sup> In this way the jury represents the wider community and is capable of understanding the position of the accused in it.<sup>678</sup> Clearly we cannot expect impartiality in the sense that jurors hear the evidence and make a decision free from their own opinions 'as pure pieces of disembodied reason'.<sup>679</sup> However we can expect a free and independent deliberation of twelve persons acting in concert.

3.21 So the concepts of impartiality and representation converge. According to the United States Constitution the accused has a right to a 'speedy and

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<sup>674</sup> Mark Findlay, *Jury Management .op.cit.*,p6.

<sup>675</sup> Jeffrey Abramson, *We, the Jury: The Jury system and the Ideal of Democracy*, USA: Basic Books, 1994, p 100.

<sup>676</sup> Findlay, *Jury Management , op.cit.* p 7.

<sup>677</sup> Abramson *op.cit.* p 101.

<sup>678</sup> Findlay, *Jury Management , op.cit* p 7.

<sup>679</sup> Abramson, *op.cit*, p 140.

public trial, by an impartial jury of the State and district wherein the crime shall have been committed...'.<sup>680</sup> The United States Supreme Court has held that this 'impartial jury' is achieved by ensuring that a 'fair cross-section of the community' is represented on the jury. As a result, the Supreme Court has ruled that peremptory challenges must not be used to intentionally exclude participants on the basis of race or gender so as to undermine the fair cross section goal.<sup>681</sup> Victoria has also recognised the desirability of providing for a cross-section of the community on our juries by requiring the random selection of jurors.<sup>682</sup> The limitations of this 'safeguard' are the subject of discussion in this paper.

## Conclusion

3.22 To return to the original questions posed at the beginning of this section, just who is the jury to represent? The answer is a complex one. Historically the jury did not represent a cross-section of society, nor did it mimic all characteristics of the accused. In America the discussion has evolved to the point where the ideal jury is mooted to be either a microcosm of society (which is not possible in such a complex society) or where characteristics of the accused or victim are to be represented in the composition of juries. Arguably this could relegate the jury to a body reflecting sectional interests where persons are chosen as 'representatives' to sit upon a jury.<sup>683</sup> This could in fact directly oppose the goal of obtaining an impartial jury.

3.23 As discussed above, a fair trial may consist (where relevant) of a jury composed of persons who are representative of the community and are capable of bringing to the deliberation a broad range of experiences. Whilst individual bias and prejudice cannot be ruled out, the possibility of decisions prejudicial to the accused or against the interests of justice are in fact minimised. It follows that no one 'group' in society should be able to monopolise the jury, nor should any group be systematically excluded from participating by the process of forming the jury panel or by the use of

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<sup>680</sup> Constitution of the United States, Amendment VI (1791).

<sup>681</sup> See *Holland v Illinois*, 493 U.S. 474 (1990); *Batson v Kentucky*, 476 U.S. 79 (1986).

<sup>682</sup> *Juries Act 1967* s8(2) and s 10(1).

<sup>683</sup> This argument is put forward by Jeffrey Abramson in *We, the Jury: The jury system and the ideal of democracy*, USA: Basic Books, 1994 at p 104 where he states that 'My purpose is to defend the rise of the cross-sectional ideal insofar as it speaks to enriched deliberations across group lines and to criticise it insofar as it recommends mere proportionate representation for group differences'.



challenges. The discussion which follows regarding the representation of women, people from non-English speaking backgrounds and indigenous people on juries is based upon this analysis.

## **SECTION 2: REPRESENTATION OF WOMEN ON THE JURY**

### **Introduction**

3.24 This section will examine the representation of women on juries. Firstly, an historical account of the representation of women on Victorian juries will be discussed in order to set the context. General questions that this section will raise are:

- a. Is the representation of women on Victorian juries comparable to the representation of men?
- b. Should the representation of women continue to be left up to the random selection procedure or should other procedures be considered in order to ensure a fair representation of women on Victorian juries?
- c. How does the representation of women impact upon the concept of requiring an impartial jury?
- d. Do current exemptions for jury service discriminate against women in the sense that they do not have an equal opportunity for serving on juries?
- e. Does the use of peremptory challenges exclude women in such a way as to be contrary to the requirement of community representation and the selection of an impartial jury?

### **The History of Women's Participation in the Victorian Jury System**

3.25 Historically women have been excluded from jury service in Victoria. In 1956 a Juries Bill to consolidate and amend the law relating to juries was presented in the Victorian Parliament. A proposed amendment contended that women should serve as jurors on a voluntary basis. This meant that women would be placed on the jury lists but that they could then request an

exemption.<sup>684</sup> It is interesting that it was considered that women as mothers would be preferable on juries as:<sup>685</sup>

the mere fact that a woman is a mother makes her better than she otherwise would be. Such a person has a keener sense of judgement, more common sense and is more practical than women without children. She has lived the real life.

However the fact that women had child bearing responsibilities was in turn used to argue that it was not possible to make jury service compulsory for women.<sup>686</sup> In the end it was decided that due to difficulties in providing suitable facilities at court and administrative difficulties involved in including women in the pool of jurors, any reference to women would be deleted from the Bill.

3.26 Eight years later, the *Juries (women jurors) Bill* was presented to amend the *Juries Act 1958 (Vic)* and the *Women's Qualification Act 1958 (Vic)* with respect to jury service by women. All 'persons' were eligible for jury service instead of just 'men'. However women could claim exemption from serving by reason of their sex alone. In addition, there was no positive obligation to place women onto the lists of jurors. Clause 4 of the Victorian Bill stated that 'the Chief Electoral Officer shall not be required to include the name of any woman on a draft juror's roll for any jury district until he has been given notice by the barrister that he is to include women in the next draft juror's roll for that district'. In addition there was a loophole whereby 'if there are any jury districts in the state where there are not adequate amenities, women jurors will not be used'.<sup>687</sup>

## Current Status of the Law

3.27 It was not until 1975 that the automatic right of exemption from service for women and the anomaly discussed above was removed from the *Juries Act*. In its place, an exemption for pregnant women and a non-gender specific exemption for 'persons' who have full-time care of children or of persons who are aged or in ill-health. This represents the current status of the law with respect to jury service of women in Victoria. The *Juries Act 1967* (as amended)

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<sup>684</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, August 29, 1956, p 3797.

<sup>685</sup> *id.*, p 3803: Quoted in an article by Ross Van Schie, 'Twelve Good Women and True' (1975) *Legal Service Bulletin*, 222.

<sup>686</sup>Note that in the U. K compulsory jury service by both sexes had been in existence since the beginning of the twentieth century, see: Van Schie, *ibid.*

<sup>687</sup>Victoria, *Parliamentary Debates*, Legislative Council, November 26, 1964, p1857, cited in Van Schie, *id.*, p223.

states that subject to certain qualifications of the Act 'every person enrolled as an elector for the Legislative Assembly shall be qualified and liable to serve as a juror'.<sup>688</sup> Schedule 4 states the categories of persons entitled as of right to be excused from serving as jurors and includes pregnant women (15) and persons who are required to undertake the full-time care of children or of persons who aged or in ill health (15A). So prima facie women now have the same right as men to serve on Victorian juries under statute.

## Perceptions of the Involvement of Women in Victorian Juries

3.28 It is interesting to examine some of the comments that were made in Parliament when the Bills amending the *Juries Act* were debated. The 1964 Bill was presented as 'one of the penultimate steps in the legal emancipation of women'.<sup>689</sup> However it was also stated that making women liable for jury service had no real bearing on the composition of juries because of the right for both sides in any proceedings to challenge jurors. As Mr Hamer said, 'so far as the administration of justice is concerned, the question whether men or women jurors are impaneled is of no account'.<sup>690</sup> But interestingly, when introducing the 1975 Bill, the then Minister for Social Welfare, W. V Houghton, MLC, stated that:<sup>691</sup>

the introduction of this amendment, coming as it does at the beginning of International Women's Year, is a recognition of the role that women can play in the life of a community. The Government believes that women can better participate in the administration of justice if their representation on juries is increased to a level more in keeping with their levels in the community.

3.29 These comments state the issues that are relevant to this consideration of women serving on juries. They recognise the importance of women participating in the jury system in numbers 'in keeping with their numbers in the community' as necessary in order to reflect the community in which the jury exists. Yet the comments also reflect the difficulty in achieving proportional representation due to the challenging system. Underlying this is the recognition of the right of women to participate in the administration of justice and the opportunity that the jury system can offer for this. As the system for selecting jurors currently stands, there is no guarantee that women

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<sup>688</sup> *Juries Act* 1967 Victoria, s.4(1).

<sup>689</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, November 18, 1964, p1548.

<sup>690</sup> Victoria, *Parliamentary Debates*, Legislative Council, November 26, 1964, p1858.

<sup>691</sup> *id.*, March 26, 1975, p4567.

will have a role to play in the administration of justice in every case. The implications of this situation are discussed below.

## **The Present Representation of Women on Victorian Juries**

### **The Statistical Picture**

3.30 It is difficult to give an entirely accurate picture of the representation of women on Victorian juries as there is no comprehensive data compiled on the gender composition of juries. In 1975 Ross Van Schie writing on the history of women in the Victorian jury system noted the limitations of work in this area as 'no statistics are available either of a breakdown by sex of jurors, or of the number of women who exercise the option of exemption'.<sup>692</sup>

3.31 However, a data base compiled by the Victorian Law Reform Committee's research staff provides statistics on the number of women and men who were summoned for jury service, the numbers of women and men who presented for jury service and the number of women and men who served on juries in that year. The data shows that of 23,948 persons summoned, 10,939 were women compared with 13,009 men. Assuming that a random selection of names from the electoral role would be approximately 50/50 men/women, there would appear to be a bias in the exemptions available operating against women.<sup>693</sup> This conclusion is further confirmed by the fact that women represent over 50 per cent of the potential jury population.

### **Questionnaire**

3.32 At the time of researching this project there was no information about the general representation of women on juries in Victoria. As a result a questionnaire was designed and sent to the Sheriff's Office in both metropolitan and regional courts in Victoria.<sup>694</sup> The purpose of the questionnaire was to:

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<sup>692</sup> Van Schie, *op.cit.*, 224.

<sup>693</sup> See discussion in Part 4 below. The gender composition of the electoral role was requested from the State Electoral Office in order to check that women are enrolled to vote in numbers equal to men. However a special computer program was required for this task the cost of which was beyond available resources.

<sup>694</sup> see Appendix 1.

- a. gain a picture of the representation of women, people from a non-English speaking background and indigenous people on Victorian juries; and
- b. to try and ascertain some information on the use of peremptory challenges to strike women from juries.

3.33 While the evidence is anecdotal it does represent the opinions of those people who are responsible for the administration of juries in Victoria and who in many cases have served a considerable number of years in the system. See summary of answers in Tables No 1&2.

**TABLE NO 1**

## TABLE NO 2

## Discussion

3.34 The response to the questionnaires show overwhelmingly that women are under-represented on our juries. In country Victoria the problem seems to be worse. Generally less women appear to be summoned in the first instance and then an even smaller number make it on to the jury. In Horsham the Sheriff estimated that women represent as little as 20-25 per cent of jurors. Responses to the questionnaire suggests that in many cases women are excluded from juries by the exercise of peremptory challenges on the basis of their sex. Given this, while it is possible there may be many cases where women represent half of the persons on juries or even the majority, it is more likely that women are in the minority or not represented at all.<sup>695</sup>

3.35 If the aim of our jury system is to provide a judgement that as far as possible reflects the balance of attitudes in the community, then juries which do not represent women fail to meet this goal. This is the problem with leaving the representation of women up to chance. Broadly there are six ways in which the issue of the representation of women can be addressed.

3.36 Firstly the *Juries Act* can be amended in order to provide that there be equal representation of men and women on all juries. Alternatively the Act could provide for a minimum number of women to serve on all cases. Thirdly the Act could provide for the representation of women on juries in certain cases. Fourthly the classes of exemption which allow women to be excused from jury service either because of their sex or because of their concentration in certain professions may be amended or abolished. Fifthly, a clause may be inserted in the *Juries Act* specifying that jurors may not be challenged solely on the basis of their sex. Another option is that the peremptory challenge is abolished altogether. Each of these options and their relationship to each other will be considered. Firstly it is necessary to set the background by examining the unequal status of women in society generally, as dictated by the law.

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<sup>695</sup> The author acknowledges that it is not impossible to make the same statement in relation to men, although according to the results obtained by the questionnaire, it seems that the under-representation of men is not the norm. As discussed in the introduction, the scope of this paper focuses on the representation of women and the implications of *their* exclusion.



## The Unequal Status of Women in Australian Society

3.37 It is accepted by governments of today that women occupy unequal status in Australian society.<sup>696</sup> Historically, women have been excluded from equal participation in public life by a range of sexist laws. The exclusion of women from jury service is one example of this. Another is the fact that the right to vote was restricted to men until universal suffrage was achieved early this century after a protracted campaign by women, 'in which they felt the full force of the law against their struggle'.<sup>697</sup> Until the late nineteenth century, under British law and later Australian law, once a woman was married she had no right to own property. All property became that of her husband's.<sup>698</sup> Any income a woman made was also the property of her husband. In addition, women did not have custodial rights of the children they bore in wedlock.<sup>699</sup> More recently, married women remained excluded from many occupations. Until the mid-1960's married women could not hold permanent positions in the Commonwealth Public Service.<sup>700</sup> Employment law maintained an explicit rule of unequal pay, expressed in the 'Fruitpickers' Case<sup>701</sup> where the court decided that women's pay should be lower than

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<sup>696</sup> The recent work of many governmental and other bodies all state evidence of this fact. See the following which is a selection only of the reports and initiatives taken in relation to the status of women in 1994:

- the Access to Justice Advisory Committee Report on *Access to Justice: an action plan*
- the Senate Standing Committee on Legal and Constitutional Affairs Report on *Gender Bias and the Judiciary*
- the Australian Law Reform Commission, Report No 69 Part 1 and 11, *Equality Before the Law: Women's Equality*
- report by the Tasmanian Women's Consultative Council on women and sex discrimination and state wide consultation for a future report on women and justice
- several conferences on legal issues affecting women, including a national conference on *Challenging the Legal System's Response to Domestic Violence*
- the NSW Ministry for the Status and Advancement of Women report on *Aboriginal Women and the Law*
- the Joint Standing Committee on Foreign Affairs, Defence and Trade Report on *Sexual Harassment in the Australian Defence Force*
- the establishment of three inquiries on aspects of gender bias by the NSW Ministry for the Status and Advancement of Women: *Gender bias and the Criminal Justice System, Gender Bias and the Civil System, Gender Bias and the Legal Profession.*

<sup>697</sup> M Mackenzie, *Shoulder to Shoulder*, 1988, cited in Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, National Capital Printing, Canberra 1994, p30.

<sup>698</sup> See discussion of the history of women in the Australian legal system in J. Scutt, *Women and the Law: Commentary and Materials*, Sydney: The Law Book Company Ltd, 1990 at p2.

<sup>699</sup> *ibid*

<sup>700</sup> *Public Service Act 1922* (Cth), section 9: example cited by Access to Justice, *op.cit.*, p 30.

<sup>701</sup> *Rural Workers' Union v Mildura Branch of the Australian Dried Fruits Assoc* (1912) 6 CAR 61.

men's, to be determined on a basis different than that used to determine pay rates for men. In 1969 the Conciliation and Arbitration Commission accepted that where women and men do the same work they should receive the same pay.<sup>702</sup> It is only recently that steps have been taken to provide for equal assessment of the value of work primarily done by women in comparison with that primarily done by men.<sup>703</sup>

3.38 Although the position and perception of women in society has improved over time, recent reports demonstrate that women continue to face inequality in many aspects of their lives including their relationship to the law.<sup>704</sup> The report of the Access To Justice Advisory Committee provides an action plan for improving the access to justice 'for all Australians'.<sup>705</sup> The report states that although women constitute a majority of the population, they continue to be disadvantaged by the legal system.<sup>706</sup> The report states that:<sup>707</sup>

Women still have less access to positions of power and privilege and, in particular, are seriously under-represented in the institutions that make and uphold the law. It is clear that this is not the result of accident or women's choices, but of a history of judicial decisions and discrimination against women in the legal system.

3.39 The report states as examples that as at June 1993, women comprised 8.84 per cent of the members of the House of Representatives and 21.05 per cent of Senators. Nearly 90 per cent of all federal judicial offices are held by men; there has only been one woman appointed to the High Court; 12 out of 223 other senior federal, State judges are women.<sup>708</sup> So clearly women are under-represented in our institutions which are responsible for making laws. It is also increasingly recognised that the law is not a body of value free

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<sup>702</sup> 1969 *Equal Pay Case* 127 CAR 1142.

<sup>703</sup> Australia Law Reform Commission, *Equality Before the Law: Discussion Paper 54*, July 1993, p 119.

<sup>704</sup> *ibid*

<sup>705</sup> *id.*, pv.

<sup>706</sup> Access to Justice Advisory Committee, *op.cit.*, p 30.

<sup>707</sup> Access to Justice Advisory Committee, *op.cit.*, pp30-31.

<sup>708</sup> The Senate Standing Committee on Legal and Constitutional Affairs report on *Gender Bias and the Judiciary*, Canberra: Senate Printing Unit, 1994, at p91-92 state that 'membership of the judiciary in Australia is remarkably homogeneous. Judges are overwhelmingly male, former leaders of the Bar, appointed in their early fifties, and products of the non-government education system. The Commonwealth Attorney-General has noted that men of Anglo-Saxon or Celtic background hold nearly 90% of all federal judicial offices..' The inquiry makes similar comments in relation to the State Court system but also notes that while still under-representative, the Family Court has 7 out of 52 judges as women; a figure higher than anywhere else in the system.

principles. Decisions must be made about which values will be endorsed by laws and which interests will be protected by laws. In its report on *Women's Equality Before the Law* the Australian Law Reform Commission stated that because participants in the law making process as judges, lawyers, members of Parliament and public servants drafting and enacting legislation have overwhelmingly been men, the law inevitably reflects the values, concerns and interests of these present and past law makers.<sup>709</sup> So women's voices and therefore women's perspective have largely been excluded from the process of law making. As a result it has been argued that 'women lack the confidence which, as citizens, they are entitled to have in the fairness of our major legal institutions'.<sup>710</sup>

3.40 The fact that women have been largely excluded from the law making process means that the justice system has come to be seen as failing to represent the experiences of women. In turn, recent academic and legal analysis has concluded that this systematic failure of the legal system to adequately incorporate the experiences of women amounts to 'gender bias' in the law.<sup>711</sup> The fact that many laws are gender biased is now accepted internationally and is seen as a human rights issue.<sup>712</sup> The recent United Nations World Conference on Human Rights stressed the importance of working to eliminate gender bias in the administration of justice.<sup>713</sup>

## **Equal Gender Representation in all Cases**

3.41 There are many arguments in favour of juries consisting of equal numbers of women and men. Given the problems with leaving the selection of women on juries up to chance and the possible inequalities which follow, this is an option which would ensure that the perspective of women is included in this aspect of the criminal justice system, in every case.

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<sup>709</sup> Australian Law Reform Commission, Report No 69 Part 11, *Equality Before the Law: Women's Equality*, 1994, p14.

<sup>710</sup> E Evatt, *Speech (Mitchell Oration)* 23 September 1994, cited in *ibid*.

<sup>711</sup> See Australian Law Reform Commission, Report No 69 Part 11, *Equality Before the Law: Women's Equality*, *op.cit.*, pp15-16 footnote 20.

<sup>712</sup> See Australian Law Reform Commission, Report No 69 Part 11, *Equality Before the Law: Women's Equality*, *op.cit.*, p16. The Senate Standing Committee on Legal and Constitutional Affairs report on *Gender Bias and the Judiciary* describes gender bias as stereotyped views about the proper social role, capacity, ability and behaviour of women and men which ignore the realities of their lives and result in laws and practices that disadvantage women: See Senate Standing Committee on Legal and Constitutional Affairs report on *Gender Bias and the Judiciary*, *op.cit.*

<sup>713</sup> Vienna Declaration and Program of Action Pt 111 s 11.C.3.

## Equal Gender Representation Legitimises the Judicial Process

3.42 Women represent over half of the Victorian population.<sup>714</sup> If the jury is to retain its legitimacy as the voice of the community then women must make up half of all juries regardless of the nature of the case being tried. Professor Mark Findlay in his report on *Jury Management in New South Wales* is careful to stress the importance of community involvement in strengthening the legitimacy of the jury.<sup>715</sup> Community participation allows people to see the justice system at work and hopefully, to have their confidence in the system strengthened by the experience.<sup>716</sup> The effect that this maintenance of confidence has on the perception of the criminal justice system generally 'should not be underestimated'.<sup>717</sup> Arguably a lack of confidence in the system comes from a perception of bias. If within the trial setting the jury does not witness any evidence of partiality then the perception of the legal system as impartial is strengthened.<sup>718</sup>

3.43 The Senate Standing Committee on *Gender Bias and the Judiciary* discusses the merits of more women being appointed as judges in order to maintain public confidence in the judiciary.<sup>719</sup> The Committee argues:<sup>720</sup>

if judges are seen to come from only one group in society, then those outside that group may believe that their perspectives are not included in judicial decision making. This may lessen community understanding of, and faith in judicial decisions. For example, the absence of women may tend to undermine the acceptance of court decisions which clearly involve gender distinctions.

Clearly, if the jury is to operate as a democratic institution and maintain the confidence of the community, women need to be consistently represented on the jury.

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<sup>714</sup> As at the 30th of June 1994, of a total Victorian population of 4476100 persons, the numbers of males and females were:  
Males: 2216500 Female: 2259600  
Therefore Females represented 50.48% of the population of Victoria.  
Source: ABS, *Australian Demographic Trends 1986*, 3101.0  
*Monthly Summary of Statistics*, 1303.2, reproduced in The Library Parliament of Victoria, *Statistical Summary Victoria*, Background Paper, December 1994.  
The population of the Melbourne Statistical District according to the 1991 census:  
Males: 1489368 Females: 1533065  
Therefore women represented 50.72% of the total population of Melbourne.

<sup>715</sup> Findlay, *op.cit.*, p7-8.

<sup>716</sup> *id.*, p14.

<sup>717</sup> *id.*, p15.

<sup>718</sup> *id.*, p14.

<sup>719</sup> Senate Standing Committee, *op.cit.*, p96-105.

<sup>720</sup> *id.*, p96.

## Equal Gender Representation Ensures Reflection of Community Values

...if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavour, a distinct quality is lost if either sex is excluded.<sup>721</sup>

3.44 Such was the response of the United States federal district court in confronting the exclusion of women from the jury in 1943. In doing so the court grappled with the 'sameness versus difference' question which continues to be debated among advocates of gender equality.<sup>722</sup> Briefly, the sameness argument stressed the irrelevance of gender to the work of juries and, for that very reason, the right of women to serve on the same terms as men. The 'difference' argument emphasised the unique contributions women would make to the quality of justice, drawing on their fundamentally different experiences in life 'of which men knew little'.<sup>723</sup>

3.45 In Australia, much of the discussion of the representation of women in the justice system has concentrated upon whether or not increasing the presence of women (and therefore the inclusion of different perspectives) will have any effect on the system generally. Justice Mary Gaudron has stated that she would disallow the question 'Can women's judgements make a difference?' because it assumes a woman judge to be a 'goddess of wisdom with state of the art ideology'.<sup>724</sup> Many submissions to the Senate Standing Committee who proposed an increase in the representation of women on the bench also noted that such a measure would not of itself provide a sufficient response to gender awareness.<sup>725</sup>

3.46 Those not in favour of equal representation of men and women focus upon the fact that women will not necessarily decide cases according to a 'pro female bias'. In answer to the question, 'should there be equal number of men

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<sup>721</sup> *Ballard v United States*, 329 U.S. at 193-194.

<sup>722</sup> see Carol Gilligan, *In a different voice: Psychological Theory and Women's Development*, Cambridge : Harvard University Press, 1982.

<sup>723</sup> Abramson, *op.cit.*, p119.

<sup>724</sup> Cited in *ibid.*, at page p95

<sup>725</sup> *id.*, p99.

and women on juries', Claude Thomson, the President of the International Bar Association, stated that:<sup>726</sup>

I'd be surprised if anyone, after sober reflection, would think that there is any benefit that would come from that. I've done some jury work and I don't think that it's fair to say that men have a pro- male bias and women a pro-female bias. It doesn't turn out that way in our national elections.

3.47 However, the objective in having equal representation of women and men on juries is not to provide for 'pro-female' decisions. The representation of women is necessary if a jury is to provide deliberations based upon the values and perspective of the entire community which necessarily go beyond the perspective of men as a result of different life experiences. In response to the question of whether or not women judges would make a difference, Madam Justice Bertha Wilson of the Supreme Court of Canada eloquently stated that:<sup>727</sup>

If the existing law can be viewed as the product of judicial neutrality or impartiality, even although the judiciary has been very substantially male, then you may conclude that the advent of increased numbers of women judges should make no difference, assuming, that is, that these women judges will bring to bear the same neutrality and impartiality. However if you conclude that the existing law, in some areas at least, cannot be viewed as the product of judicial neutrality, then your answer may be very different...

3.49 So the representation of women on juries means that a balance of views will come into play in reaching a decision. It enables the reaching of a 'common understanding of events that no one person and no one sex could reach alone'.<sup>728</sup> As Abramson notes, the fact that in the end the sexes do not appear to vote as blocks is a positive sign that the deliberation has worked to produce a verdict persuasive across gender lines.<sup>729</sup>

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<sup>726</sup> Barry Virtue, 'A chance to build world wide links' (1994) 29 *Australian Law News*, 22 at p23. Note that a 1975 study on rape law reform put forward evidence to suggest that the presence of women does not effect verdict outcome. This argument has since been used frequently to indicate that the equal representation of women is not required to do justice to an accused or victim. See Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report, Rape and Other Sexual Offences*, 1975, pp 53-55, discussed below.

<sup>727</sup> Madame Justice B Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 *Osgoode Hall Law Journal* 507 at p511.

<sup>728</sup> Abramson, *op.cit.*, p121.

<sup>729</sup> *ibid.*

## Implementation of Federal Government Policy

3.50 In February 1988 the Federal Government released its *National Agenda for Women*.<sup>730</sup> This document outlined the government's commitment to improving the status of women up to the year 2000. The *Agenda* states that:<sup>731</sup>

The Government is committed to ensuring that its policies and programs operate to improve the status of women by providing economic security and independence, freedom from discrimination and equality of opportunity in all spheres of activity. It is committed to ensuring that women's needs are taken into account in the development of Government policies and programs. Women must have a choice, a say and a fair go and they must have these regardless of their culture, language, age or family circumstances.

3.51 The Government specifically adopted action in relation to women and decision-making by implementing an active policy of seeking equal representation of women and men on Government boards by the year 2000.<sup>732</sup> In 1993 the Government announced *The New National Agenda for Women 1993-2000* after consultation with women in the community, representatives of women's organisations and all areas of Government. It also incorporated the findings from the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half way to Equal*, an inquiry into Equal Opportunity and Equal Status for Australian Women.<sup>733</sup> This *New National Agenda* states on behalf of women that:<sup>734</sup>

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<sup>730</sup> Office For the Status of Women, Department of the Prime Minister and Cabinet, *National Agenda For Women: Implementation Report*, AGPS, Canberra, 1991.

<sup>731</sup> *id.*, p1.

<sup>732</sup> To this end a *Registrar of Women*, a data base of women with expertise is being kept by the Office for the Status of Women in order to provide a source of names to Commonwealth Ministers and Departments for possible appointments to committees, boards and authorities.

<sup>733</sup> See *New National Agenda for Women 1993-2000*, *op.cit.*, at p1. The House of Representatives Standing Committee on Legal and Constitutional Affairs report *Half Way to Equal: Report of the inquiry into Equal Opportunity and Equal Status for Women in Australia*, AGPS, Canberra, 1992 was to inquire into and report on the progress made towards the achievement of equal opportunity and equal status for Australian Women, as detailed in the *National Agenda for Women*, and the extent to which the objectives of the *Sex Discrimination Act 1984* have been achieved or are capable of being achieved by legislative or other means, with particular reference to:

- (1) effective participation by women, including young women, in decision making processes;
- (2) the extent to which women receive appropriate recognition for their contribution to society.

<sup>734</sup> *id.*, p5. In addition *Agenda's* action for the future states that the private sector is to be encouraged to include at least one woman amongst the names put forward as nominations for boards, commissions and committees :p6.

To share the future we need an equal share in making the decisions that affect our lives - decisions such as those made in Cabinet meetings, executive meetings, committee meetings club rooms and neighbourhood halls. We welcome the Government's commitment to achieve 50 per cent representation for women on Government Boards by the year 2000...We want more opportunities to make our contributions to the decisions on important issues...all decisions which affect our lives.

3.52 In May 1995 the Federal Government released its 'National Women's Justice Strategy'.<sup>735</sup> In further response to the Law Reform Commission's report *Equality Before the Law*, the government committed funding to breakdown disadvantage and discrimination against women to ensure equal access to justice for Australian women.<sup>736</sup>

3.53 Given the wide acknowledgment by the Federal Government of both the unequal status of women and the importance of women being represented on decision making bodies, the equal representation of women on juries would be in accordance with the government's policy of giving women an equal 'say' in the decisions which affect their lives, and the life of their community.

3.54 As part of the Government's *New National Agenda For Women* the then Prime Minister, the Hon Paul Keating, announced a reference to the Australian Law Reform Commission in 1993. After widely circulating a discussion paper, receiving an extensive number of submissions and producing an interim report, the Commission produced a report in two parts in 1994. Part I, *Equality before the Law: Justice for Women* reported on the necessary improvements to promote equality for women within the existing legal system and more fundamental changes that needed to be made to the structure of the legal system.<sup>737</sup> The report inquires into gender inequality, the *Sex Discrimination Act 1984*, women's access to justice and violence against women. The report found that despite some improvements in the last 10 years, women in Australia continue to suffer serious inequality and that their social inequality is connected to their legal inequality.<sup>738</sup> The report states that:<sup>739</sup>

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<sup>735</sup> See Attorney-General's Department, *The Justice Statement*, Canberra: Office of Legal Information and Publishing, 1995, p 75.

<sup>736</sup> *id.*, p 75.

<sup>737</sup> Australian Law Reform Commission, Report No 69 Part 1, *Equality Before the Law: Justice for Women*, 1994.

<sup>738</sup> *id.*, p9.

<sup>739</sup> *id.*, pp 9-10.



While the relationship between the law and women's social and economic status is a complex one, it is clear that each can have an important impact upon the other. The law not only reflects women's unequal status. It can also cause, perpetrate and exacerbate that inequality.

3.55 In Part II of the Commission's report, *Equality Before the Law: Women's Equality*, the Commission reported on the 'architecture of the legal system', namely the basis of the law and the legal system.<sup>740</sup> The report examines the existence of gender bias and the law, the meaning of equality, legal education and the legal profession, the economic life of women, and women in remote communities. The Commission found that gender bias is widespread and that its existence means that women do not have equal protection of the law.<sup>741</sup>

3.56 The Commission recommended that the experiences of women be included in the law. It suggests that the enactment of an Equality Act would help to achieve this.<sup>742</sup> The Commission also recommended the inclusion of gender issues in law school curriculums and stated that the position of women in the legal profession needs to be affirmed.<sup>743</sup>

3.57 The report of the Access to Justice Advisory Committee endorses the findings of the Australian Law Reform Commission's Interim Report on *Equality Before the Law* of wide spread gender bias in the legal system.<sup>744</sup> The report confirms that 'One result of the predominance of men in legal institutions has been the establishment of laws and legal systems that reflect and represent social ideals of masculinity'.<sup>745</sup> The report endorses the ALRC's recommendation that there be an establishment of a National Women's Justice Program designed to address the concerns raised by the ALRC.<sup>746</sup>

3.58 A policy of equal representation of women on juries is in accordance with the recommendations of both these important reports. Both reports recognise the need to increase the participation of women in legal institutions

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<sup>740</sup> Australian Law Reform Commission, Report No 69 Part 11, *Equality Before the Law: Women's Equality*, 1994, pp 1-2.

<sup>741</sup> *id.*, pp 13-23.

<sup>742</sup> The Commission recommends that an Equality Act to give parliaments, governments and courts guidance on community expectations of law, policy and programs. The Act would provide a standard against which government and individual actions could be judged. The Commission found that the current status of the law is not sufficient to ensure the equality of women before the law, p2.

<sup>743</sup> *id.*, summary of recommendations pp xxv-xxxv.

<sup>744</sup> Access to Justice *op.cit.*, p30. The ALRC's final report was not completed in time to be considered by the Advisory Committee.

<sup>745</sup> *id.*, p31.

<sup>746</sup> *d.*, p59.

in order to provide for the incorporation of women's experiences into the law and to aid in women's access to the law.

### *Submissions Received*

3.59 Submissions were received by the Victorian Law Committee. The *Issues Paper* asked if the composition of juries should change according to the nature of the offence being tried or because of characteristics of the accused or victim.<sup>747</sup> The *Issues Paper* did not ask the general question of whether women should be equally represented on all juries. Nor was it able to present information that women were under-represented on Victorian juries due to the unavailability of such information at that time. Perhaps as a consequence there were only a few submissions who canvassed the issue of the representation of women in any substantial manner.<sup>748</sup>

3.60 The submissions generally tended to argue that the composition of the jury should not be changed within the context of discussing the meaning of a 'representative' jury. Reasons centred around the argument that there was a difficulty in 'drawing the line'. For example, the Victoria Police stated that the jury should be broadly representative of the Victorian community. They asked:<sup>749</sup>

should each jury be required to be made up of 50 per cent women as they represent 50 per cent of the Victorian community? Similarly should the composition of juries be representative of age distribution according to figures released by the Australian Bureau of Statistics? It is obviously impossible to impose such requirements.

3.61 It is the author's contention that providing for the equal representation of women on juries does not automatically create such problems. The representation of women is required for the specific reasons discussed. Gender is a factor which permeates ethnicity, age and class. Equal gender

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<sup>747</sup> *Issues Paper, op.cit.*, p 3-4.

<sup>748</sup> Contact was made with many groups active in working in the field of the legal rights of women. For example, the Centres Against Sexual Assault, Women's Information and Referral Service, Domestic Violence and Incest Resource Centre, Immigrant Women's Domestic Violence Service, Refuge Referrals, Women's Unit of ATSIC, Legal Action Against Sexual Assault Project were amongst those contacted. All of these organisations gave valuable assistance in directing the author to resources and in discussing issues in their area of expertise. However it was disappointing that due to time constraints and a lack of human resources they were unable to make written submissions. Note that many were keen to give oral evidence at an open hearing and require notification of hearing dates.

<sup>749</sup> PE Driver, Chief Superintendent, Corporate Policy, Planning and Review Department, Victoria Police, 20 January 1995 p 2.

representation on juries is a measure which can be relatively easily implemented in order to give greater effect to the notion that juries are to be representative of the community.

3.62 The Women's Action Alliance submitted that as the Committee does not give any evidence of serious problems 'any manipulation of the composition of juries should be rejected'.<sup>750</sup> It is now clear from the statistics compiled by this Committee that women are under-represented on juries. In addition, the proposal that women be equally represented on all juries is not dependent upon the nature of the offence to be tried. It would seem that a general fear held is that the composition of juries would be 'manipulated' from case to case depending on the offence and characteristics of the accused or victim. A policy of equal representation across the board would address these concerns.

3.63 The belief that women should be no less than one third of the jury has also been held by some law reform agencies.<sup>751</sup> However it does not appear to be based in any real logic beyond administrative efficacy. The representation of women needs to be approached from an equal representation argument in order for it to be credible and beyond any allegations and actuality of tokenism.

3.64 The primary body responsible for the administration of women's affairs in Australia has recommended the equal representation of women in all cases. The Office for the Status of Women submitted that:<sup>752</sup>

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<sup>750</sup> Mrs N Sullivan, State President, Women's Action Alliance (Victoria) Inc, 23 January 1995, p 1.

<sup>751</sup> See discussion under 'Sexual Offences' below.

<sup>752</sup> Submission from the Office For The Status of Women, Kathleen Townsend, First Assistant Secretary, 9 January 1995, p2.

1. In offences where women are either the complainant ( such as sexual assault or assault trials ) or the accused, the Office would support measures which ensured at least an equal representation of men and women on the jury.<sup>753</sup> In cases where women are the complainants, potential women jurors are often routinely objected to by defence counsel when a jury is being selected permitting an over representation of men judging the issues. It is believed that such an over representation is part of the reason that many trials concerning violence against women end in unfavourable results from the woman's perspective.

2. In all offences women should make up half of the jury, in recognition of the fact that as half the population, it is important that women have opportunity to participate in jury service. This would avoid the perception that it is only necessary to ensure women's representation on juries in what are perceived as 'women's issues'.

## Representation of Women on Juries in Sexual Offence Cases

### Background

3.65 In the Victorian Law Reform Committee's *Issues Paper*, the issue of the gender representation on juries in sexual offence cases was raised.<sup>754</sup> Many reports commenting on the representation of women on juries have concentrated on the implications of women's representation on juries in sexual offence cases. The inclusion of gender issues and the jury in such reports is a recognition and an attempt to address the fact that primarily, sexual violence is committed against women by men.<sup>755</sup> The gender composition of juries is seen to be one way of combating prejudice in cases of male violence against women.

3.66 It is also necessary to look in detail at the arguments raised in the context of sexual offence cases because they raise and confirm the unequal position that women occupy in society. They also show how the legal system perpetuates this inequality.<sup>756</sup> The *New National Agenda for Women* states that:

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<sup>753</sup> Note that in England under the *Sex Disqualification (Removal) Act, 1919, s 1(b)*, a judge had the discretion in his own instance or on application by any of the parties, to make an order that the jury shall be composed of men only or women only as the case may require. On application by a woman, a judge could grant exemption from jury service by reason of the nature of the evidence to be given or the issues to be tried.

<sup>754</sup> See *Issues Paper, op.cit.*, p3.

<sup>755</sup> Note the establishment of the National Committee on Violence Against Women in 1990 to enable national consideration of legal, policy and program issues and to conduct community education work in relation to all forms of violence against women.

<sup>756</sup> For a feminist analysis of the law of rape see Jocelyn Scutt, *Rape Law Reform: a collection of papers*, Australian Institute of Criminology, Canberra 1980.

<sup>757</sup> *New national Agenda for Women, op.cit.*, p11.

Men's violence against women is about power and control. Many men think they own women and that they have the right to control or dominate us by using violence.

3.67 Melanie Heenan's work observing rape trials highlights the difficulty in obtaining convictions in rape cases. She suggests that this is because rape cases are often determined by reference to stereotypical assumptions about the moral culpability of women.<sup>758</sup> The question then is, can the composition of the jury play a role in redressing this problem?

## Gender Equality on Juries in Sexual Offence Cases

### *Arguments Against*

3.68 The arguments against providing for the equal representation of women on juries in cases involving sexual offences can be stated as follows:

1. That the representation of women on a jury do not effect verdicts. As a result, the absence of women does not prevent justice being done.
2. That studies show that there is no real underrepresentation of women on juries.
3. That providing for proportionate representation of women on juries in cases of sexual offences singles out sexual offences relegating them to the concern of 'women's issues'.
4. That men and women are equally affected by myths about the nature and causes of sexual offences. It has been argued that in fact women are more unsympathetic and more likely to blame the victim and acquit an accused, than men are.

### *Findings of Major Reports*

3.69 The report of the Criminal Law and Penal Methods Reform Committee of South Australia was the first to enquire into the impact of jury composition on verdict outcome.<sup>759</sup> A study was conducted of all indictments for rape in the Supreme Court from the beginning of 1965 to the end of 1975. From the

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<sup>758</sup> Anne Edwards and Melanie Heenan, ' Rape Trials in Victoria: Gender, Socio-cultural Factors and Justice' (1994) 27 *The Australian and New Zealand Journal of Criminology*, 213. Note also the comments by the Deputy Registrar of Wangaratta that Wangaratta has an extremely high acquittal rate' regardless of the composition of the jury. See Table No 1.

<sup>759</sup> Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report: Rape and Other Sexual Offences*, 1975.

beginning of 1966 when women sat upon juries, verdicts were given in 87 rape cases. The data collected showed that there was 'no statistically significant difference between the verdicts of male and female dominated juries, and that it is safe to conclude that women are no more likely to convict of the offence of rape than are men'.<sup>760</sup> The Report concluded that the inclusion of equal numbers of men and women on juries is not likely to result in either more or less convictions in rape cases. As a result, it was decided that there was no justification for requiring a charge of rape to be tried by a jury containing a specific proportion of women to men.<sup>761</sup>

3.70 Later reports on rape law reform have relied upon the information provided in the South Australian report. In Victoria, the Law Reform Commission's report on *Rape Prosecutions* of 1976, recommended that the composition of juries should remain the same as any change would 'at most give a greater appearance of impartiality, and even this, perhaps, only to the casual observer'.<sup>762</sup>

3.71 In 1976 the Law Reform Commission of Tasmania noted that their Advisory group recommended a minimum of four women on all juries trying charges of rape.<sup>763</sup> The Commission itself recommended that women should form at least half of the jurors in rape cases in recognition of the fact that 'it was usual practice for defence to object to women jurors'.<sup>764</sup> However in 1982, the Tasmanian Commission recommended against women representing a specified proportion of juries in rape cases.<sup>765</sup> The Commission cited in support of their recommendation the South Australian findings on jury composition and verdicts concluding that 'such evidence indicates that there is no justification for requiring a charge of rape to be tried by a jury containing a specific proportion of women to men'.<sup>766</sup>

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<sup>760</sup> *ibid.*, p54.

<sup>761</sup> *id.*, p55.

<sup>762</sup> Law Reform Commissioner, Report No. 5, *Rape Prosecutions : court procedures and rules of evidence*, Melbourne 1976, p38. The Commissioner cited the results of a survey made of 98 criminal cases of all kinds tried in the third, fourth and fifth courts in the County Court at Melbourne in the year ending June 1974 which showed that in almost 50% of cases there were between four and nine women on the jury of twelve and that in 89% of the cases the jury included at least two women. See p38 of the report above.

<sup>763</sup> Tasmania, Law Reform Commission, *Report and Recommendations for Reducing Harassment and Embarrassment of Complainants in Rape cases*, 1976, p8.

<sup>764</sup> *id.*, pp8-9.

<sup>765</sup> Law Reform Commission of Tasmania, Report No 31, *Report and Recommendations on Rape and sexual Offences*, 1982, p27.

<sup>766</sup> *ibid.*

3.72 In 1977 the Australian *Royal Commission on Human Relationships*, after noting the experience of South Australia, recommended because of the perceived difficulty in providing equal representation of men and women, that a minimum of four women should be represented on juries trying sexual offence cases.<sup>767</sup> This recommendation was made 'not so much to change the outcome of the trial but to ensure participation of women in the process and a broader range of attitudes'.<sup>768</sup> However in 1980, a National Rape Conference rejected this recommendation of the Royal Commission passing the following resolution with only one dissent:<sup>769</sup>

...while it is important that both men and women should serve on juries in trials involving sexual offences, this applies equally in respect of all crimes. Provided that the law gives an equal opportunity to men and women for jury service generally, no special rule need be established in relation to rape trials.

3.73 In 1987 the Victorian Law Reform Commission suggested that there should be no formal requirement as to the gender composition of juries.<sup>770</sup> They based their suggestion on two factors:<sup>771</sup>

1. That there is no evidence to suggest that the outcome of trials is affected by the gender composition of juries.
2. That adopting a system of gender representation in order to dispel public criticism that may result after an acquittal by an all male jury in a trial for the rape of a woman implies that men are more likely to acquit sexual offenders. As there is no evidence to support that view, such change would raise prejudice to the level of legal principle.

3.74 In 1988 the final report of the Victorian Law Reform Commission confirmed this view.<sup>772</sup> The Commission stated that there is wide spread belief that the outcomes of sexual offence cases are affected by the prevalence

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<sup>767</sup> Australia, *Royal Commission on Human Relationships*, Final Report, Volume 5, part VII: *Rape and other sexual offences*, AGPS, Canberra, 1975, p197.

<sup>768</sup> *ibid.* Note that the Commission stated that its 'basic position is that there should be a balance of the sexes in all criminal trials of whatever kind at p197. However their main focus was to reform the area of sexual offences.

<sup>769</sup> National Conference on Rape Law Reform, Hobart, 28th-30th May, 1980. Resolution reproduced in Law Reform Commission of Tasmania, *Working Paper on Rape Law Reform*, by C.Warner, 198, p55.

<sup>770</sup> Law Reform Commission of Victoria, Discussion Paper No5, *Rape and Allied Offences: Procedure and Evidence*, 1987, p12.

<sup>771</sup> *ibid.*

<sup>772</sup> Victoria, Law Reform Commission, Report No. 13, *Rape and Allied Offences: Procedure and evidence*, 1988, p30.

in the community of myths regarding rape and allied offences.<sup>773</sup> The Commission stated that there is no evidence to suggest that there is a disproportionate acceptance of these myths according to gender. In the opinion of the Commission, the appropriate issue for reform is not gender composition but to dispel myths and counter the influence of attitudes which prejudice the fair hearing of complainants.<sup>774</sup>

3.75 Currently there is work being done by the Victorian Department of Justice, Criminal Statistics and Justice Research Unit on the laws and procedures governing the area of sexual assault. The Unit has conducted research into the outcomes of 108 trials relating to persons charged with an offence of rape during the period 1 January 1992 to 30 June 1993. The results do not support there being any significant bias in favour of acquitting an accused person charged with rape by male dominated juries. Of the 108 trials, 57 (52 per cent) resulted in a conviction, while 51 (47.2 per cent) resulted in an acquittal. The rates for 50 juries consisting of eight or more men were 28 (56 per cent) convictions and 22 (44 per cent) acquittals. On juries where there were five, six or seven women, there were 19 (57.6 per cent) convictions and 14 (42.4 per cent) acquittals.<sup>775</sup>

3.76 The results should be treated with some caution owing to the relatively large number of juries (19) the gender composition of which is unknown. The comparable statistics for this group were eight (42.1 per cent) convictions and eleven (57.8 per cent) acquittals which is the reverse of the other trends. Whilst these figures are not conclusive, they do not go any further toward suggesting that the outcomes of rape trials are consistently affected by the gender composition of juries.<sup>776</sup>

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<sup>773</sup> *ibid.* There is a wealth of evidence to suggest that this is the case. Reports on Gender Bias, discussed earlier in this paper, and Law Reform Commission Reports on the law of rape confirm this. For extensive material in this area see the study conducted by the Australian Institute of Criminology: Patricia Weiser Easteal (ed) *Without Consent: Confronting Adult Sexual Violence*, Conference Proceedings, Canberra: Australian Institute of Criminology, 1993. See especially the paper of Easteal, *Beliefs About Rape: A National Survey*, at p21 of the report.

<sup>774</sup> Victoria, Law Reform Commission, Report No. 13, *Rape and Allied Offences*, *op.cit.*

<sup>775</sup> The sample of six juries consisting of eight or more women is considered to be too small to be considered statistically relevant.

<sup>776</sup> It would be interesting to compile information on these latest statistics on the age of the respective jurors. Are older female jurors more conservative than younger ones? What effect does this have on trial outcome?



## The Use of Peremptory Challenges to Exclude Women in Sexual Offence Cases

3.78 Regardless of a lack of conclusive empirical evidence to suggest that gender composition of juries effects outcome, this view is still widely held. The exclusion of women from juries in sexual offence cases by the use of peremptory challenges is evidence of this. The results of the Criminal Justice Statistics and Research Unit clearly show that there is a bias in favour of men serving on juries trying such cases. In 50 cases (46.3 per cent) eight or more men were impaneled, while eight or more women sat in only six cases (5.6 per cent). Juries reasonably balanced in regard to gender, that is, five, six or seven women/men, tried 33 cases (30.5 per cent). The composition of a further 19 (17.6 per cent) juries is unknown.

3.79 In addition, the opinions given in answer to the questionnaires asking whether peremptory challenges are used to exclude women in sexual offence cases, were overwhelmingly in the affirmative.<sup>777</sup> Why do parties exclude women on the basis of their sex? Is this evidence that women do in fact effect verdicts or is it the practical implementation of a myth?<sup>778</sup>

3.80 Interestingly, the response from Horsham stated that women are preferred on juries if the victim had accepted a lift from a stranger when the rape occurred. This idea, that women can actually be more likely to blame the victim and acquit is held by some legal writers. One American study has examined empirically the influence of extra-legal factors on juries decision making in rape trials.<sup>779</sup> The study relied upon court room observations and pre-trial and post-trial interviews with 331 jurors involved in 38 sexual assault trials between 1978 and 1980. The findings indicate that jurors were more likely to depend on information about the victim's lifestyle, sex-role

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<sup>777</sup> See Table No.1.

<sup>778</sup> Note that a national survey conducted via the Murdoch chain of newspapers entitled 'beliefs about rape' found that women's attitudes towards the nature and causes of rape were often significantly different than men's. For example in answer to the statement that rape is a male exercise in power over women' 63.1% of women 'strongly agreed' while only 34.1% of men agreed. Age was also a factor amongst the variations in answers from women. See P Weiser Easteal, 'Beliefs about Rape: a National Survey' reproduced in P Weiser Easteal (ed) *Without Consent: confronting Adult Sexual Violence*, Conference Proceedings, Canberra: Australian Institute of Criminology, 1993, p 21. Note that the results are suggestive rather than definitive according to the author as of 6,588 surveys received, 5,303 of the respondents were female.

<sup>779</sup> G. LaFree, B Reskin, C Visher 'Jurors' response to Victims' Behaviour and Legal Issues in Sexual Assault Trials', (1985)32 *Social Problems*, pp389-407.

behaviour, relationship to the alleged offender than on material evidence of rape. Particular pressure may be put on women jurors:<sup>780</sup>

Some women may find abandonment of the traditional beliefs represented by rape myths as too threatening to be tolerable in so far as to relinquish these beliefs enhances their awareness of being personally vulnerable.

3.81 Heenan and Edwards in their observation of rape trials state that the decision of juries to acquit in a number of cases observed could only be explained by reference to an:<sup>781</sup>

attempt to preserve their sense of an ordered, predictable and relatively safe world for themselves and their children, when faced with the frightening alternative prospect that maybe even apparently 'normal' social encounters can turn into dangerous rape situations.

## Recognition of the Rights of Victims

3.82 Recent reports have emphasised the rights of the victim. The Victorian *Crimes (Sexual Offences) Act 1991* demonstrates a direct attempt by Parliament to reduce the trauma for victims giving evidence during court proceedings without moving away from a primary concern to protect the rights of the accused.<sup>782</sup> In 1991 the Victorian Law Reform Commission specifically examined ways in which the criminal justice procedure could be improved for victims of a sexual offence.<sup>783</sup> The commission recommended that there should be separate facilities at court so that the accused and the victim do not come into contact due to the trauma experienced by victims as a result of such encounters.<sup>784</sup> The Commission also states the need to examine the possibility of allowing victims to give evidence by closed circuit television in appropriate circumstances.<sup>785</sup> Consultation occurred with the Community Policing Squad to draft a code of practice designed to deal with victim's reports of feeling disregarded and discouraged from proceeding with reports.<sup>786</sup>

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<sup>780</sup> L Vandervort, 'Mistake of Law and Sexual Assault: Consent and Mens Rea', (1987/1988)2 *Canadian Journal of Women and the Law*, pp 233-309.

<sup>781</sup> Edwards and Heenan, *op.cit.*, p233.

<sup>782</sup> Together with section 37A of the *Evidence Act 1958* the reforms restricted the circumstances under which the evidence can be led of a victim's prior sexual history with persons other than the accused.

<sup>783</sup> Victoria, Law Reform Commission, Report No.42, *Rape: Reform of Law and Procedure: Interim Report*, 1991.

<sup>784</sup> *id.*, pp 45-46.

<sup>785</sup> *id.*, pp 46-47.

<sup>786</sup> *id.*, p 17.

3.83 The recent Report of the Chief Justice's Task Force on Gender Bias in Western Australia examines in detail the effect of the court environment on women as victims.<sup>787</sup> The task force was disturbed by the layout of the court and the lack of women as court personnel in sexual assault cases; 'very little thought has been given to the feelings of victims (witnesses) in sexual assault cases in the way the court has been planned'.<sup>788</sup> Concerned about the humiliation suffered by victims, the task force 'could see no rationale for denying an adult sexual assault victim access to the remote witness facility currently used for child sexual assault victims'.<sup>789</sup>

3.84 The Australian Law Reform Commission's report *Equality Before the Law: justice for women* also discusses the treatment of women as victims in court.<sup>790</sup> The ALRC state that many women feel that 'they are on trial rather than the offender'. The Commission makes recommendations designed to reduce the trauma suffered by victims of sexual assault; to protect women's privacy and dignity.<sup>791</sup>

3.85 It is submitted that there is great potential for increasing trauma for women by allowing a victim to confront an all male jury or a male dominated jury. Whilst this is true for all women it may be especially so for women from a non-English speaking background who may face an additional language barrier and who may be culturally opposed to disclosing sexual matters to men. The ALRC received submissions stating that the experience is often worse for women who are Aboriginal or Torres Strait Islander in whose cultural background 'sexual matters are not discussed in mixed company, let alone before open courts'.<sup>792</sup>

3.86 Given the extensive and uncontested reports of intimidation, humiliation and trauma experienced by women and children who are victims of sexual assault, juries should not be permitted to be dominated by one gender. Women should be equally represented on juries as part of the National strategy in eliminating violence against women.<sup>793</sup>

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<sup>787</sup> The Hon Mr Justice D. K. Malcolm AC, Chief Justice of Western Australia, *Report of Chief Justice's Taskforce on Gender Bias*, 30 June 1994.

<sup>788</sup> *id.*, p 40.

<sup>789</sup> *id.*, p 41.

<sup>790</sup> ALRC, *Justice for women, op.cit.*, pp 149-152.

<sup>791</sup> *id.*, p 154.

<sup>792</sup> *id.*, p 150.

<sup>793</sup> See *New National Agenda for Women 1993-2000, op.cit.*, p 11 Eliminating Violence

## Alternative Means of Ensuring Equal Representation in Jury Selection

### The Use of the Peremptory Challenge

3.87 Some submissions have suggested that the way to gain an appropriate cross section of the community and an 'adequate' representation of women is to widen the pool of potential jurors.<sup>794</sup> Whilst these suggestions have some merit, it does not solve the problem of women being excluded by the use of peremptory challenges.

3.88 In the United Kingdom the peremptory challenge has been abolished.<sup>795</sup> In Victoria, both the accused and the prosecution have the right to peremptorily challenge six jurors each. In 1994, extending the case of *Batson v Kentucky*,<sup>796</sup> the Supreme Court of the United States ruled that peremptory challenges could not be used to eliminate jurors simply because of their sex.<sup>797</sup> In this case (a paternity suit) challenges were used to select an all female jury. Writing for a six person majority, Justice Harry Blackmun found that:

intentional discrimination on the basis of gender violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate insidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

3.89 The American approach is based on an interpretation of their Constitution. Victoria could enact a provision in the *Juries Act* to the effect that peremptory challenges are not to be exercised to exclude persons on the basis of their sex.<sup>798</sup> However the approach is problematic. Firstly, under the

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Against Women'.

<sup>794</sup> See the following submissions:

Submission No:42: Victoria Police (submitted this in relation to women).

62: His Honour Judge Mullaly, Chairman of the Law Reform Committee of the Judges of the County Court (submitted in relation to acquiring a representative jury generally).

<sup>795</sup> Whether the peremptory challenge should be abolished in Victoria as a means of eliminating gender bias in the selection of juries is beyond the scope of this paper.

<sup>796</sup> 476 U.S. 79 (1986). This case held that a defendant can establish a prima facie case of race discrimination under the equal protection clause by relying solely on the facts concerning jury selection at his/her own trial. See discussion by S. Sagawa, 'Batson v Kentucky: will it keep women on the jury?' (1986) *Berkeley Women's Law Journal*, p14.

<sup>797</sup> *J.E.B. v Alabama*, *op.cit.*

<sup>798</sup> The Human Rights and Equal Opportunity Commission submitted that a general statement should be in the *Juries Act* stating that jury service is to be conducted on the basis of non-discriminatory community representation, subject to the specific provisions of the Act. *Submission*, No 26, p1. However the Commission seemed to be directing such a provision at the manner of selecting the jury pool ie: categories of

American case law, an accused must show that persons of a 'cognisable group' were systematically excluded from the 'venire'. Then an inference is raised that the prosecution used the challenges to exclude jurors on account of their sex. The burden then shifts to the prosecution to make a neutral explanation for excluding the jurors. If Victoria adopted a non-discrimination provision we would need mechanisms comparable to this.

3.90 This process is time consuming. It is also doubtful that it is effective in ensuring the representation of women consistently ie; a party must make application and the exclusion must be 'systematic'. In addition there are problems in ascertaining what is a 'neutral explanation' for the exclusion. Finally, it is difficult to limit the rule of non-exclusion on the basis of sex or race. Abramson notes that the U.S court will now have difficulty if cases come before it arguing the exclusion of jurors on the basis of religion or occupation.<sup>799</sup>

3.91 The U.S approach is an attempt to ensure against prejudice and to allow all groups the right to participate in the jury system. However, it is also coupled with extensive in court questioning as to bias. Given the time involved in this process it should be viewed with caution. The most effective way of fulfilling the dual objectives of representation and impartiality is to ensure that women are equally represented in all cases and to provide for juror education.

## Juror Education

3.92 Recent reports recognise that many judges base decisions on outdated concepts of appropriate behaviour of men and women and apply double standards.<sup>800</sup> It has been accepted that judges need to be educated in relation to the use of gender bias assumptions in order for justice to be done for women. Given that juries of any gender are equally susceptible to adopting these attitudes when deliberating, they too should be educated.

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excusal, not at the use of peremptory challenges. The committee may wish to consider such a provision in so far as it relates to the formulation of the pool.

<sup>799</sup> Abramson, *op.cit.*, p 137.

<sup>800</sup> *Gender Bias and the Judiciary, op.cit.* This inquiry was instigated after the reporting of a warning given by Justice Bollen in a rape case that stated that 'rougher than usual handling' may be acceptable for a husband to persuade the wife to agree to sexual intercourse. The report found that gender bias, whilst perhaps not intentional, was wide spread within the judiciary and the legal profession.

3.93 Community education about the causes of violence against women is being continually recommended by Law Reform bodies. This initiative should be implemented and supported. The federal government has recently committed resources to courts and tribunals to conduct gender awareness programs.<sup>801</sup>

3.94 Where the victim is a woman, jurors could be given an explanation of the gender biased assumptions that exist in the community and their prejudicial effect. This could be achieved by a direction given by the presiding judge or by distributing information prior to the commencement of the trial by court staff, followed by a direction by the judge.<sup>802</sup>

### Qualification for Jury Service

3.95 According to the data compiled by this Committee's research staff, fewer women are summoned for jury service than men in Victoria. Experience demonstrates that most people who are entitled to be excused as of right, avail themselves of the exemption. Currently there are a number of categories of excusal in the *Juries Act* which operate to exclude more women from jury service than men:

*Sch 4, item 7: School teachers. Of Victoria's 62,000 school teachers 67 per cent are women.*<sup>803</sup>

*Sch 4, item 14: Persons over sixty-five years of age. Of those aged 65 to 74, 54 per cent are women.*

*Sch 4, item 15: Pregnant women. Approximately 53,000 women are pregnant at any given time.*<sup>804</sup>

*Sch 4, item 15A: Full time carers. Approximately 78 per cent of all carers are women.*<sup>805</sup>

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<sup>801</sup> *Justice Statement, op. Cit.*, PP 76, 90-93.

<sup>802</sup> This could be set out in a 'Juror's Handbook'.

<sup>803</sup> 62,135 in the 1991 ABS census.

<sup>804</sup> 1993 confinements = 63,172 + foetal deaths [20 weeks or 400 gms] 423 + estimated miscarriages under 20 weeks (10-15% of all other pregnancies) = 70,000-73,000 divided by 75% = 52,500 -54,750. (figures courtesy of Douglas Trapnell- Director of Research, Vic L.R.C.).

<sup>805</sup> Submissions from *Carers Association Victoria*, Submission No 88, received 2 May 1995.

3.96 Results obtained from the questionnaires confirm that these are the categories of excusal most often invoked by women.<sup>806</sup> Arguably this amounts to structural discrimination against women.<sup>807</sup> If women are to be equally represented on juries then the pool of potential jurors needs to be widened.

## **Section 3: THE JURY IN A MULTICULTURAL SOCIETY**

### **Introduction**

3.97 As discussed in Section one, any examination of the jury system involves confronting the practical implications of the idea that a person should be tried by a jury of his/her 'peers' and concurrently, that the jury is to be representative of the community as a whole. The notion of judgement by 'peers' evolved in a homogeneous society. However, contemporary Victorian society is diverse. In a multicultural society there are many different perspectives and values judged by one set of laws.

3.98 Juries must be drawn from the 'community' in which the crime occurred. Amongst other things, this requirement recognises that the jury and the accused should share some common understanding of the values of that community. Where the accused is a member of a racial or ethnic group there may be concern that a jury, none of whom share the racial background of the accused, may be less able to judge that person's behaviour.

3.99 Arguably the right of an accused to a fair trial could mean that a non-English speaking background (hereafter, 'NESB') accused has the right to have some representatives of his or her ethnic background sitting on the jury. The jury is supposed to satisfy both the accused and the community by providing the impartial judgement of behaviour with reference to shared values and changing standards of the community.<sup>808</sup>

3.100 There are a number of approaches to trying to satisfy both goals in a multicultural society where the same legal system applies to all people.<sup>809</sup>

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<sup>806</sup> See Tables No. 1 & 2.

<sup>807</sup> See submission of Human Rights and Equal Opportunity Commission, *op.cit.* The commission submits that entitlements to be excused in practice discourage persons from participation and that this amounts to discrimination.

<sup>808</sup> See discussion by the Law Reform Commission of Nova Scotia, *Juries in Nova Scotia*, 1994, at p 22.

<sup>809</sup> The ALRC in its report on *Multiculturalism and the law* received some submissions suggesting that cultural values should be accommodated by introducing special laws applying to particular ethnic groups. The Commission concluded that any such

Firstly, there could be a form of 'quota' system where members of specified groups are guaranteed to appear on every jury. Secondly, there could be provision made for the representation of members of the accused or complainant's ethnic group on juries in all cases, or where the case contains a specific 'racial element'. Alternatively, Victoria could attempt to remove any systemic discrimination from the jury selection process by ensuring that all persons have an equal chance of being selected for jury service. A provision could also be inserted in the *Juries Act* prohibiting the use of peremptory challenges to exclude persons on the basis of race, reducing the numbers of peremptory challenges available, or abolishing the peremptory challenge. These options are discussed below.

## National Agenda for a Multicultural Australia

3.101 The National Agenda for a Multicultural Australia is a statement of the Federal Government's policy response to the changing ethnic composition of Australian society. It represents an effort to modify Australia's institutional structures and processes and to ensure their capacity to respond to the needs of a diverse, multicultural and multilingual population.<sup>810</sup> Multiculturalism is defined by the National Agenda for a Multicultural Australia as a policy for 'managing the consequences of cultural diversity in the interests of the individual and society as a whole'.<sup>811</sup> The Government's objectives include the promotion of:<sup>812</sup>

1. equality before the law by systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain groups of Australians; and

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change would be oppressive and that instead problems should be rectified by making changes of general application. See ALRC, Report No 57, *Multiculturalism and the law*, 1992, p11.

<sup>810</sup> Commonwealth Attorney-General's Department, *Access to Interpreters in the Australian Legal System*, Canberra: AGPS, 1991, p 1.

<sup>811</sup> Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *National Agenda for a Multicultural Australia: Sharing our Future*, AGPS, July 1989, p vii.

<sup>812</sup> *id.*, p 17. See also the Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *Building the National Agenda for a Multicultural Australia: Some issues for consideration*, Canberra: AGPS, 1988, and the Department of Prime Minister and Cabinet, *Community Relations Strategy: An initiative of the Commonwealth Government's National Agenda for a Multicultural Australia*, Canberra: AGPS, 1991.



2. to promote an environment that is tolerant and accepting of social and cultural diversity, and that respects and protects the associated rights of the individual.

3.102 The referral to the Australian Law Reform Commission (hereafter, 'ALRC') of the reference on multiculturalism was a Government initiative as part of the *National Agenda for a Multicultural Australia*. The ALRC was to consider whether the principles underlying the relevant laws, and the mechanisms available for resolving disputes arising under or concerning the law, take adequate account of the cultural diversity of Australian society. The Commission made recommendations designed to 'accommodate cultural diversity' in relation to the criminal justice system.<sup>813</sup>

### Cultural Diversity in Victoria

3.103 People from a diverse range of ethnic and cultural backgrounds reside in Victoria. According to the Australian Bureau of Statistics Census 1991, 68 per cent of people in Melbourne were born in Australia. The remaining 32 per cent were born in some 46 other countries.<sup>814</sup> Of these countries 39 were non-English speaking countries. A number of persons were Australian born but have parents who were born overseas.

3.104 The relations between people of different races and national origins in Victoria have ranged from cooperation to conflict. Whilst Victoria does not possess the population or arguably the problems of the United States or Britain, it is clear that racial problems are common. A recent report by the Committee to Advise the Attorney-General on Racial Vilification in Victoria has found that 'racial vilification' is common:<sup>815</sup>

...negative attitudes and discriminatory actions remain common. One manifestation, and source, of inter-racial conflict is 'racial vilification'- racially based abuse, and defamatory remarks.

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<sup>813</sup> See summary of recommendations in *Multiculturalism and the law, op.cit.*, ppxxx-xxxi. The ALRC's specific recommendations as to the composition of juries is considered below.

<sup>814</sup> ABS, 1991 Census of Population and Housing: *Expanded community Profile for the Melbourne Statistical Division*, Table E06 'Birthplace (countries) by sex', p 3.

<sup>815</sup> Report of the Committee to Advise the Attorney-General on Racial Vilification, *Racial Vilification in Victoria*, Melbourne March 1992, p 1. See also detail at p 12, 'How extensive is it?'

3.105 The Human Rights and Equal Opportunity Commission produced a *Report of the National Inquiry into Racist Violence in Australia*.<sup>816</sup> The Commission reported on the extent of racist violence in Australia and examined measures to deal with acts of violence or intimidation based on racism. Whilst they received wide spread evidence of racist violence, there were significant problems in estimating its extent. No official statistics are kept in order to identify particular crimes as having a racial element.<sup>817</sup>

### **Representation of NESB Persons on Victorian Juries**

3.106 Whether or not NESB persons are represented on Victorian juries is difficult to ascertain. There are no records kept as to the ethnic composition of juries or of the ethnicity of those persons sent questionnaires or summoned. Due to the absence of information available, a questionnaire was devised and sent to higher Metropolitan and Regional Courts asking jury administrators their opinions of the representation of NESB persons on juries.<sup>818</sup> See the summary of results in Tables 3 and 4.

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<sup>816</sup> Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Canberra: AGPS, 1991.

<sup>817</sup> *id.*, p313. See also Anti-Semetic Report.

<sup>818</sup> See copy of Questionnaire in Appendix 1.

**TABLE NO 3**

**TABLE NO 4**

### *Regional Victoria*

3.108 It seems that the low numbers of NESB persons summoned are consistent with the low numbers of NESB persons in rural Victoria generally, with the exception perhaps of Geelong.

3.109 However some respondents reported lower proportions of NESB women summoned as compared with men. Six regions reported an approximately equal representation of men and women from a NESB summoned. Two reported a proportion of 40 per cent women. Four reported a proportion of less than 20 per cent women summoned. In Geelong the proportion of NESB women summoned was reported to be as low as 5 per cent. Three were unable to answer.<sup>819</sup>

### *Melbourne*

3.110 At the time of writing the ethnic composition of the Melbourne Jury District was not known. Note however that Table No. 4 shows that most NESB persons summoned for jury service are of Greek, Italian, Southern European or Western European Background. Melbourne also reported the under-representation of NESB women summoned.

## **The Disproportionate Impact of the English Language Requirement**

3.111 Generally the opinions of the administrators of juries in rural and metropolitan Victoria believed that NESB persons often claimed to be ineligible due to their lack of command of the English language [Schedule 3, item 2(e)]. The Melbourne Deputy Sheriff stated that the under-representation of NESB women summoned was due to the fact that more women claimed child care responsibilities or a lack of knowledge of English than men.<sup>820</sup> In this context, it is important to note that the Australian Bureau of Statistics indicates that more NESB women do not speak English than NESB men.<sup>821</sup>

3.112 The Office for the Status of Women has stated that the availability of English learning opportunities and literacy classes needs to be extended for

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<sup>819</sup> This figure includes Shepparton which has not responded to the questionnaire to date. Note also the subjective nature of these answers ie: the different proportions stated from respondents from the same court.

<sup>820</sup> See Table No. 4.

<sup>821</sup> ABS *op.cit.*, Table E12 'Birthplace by proficiency in English by sex', p 8.

women. The Office states that provision of such classes in the work place would be one way of increasing access to services.<sup>822</sup> The ALRC has also recommended that there needs to be increased access to English classes which also include basic instruction about the criminal law.<sup>823</sup>

3.113 The English language requirement has the potential to limit the representativeness of juries by excluding sections of the population from participating. In Hong Kong, jurors must be competent in the English language in order to serve. The result of this requirement is that 'the Hong Kong jury is not the least representative of the community from which it is drawn'.<sup>824</sup>

3.114 The only alternative to imposing the English language requirement in Victoria is to allow all persons to participate regardless of their understanding of English and to provide an interpreter service in court for jurors. Given the complexity of trials and the diverse range of languages spoken, this may not be practical. However, given the multicultural nature of Victoria, every measure should be taken to ensure that NESB persons have an opportunity to participate.<sup>825</sup>

## A Quota System

3.115 Many law reform bodies and legal writers have considered the idea that persons should be represented on juries proportionate to their

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<sup>822</sup> *New National Agenda for Women, op.cit.*, p 62.

<sup>823</sup> *Multiculturalism and the law, op.cit.*, p 220. The ALRC in their report on *Equality Before the Law : Justice for women*, state that evidence was given to the Committee that men of a non-English speaking background were more likely than women of a non-English speaking background to have opportunities to learn English, particularly in the context of continuing restrictions on funding for English classes and increased emphasis on language training for employment purposes, pp 10-11.

<sup>824</sup> P Duff and M Findlay, *Juries: A Hong Kong Perspective*, Hong Kong: Hong Kong University Press, 1992, p 8.

<sup>825</sup> Note that under the New Brunswick *Jury Act*, section 7 and 11 (3)(b)(iii), a potential juror may indicate her or his preference to serve only on a jury of the official language of her or his choice. However a Bill, when enacted, will remove this reference to a juror's ability to select jury service in the official language of his or her choice. See An Act to Amend the *Jury Act*, Bill 87, 3rd Session, 52nd legislature, New Brunswick, 43 Elizabeth II. 1994, First Reading 30 November 1994. In Quebec, under *Juries Act*, the judge determines the composition of the jury which may be unilingual or mixed. See *QJA*, sections 13 and 14. The former refers to a jury made up entirely of english or french speaking jurors, while the later refers to a jury made up of half english half french speaking jurors.

representation in the community.<sup>826</sup> All have unanimously rejected this idea. Logically this would be impractical given the vast numbers of different ethnic groups which make up Victorian society. There was no support for this proposal in any submissions.<sup>827</sup>

3.116 However, while the literal interpretation of a quota system has not been supported, there have been cases where judges have dismissed juries on the basis that they are unrepresentative of the community from which they are drawn. Reference has been made in cases to the proportion of persons in the community versus their numbers appearing on a jury<sup>828</sup>

3.117 A court may stay proceedings in order to ensure fairness.<sup>829</sup> There may be cases where the jury is so unrepresentative of the community that a judge would be justified in discharging a jury or staying proceedings, until a more representative jury could be impaneled. Attempts by accused to invoke this power have been largely unsuccessful in Australia.<sup>830</sup>

## Representation of an Accused's Ethnicity on a Jury

3.118 Historically, in Victoria a 'foreign' accused could obtain an order to be tried by a jury of 'foreigners'. This was called a jury 'de mediatate'.<sup>831</sup> This was also the case in England. Because of the relatively homogenous society such an order could be made as there were clearly defined lines between the norm

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<sup>826</sup> See for example:  
*Racist Violence, op.cit.*, p 311,  
*Juries in Nova Scotia, op.cit.*, p23,  
*Uniform Law Conference of Canada, op.cit.*, p 225,  
*Abramson, op.cit.*, p 102.

Department of Justice Canada, Pomerant. D, Working Document, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, 1994, p 23.

<sup>827</sup> Note that this refers to the proportionate representation of ethnic groups on juries themselves. The United States Supreme Court has ruled that the very meaning of the constitutional guarantee of trial by an impartial jury required that the jury *pool* be a mirror image or microcosm of the eligible community population. See *Taylor v Louisiana*, 419 U.S 522, 528 (1975) and discussion in *Abramson, op.cit.*, p100.

<sup>828</sup> For example, in the Canadian case of *R v Nepoose*, the court found that a jury in which the proportion of men and women were roughly equal, resulted in a jury panel that was not 'reasonably representative of the community', and that this amounted to a breach of the Canadian Charter.

<sup>829</sup> See *Jago* (1989) 168 CLR 23, 31 per Mason CJ. See also *Dietrich* (1992) 177 CLR 292, 338 per Toohey J. This power is discussed in the *Issues Paper, op.cit.*, p 2.

<sup>830</sup> See *R v Smith* [1981] *Aboriginal Legal Bulletin*, 3; *Walker v R* (1988) 38 A Crim R 150 and discussion at page 3 of the *Issues Paper, op.cit.*

<sup>831</sup> *Juries Statute* 1865, Vic. No 272. See discussion of this in the case of *Regina v Ah Toon* (1866)3 V.L.R 31.

and 'others' or 'foreigners'. However, in contemporary society, whilst differences are recognised there is an assumption that all persons submit themselves to the law which is reflective of our common values. In fact recent case law shows that the term trial by 'peers' will be given a very broad interpretation. In the case of *Walker*, the Queensland Court of Criminal Appeal held that the right to trial by 'peers' as specified in Chapter 39 of the Magna Carta, meant a right to be tried before 'equals'.<sup>832</sup> The appellant, an Aboriginal person, argued that he had been deprived of his right to be tried by a jury of his 'peers' since the jury did not comprise his own tribes people. As all persons are equal before the law in Australia the court held that the jurors 'were at law certainly all his equals, as he was one of them'.<sup>833</sup> Consequently the appeal was dismissed.<sup>834</sup>

## The Position in Other Jurisdictions

### *England*

3.119 In 1989 the Court of Appeal held in *R v Ford* that:

Since fairness in the composition of a jury was best attained by the principle of random selection a trial judge had no discretion to interfere with the composition of a jury in order to secure a jury of a particular ethnic origin or which was drawn from a particular section of the community.

3.120 Since then, Lord Runciman's *Royal Commission on Criminal Justice* has recommended where a case has a racial dimension which results in a defendant from an ethnic minority community believing that he or she is unlikely to receive a fair trial from an all-white jury, that it be possible for the defence to apply to the judge before the trial for the selection of a jury containing up to three people from ethnic minority communities.<sup>835</sup> The defence must persuade the judge that such a belief was reasonable because of the 'unusual and special features of the case'.<sup>836</sup>

3.121 The report also recommended that it be open to the prosecution to apply on behalf of the victim that a racial dimension to the case points to the

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<sup>832</sup> *Walker v R* (1988) 38 A Crim R, 150.

<sup>833</sup> *id.*, p156. Arguably because of the unique position of Aboriginals in being dispossessed of their land and culture, such an interpretation of 'peers' is not fair. This will be discussed in section 4 below.

<sup>834</sup> The case went on to the High Court but on another ground of appeal.

<sup>835</sup> United Kingdom, Report, *The Royal Commission on Criminal Justice*, London: HMSO, July 1993, p 133.

<sup>836</sup> *ibid.*



need for a multi-racial jury. In addition, it was recommended that it should be open to the defence or prosecution to argue, and the judge to order, that one or more of the three jurors should come from the same ethnic minority as the defendant or the victim.<sup>837</sup>

3.122 The Royal Commission on Criminal Justice report on *Criminal Justice Systems in Other Jurisdictions*, examined whether or not any other jurisdictions provided for specific representation of persons from ethnic groups on juries.<sup>838</sup> The Commission found that no other countries provided for specific ethnic representation in the manner recommended by Lord Runciman. However it noted that the United States did have methods in place designed to ensure that ethnic groups have an equal opportunity to be represented on juries.<sup>839</sup>

### *Canada*

3.123 Canada has recently looked at the proposal of introducing measures to ensure the representation of racial minorities on juries.<sup>840</sup> They have concluded that such measures should not be taken. The Uniform Law Conference states the problem as follows:<sup>841</sup>

If persons are placed on a jury because they share the ethnic background of the accused or the victim there is a very real danger that those jurors will be perceived, both by themselves and by the community at large, as the representative of one side or the other.

3.124 They also note the problem with 'drawing the line' of who should benefit from any such system.<sup>842</sup> For example, should it be all ethnic and racial groups? Should other characteristics such as income level, age, or religion be taken into account? Any answer would in some ways be seen as

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<sup>837</sup> *id.*, p 134. Note that a search of Halsbury's Laws of England has not found any legislative enactment of this recommendation. Bills and parliamentary debates as recent as 1993 are not available in any Victorian libraries and therefore have not been searched. To date the author awaits a search being conducted by the Parliamentary Library of Canberra.

<sup>838</sup> The Royal Commission on Criminal Justice: *Criminal Justice Systems in other Jurisdictions*, London: HMSO, 1993.

<sup>839</sup> The position of the United States is examined below.

<sup>840</sup> See *Uniform Law Conference, op.cit.*, p225 and *Juries in Nova Scotia, op.cit.*, p23.

<sup>841</sup> *Uniform Law Conference, op.cit.*, p 225. Abramson, *op.cit.*, is very critical of this 'representation' approach. He argues that the United States is in danger of destroying the noble goal of community representation where the new purpose of the cross-section is 'to give voice...to competing group loyalties, almost as if a juror had been sent by constituents to vote their preferred verdict' p 102.

<sup>842</sup> *ibid.*

arbitrary and unfair. Consequently the Conference suggested that the best way to reach the objective of obtaining a representative jury is to adopt procedures to make it possible that members from ethnic groups have as equal a chance of being chosen as anyone else.<sup>843</sup>

3.125 The Law Reform Commission of Nova Scotia also expressed concern for the implications for impartiality where jurors chosen from ethnic groups could see themselves as representatives of one of the parties.<sup>844</sup> The majority decided that there should not be any provision made for specific representation of ethnic groups based on the ethnicity of the parties but rather that procedures should be adopted to remove systemic and other discriminatory exclusions and exemptions.<sup>845</sup>

3.126 The Canadian Department of Justice has examined the arguments for including 'representatives' of the accused's racial or cultural background on the jury.<sup>846</sup> The department recommended against such a reform and among other arguments stated that:<sup>847</sup>

First, the Supreme Court of Canada has clearly stated that the jury is a vehicle for *public* involvement in the administration of justice and a vehicle for the expression of a *community* conscience. Engineering jury composition to reflect only the interests or characteristics of the accused, or of the accused and victim, thus would be incompatible with the purposes of jury trials stated by the court.

### *Submissions*

3.127 The overwhelming number of submissions were in favour of Victorian juries being representative of the Victorian community.<sup>848</sup> Of these a

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<sup>843</sup> *ibid.* Recommendations were; expanding eligibility from the requirement of citizenship to include 'landed immigrants'; ensuring that only essential exemptions remain; adopting a uniform approach on the discriminatory effect of the use of peremptory challenges.

<sup>844</sup> *Nova Scotia, op.cit.*, p 23.

<sup>845</sup> *ibid.*

<sup>846</sup> Department of Justice Canada, *op.cit.*, p 23.

<sup>847</sup> *ibid.*

<sup>848</sup> See for example;  
Office for the Status of Women  
Family Council of Victoria  
The Public Policy Assessment Society  
Victoria Police Corporate policy, Planning and Review Dept  
County Court

However the Office for the Status of Women would support measures ensuring a significant representation of NESB or Aboriginal people on the jury where the accused or complainant is NESB or Aboriginal. The Office however notes that due to the complexity of the concept the views of relevant NESB and Aboriginal

substantial proportion rejected the idea suggested in Issue 1.2.3 of the *Issues Paper* which asked:<sup>849</sup>

Are there circumstances where, either by reason of the characteristics of the accused or the victim, or the nature of the offence, a jury which is deliberately designed not to be representative of the community, is justified?

3.128 The following represent the general attitude expressed in submissions on this issue:

The Society does not accept that the overall membership of a jury should be representative of a particular minority group to which the accused belongs. Such a proposal smacks of cultural relativism.

Similarly, the Chief Judge County Court noted that:

Any attempt to provide for the 'representation' of traits of the accused and victims will lead to endless arguments about what is to be 'represented' and by whom.

The Victorian Council For Civil Liberties also drew attention to the definitional problems:

We consider that if these changes were adopted, insurmountable problems are likely to be created in defining and selecting the particular jurors to comply with the particular racial grouping and may in fact have the opposite effect to that desired...In many countries race and religion are inextricably linked in the relations between people, and so if race is to be a basis of jury selection, religion may need to be another.

## The Accused's Right to a Fair Trial

3.129 After the High Court decision in *Dietrich v R* it is clear that an accused has a right to a 'fair trial'.<sup>850</sup> Mason CJ and McHugh J state that 'there has been no judicial attempt to list exhaustively the attributes of a fair trial'.<sup>851</sup> Instead the court said that what amounts to a fair trial for an accused depends on all the circumstances of the particular case and is 'inextricably linked to the facts of the cases and the background of the accused'.<sup>852</sup>

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communities should be sought. In response to this the author contacted Ethnic legal centres, community groups and Aboriginal legal centres by telephone and then by sending out Issues Papers upon an expression of interest. However apart from receiving a submission from ATSIC, there was no written response.

<sup>849</sup> *Issues Paper, op.cit.*, p 4. Oral Evidence given to this Committee from Mr Bowen, retired Prosecutor for the Queen, 6 March 1995, was against adopting any such measure. See p 189 of transcript.

<sup>850</sup> 109 ALR 385.

<sup>851</sup> *id.*, at p 387.

<sup>852</sup> *id.*, at p 396.

3.130 Arguably an absence of members of the accused's race on a jury could be said to amount to a denial of a fair trial. The argument is, that in a trial of a NESB accused there needs to be NESB persons on the jury in order for the jury to understand the cultural context of the crime. However whether or not this would amount to the denial of a fair trial would depend upon all of the 'circumstances of the case'. An American case serves to illustrate the dilemma:

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In 1990, Han Tak Lee, a Korean-born defendant, was found guilty of murdering his daughter by arson. No Asian-Americans served on the jury and several jurors indicated that they were swayed by the prosecutor's emphasis on Lee's lack of emotion when firefighters led him and his grieving wife to the charred cabin where their daughter's body was recovered. Following the guilty verdict, Asian-American groups rallied in support of Lee, pointing out that 'his behaviour during and after the fire was inexplicable to most Americans and appeared to convey his guilt - but it was perfectly in tune with Korean custom'. The Rev. Joon Soo Choe, an organiser of the rally, said that 'Korean fathers, even when they are feeling extreme sorrow, they can't cry'.

### **Characteristics of the Accused's Culture can be Given in Evidence**

3.131 The ALRC has recently examined the admissibility of evidence of cultural factors.<sup>854</sup> The report states that:<sup>855</sup>

In working out what was an accused's state of mind, a judge or jury are likely to apply their own cultural logic and may make the wrong inferences from behaviour unless they have evidence of the customs, practices and beliefs prevalent in the accused's community. This is particularly so if it is a minority community.

3.132 The Commission states that where reasonableness, negligence or recklessness is an element, the determination is ultimately a value judgement, not a question of fact. It argues that such a judgement can only be made against one set of values:<sup>856</sup>

The Commission agrees that a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different groups would lessen the protection afforded by the criminal law.

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<sup>853</sup> Jennifer Lin, 'Was Jury Confused by Culture - or Did He Kill His Daughter?' *Philadelphia Inquirer*, April 28, 1992, p A1, reproduced in Abramson, *op.cit.*, p 101.

<sup>854</sup> *Multiculturalism and the law, op.cit.*, pp 182-187 and in its Discussion Paper No. 48, *Multiculturalism: Criminal law*, 1991, pp 11-21.

<sup>855</sup> *Multiculturalism and the law, id.*, p 183.

<sup>856</sup> *id.*, p 187. This is against the provisional recommendation made in the Commission's Discussion Paper 48, p 20, para 2.3.2.

3.133 However, the Commission distinguishes the above from the issue of what an accused's intention or state of mind actually was when the offence was committed. This is a question of fact.<sup>857</sup> Like other questions of fact, the court must take into account all evidence relevant to it and admitted. Clearly, so far as they help to show what the accused's state of mind was, the accused's culture and ethnic background will be relevant.<sup>858</sup>

3.134 The Commission states that there are rules of evidence which can impede such evidence being admitted. Firstly, under the common law, evidence cannot be given about matters of 'common knowledge'. Unless particular cultural values are determined by the judge to be so peculiar as to be outside the 'normal' range of experience, evidence of them may not be allowed.<sup>859</sup> Another rule excludes the evidence of witnesses that are expressed in terms of an 'ultimate issue' the court has to decide.

3.135 As a result, the Commission in both its reports on *Evidence* and *Multiculturalism*, recommended that three rules of evidence be abolished and recommended legislation to give effect to this. On 15th October 1991 the *Evidence Bill 1991* (Cth) was introduced into federal parliament to abolish these three rules. The *Evidence Act 1995* (Cth), was assented to on 23rd February 1995 with some of the Act not coming into force until the 18th April 1995. By Section 80, the common knowledge and ultimate issue rule was abolished. The rules in relation to the admissibility of opinion and expert evidence were also amended.<sup>860</sup>

3.136 Section 4 (1) of the *Evidence Act 1995* (Cth), limits the application of the Act to the Federal Court and courts in the Australian Capital Territory. Section 4 (5) states that the Act does not generally apply to appeals from State Courts exercising federal jurisdiction. As a result, the committee may consider recommending that Victoria adopts comparable legislation, covering offences under both State and Federal law.<sup>861</sup>

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<sup>857</sup> *Multiculturalism and the law, op.cit.*, p 183, para 8.32.

<sup>858</sup> *ibid.* The Full Court of the Supreme Court of Victoria has ruled that in essence that such evidence is admissible. In *R v Yildiz* (1983) VR, said that to receive evidence of what is happening in a community, of how an ordinary member of the Turkish community acts and what his values are, are matters of fact and do not require expert evidence. See commentary by Mr Justice Gobbo, 'Justice and Ethnicity: a view from the bench' (1990) *Migration Monitor*, p 14 at p 15.

<sup>859</sup> *id.*, p 185.

<sup>860</sup> *Evidence Act 1995*, s79.

<sup>861</sup> New South Wales has enacted legislation drafted in identical terms in all material respects: See *Evidence Act 1995*, NSW.

3.137 This is in accordance with the recommendations of the ALRC which states that:<sup>862</sup>

The application of different rules of evidence in different jurisdictions results in inequality before the law, as a person charged with the same federal offence may be convicted in one State and acquitted in another because certain evidence was or was not admissible. This may create a situation where Australia is in breach of its obligations under the ICCPR.

## Impediments to NESB Participation on Juries

### Citizenship

3.138 In order to become a citizen a basic knowledge of English is required. This may be demonstrated by:<sup>863</sup>

- a. responding in simple English to questions in simple English about personal particulars; and
- b. answering 'yes' or 'no', or replying in simple English to factual questions on the responsibilities and privileges of Australian citizenship.

3.139 However, the *Australian Citizenship Instructions* state that jury service is a 'responsibility' of a citizen.<sup>864</sup> Arguably there is an anomaly here as citizenship imposes an obligation, yet it does not require that the person be capable of fulfilling it. The Immigration Department also has the power to waiver the English language requirement in certain circumstances.<sup>865</sup>

3.140 In Australia a person must be an Australian citizen in order to serve on a jury. According to the ABS, of a total of 3,235,480 persons overseas born and likely to be residentially eligible for citizenship, 2,130,384 were Australian citizens, while there were 1,105,096 non-citizens likely to be eligible. This means that the citizenship rate for Australia is 65.8 per cent.<sup>866</sup>

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<sup>862</sup> The ALRC is referring to articles 14 and 26 of the International Covenant on Civil and Political Rights. See p 186, *Multiculturalism, op.cit.*

<sup>863</sup> Department of Immigration and Ethnic Affairs, *Australian Citizenship Instructions, Amendment 14*, June 1992, para: 3.11.1.

<sup>864</sup> *id.*, Amendment 14, June 1992, para: 3.12.1 (a).

<sup>865</sup> *id.*, Amendment 6, 1987, para 4.3.

<sup>866</sup> ABS, 1991 Census Matrix Table CSC6171, 'Citizenship Rate Based on Those Likely To Be Eligible, ie pre mid 1989 arrivals'. The figures are based on Australian citizens who arrived in Australia before mid 1989. Note that the citizenship rate differs between ethnic groups.

Many of these persons who are citizens may not be of a NESB. For example, during the 1993-1994 financial year, the major country of persons former nationality or

3.141 As a result, large numbers of NESB persons who have been in Australia long enough to be eligible for citizenship are not being represented on our juries.

3.142 The rationales for requiring jurors to be citizens are:

- a. only a citizen will be familiar with the experiences and standard of conduct of the average member of the community and 'feel a commitment to the community';
- b. non-citizens cannot easily be included as their names are not on electoral lists.

3.143 The ALRC considered whether permanent residents should be qualified to serve on juries.<sup>867</sup> It decided against this preferring citizenship as the appropriate qualification. Instead the Commission recommends that:<sup>868</sup>

- a. Persons should be encouraged to take up citizenship;
- b. When migrants become citizens, they should be given an opportunity to register immediately on the electoral role; and
- c. The Department of Immigration, Local Government and Ethnic Affairs should include information about the jury system and jury duty in the information package supplied to applicants for citizenship.<sup>869</sup>

3.144 In America, sources such as car registration and real estate lists are used to supplement the electoral list in order to ensure that jury pools are as representative as possible.

3.145 In Canada, every province requires prospective jurors to be Canadian citizens.<sup>870</sup> The *Uniform Jurors Act* adopted by the Uniform Law Conference in 1974 retained a disqualification for non-citizens.<sup>871</sup> However, uniquely in

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citizenship who took out citizenship in Australia was Britain at 32.45%.  
Source: Fact Sheet, Department of Immigration and Ethnic Affairs.

<sup>867</sup> Discussion Paper No 48, *Op.cit.*, p 63.

<sup>868</sup> See Report of the Civics Expert Group, *Civics and Citizenship Education*, AGPS, 1994. The function of the Expert Group is to provide the Government with a strategic plan for a non-partisan program of public education and information on the Australian system of government, the Constitution, Citizenship and other civic issues.

<sup>869</sup> Report, *Multiculturalism*, *op.cit.*, pp 220-223.

<sup>870</sup> This is according to a paper prepared in April 1994 by D Pomerant, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, Working Document, Department of justice, 1994, p 50.

<sup>871</sup> Uniform Law Conference, *Proceedings of the Fifty-sixth Annual Meeting of the Uniform Law Conference of Canada*. (Held at Minaki, Ont., August 19-August 23, 1974), at pp

Canada, the Northwest Territories allow 'permanent residents' to serve on juries.<sup>872</sup>

3.146 Approximately a quarter of a million landed immigrants enter Canada each year.<sup>873</sup> In some communities, landed immigrants may constitute a significant proportion of the population. The Uniform Law Conference has recommended that 'landed immigrants' be eligible for jury service in addition to citizens in an effort to increase the likelihood of ethnic groups being represented on the jury.<sup>874</sup>

3.147 The Law Reform Commission of Nova Scotia has recommended that the voters' list should no longer be the only source for the Jury List.<sup>875</sup> The Commission was of the view that the 'voters' lists become more inaccurate the further one moves from an election. Those inaccuracies are most likely to concern tenants and other people who move frequently.'<sup>876</sup> In order to be more inclusive, the Medical Service Insurance System list was also to be used, as it was the most up to date and comprehensive list in the Province. However, the majority argued that the citizenship requirement should remain as the best indicator of a persons commitment to and knowledge of the community where the trial is to occur.<sup>877</sup>

## Conclusion

3.148 Many numbers of eligible persons are not taking out citizenship.<sup>878</sup> The ALRC did not give reasons against allowing permanent residency to be the qualifier for jury service. The only advantage in the citizenship requirement is that it is evidence of a commitment to Australia and it's values. It does this by specifying that persons have been resident in Australia for a minimum of two years. However, even this requirement can be waived in certain cases.<sup>879</sup>

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182-183, s. 2(a).

<sup>872</sup> By a 1985 amendment to its *Jury Ordinance*, R.O., c.55. s.1.

<sup>873</sup> Pomerant, *op.cit.*, p 50.

<sup>874</sup> *Uniform Law Conference, op.cit.*, p 229.

<sup>875</sup> *Juries in Nova Scotia, op.cit.*, p 26.

<sup>876</sup> *ibid.*

<sup>877</sup> *id.*, p 28. As the Medical lists are more inclusive than the electoral role, those called for jury service will be required to declare their eligibility as citizens. The dissenting opinion was that jury service is a duty not a right and should be carried out by all residents of Nova Scotia.

<sup>878</sup> There needs to be information found about the effectiveness of programs designed to promote citizenship.

<sup>879</sup> *Australian Citizenship Instructions, op.cit.*, para 3.7., and para 3.8.



3.149 Arguably, permanent residency status equally amounts to a commitment to Australian society. For example, in 1993-1994, some 11 954 people were granted permanent residency status: 58 per cent on family grounds, 22.1 per cent on economic grounds, 11.6 per cent on humanitarian grounds. Arguably these people are as committed to Australia as citizens.<sup>880</sup>

3.150 There needs to be further inquiry made as to whether allowing permanent residents to serve would significantly increase the representation of NESB persons on the jury.<sup>881</sup> If a role of the jury is to apply the 'community conscience' to deliberations, then the rationale for excluding a significant element of that community conscience for two years until citizenship is granted is questionable.<sup>882</sup>

### Challenges to Jurors

3.151 Arguably, the present capacity for parties to exclude NESB persons solely on the basis of their race is contrary to both racial discrimination laws and Australia's obligations under International Conventions.

### Peremptory Challenges and Race in America

3.152 The Supreme Court in *Batson v Kentucky*<sup>883</sup> held that it was unconstitutional for peremptory challenges made by the prosecutor to be made on the basis of race. In *Georgia v McCollum*<sup>884</sup>, the Supreme Court extended the rule, holding that a defendant may not discriminate on grounds of race when exercising peremptory challenges to trial jurors. In a separate opinion, one Justice noted that the court's decision moved away from protecting the defendants rights to protecting the rights of jurors to serve on juries.

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<sup>880</sup> The Uniform Law Conference argues that the citizenship requirement is based on the false assumption that people who do not share a culture cannot adequately judge one another's behaviour. *op.cit.*, p228.

<sup>881</sup> Inquiry was made to the Department of Immigration and Ethnic Affairs for statistics on the numbers of persons by ethnicity who are permanent residents in Victoria compared with the number of persons by ethnicity who are citizens. This information may only be provided on fee for service basis.

<sup>882</sup> Pomerant, *op.cit.*, p 51 also made this argument in relation to the exclusion of landed immigrants from juries in Canada..

<sup>883</sup> *op.cit.*

<sup>884</sup> 60 LW 4577 (1992).

3.153 The Supreme Court of the United States has clarified that the principles of *Batson* apply to the exclusion of any juror on the basis of race. Thus, it held that a white accused could also challenge a prosecutor's exclusion of black jurors on the basis of race.<sup>885</sup> This approach means that the challenge is retained, but control is applied to ensure that it is used for proper purposes.

3.154 Under *Batson*, an accused must show that persons of a 'cognisable group' were systematically excluded from the 'venue'. It is for the prosecution to give a legitimate explanation for excluding the jurors. Critics argue that a competent lawyer will always be able to articulate a 'legitimate' reason for exercising the challenge. A party may simply refrain from challenging so as to exclude minorities entirely, thereby preventing the judicial review power from being triggered. Concern is also expressed about the lack of definition of some of the *Batson* criteria. For example, what justifications for eliminating jurors are legitimate?<sup>886</sup> The process is also time consuming.

## Australia's Prohibition on Racial Discrimination

3.155 The International Convention on the Elimination of All Forms of Racial Discrimination, (ICERD) defines 'racial discrimination' to mean:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms, in the political, economic, social, cultural or any field of public life ( Art. 1).

3.156 Article 2 (1) provides that each State Party 'shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, groups or organisation'. Australia assumed this obligation when it ratified the Convention on 30 September 1975.

3.157 Section 9(1) of the Commonwealth *Racial Discrimination Act 1975* makes it unlawful for a person to do:<sup>887</sup>

any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of

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<sup>885</sup> *Powers v Ohio* 113 L. Ed 2d 411 (1991).

<sup>886</sup> See discussion by Pomerant *op.cit.*, pp 68-69.

<sup>887</sup> There must be a 'nexus' between the distinction, exclusion, restriction or preference and race. See discussion in CCH 'Race', p 6-420.

nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

3.158 The wording of this provision is very broad. It follows the wording of the ICERD very closely.<sup>888</sup> The section refers to 'any act' and is not limited to particular areas of activity such as employment. A breach of section 9(1) will constitute direct discrimination on the grounds of race.

3.159 Arguably, the use of peremptory challenges to exclude persons on the basis of their race, colour, descent or national or ethnic origin amounts to discrimination constituting a breach of the *Racial Discrimination Act* and the ICERD. By section 6, the Act operates to bind the States.<sup>889</sup>

3.160 The use of peremptory challenges to exclude persons on the basis of race could also be in breach of Australia's obligations under the International Covenant on Civil and Political Rights. Article 26 of the ICCPR affords persons equal protection of the laws and equality before the law.<sup>890</sup>

## The Abolition of the Peremptory Challenge

3.161 Whether the peremptory challenge should be abolished is beyond the scope of this paper. However, note the following:

- a. That the rationale behind the peremptory challenge is that a defendant should have an involvement in the selection of his or her own jury.<sup>891</sup> It has also been stated that the peremptory challenge is intended to be used to eliminate extremes of partiality and prejudice. This is consistent with the notion that juries should be impartial. However, they can also have the opposite effect by excluding groups of people from the jury. The

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<sup>888</sup> The ICERD is Scheduled to the *Racial Discrimination Act*. Section 7 of the Act states that 'Approval is given to ratification by Australia of the Convention'.

<sup>889</sup> Section 6A of the *Racial Discrimination Act* states that the Act is not intended to limit a State Act that furthers the objects of the Convention and is capable of operating concurrently with this Act. The relevant Victorian legislation is the *Equal Opportunity Act* 1995. The Victorian Act makes it unlawful to discriminate on the ground of race in certain circumstances. The Victorian legislation is compatible with the Commonwealth Act, its operation is restricted. As a result, the Commonwealth Act may apply to the position of juries in Victoria.

<sup>890</sup> See discussion at paragraph 70 above. Note according to *Dietrich's case op.cit.*, that this covenant is not legally binding in the absence of specific legislation to put it in effect.

<sup>891</sup> See *Findlay, Jury Management, op.cit.*, p48.

use of the peremptory challenge also conflicts with another main aim of the jury selection process; 'to ensure each jury panel or pool is representative of the community'.<sup>892</sup>

- b. That the Peremptory challenge has been abolished in England.<sup>893</sup> This followed a campaign for its abolition due to the abuse of its use to 'stack' juries.
- c. That the number of peremptory challenges available to parties in New South Wales has been reduced to three: see section 42 of the NSW *Juries Act*.
- d. That the recent study on *Jury Management* in NSW recommended that discussion about abolishing the peremptory challenge be re-opened due to its perceived inconsistency with the ideal of random selection and the formation of an impartial jury.<sup>894</sup>
- e. Note that in a recent case in New York's highest State Court, the Court of Appeals, three judges recommended that peremptory challenges be abolished because it appeared to be 'disguising' discrimination.<sup>895</sup>

3.162 All of these considerations must be taken into account. It would appear that given the problems, in terms of time and evidence, with prohibiting the discriminatory use of challenges, it may be that the interests of all parties may be better served by abolishing the peremptory challenge.<sup>896</sup> However, if present restrictions on the challenge for cause are retained, there would still be an absence of an effective mechanism for excluding prospective jurors who have nonspecific biases that may affect their judgement. The parties would also lose the perceived benefit of having some form of control over the composition of the jury.

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<sup>892</sup> *ibid.* See also discussion by Pomerant, *op.cit.*, p 65-66.

<sup>893</sup> *Criminal Justice Act*, 1988, c.33, s.118.

<sup>894</sup> *id.*, p56.

<sup>895</sup> This was referred to by the U.K Royal Commission, *Criminal Justice Systems in Other Jurisdictions*, *op.cit.*, p 207.

<sup>896</sup> The other argument is that problems would not be as large in Victoria as the United States because of our more harmonious society. Is this naive? Would there be a large amount of 'vexatious' claims for the court to deal with? Also, if women are equally represented on juries the court would be limited to hearing claims based on race. This would mean that challenges to the composition of juries based on the discriminatory use of challenges would be limited.

## SECTION 4: REPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE ON VICTORIAN JURIES

### Introduction

3.163 Aboriginal people occupy a unique position in Australian society as a result of being the original inhabitants of this continent and yet being dispossessed of their land and robbed of their culture. The Australian legal system has a history of treating Aboriginal people with prejudice, hostility and contempt.<sup>897</sup> As a consequence, Aboriginal people are disproportionately represented as defendants in the criminal justice system. However, Aboriginal people are under-represented as participants in the administration of the law.<sup>898</sup>

3.164 More recently, Australia has begun to accept responsibility for its treatment of the original inhabitants of this country. This has taken the form of granting land rights to Aboriginal people, recognising Aboriginal customary law and taking measures to change the relationship of Aboriginal people with the law.<sup>899</sup> Two reports have illuminated the injustice accorded to Aboriginal people and suggest measures towards combating the enormity of the problem. These are the reports of the Royal Commission into *Aboriginal Deaths in Custody* and the report of the Australian Law Reform Commission on *The Recognition of Aboriginal Customary Laws*.<sup>900</sup>

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<sup>897</sup> Aboriginal people have been denied the right to be self determining within Australia's economic, social, political and legal structures. They have endured manipulation from governments from the earliest days of relocation from traditional lands, through 'protective' isolation and then assimilation policies. See Council for Aboriginal Reconciliation, *Addressing the Key Issues for Reconciliation: Overview of Key Issue Papers No. 1-8*, Canberra: AGPS, 1994, p 55.

<sup>898</sup> See Royal Commission into Aboriginal Deaths in Custody, *National Report*, Volume 1, Canberra: AGPS, 1991, p12.

<sup>899</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report, op.cit.*, Volume 4, Chapter 29. The report recommends ways of changing the relationship between Aboriginal people and the police.

<sup>900</sup> 1. Royal Commission into Aboriginal Deaths in Custody, *National Report*, Canberra: AGPS, 1991. The National Report consists of 4 Volumes. In addition, there is a *Regional Report of Inquiry into Underlying Issues in Western Australia* consisting of multiple volumes.

2. ALRC, Report No 31, *The Recognition of Aboriginal Customary Laws*, Canberra: AGPS, 1986. This consists of 2 main volumes, a Summary Report and many discussion papers.

3.165 There is a considerable amount of information which provides the context for a consideration of issues pertaining to the representation of Aboriginal persons on juries. Whilst there is overlap with those considerations relevant to the discussion of the representation on juries of women and persons from a non-English speaking background, there are also considerable differences. This is because it has been recognised that due to the history of occupation, Australia now accepts that Aboriginal people occupy a unique position in Australia. This is reflected in the government's policy of reconciliation.<sup>901</sup>

3.166 A full analysis of the representation of Aboriginal people on juries is beyond the scope of this chapter. In this section issues that appear to be of most relevance will be raised. It is strongly suggested that these issues are considered in more detail, as part of the process of reforming the position of Aboriginal people in the criminal justice system as recommended by the Royal Commission.

3.167 Aboriginal people are under-represented on juries in Australia. For example, in NSW, while Aboriginal people comprise 7 per cent of the prison population, they represent less than 0.5 per cent of jurors.<sup>902</sup> There are no figures in Victoria of the numbers of Aboriginals who serve on juries in Victoria. However, answers to the questionnaires present anecdotal evidence that Aboriginal and Torres Strait Islander people are significantly under-represented on juries. In rural Victoria, they were not summoned to serve on juries in five jury districts. In Mildura where Aboriginal or Torres Strait Islander people represent 1.6 per cent of the population, the Registrar stated that they are almost not represented at all. Bairnsdale was the only district where Aboriginals were actually reported to be represented on juries. While Aboriginal and Torres Strait Islander people represent 0.26 per cent of the population of the Melbourne Statistical District, (7950 Aboriginal persons of a total population of 3022433), Table No.3 states that their representation on Melbourne juries is non-existent or at most, negligible.

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<sup>901</sup> See Council for Aboriginal Reconciliation, *op.cit.*

<sup>902</sup> See Findlay *Jury Management, op.cit.*, p5.

## Addressing the Under-representation of Aboriginal Persons on Juries

3.168 Aboriginal people may be disadvantaged by the English language requirement.<sup>903</sup> A recent report by the Law Reform Commission of Nova Scotia examined the issue of whether there should be a provision which affirmatively states that people who speak only the Mi'kmaq language should be included as jurors irrespective of the ethnic origin of the accused person with an obligation on the state to provide for translation and interpretation.<sup>904</sup> As their *Juries Act* stands, there is no rule requiring that a person be able to understand the language of the proceedings. However, there was an unofficial practice of administrators excusing persons who appear to be unable to follow the trial.<sup>905</sup>

3.169 The Commission noted that there have been provisions enacted in the Northwest Territories and in Quebec which, in the case of the Northwest Territories, enable people who speak only an indigenous language to take part in trials. In the Northwest Territories, there is a very large unilingual indigenous population. In Quebec, the provision allows for the participation of indigenous people where the accused person also speaks the indigenous language.<sup>906</sup> However the Committee did not recommend a rule requiring that indigenous people have a right to sit as jurors, or that there should be any rule as to the understanding of language. The majority was of the opinion that ensuring the greater involvement of the Mi'kmaq people in Nova Scotia was a reform that required 'more comprehensive changes involving the Federal, Provincial, Territorial and Aboriginal Governments determining the relationship between indigenous rights and access to justice issues'.<sup>907</sup>

3.170 There is a dissenting opinion in the report stating that there should be an affirmative provision regarding indigenous language included in the *Juries*

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<sup>903</sup> These were reasons given in a paper by the ALRC, Research Paper No.13, *Aboriginal Customary Laws: Problems of Evidence and Procedure*, 1983. The Committee should also consider whether the language requirement may constitute 'direct or indirect discrimination' contrary to the *Racial Discrimination Act 1975* (Cth).

<sup>904</sup> *op.cit.*, pp 30-31 and the dissenting opinion in Appendix A, p v of the report.

<sup>905</sup> *ibid.*, p 30.

<sup>906</sup> Section 45 of the *Quebec Jurors Act 1979* states that 'An Indian or an Inuk, even though he does not speak French or English fluently, may serve as a juror if the accused is an Indian or an Inuk'. Under Section 42, the sheriff, with the authorization of the judge, may use the municipal band roll, the Band list drawn up in accordance with the *Indian Act* (Statutes of Canada) or the population register of the *Ministere des affaires sociales*.

<sup>907</sup> *ibid.*, p 31.

*Act.*<sup>908</sup> The dissenting opinion stated that, by not having a proactive rule which recognises First Nation language rights, First Nations people are not able to be judged by members of their nation, if those members have difficulty understanding a trial in English. It is argued that this further contradicts the goal of jury trial by peers. Respected Elders, regarded for their wisdom, are unable to sit on a jury due to their lack of comprehension of the English language. Consequently, First Nation people should be given an 'option' to sit on juries and accordingly interpreters should be provided.<sup>909</sup>

## **The Representation of the Accused's Aboriginality on Juries**

3.171 The relevant issues are:

1. Is trial by jury appropriate at all for traditionally oriented Aborigines?
2. Should there be special juries for Aboriginal defendants?
3. Problems where members of the jury are disqualified under customary law from hearing certain evidence.

3.172 The Royal Commission into Aboriginal Deaths in Custody found that Aboriginal people were 29 times more likely than non-Aboriginal people to be detained in custody. The Royal Commission found that the reason for this gross over-representation had to do with the dispossession and disempowerment of Aboriginal people since the time of European settlement, which the report outlined in an historical section. The report made a total of 339 recommendations designed to address fundamental conflicts between the criminal justice system and Aboriginal people.<sup>910</sup> The Commission said that in order to reduce the numbers of Aboriginal people in custody, Aboriginals must have self empowerment and self determination.<sup>911</sup>

## **The Recognition of Aboriginal Customary Law**

The ALRC states that:<sup>912</sup>

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<sup>908</sup> *id.*, Appendix A, p v.

<sup>909</sup> *ibid.* The dissenter did not believe that any First Nations people should be forced to sit on a jury.

<sup>910</sup> A good summary of the report can be found in *Access to Justice, op.cit.*, pp 35-38.

<sup>911</sup> Royal Commission, *op.cit.*, Vol 1, p15.

<sup>912</sup> ALRC, Discussion Paper No 20, *Aboriginal Customary Law-The Criminal Law and Procedure*, 1984, p 5.



Aborigines are clearly in a special position. Since 1788 they have been dispersed and in many cases dispossessed, and their traditional way of life destroyed or greatly affected. Considerations of fairness thus powerfully support the case for special measures to deal with the continuing difficulties faced by many Aborigines.

3.173 As a result, the Commission recommended a partial customary law defence. This would operate like the defence of diminished responsibility. Proof of customary laws would be given in evidence. The commission also recommended that customary law be taken into account in the decision to prosecute and in sentencing. They also examined the possibility of diverting some cases to be dealt with by members of the relevant Aboriginal community.<sup>913</sup>

3.174 Aboriginal courts have been in place at different times in Western Australia, Queensland and the Northern Territory.<sup>914</sup> They have by in large been disappointing as they fail to take into account traditional customs and have been non-inclusive. The ALRC discusses at length the overseas experience of indigenous justice mechanisms.<sup>915</sup> The Commission recommends that there be no general system of Aboriginal Courts in Australia, but that courts or other official bodies may be appropriate in certain circumstances.<sup>916</sup> However the Commission stresses that this should only be undertaken at the instigation by members of the Aboriginal community concerned.<sup>917</sup>

## The ALRC Recommendations on Trial by Jury

### *Trial by Jury should Remain*

3.175 As the Commission did not receive evidence to justify the conclusion that jury trials involving Aborigines are, in any or recurring way, biased or otherwise unsatisfactory, no special measures excluding jury trial were seen as justified.<sup>918</sup> However the Commission stated that 'it is a matter for concern

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<sup>913</sup> ALRC, Summary Report no 31, pp36-64.

<sup>914</sup> ALRC, *Aboriginal Customary Laws Vol 2, op.cit.*, pp31-52 discusses this in detail.

<sup>915</sup> *id.*, Chapter 30, p 53.

<sup>916</sup> *id.*, p 221.

<sup>917</sup> Note that the Federal Government's *Justice Statement* promises funding for the redesign and refurbishment of a Darwin court in order to make it more suitable for use by Aboriginal and Torres Strait Islander people. The aim is to 'more closely approximate tribal council settings'. See Attorney General's Department, *The Justice Statement* May 1995, p 70.

<sup>918</sup> *Recognition of Aboriginal Customary Laws, Vol 1, p437.*

that Aborigines are so disproportionately represented in the criminal justice system, but so seldom appear on juries'.<sup>919</sup>

### *Representative Juries are Desirable*

3.176 The Commission noted the court's inherent power to ensure that a fair trial is achieved. For example, in *R. v. Smith*, a case involving an Aboriginal accused, Judge Martin sitting in the Bourke District Court discharged an all white jury after the crown had challenged all Aborigines on the jury panel.<sup>920</sup> The Commission said it was desirable that juries were reflective of our multi-racial society but did not recommend how to achieve this as the issue was outside their terms of reference.

3.177 Note that in the case of *Walker*, the Court of Criminal Appeal in Queensland held that an Aboriginal defendant did not have the right to be tried by a jury comprised of his own tribes people.<sup>921</sup> The High Court has held that nothing in the case of *Mabo* effects the ability of Aborigines to be regulated by State and Commonwealth law.<sup>922</sup> In reply to counsel's argument that customary law prevailed, the court said that 'Australian criminal law does not, accommodate an alternative body of law operating alongside it'.<sup>923</sup>

3.179 In the context of the problems related to Aboriginal deaths in custody, a potential issue is also that Aboriginal people as jurors may have some difficulty in convicting other Aborigines. This issue needs further consultation with Aboriginal groups.<sup>924</sup>

### *Selection of Juries Involving Aboriginal Customary Law*

3.180 In some cases single sex juries have been impaneled by the use of challenges, with the agreement of the parties and the consent of the court.<sup>925</sup> In these cases it was submitted that evidence to be called in the trial of

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<sup>919</sup> *ibid.*

<sup>920</sup> Unreported, District Court NSW, 19 October 1981.

<sup>921</sup> *Walker v R* (1988)38 A Crim R, 150.

<sup>922</sup> The court was referring to the 'native title' case of *Mabo v Queensland (No.2)* (1992) 1175 CLR 1; 107 ALR 1.

<sup>923</sup> *Walker v State of NSW* 126 ALR 321.

<sup>924</sup> In conversation with Mr Jim Berg of the Aboriginal Legal service, Mr Berg stated that there may be problems with Aboriginal people convicting persons 'of their own kind', given the reality of Aboriginal deaths in custody.

<sup>925</sup> *R v Sydney Williams* (1976) 14 SASR 1; *R v Gudabi* unreported NT Supreme Court 30 May 1983.

Aboriginal customary laws relevant to the offence could not be disclosed to persons of the other sex.

3.181 The Commission recommended that the court have a specific power to impanel a jury of one sex on application of a party where customary law forbids one sex from hearing the evidence. This should be done only after considering all options.<sup>926</sup> The Commission considered that this would be consistent with the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Sex Discrimination Act 1984* (Cth).<sup>927</sup>

## Conclusion

3.182 The above discussion highlights the need to review mechanisms which impede the participation of Aboriginal people on Victorian juries. Whether or not specific provision should be made for the representation of Aboriginals on juries where a defendant or victim is an Aboriginal is a matter requiring further investigation.

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<sup>926</sup> *Aboriginal Customary Laws, Vol 1, op.cit.*, p 440.

<sup>927</sup> *ibid.* Since the proposed provision applies equally to both sexes, and since it would only be applied in the circumstances to afford justice, it would not constitute discrimination against women as defined in Art 1. As regards the *Sex Discrimination Act*, s40(1)(d) creates a specific exemption for acts done by a person in specific compliance with an order of a court.