LAW REFORM COMMITTEE

Jury Service in Victoria

FINAL REPORT
Volume 2

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PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

Jury Service in Victoria

FINAL REPORT

VOLUME 2

REPORT ON OVERSEAS INVESTIGATIONS

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FUNCTIONS OF THE COMMITTEE

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

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

1. INTRODUCTION

1.1 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.[1] These terms of reference were amended in February 1995 to include a review of the practice of jury vetting.[2]

1.2 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.[3]

1.3 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.[4] 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.

1.4 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*;

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1 Victoria, *Government Gazette*, G 39, 29 Sept. 1994, p. 2343.

2 Victoria, *Government Gazette*, G 5, 9 Feb. 1995, p. 311.

3 Victoria, *Government Gazette*, G 24, 20 June 1996, p. 1567.

4 *Parliamentary Committees Act 1968* (Vic.), s. 4E.

b. the compilation of jury lists under Part II and the pre-selection of jurors under Part III of the *Juries Act 1967*; and

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*.[5]

1.5 In the course of conducting its Inquiry, in June and July 1995 a subcommittee consisting of five members and two staff travelled overseas to investigate the operation of the jury system in Canada, Hong Kong, Ireland, the United Kingdom and the United States. The delegation held 44 meetings in 16 cities across three continents. In total the delegation received evidence from over 130 experts; including judges, politicians, government and court officials, legal practitioners (both prosecution and defence) and legal and social-science academics.[6] Additionally, the Committee's research staff conducted extensive follow-up research between August 1995 and May 1996. The results of this investigation and the follow-up research are now published as volume two of the Committee's report.

1.6 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. For example, the chapter on the Hong Kong jury system anticipates what in July 1995 was thought likely to happen after the handover of the British Colony to the Republic of China, but does not discuss what actually has occurred. Nonetheless, the Committee believes that it is important to make the material which has been generated during and following its overseas investigations available in the present Report.

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

6 A list of the people the sub-committee met with overseas is contained in Appendix A to this Report.

'Right' to Trial by Jury

2.1 In Canada the right to trial by jury has been formally recognised. For the more serious criminal cases there is an entrenched right to a trial by one's peers under the Canadian Charter of Rights and Freedoms. The Charter forms part of the Canadian Constitution. This right to jury trial can be expressly waived by the accused.

2.2 The right to trial by jury is limited to the most serious offences, because s. 11(f) of the Canadian Charter of Rights and Freedoms only gives this right to a person charged with an offence that may be punishable by either imprisonment for five years or a more severe punishment. However, certain groups of persons are not protected by the right. Young people are excluded because, under statute, they can only receive a maximum sentence of three years in custody.[7] Those who fall within the following categories are also excluded:[8]

1. Where the offence is one under military law tried before a military tribunal.
2. Where the accused is a corporation.
3. Where the accused is an alleged dangerous offender.
4. Where the proceeding is a summary proceeding for contempt.

2.3 Due to the enshrinement of the right to jury trial in the Charter, federal or provincial legislation which is shown to infringe upon the right will be struck down by the courts.[9] This result is achieved by either applying s. 52(1) of the Constitution of Canada—which makes laws invalid that are

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7 Young Offenders Act R.S.C. 1985 c.Y-1. s. 20(1)(k); Stuart, *Charter Justice in Canadian Criminal Law*, Ontario, Carswell, 1991, p. 281. Young Offenders Act S.C. 1980–81–82–83, c.110, ss. 20 & 80.

8 Canadian Charter of Rights and Freedoms., s. 11(f). Atrens, J., *The Charter and Criminal Procedure,* Toronto, Butterworths, 1989, pp. 7 & 9.

9 *R. v. Bain* (1992) 10 C.R. (4th) 257 (S.C.C.).

inconsistent with the Constitution (of which the Charter is a part) to the extent of the inconsistency—or by Charter right. The latter is a limited right to apply to a court of competent jurisdiction to obtain a remedy which the court considers appropriate and just in the circumstances. The reasonable limits which are applied are those limits 'demonstrably justified in a free and democratic society'. Furthermore, evidence is excluded if it is shown to bring the administration of justice into disrepute.[10]

2.4 The Charter acknowledges the importance of the right to a jury trial in Canada. It states that a person should not be deprived of life, liberty and security unless in accordance with the principles of a fair trial.[11] Accordingly, there must be a 'fair and public hearing by an independent and impartial tribunal'.[12] This requirement aims to eliminate bias by the decision maker or the perception of bias.[13] A jury is independent if it is not subject to interference by outside groups. The test applied by the court is whether an informed and reasonable person would perceive the jury to be independent.[14] 'Impartiality' requires that the minds of the jurors are without actual and perceived bias. Canada's Bill of Rights (1960) also provides the right to a fair and public hearing by an independent and impartial tribunal, but this document has little if any application to modern legislation.[15]

2.5 Unsuccessful arguments have been made for an extension of the right to trial by jury, as read into the Magna Carta, to civil trials.[16] In civil cases provincial legislatures decide whether or not there is a right to jury trial. This is because they have constitutional responsibility for the administration of justice and procedure in civil matters.[17]

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10 Canadian Charter of Rights and Freedoms, ss. 1 & 24(2).

11 Canadian Charter of Rights and Freedoms, s. 7.

12 Canadian Charter of Rights and Freedoms, s. 11(d).

13 *R. v. Genereux* (1992) 70 C.C.C. (3d) 1 (S.C.C.) 17.

14 *R. v. Genereux* (1992) 70 C.C.C. (3d) 1 (S.C.C.) 17.

15 Canadian Bill of Rights (1960) s. 2(f). Hogg, P. W., 'A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights' in Beaudoin, G. & Ratushny, E., eds, *The Charter of Rights and Freedoms*, 1989, pp. 1–20.

16 Letter from Gomberg, F. K., The Advocates' Society, Toronto, Ontario to McCamus, J. D., Chair of the Ontario Law Reform Commission, 14 Sept. 1994, pp. 4–6.

17 Constitution Act 1867 s. 92(14).

The Legal Framework

Hierarchy of Courts

2.6 The Supreme Court of Canada receives appeals from the provincial courts of appeal on criminal and civil matters.[18] The Supreme Court is the highest court in Canada and, as such, has the ability to unite the 'ten provincial hierarchies into what is essentially a single, national system'.[19] In the interests of uniformity, the Court generally aims to interpret legislation consistently rather than looking at provincial judgments. Appeals for most civil matters require leave. Criminal appeals are without leave provided a dissenting opinion was given in the Provincial Court. Otherwise criminal appeals must be by leave and be on a question of law.[20]

2.7 Provincial Parliaments have the power to legislate on matters related to the administration of justice in their province, including the 'constitution, maintenance and organisation' of provincial courts of criminal and civil jurisdiction.[21] Provincial courts decide criminal and civil cases. In deciding these cases judges can apply constitutional, federal and provincial laws.[22]

2.8 In the provinces a process of amalgamation has seen the abolition of the county and district courts.[23] Each province now has a superior court (with an appeal division and a trial division) and an inferior court.[24] The two Canadian territories—the Northwest Territories and the Yukon Territory—have a similar court system. Accordingly, under the Criminal Code a 'court of appeal' means: in Prince Edward Island, the Appeal Division of the Supreme Court, and in all other provinces, the Court of Appeal. The superior courts of criminal jurisdiction for the provinces and territories are as follows:[25]

(a) in Ontario, the Court of Appeal or the Ontario Court (General Division);

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18 Supreme Court Act R.S.C. 1985, c. S26, s. 35, Constitution Act 1867, s. 101. Hogg, P. W., *Constitutional Law of Canada*, Toronto, Carswell, 1992, p. 211. Constitution Act 1867, s. 101(1).

19 ibid., pp. 208, 209.

20 ibid., p. 213.

21 Constitution Act, 1867 s. 92(14).

22 Hogg, op cit., p. 163.

23 Deans, R. & Sandell, H., *Canada's Court System*, Department of Justice, Canada, 1994, p. 5.

24 Hogg, op cit., p. 162.

25 Criminal Code R.S.C. 1985, c. C-46, s. 2.

(b) in Quebec, the Superior Court;

(c) in Prince Edward Island, the Supreme Court;

(d) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Appeal or the Court of Queen's Bench;

(e) in Nova Scotia, British Columbia and Newfoundland, the Supreme Court or the Court of Appeal;

(f) in the Yukon Territory, the Supreme Court; and

(g) in the Northwest Territories, the Supreme Court.

A 'court of criminal jurisdiction' means:

(a) a court of general or quarter sessions of the peace, when presided over by a superior court judge;

(b) in Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec City;

(c) a provincial court judge or judge acting under Part XIX of the Criminal Code; and

(d) in Ontario, the Ontario Court of Justice.

2.9 In those provinces where there are still two levels of courts as well as the provincial court, the Crown has a discretion as to whether to place the indictment in the Superior Court or the other court.[26]

2.10 The appointment and payment of inferior court judges is the responsibility of the provinces.[27] These judges rely on the principle of judicial independence (which in some provinces is statutory reinforcement) for their security of tenure.[28] An added protection exists for judges hearing criminal matters, in the form of the Charter of Rights and Freedoms. The Charter protects judicial independence by providing the right to trial by an 'independent and impartial tribunal'.[29]

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26 *Martin's Annual Criminal Code 1996*, with annotations by Greenspan, E. L., Ontario, Canada Law Book Inc., 1996, Annotation for s. 468.

27 Constitution Act 1867. s. 92(4).

28 Hogg, P. W., *Constitutional Law of Canada* , p. 169.

29 ibid., p. 170. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Being Schedule B of the Canada Act 1982 (U.K.), c.11, s. 11(d).

2.11 Superior court judges are appointed and paid for by the Federal Government and their tenure is constitutionally guaranteed.[30]

Incidence of Trial by Jury

Criminal Procedure

2.12 Under the Constitution Act 1987 the Federal Parliament has the power to make laws on criminal law and criminal procedural matters (other than the constitution of courts of criminal jurisdiction).[31] This power was used to enact the Criminal Code R.S.C. 1985 c. C-46 which specifies when a jury trial is available in criminal cases.

2.13 Where there is an indictable offence which is triable only by a superior court of criminal jurisdiction, as is the case for the most serious offences such as treason and murder or an attempt to commit murder, trial is by a judge and jury unless both the accused and the Attorney-General give consent for trial by judge alone.[32] If their consent is given then the offence is tried without a jury and the judge can order any offence to be tried in conjunction with that offence.[33] The consent of the accused and the Attorney-General cannot be withdrawn unless both of them agree to its withdrawal.

2.14 The least serious indictable offences are heard by provincial courts without a jury. These offences are listed in s. 553 of the Code, and include theft under $5,000 and obtaining money or property valued under $5,000 by false pretences and fraud in relation to fares. This mode of trial occurs without the consent of the accused.[34]

2.15 In relation to other indictable offences the accused may elect to be tried by a jury after a preliminary hearing or by judge alone, with or without a preliminary hearing.[35] A 'speedy trial' occurs when the accused elects to have a preliminary hearing and to be tried by a judge without a jury. The accused may be tried by either a judge of a superior court of criminal jurisdiction sitting without a jury or by a judge of a court of criminal jurisdiction sitting

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30 Constitution Act. 1867 ss. 96–101.

31 Constitution Act 1867 , s. 91(27).

32 Criminal Code, s. 473.

33 Criminal Code, s. 473.

34 Criminal Code, s. 553.

35 Criminal Code, ss. 536(3) & 558.

without a jury. Although the accused elects the mode of trial, he or she has no say on the level of judge who holds the trial.[36] A 'summary trial' occurs when the accused chooses to be tried by a provincial court judge without a jury and without a preliminary inquiry.[37] As a matter of practice the accused tends to elect at first instance to have a preliminary hearing and jury trial and then re-elects to be tried by judge alone. When a preliminary hearing is held for indictable offences the prosecution calls sufficient witnesses to establish a prima facie case. These witnesses can be cross-examined by the defence. The defence may also call witnesses, but in practice this is rarely done.

2.16 Summary offences, such as soliciting, are tried without a jury. Trial is without a jury for those indictable offences which proceed by summary conviction. For these hybrid offences (which include assault) the prosecutor has a discretion whether to prosecute by indictment or by summary conviction.

Civil Procedure

2.17 Quebec abolished civil juries in 1976.[38] In the other provinces for most civil cases the parties may chose between trial by judge alone and trial by jury.[39] In Alberta, British Columbia, Manitoba and Newfoundland for most types of cases there is a presumption that trial will be by judge alone.[40] But in Nova Scotia there is a general presumption of trial by jury and where a party seeks trial by judge alone he or she must show that a jury should not be used.[41]

2.18 A judge in Alberta, British Columbia and Newfoundland has the power to take a trial away from a jury where complex issues, scientific investigations or prolonged examination of documents or accounts will be involved.[42] Similarly, in Alberta, British Columbia, Nova Scotia, Prince

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36 Granger C., Charron, L. & Chumak P., *Canadian Criminal Jury Trials*, Toronto, Carswell, 1989, p. 46.

37 Criminal Code, ss. 536(2) & 536(3).

38 Juries Act S.Q. 1976 c.9, s. 56.

39 For example, in Ontario this choice exists under the Courts of Justice Act S.O. 1984, c.11, s. 121; Juries Act, R.S.O. 1990, c. J.3. s. 26.

40 Jury Act R.S.Nfld 1991 c16, s. 32(3) Rules of Court B.C. Reg. 310/76 (as amended) and Rule 39(17).

41 Nova Scotia, Law Reform Commission, Final Report, *Juries in Nova Scotia*, June 1994, (hereafter, 'Nova Scotia Report') p. 25, Clause 12 of the Draft Juries Act.

42 Jury Act, S.A. 1982, c. J-2.1, s. 16(2).

Edward Island and Saskatchewan a judge may override a request for jury trial.[43]

2.19 In Prince Edward Island a jury trial is not allowed for certain actions. These actions include: 'execution of a trust, specific performance of contracts, partition and sale of property and "other equitable relief" actions'.[44] Similarly, in British Columbia jury trials are not allowed for certain listed matters.

2.20 In specified cases (for example, cases involving defamation or false imprisonment) trial in Alberta, New Brunswick, Newfoundland and Saskatchewan will be by jury on application from one of the parties.[45] For these specified cases in Prince Edward Island, Northwest and Yukon Territories trial must be by a jury, and in the Territories jury trial is restricted to these instances.[46] By contrast, in Nova Scotia and Manitoba these cases are tried by a jury unless the parties agree on trial by judge alone.[47]

2.21 The availability of jury trials in civil cases in the Canadian Provinces is summarised in the following table:

	JUDGE ALONE TRIAL	JURY TRIAL
ALBERTA	Available (without application).	Permitted on application for: defamation, malicious arrest, malicious prosecution, seduction, breach of promise & torts/property (where $10,000 or more is involved).
BRITISH COLUMBIA	List of matters where there must be judge alone trial. Available (without application).	Permitted on application , unless precluded in list.
MANITOBA	Limited availability.	Compulsory (unless waived) for defamation, malicious arrest, malicious prosecution & false imprisonment cases Permitted in all cases if an application is made.
NEW BRUNSWICK	Available.	Permitted on application for defamation, malicious prosecution, false imprisonment, breach of promise. For other claims jury trial is discretionary.

43 Jury Act, S.Sask. 1981, c.J-4.1. s. 20.

44 'The Jury Selection Process in Canadian Civil Juries', document prepared upon request for the Australian High Commission and the Victorian Law Reform Committee Delegation, Jun. 1995, p. 2.

45 Jury Act, S.A. 1982, c. J-2.1, s. 16 Jury Act, S.Sask. 1981, c.J-4.1. s. 16, Jury Act, R.S.Nfld. 1991. c.16. s. 32.

46 Court of Queen's Bench Act S.M. 1988–1989 c.4, s. 64. Jury Act, S.P.E.I. 1992, c.37, s. 40, Jury Act, R.S.N.W.T. 1988, c. J-2) & Jury Act, R.S.Y.T. 1986. c.97.

47 Judicature Act, R.S.N.S. 1989, c.240.

NEWFOUNDLAND	Available.	Permitted on application for defamation, malicious prosecution, false imprisonment, breach of promise, seduction. For other claims jury trial is discretionary.
NOVA SCOTIA	Limited availability.	Presumption of jury trial unless waived for defamation, malicious arrest, malicious prosecution, false imprisonment, criminal conversation & seduction. Permitted on application for all claims.
ONTARIO	List of matter where there must be judge alone trial.	Permitted after notice.
PRINCE EDWARD ISLAND	List of matter where there must be judge alone trial.	Available in all claims on application other than those precluded.
SASKATCHEWAN	Available (without application)	Permitted on application for defamation, malicious prosecution, malicious arrest, breach of promise, claims involving more than $10,000 & if in interests of justice — eg., where community involvement is desirable.
NORTHWEST & YUKON TERRITORIES	Available for cases not excluded.	List of cases that must be tried by jury.

2.22 Civil juries in most provinces comprise six jurors. However, in New Brunswick and Prince Edward Island seven jurors are needed, while in British Columbia there must be eight jurors and in Newfoundland nine jurors are required.

Representativeness of the Jury System

General Concepts of Representativeness

2.23 In 1991 the Supreme Court of Canada held that generally a person is to be tried by a jury drawn from the community where the alleged offence occurred and which is representative of that community.[48] The Court in *Sherratt v. R.* found that the characteristics of impartiality and representativeness were necessary in order for a jury to be able to perform its functions properly.[49] By the term 'representativeness' the Court meant that the jury should be representative of a cross-section of the community and, therefore, also representative of the larger community to the extent that it is possible and appropriate. Without representativeness (and impartiality) the right to jury trial provided by the Charter would be meaningless, according to Madam Justice L'Heureux-Dube. Here jury representativeness may have

48 *R. v. Sherratt* [1991] 1 S.C.R. 509; Pomerant, D., Department of Justice, Canada, Working Document, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, April 1994, (hereafter 'Pomerant, Multiculturalism') vi.

49 *R. v. Sherratt* [1991] 1 S.C.R. 509 at 141.

referred to the trial panels or to the sources from which the selection of prospective jurors was made.

2.24 However, in *R. v. Biddle* the members of the Supreme Court who considered the concept of 'representativeness' regarded it as being a less significant attribute than was considered the case in *Sherratt*. Justice McKachlin and Madam Justice L'Heureux-Dube stated that the right to jury trial provided by the Charter does not include the right to a jury which is representative of the community.[50] Representativeness was viewed by that court as being an 'impossible achievement'. It is impossible because the community can be divided up into many groups based on factors such as gender, race, class and education. Here representativeness means that the community is reflected on a smaller scale within the jury, rather than that a person takes upon himself or herself 'the duty of protecting...the interests of the group [he or she] is considered to represent'.[51] This second interpretation is not used because it would place the values of representativeness and impartiality in conflict.

2.25 Accordingly, the Charter right to jury trial can only be invoked by an accused if representativeness is excluded to the point that its exclusion is seen by the court as undermining the impartiality of the jury. This is because the Charter protects the right to an impartial jury and 'representativeness' may only assist in achieving impartiality.

2.26 Nevertheless, some commentators have argued that the Charter's definitions of concepts such as the right to a jury trial, the nature of juries and a 'fair trial' are undergoing a process of evolution:[52]

> After 13 years of dealing with the Charter we are still very uncertain about where it is going to take us, and that is true in relation to notions like fair trial. It is possible — just to give an example — ...that we could argue about what a fair trial by jury ought to be, with a view to legislative amendment... On the other hand, someone might say that in the context of a particular trial that the manner in which the judge dealt with the jury offends fundamental notions of fairness, quite apart from whatever the Criminal Code says or the provincial legislation dealing with juries.

However, at the moment there is no requirement that the jury reflect a certain

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50 McLachlin J. & L'Heureux-Dube J. in *R. v. Biddle* (1995) 96 C.C.C. 3d 321.

51 Marshall, G., 'The Judgement of One's Peers', in Walker, N., ed., *The British Jury System,* Cambridge, University of Cambridge Institute of Criminology, 1975, p. 8.

52 Faculty of Law, McGill University, Meeting with Victorian Law Reform Committee (hereafter, 'VLRC') delegation, Montreal, 26 Jun. 1995, p. 34.

racial balance, and provincial legislation only ensures a limited degree of representativeness by randomly selecting people within the district.[53]

Community Attitudes to Trial by Jury

2.27 While surveys show that people tend to find jury service a rewarding experience, there is generally a negative attitude towards service in the community. This is because people tend to see it as an obligation rather than a privilege. It is time consuming, financially disadvantageous and inconvenient for people to serve on a jury. Juries are also regarded by some people as being expensive for the taxpayer and time consuming for the courts. These attitudes tend to lead to people seeking excusal or exemption. Before getting to court one-third to one-half of jurors ask to be excused and between 10 per cent and 25 per cent of people later seek exemption from the judge.[54] Considerable expense is incurred since it is necessary to send notices to up to twice as many people as are needed in court to ensure that there are sufficient prospective jurors.[55]

2.28 The Law Reform Commission of Nova Scotia found that the perception of minorities towards jury service reflects their concerns about the representativeness of juries:[56]

> Many people feel that the juries are not representative of the entire community but rather reflect only a small segment of the people who make up Nova Scotia. This has given rise to a concern that the values, morals and attitudes of only a small group of people are shaping the way in which justice is provided in Nova Scotia. It can also create the impression that some people in Nova Scotia, particularly people from ethnic communities, have no role in setting the standards for what is just and fair in society by serving as jurors.

2.29 Despite the negative attitudes towards jury service, most people believed in 1979 that they were more likely to receive a fair and just verdict when tried by a jury than by a judge: 9.2 per cent of people surveyed thought the judge would be more likely to arrive at a fair verdict, 36.7 per cent thought that a jury would be and 54.1 per cent thought that judge and jury would be equally as likely.[57] A 1988 Canadian study on attitudes towards juries within

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53 *R. v. Sherratt* [1991] 1 S.C.R. 509 at 525; Nova Scotia, Report, p. 5.

54 ibid., 5.

55 ibid.

56 Law Reform Commission of Nova Scotia, Discussion Paper, *Juries in Nova Scotia*, (hereafter, 'Nova Scotia, *Discussion Paper*') p. 1–2.

57 Law Reform Commission of Canada, *Studies on the Jury* , Ottawa, The Commission, 1979, p. 10.

the legal community found that there was support for juries, with people responding in the following manner:[58]

1. Only 34.1 per cent of judges and 26.9 per cent of lawyers believed that a judge was more likely to reach a fair and just verdict, compared to 20.3 per cent of judges and 31.5 per cent of lawyers who thought a jury was more likely to do so.
2. 86.4 per cent of judges and 70.9 per cent of lawyers believed that it was unlikely that a person could be wrongfully convicted by a jury.

Jury District Formation

2.30 Jurors are selected from jury districts. The definition of a 'jury district' in each province determines the nature of the community from which the jury is selected, and therefore affects what is meant by the term 'representative of the community'. Under provincial legislation jury districts consist of either a county, district, judicial district or of those people living within a certain distance of the court. These definitions are intended to reflect the general rule that an accused must be tried where the alleged offence occurred and by people living in that area.[59] The rule is based on the historical role of jurors. Originally jurors were neighbours of the accused and determined their verdict according to their personal knowledge of the relevant facts.

2.31 Nevertheless, the Criminal Code contains exceptions to this rule. The Code allows a judge to order a change of venue if it appears expedient to do so in the interests of justice. This may be the case when a change of location is needed to ensure a fair trial for the accused, perhaps due to pre-trial publicity.[60] The Code also allows the accused to apply to be tried in either English or French, such an application may also impact upon where the trial is held. For example, it may be easier to form a French jury panel in a location other than where the offence occurred.[61]

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58 Stuesser, L., 'Lawyers judge the jury' (1990) 19 *Man. L. J.* 52, 57–58.

59 *R. v. Sarazin and Sarazin* (1978), s9 C.C.C. (2d) 131 (P.E.I.S.C.) cited in Pomerant, *Multiculturalism*, op. cit. p. 14.

60 Criminal Code, s. 599(1)(a).

61 *R. v. Tremblay* (1985) 42 Sask.R. 216.

2.32 The jury district in Alberta consists of the judicial district where the court is sitting.[62] In Newfoundland the jury district is within 25 kilometres of the court, although this may not be the case if alternative sources need to be used to compile the list, for example, where the trial is to be held in French.[63] A jury district in the Northwest Territories is within 30 kilometres of the court and in Yukon within 20 miles. In Quebec the district comprises of the municipalities within the judicial district of the sheriff.[64] In British Columbia and Manitoba the sheriffs have a discretion in regard to describing the jury districts within their counties.[65] In British Columbia this discretion is limited by the *Sheriff's Operating Manual* which specifies that panellists should be chosen from within a one hour travelling distance by car or by public transport from the court.[66] However, the sheriff does have the discretion to empanel people residing further away (subject to the direction of the trial judge). This discretion may be exercised, for example, in relation to indigenous people when the accused is an indigenous person.

2.33 In New Brunswick jury districts consist of the prescribed counties or groups of counties in the Province. In Nova Scotia there are eighteen jury districts. These are based on counties and court locations.[67] There are six districts in British Columbia.[68] The jury district in Ontario consists of people in the county and in Indian reserves.[69] In Saskatchewan the jury district is the province.[70]

2.34 If there are a lot of courts scattered throughout the province then defining the jury district in terms of its distance from the court will ensure a high degree of representativeness. However, if there are only a few courts in the province and the jury district is defined in this manner then the jurors may not represent the community where the alleged offence occurred.[71]

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62 Jury Act S.A. 1982, c. J-2.1, ss. 1 & 6.

63 Jury Act. F.S.Nfld. 1990, s. 11.

64 Jurors Act R.S.Q, s. 7& 8.

65 Jury Act R.S.B.C. 1979, s. 7; .Jury Act L.R.M, s. 5.

66 Ministry of Attorney General, Jury Administration, *Sheriff's Operating Manual*, Jan. 1993, para. 6–3.

67 Juries Act R.S.N.S. 1989, s. 7.

68 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver 19 Jun. 1995, p. 87.

69 Juries Act R.S.O 1990, s. 7.

70 Jury Act S.Sask, 1980–81. s. 6 .

71 Nova Scotia, Report, p. 19.

2.35 According to David Pomerant the 'sources of selection should be reasonably representative of the community where the offence is alleged to have been committed'.[72] The meaning given by the courts to 'representative of the community' is not clear. It may mean representative of the community where the offence occurred or representative of the community by and large. For an accused person the meaning of the phrase becomes vital when the location of the trial changes from the district where the alleged offence occurred to one which is greatly different, for example, in terms of its racial diversity.[73] The issue arises because the Crown has 'a fair bit of leeway in where the charge is made', so that provided the court has jurisdiction to hear the matter 'you can have a trial in [a] community to which nobody, neither witnesses, victims [nor] accused have any ties at all'.[74]

2.36 The courts have not recognised a right for an accused to be tried by jurors who reside in his or her community.[75] This is because the accused has no right to be tried by a jury assembled from a smaller geographical area than that defined in the legislation as the jury district. In *R. v Nepoose (No.2)* approval was given for the use of a jury district which was within 50 kilometres of the court.[76] The Court took the view that if the jury was selected from within a smaller distance, as requested by the accused, this would have the effect of removing the general population from the panel.

2.37 Even in those provinces that define jury districts in terms of counties, such as Nova Scotia, the jury may not be drawn from the community where the offence took place. In the Final Report of the Law Reform Commission of Nova Scotia on Juries attention was drawn to this prospect. Moreover, the Commission emphasised the fact that the communities in Nova Scotia may differ greatly: [77]

> There are communities throughout Nova Scotia which differ significantly in their composition. Since jurors are usually taken from a specified geographical area reflecting the constraints imposed by travel to the Court, this may mean in jury trials that not only is an accused tried at a location further away from the place where the offence occurred but the jury is also unlikely to be drawn from the community.

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72 Pomerant, *Multiculturalism*, p. 39.

73 ibid., p. 32.

74 Criminal Law Policy Section, Department of Justice, Canada, Ottawa, Meeting with the VLRC delegation 21 Jun. 1995, p. 8.

75 *R. v. Nepoose* (1991) 85 Alta. L.R. (2d) 8 (Alta. Q.B.)

76 85 Alta.L.R. (2d) 8 (Alb.Q.B.).

77 Nova Scotia, Report, p. 8.

2.38 According to the Commission several events have tended to increase the likelihood that the jury will not be drawn from the community where the offence took place:[78]

(i) The merger of the Supreme and County Courts.

(ii) The likely closure of some of the Court Offices, as a result of recommendations made in the 1991 Report of the Nova Scotia Court Structure Task Force.

(iii) The fact that judicial districts in Nova Scotia have increased in size because of the merger of courts. In the future the jury districts may also be reduced from eighteen to four.

2.39 To solve the problem of the jury not being representative of the community where the alleged offence occurred the Commission recommended post codes of the area be used to compile the list of potential jurors.[79] In Manitoba the use of post codes was also recommended for urban areas by the *Inquiry Investigating Aboriginal Justice*. It suggested using the post code near where the offence occurred or alternatively, that of the accused person's and victim's place of residence, in equal numbers.[80]

Juror Eligibility Criteria

Qualification Criteria in Criminal Cases

2.40 The Criminal Code adopts provincial legislation on jury qualification and summoning.[81] At present citizenship is a requirement for eligibility for jury service in all the provinces and in the territories, except for the Northwest Territories. In the Northwest Territories permanent residency is required. Accordingly, the legislation in Alberta, Newfoundland, Nova Scotia, Ontario and Saskatchewan provides that residents of the province who are Canadian citizens and at least eighteen years old qualify for service.[82] In Quebec a similar provision exists, although instead of requiring residency the person must be on the electoral list.[83] In British Columbia and Manitoba every person

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78 ibid., p. 35.

79 ibid., p. 36.

80 *Report of the Aboriginal Justice Inquiry in Manitoba*, 1991, cited in Nova Scotia, Report, p. 36.

81 Criminal Code, s. 626(1).

82 Jury Act S.A. 1982, c.J-2.1, s. 3. Jury Act R.S.Nfld. 1990, s. 4; Juries Act R.S.N.S. 1989, c.242, s. 4 & 5(4); Juries Act R.S.O. 1990, s. 2; Jury Act S.Sask. 1980–81 , s. 3.

83 Jurors Act R.S.Q. 1976. s. 3.

has a right and duty to serve as a juror unless disqualified or exempt.[84] In New Brunswick to be eligible for jury service a person must be a resident, aged between nineteen and seventy years, a Canadian citizen and not afflicted with blindness, deafness or other physical or mental condition incompatible with the discharge of the duties of a juror.[85] The requirement of citizenship is also reinforced by the federal Criminal Code, which states that a challenge for cause can be made on the basis that the potential juror is an 'alien'.[86]

2.41 The lack of representativeness caused by requiring citizenship was acknowledged by the Ontario Court (General Division) in *R. v. Church of Scientology*. The Court held that the exclusion of non-citizen permanent residents in Toronto (whose numbers were large) meant that representativeness was not achieved.[87] However, it found that because the legislature demanded that the jury be comprised of citizens, the Court could do nothing about this unless the requirement of citizenship was shown to be unreasonable.

2.42 David Pomerant, a leading academic commentator, has recommended the widening of the categories of people who qualify for jury service by the removal of the requirement of citizenship. He also suggested that the provinces, in the interests of consistency, adopt a uniform approach to jury qualification.[88] The requirement of citizenship not only reduces the representativeness of the jury, but it also infringes upon the accused person's opportunity to have a trial by one's peers. The reasons for this are that first, the community where the crime is committed will consist of residents who are citizens and non citizens; and secondly, people who are accused of crimes may not be citizens. There are around 250,000 immigrants entering Canada each year.[89] Consequently, in some Canadian areas the ethnic community will be quite large.

2.43 According to Pomerant, removing the requirement of citizenship would not only broaden the representativeness of the jury but it would accord

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84 Jury Act R.S.B.C. 1979, s. 2, Jury Act , L.R.M. 1987, s. 2.

85 Jury Act S.N.B. 1980, s. 2.

86 Criminal Code, s. 638(1)(d).

87 (No.1) (1992), 74 C.C.C. (3d) 327 (Ont. Ct. Gen. Div.) 336.

88 Pomerant, *Multiculturalism*, vii.

89 Currie, A., *Ethnocultural Groups and the Justice System in Canada,* Technical Report, Department of Justice Canada, 1994, p. 56.

with the policy underlying the Canadian Multiculturalism Act.[90] The Act seeks to promote input from people of all origins, whether or not they are citizens, in the shaping of Canadian society.

2.44 Similarly, the Nova Scotia Law Reform Commission initially recommended removing the requirement of citizenship. Concern was voiced that the exclusion of immigrants from jury service might infringe upon the Charter. However, the majority of Commissioners later decided that citizenship should be retained as a requirement.[91] Its retention was supported on the basis that immigrants may not have sufficient knowledge of the language or of local values to justify their serving on a jury.

2.45 The Uniform Law Conference of Canada in 1975 also supported the use of citizenship as a basic qualification for service.[92] The requirement of citizenship is convenient because the electoral roll does not include non-citizens and it would be difficult to place them on the jury list.[93] For the same reason, the requirement that jurors be over 18 years old is also a convenient one.

Disqualification, Ineligibility and Excusal Criteria

2.46 There are two stages when exemptions may be applied to potential jurors. At the first stage, a person can, after receiving a summons, send in a request for an exemption together with an affidavit. At the second stage, the judge will ask potential jurors, just before the jury is empanelled, whether any of them are exempt.[94] As a result of the granting of exemptions only about 30 per cent of people summoned for jury service go on the panel.

2.47 According to Pomerant, the disqualification, ineligibility and exemption criteria should be as narrow as possible in order to increase the representativeness of the jury. Consideration should be given, therefore, to reducing the categories of exemption. This approach is not new; it was

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90 Pomerant, Multiculturalism, p. 52.

91 Nova Scotia, Report, pp. 28–29.

92 *Proceedings of the Fifty-Seventh Annual Meeting of the Uniform Law Conference of Canada*, Halifax, Nova Scotia, 18–22 Aug. 1975, (hereafter, 'Uniform Law Conference, 1975'), p. 256.

93 Canada. Law Reform Commission, *The Jury in Criminal Trials*, Working Paper 27, 1980, 40. (hereafter, 'Canada, Law Reform Commission Working Paper 27')

94 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 3.

proposed at the Uniform Law Conference of Canada in the Proposed Uniform Jurors Act in 1975. The proposal recommended the use of the following categories of exemption:[95]

1. Exemption where there is a conscientious or religious objection.
2. Exemption on the ground that exceptional hardship would otherwise be incurred in relation to a person's livelihood or in meeting legal or moral obligations to other people who immediately rely on him or her.
3. Exemption where serving would be contrary to the public interest on the grounds that the person performs essential or urgent services which cannot be reasonably rescheduled or performed by someone else or services that tend not to be performed by another when that person is absent or on vacation.

2.48 The grounds for excusal should be kept to a minimum to promote the representativeness of juries, according to the Law Reform Commission of Canada.[96] Nonetheless, it recommended that in order for local circumstances to be considered, these grounds should be stated in general terms.

2.49 The use of fewer categories of exemption and disqualification was also recommended by the Nova Scotia Law Reform Commission in 1994.[97] The Commission recommended that disqualification should only occur when a person is not a resident or his or her occupation is one which would make jury service inappropriate, mainly due to a perceived bias. This approach distinguishes between the various concerns that motivated the existing categories of exemption, with some of them being found to be inappropriate. These concerns had centred around hardship and the public perception of either a lack of impartiality or that some occupations provide services which are more important than jury service.

2.50 Accordingly, the Commission's Draft Juries Act provides that every citizen in Nova Scotia who is at least 18 years of age is eligible for jury service unless disqualified. The list of people who are disqualified is as follows:[98]

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95 Uniform Law Conference, 1975, p. 260, Schedule 2.

96 Canada, Law Reform Commission Working Paper 27, p. 44.

97 Nova Scotia, Report, 28.

98 ibid., Appendix B, ii.

a) the Lieutenant Governor of the Province of Nova Scotia, a member of the House of Assembly, the House of Commons, or the Senate;

b) a Judge of a Court, or an officer of the Supreme Court of Appeal;

c) people who hold a law degree;

d) a full-time member of any police force in the province, a probation officer, or a warden or employee of a correctional institution.

Under the draft, medical practitioners would be automatically excused, after applying. The Commission asserted that the other exemptions should not be automatic, rather they should be assessed on a case by case basis. Excusals could be granted where appropriate due to hardship, illness, or inconvenience.

2.51 The Law Reform Commission of Canada also doubted the validity of the argument that some occupations provide services which are more important than jury service. It regarded only legislatures and Cabinet Ministers as performing occupations which would justify automatic exemption.[99]

2.52 The Victorian Law Reform Committee delegation (the VLRC delegation) was also informed that the jury system is not representative of the community because of the nature of the categories of exemption. Mr Gaston St-Jean, the Executive Director of the Criminal Justice Association, described the problem as resulting in an absence of professional persons on juries:[100]

> One of the problems with our jury system in Canada is that you exclude ... all the people that are involved in the administration of the law, judges, lawyers, policemen, their spouses, their employees, they are excluded, plus all professionals...The doctors, the vets, the dentists, admittedly they don't have the time or they have excuses, but I have never heard [of] a case where they had a professional on it.

2.53 The absence of some professionals, namely lawyers, has been seen as necessary by the Law Reform Commission of British Columbia. Lawyers need to be excluded from juries in order to avoid the perception that the process is

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99 Canada, Law Reform Commission Working Paper 27, p. 43.

100 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 7.

further 'driven by the interests of the legal community'.[101] It is desirable that the jury system be seen by the public as involving the community. Furthermore, if there was a lawyer on the jury then the other members of the jury might defer to him or her because he or she is a lawyer.

2.54 The categories of persons who are described as being unable to serve on juries, or able to be exempted, vary among the provinces.[102] The language used to describe these categories also varies, with the following terms being used: disqualified, exempt, excluded, ineligible, may be exempted, and a ground of exemption. Not only does this difference in language make comparison between the jurisdictions difficult, but the meaning of some of the terms is confusing. For example, the Law Reform Commission of Nova Scotia found that in relation to s. 5 of the Nova Scotia Juries Act the terms 'exemption' or 'not liable' were misleading:[103]

> It appears that these people could serve if they so chose. In fact, this is not accurate because some of these exemptions are actually disqualifications in that the presence of some groups, such as Judges, on juries might appear contrary to the requirement of impartiality.

2.55 However, since the language in the legislation may determine whether or not persons are able to serve on a jury, if they so chose, the following discussion of jury service needs to make reference to the particular term used. For this reason, the following sections need to be read together in order to understand who may serve on a jury in the jurisdictions under consideration.

2.56 The Criminal Code is also relevant to the following categories since it specifies that no person can be disqualified, exempted or excused on the grounds of their sex.[104]

Disqualification

2.57 In British Columbia, Manitoba, Quebec, and Newfoundland the term 'disqualified' is used to exclude persons from jury service because of their

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101 British Columbia, Law Reform Commission, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 11.

102 Juries Act R.S.N.S., s. 5; Juries Act R.S.O. 1990, ss. 3 & 4, Jurors Act, R.S.Q., ss. 3–6. Jury Act S.Sask 1981, s. 4 & 5; Jury Act S.N.B. 1980. The NB Bill (once passed) will replace the current list of people who are ineligible. Jury Act S.A. 1982, ss. 4 & 5; Jury Act RSBC 1979, s. 3–6.

103 Nova Scotia, Report, p. 10.

104 Criminal Code, s. 626(2).

occupation. In these jurisdictions the term applies to persons who are involved in the administration of justice, such as judges and their officers, barristers and solicitors (or notaries), coroners (in Manitoba and Quebec), court officials or officers, and employees of the Justice Department or Attorney-General's Department and of the Solicitor General (in British Columbia, Manitoba and Newfoundland). In some jurisdictions specific mention is also made to the disqualification of the following persons: a Justice of the Peace (in Manitoba and in Newfoundland), members of the Police Force (in Manitoba and Newfoundland), the Sheriff and his or her officers, wardens and prison officers (in British Columbia, Manitoba and Newfoundland); and Peace Officers (in British Columbia, Manitoba, and Quebec). In Quebec firemen are also disqualified from jury service.

2.58 Members of the Executive Council, House of Assembly, the Canadian Senate, the House of Commons and of the Privy Council are disqualified from jury service in British Columbia, Manitoba, Quebec and Newfoundland. The officers of members of the Canadian Senate and House of Commons are disqualified in Manitoba and Newfoundland, and officers of the House of Assembly are disqualified from jury service when the House is sitting in British Columbia and Newfoundland. The consorts of members of the Executive Council, Canadian Senate, House of Commons, or Privy Council are also disqualified.

2.59 Additionally, persons will be 'disqualified' because of a relevant criminal conviction in British Columbia, Manitoba, Newfoundland, Nova Scotia and Quebec. The term 'disqualified' is applied to persons who have a conviction for an indictable offence in Manitoba. Disqualification in British Columbia and Newfoundland will result where a person was sentenced within the last five years for an offence carrying a certain punishment or level of fine. Persons convicted of an offence punishable by two or more years are disqualified in Nova Scotia. In Quebec any criminal act will disqualify a person from jury service. A person who is charged with an offence will be disqualified in British Columbia, Manitoba and Newfoundland if the offence carries a penalty of one year or more.

Ineligibility, *Exclusion*, *Exemption and Excusal*

2.60 In Ontario and New Brunswick persons who are unable to serve on a jury are referred to as being 'ineligible'. This term is also used in the New

Brunswick Bill 87 (an Act to Amend the Jury Act). In Alberta the term 'excluded' is used and in Nova Scotia the phrase 'shall be exempt' is used. Included in these categories are persons who are involved in the administration of justice, such as solicitors and barristers (in Alberta and Ontario students at law are also excluded or ineligible), judges and justices of the peace, (except for New Brunswick and Nova Scotia where justices of the peace are not mentioned), members of the police force (in Alberta, Nova Scotia, New Brunswick and Ontario (every person enforcing the law), and employees of the Department of Justice (in Alberta and New Brunswick). In Ontario and New Brunswick spouses of persons associated with the administration of justice (and in the case of New Brunswick (and in Bill 87) also the legislative branch of government) are ineligible for jury service.

2.61 A range of other professionals are also ineligible for jury service in some of these jurisdictions: for example, medical practitioners and dentists in Nova Scotia, New Brunswick (also veterinarians) and Ontario (but not dentists) and firefighters (in Ontario[105] and New Brunswick and under Bill 87).

Involuntary Exclusion from Jury Service

2.62 Persons with a mental or physical impairment which is incompatible with jury service will also be disqualified in British Columbia and Manitoba. In Quebec persons with a mental illness or deficiency are disqualified, and persons with an infirmity are exempt. In Ontario persons with a physical or mental impairment are ineligible if it seriously impairs their ability to serve on a jury. In New Brunswick persons who are blind, deaf or have any other physical or mental condition incompatible with jury service are ineligible. In Alberta persons with a mental, physical or other infirmity incompatible with the discharge of the duties of a juror may be exempted. However, such a provision will not apply in Alberta and British Columbia where a person can see or hear adequately with assistance from either a device or a person.[106]

2.63 The other Canadian jurisdictions are under pressure to adopt the approach taken in British Columbia and Alberta towards persons with a disability. Community groups have raised concerns that disabled people are discriminated against by being excluded or exempted from jury service. As a result, the New Brunswick Bill 87 when enacted will remove the broad

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105 Fire Fighters Exemption Act, s. 1.

106 Jury Act, R.S.B.C. 1979, c. 210, s. 4.1; Jury Act, S.A. 1982, c. J-2.1, s. 5.1(1).

ineligibility and replace it with a provision that states that persons with a physical or mental condition which is incompatible with the discharge of the duties of juror may be exempted from jury service only if they cannot be aided or assisted so that they can perform these duties.

2.64 Nonetheless, it may still be difficult for persons with a disability to serve because prosecutors may, as a matter of practice, exclude some handicapped people on the ground that their service is 'just physically impossible'.[107] This exclusion, if it occurs, has been described by the federal Justice Department as being an infringement upon the right to participate in the criminal justice system:[108]

> They have rights to participate in a criminal justice system and if they are automatically disqualified from sitting as jurors those rights are being diminished.

2.65 The federal Department of Justice has suggested that there should be a review of provincial and federal legislation to determine whether the process of jury selection discriminates against people based on disability.[109] Two sources of discrimination were identified in the Department's consultation paper.[110]

1. All provinces provide that a person should be disqualified from serving on a jury if he or she has a physical or mental infirmity which is incompatible with the discharge of the duties of a juror. Provision may also exist to prevent a person who is unable to speak, read or understand the language in which the trial is to be conducted from serving on the jury.
2. The Criminal Code provides that a juror can be challenged for cause on the ground that he or she is physically unable to perform the duties of a juror properly.[111]

2.66 Where a person is unable to understand the language in which the trial is to be conducted he or she will be disqualified from jury service in British Columbia, Manitoba, Quebec, and Newfoundland.

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107 Criminal Law Policy Section, Department of Justice Canada, Meeting with the VLRC delegation, Ottawa, 21 Jun. 1995, p. 4.

108 ibid., p. 3.

109 Canada. Department of Justice, *Amendments to the Criminal Code and the Canada Evidence Act With Respect to Persons With Disability*, Consultation Paper, May 1993, pp. 12–13.

110 ibid.

111 Criminal Code, s. 638(1)(e).

Discretionary Excusal and Deferral

2.67 Excusal on the ground of hardship or care of another person is available in many of the Canadian jurisdictions, for example, in Alberta, New Brunswick(Bill 87), Quebec (where a persons health or domestic obligations are incompatible with jury service, or if the public interest allows their exemption for reasonable cause), British Columbia, Newfoundland, Manitoba and Saskatchewan.

2.68 The New Brunswick Bill will remove the prohibition on persons over the age of seventy years qualifying for jury service, although these persons may be exempt. This measure will allow, but not force, persons over the age of seventy years to serve on juries. This position is similar to that in Quebec, Saskatchewan (where a person who is aged sixty-five or over may be exempted from jury service) and in Manitoba (where persons over the age of 75 years are exempt from jury service on application).

Conscientious Objection to Jury Service

2.69 In Alberta, people with a conscientious objection to jury service may be exempted. In the other provinces and in the territories potential jurors may be excused during the trial if they hold religious or moral beliefs which are inconsistent with conscientious jury service.[112]

Exemptions for Long Service

2.70 In most jurisdictions there is an exemption from jury duty if a person has served recently on a jury. For example, in British Columbia there is a policy that persons who have been summoned and served as a panellist are exempt from jury service for two years, and the legislation provides that persons who have served on a jury are also exempt for two years.

Ethnicity and Gender Issues Affecting Jury Representativeness

Ethnicity

2.71 One response to the growing diversity of Canada's population is the recognition of the need to consider the degree to which the jury selection processes includes minority groups. Immigrants make up about 15 per cent of the population and in 1991, 54 per cent of immigrants were European born

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112 Balfour, Q.H. Der, *The Jury: A Handbook of Law and Procedure,* Toronto, Butterworths, 1993, para. 3–12.

and 25 per cent were born in Asia.[113] Furthermore, immigrants are more likely to live in urban centres than people who were born in Canada and most jury trials are held in these centres.

2.72 The interests of minorities are protected by the Canadian Charter of Rights and Freedoms. It gives every individual the right to equal protection and to equal benefit under the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.[114] Furthermore, the Charter is to be interpreted in a way which is consistent with the aim of fostering the multicultural heritage of Canada.[115] Moreover, the Multiculturalism Act promotes the elimination of barriers to the full and equitable participation of individuals and communities of all origins in the shaping of aspects of Canadian society.[116]

2.73 Arguments have been raised that s. 15 of the Charter—which deals with the equality rights described above—ought to provide equal access to jury service for all people. It is claimed that such an interpretation of the Charter would recognise peoples' equal worth as members of the community and reduce institutionalised racism.[117]

2.74 The need for statutory recognition of the interests of minorities formed the starting point for a recent report on jury service by Pomerant. Two main findings resulted: first, that there was a lack of criteria for determining the representativeness of juries in Canada; and secondly, that the selection process had allowed people to be excluded because of their race. Similar problems have been experienced in Nova Scotia, where the effect of this exclusion was described in 1989 as being such that: 'There has not yet been a jury trial in Nova Scotia in which a single Native person has sat on a jury'.[118]

2.75 Inquiries in Manitoba and Alberta have also found that aboriginal Canadians are under-represented on juries.[119] Given that jurors should not be

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113 Pomerant, *Multiculturalism*, p. 2.

114 Charter of Rights and Freedoms, s. 15.

115 Charter of Rights and Freedoms, s. 27.

116 Pomerant, *Multiculturalism*, 3; *Multiculturalism Act* 35–35–37 Eliz. II (1986–87–88) R.S. 1985, c.24 (4th Supp.).

117 Peterson, C., 'Institutionalised Racism: The Need for Reform of the Criminal Jury Selection Process' (1993) 38 *McGill Law Journal* 148.

118 Clark, S., *The Mi'kmaq and Criminal Justice in Nova Scotia* , Nova Scotia Royal Commission on the Donald Marshall, Jr. Prosecution, 1989, p. 48.

119 Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, Vol. 1,

excluded for reasons other than bias and that it is desirable for the jury to represent a cross-section of the community, the lack of Native people serving on juries is disturbing.

2.76 The exclusion of Aboriginal Canadians from the jury may cause Aboriginal accused persons to question the fairness of their trial. In particular, this concern may be raised where according to an accused person's culture those people who are called upon to restore harmony after a breach of personal responsibility or an anti-social act would not be strangers to the accused.[120] In these circumstances, the principle of impartiality may also be problematic; for example, within Aboriginal communities people who can resolve the matter often know the family history of the accused.[121]

2.77 According to Pomerant, changes are needed in the jury selection procedure. He suggested that a criteria for ensuring representation for racial, ethnic and cultural minorities should be introduced.[122] Toward this end, support was given for the introduction into the Criminal Code of an anti-discrimination clause governing the selection of jurors, particularly in relation to disqualifications.[123] The Attorney-General of Ontario, Howard Hampton, has also recommended the inclusion of such a clause.[124]

2.78 There are a number of practical barriers to representation for minorities. First, the procedure used to summon potential jurors tends to exclude Aboriginal people since they often live in communities with poor mail and phone services, this in turn leads to delays in both delivery and response to summons.[125] Secondly, in some provinces the language

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Winnipeg, Queen's Printer, 1991, p. 378; *The Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, Regina, Queen's Printer, 1991.

120 Turpel, M. E., 'On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In', in Royal Commission on Aboriginal Peoples, Report , National Round Table on Aboriginal Justice Issues*, Aboriginal Peoples and the Justice System,* Ottawa, Canada Communication Group, 1992, p. 177.

121 ibid.

122 Pomerant, *Multiculturalism*, vi.

123 Pomerant, C.C. 219, recommendation 6, cited in Etherington, B., 'Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform' Working Document, May 1994, p. 38.

124 Canada, Department of Justice, *Visible Minority Representation on the Criminal Jury*, Paper Prepared for the Uniform Law Conference Aug. 1992, p. 1.

125 *The Justice System and Aboriginal People*, Vol. 1, Winnipeg, Manitoba, 1991, pp. 382–383, cited in Petersen, C., 'Institutionalised Racism: The Need for Reform of the Criminal Jury Selection Process' (1993) 38 *McGill Law Journal* 153.

requirements act as a barrier for Aboriginal people. People who do not meet language requirements are exempt from jury service in Quebec (unless the person is an Indian or an Inuk and the accused is an Indian or Inuk) and Yukon. In Saskatchewan, British Columbia, Manitoba and Prince Edward Island such a person will be disqualified. By contrast, in the Northwest Territories this barrier will be overcome provided that the person's first language is an official language.[126] This provision seeks to prevent the exclusion of Aboriginal people. The relevant provision implements a recommendation made in 1987 by the Northwest Territories Committee on Law Reform.[127] A similar provision has been suggested for Manitoba.

2.79 Despite the high degree of exclusion of minority groups from jury service, little support exists for the use of 'affirmative action' to ensure that the accused has a jury which is representative of his or her ethnicity. Pomerant rejected this proposal because the courts have found it desirable for juries to consist of a fair cross-section of the community. Furthermore, such a proposal cannot be implemented due to the use of random selection and the opportunity for the parties to challenge potential jurors.

Gender Issues

2.80 The Criminal Code provides that no person can be disqualified, exempted or excused on the grounds of their sex.[128] As a result of this provision there are no longer any prohibitions on women serving as jurors.

2.81 The issue of gender imbalance on the jury panel has been dealt with by relying on s. 11(f) of the Charter, which entitles an accused person to jury trial where the alleged offence is a serious one. In *R. v. Nepoose (No.1)* the Alberta Queen's Bench held that the accused's right to jury trial had been breached because the jury was not reasonably representative of the community.[129] A gender imbalance had resulted from the sheriff's use of a jury list which had a ratio of 2.5 men for every woman. Under s. 11(f) of the Charter the accused needs to show only that the jury was not representative of the community. There was no need to show deliberate exclusion of women from the panel.

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126 *An Act to Amend the Jury Act,* S.N.W.T. 1986, c.7, s. 1.

127 Northwest Territories Law Reform Committee, Report, *An Act to Amend the Jury Act*, Working Paper No.1, 1987, p. 9.

128 Criminal Code, s. 626.

129 (1991) 85 Alta.L.R. (2d) 8 (Alta. Q.B.).

Still, according to C. Petersen there are two main disadvantages in using this section to protect against gender imbalance:[130]

1. It removes the issue of gender imbalance from the equality rights arena.
2. The right to a trial by jury (and therefore any consideration of gender imbalance) only arises in serious cases.

2.82 Where the panel consists of an uneven ratio of males and females, so that the accused cannot reasonably select jurors of a particular gender, a challenge to the array may be made. This occurred in *R. v. Catizone* where there were only three women in a panel of seventy jurors.[131]

2.83 However, in *R. v. Biddle* those judges of the Supreme Court of Canada who considered the issue of gender imbalance were divided in their approach.[132] During jury selection the Crown had used its power to stand aside to obtain an all female jury to hear charges relating to several offences arising from attacks on women. As a new trial was necessary on another ground the majority of the Court found it unnecessary to consider the effect of empanelling an all female jury. Nevertheless, Justice McLachlin and Madam Justice L'Heureux-Dube chose to consider the issue and concluded that an all female jury does not support an inference of bias or the perception of bias which favoured the Crown. Justice Gonthier was alone in finding the jury both unrepresentative of the community and lacking impartiality. He regarded it as 'a matter of gauging the anticipated effect of the conduct of the Crown in its selection of the jury on the perception of a reasonable observer as to the quality of the jury.' He thought that a reasonable observer would think that such a jury was lacking in impartiality.

The Conditions of Jury Service and Representativeness

2.84 The conditions of jury service are relevant to the representativeness of juries because the length of jury service and the level of remuneration provided to jurors can affect whether or not persons can arrange their affairs in a way which enables them to serve without experiencing hardship.

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130 Petersen, C., 'Institutionalised Racism' (1993) 38 *McGill Law Journal* 163.

131 (1972) 23 C.R.N.S. 44 (Ont. Co. Ct.), cited in Balfour Q.H. Der, *The Jury : A Handbook of Law and Procedure*, Toronto: Butterworths, 1993, para. 2–11.

132 (1995) 96 C.C.C. (3d) 321.

Length of Jury Service

2.85 In British Columbia after the jury is selected the remaining panellists are dismissed, although the panel can be recalled the next month for a second jury selection. In Ontario if prospective jurors are not chosen for service within three to four days they are discharged.[133]

Payments to Persons Summonsed for Jury Service

2.86 The payments received by persons summoned for jury service vary among the provinces. In Newfoundland a person who is self-employed or unemployed receives compensation for jury service from the Consolidated Revenue Fund as well as compensation for child care expenses. Other people do not receive payment from the State, except for reasonable travel and other expenses.[134] This is because in Newfoundland employers must pay jurors their normal wage, failure to do so constitutes a summary offence punishable by a maximum fine of $1,000 or, on default, imprisonment for not more than three months.[135]

2.87 In British Columbia, Ontario, Saskatchewan and Quebec employers must give time off to attend jury service but there is no obligation for them to provide make-up payment. Some employers will supplement the payment given by the State so that jurors receive their normal wage. In British Columbia employers under most union contracts pay the juror's full pay or 40 per cent.[136]

2.88 In those jurisdictions where jurors do not receive compensation for their lost wage, the payment of a nominal fee will act as a disincentive to jury service. In British Columbia for each day a juror is paid $20, with this increasing to $30 a day after the first 10 days, as well as an agreed meals and lodgings allowance. Tea and coffee, meals and accommodation are also provided when the jury is delivering a verdict. Payment is provided for any necessary and reasonable travelling and lodging expenses. There is no longer any payment for just showing up for jury service.[137] In Ontario minimal daily

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133 Criminal Lawyers Association in Ontario, Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 1.

134 Jury Act 1991 Nfld, c.16, s. 43.

135 Jury Act 1991 Nfld, c.16, s. 42.

136 British Columbia Law Reform Commission, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 18.

137 ibid., p. 17. Potential jurors used to receive $10.

payment (in addition to travel expenses) is provided: $2.75 per day for the first ten days, $40 a day thereafter and where the trial runs over 49 days, $50 a day. In Quebec jurors and candidate jurors receive payment for loss of time, meals, lodgings and transport. The sum of money given is on a sliding scale beginning with around $22 a day plus meals.[138] In Nova Scotia people who are summoned, whether or not they serve on a jury, are paid $15 per day, together with a travel allowance.

2.89 The justification for giving only a nominal fee instead of real compensation is that jury service is a public service for which compensation should not be necessary. However, this justification needs to be balanced against the likelihood that potential jurors may experience financial hardship by serving, and that many persons may seek to be excused from jury service due to hardship.

2.90 In Nova Scotia the most common reason for the court excusing potential jurors from service is financial hardship.[139] This is because there is a tendency for judges to exclude people who are self-employed or who need their income. The impact of this practice on the composition of juries is quite serious because 'only people whose incomes are not affected by jury service can participate'.[140] Unemployed people cannot afford to serve on a jury because in Nova Scotia they lose their benefits when serving. This situation occurs because after two days of service they are considered unavailable for work.

2.91 The Law Reform Commission of Nova Scotia has recommended that a distinction be made between providing payment for those who serve as jurors and those who only reach the panel stage in selection. The later group is only inconvenienced for two hours and therefore could be denied payment. Further savings could be made by not paying jurors who receive money from their employer during jury duty. These recommendations were made because of the large expense incurred by municipalities in paying even nominal fees to these persons, for example, in Halifax $70,000 was paid in jury fees in 1991.

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138 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 11.

139 Nova Scotia, *Discussion Paper*, p. 16.

140 Nova Scotia, Report, p. 39.

2.92 In other provinces consideration has been given to providing payments only after receiving a request and where the juror can demonstrate sufficient financial loss. A number of other approaches are also being considered.[141] A standard fee could be used. This fee would then be increased by a judge if the trial was long or the juror had experienced hardship. Alternatively, employers could be forced to pay employees during jury service. Provision would be made to compensate an employer who was experiencing hardship due to paying the fee. However, this approach was deemed impractical by the Commission due to public disapproval.

2.93 Aboriginal people living in remote areas may be particularly discouraged from serving on juries by the fact that travel expenses are not pre-paid but are reimbursed later.[142] Low income earners may also be discouraged from serving. They cannot afford to lose income through jury service or, if they care for children, the cost of day care.

Jury Management Issues

Jury Roll Formation and the Summoning Process

Sources of Jury Selection

2.94 The out of court procedure for selecting the jury panel is specified in provincial legislation. The legislation describes the procedure for compiling the master list and for selecting potential jurors from it.

2.95 In Alberta, British Columbia, Newfoundland, Nova Scotia, Quebec and New Brunswick the jury list is compiled from the list of voters.[143] However, using the voters list may result in an unrepresentative panel because only people who register to vote, which may be a small percentage of residents, are included. In Quebec this is particularly a problem because, to be a juror a person must be included on the voters list.

2.96 In several provinces other lists can be used as well as the voters list. In Alberta, the Northwest Territories and the Yukon the assessment rolls and

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141 Nova Scotia, *Discussion Paper*, p. 17.

142 *The Justice System and Aboriginal People*, Vol. 1, Winnipeg, Manitoba, 1991, p. 383, cited in Petersen, C., 'Institutionalised Racism: The Need for Reform of the Criminal Jury Selection Process' (1993) 38 *McGill Law Journal* 155.

143 Jury Act, S.A. 1982, c. J-2.1, ss. 1 & 6; Jury Act, R.S.Nfld. 1990, c. J-5, s. 11; Jurors Act, R.S.Q. 1993, c. J-2, ss. 7 & 8; Juries Act R.S.N.S. 1989, c.242, s. 7 and Jury Act, S.N.B. 1980, c. J-3.1, s. 10(2).

any other public papers can be used. In Ontario, the Director of Assessment forwards to the sheriff a list of persons in the county, and where an Indian reserve exists any record available may be used by the sheriff to prepare the jury roll.[144]

2.97 Nevertheless, even where municipal sources are used to assist in compiling the jury list, jury representativeness may not be ensured.[145] The reason for this is that in Alberta, for example, property owners alone are included on the assessment rolls and most directories include only the name of one person in each household. The result is that women, persons renting, persons of native ancestry and young people tend to be excluded.

2.98 Other provinces use other alternative sources to assist in compiling the jury list. In Newfoundland and British Columbia, where the trial is to be conducted in French, speciality lists may be used. These lists consist of potential jurors who speak French.[146] In New Brunswick the most recent list of beneficiaries under the Medical Services Payment Act and regulations may be used.

2.99 In British Columbia the sheriff has a broad discretion to use the procedures that he or she deems appropriate, although this discretion must give due regard to the right to serve on a jury under the provincial legislation, unless disqualified or exempt, and the procedures contained in the sheriff's manual. The manual requires that the list of voters be used.[147] Criticism of both the unfettered nature of the sheriff's discretion in British Columbia and the lack of a method for reviewing his or her decisions has been voiced. It has been suggested that there is a lack of protection of the representativeness of those people selected for the source list or panel.[148] In Prince Edward Island the sheriff also has a broad discretion. He or she submits to the prothonotary a list of selected persons.

2.100 The Nova Scotia Law Reform Commission has recommended that the voters list no longer be used to compile the jury list. Not only is it inaccurate, particularly if there has not been a recent election, but there is a more

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144 Juries Act , R.S.O. 1990, c. J.3, s. 7.

145 *R. v. Nepoose* (1991) 85 Alta. L.R. (2d) 8 (Alta Q.B.). 21–23.

146 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver 19 Jun. 1995, p. 8.

147 Jury Act R.S.B.C. 1979, s. 7

148 Pomerant, *Multiculturalism*, p. 44.

inclusive list available: the Medical Service Insurance System List.[149] This list covers everyone eligible for medical insurance. It also includes their date of birth and is updated every four years. The Commission's recommendation follows the approach taken in Saskatchewan, where the jury list is compiled from the register kept under the Saskatchewan Hospitalisation Act.[150] This register encompasses 98 per cent of the population and is up to date and on computer.[151] Accordingly, the representativeness of the Saskatchewan community is protected during this step of jury selection.

Summoning Process

2.101 In Alberta the sheriff is directed by the clerk of the court to randomly summon sufficient numbers of potential jurors. In British Columbia the names of potential jurors are chosen at random from the voters list. Jurors are summoned by the sheriff at least 15 days prior to day on which they are required to attend. Persons whom the sheriff knows to be exempt are not summoned. The names of people summoned are drawn at random by the clerk. Accordingly, sheriffs in the provinces when compiling the array have no discretion to choose jurors. They must summon those people whose names appear on the list of qualified jurors to be called.

2.102 In Saskatchewan, where the voters list is not used for compiling the jury list, the person in charge of the register kept under the Saskatchewan Hospitalisation Act receives a requisition from the Inspector of Legal Offices of the Department of Justice Canada. He or she then randomly selects the required number of names and addresses and forwards them to the Inspector. The sheriff, eight weeks before the opening of a jury sitting, tells the Inspector how many potential jurors are required for the next sitting of court. The Inspector then randomly selects names and addresses from the register list and sends them to the sheriff. The sheriff must then serve each person listed with the Juror Information Return and Summons and an Application for Relief from Jury Service. After the Juror Information Return and Summons have been returned the sheriff prepares a jury list, which shows names of persons and disposition of each Return and Summons. This list is a public record once filed.

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149 Nova Scotia, Report, pp. 26–27.

150 Jury Act , S.Sask. 1981, c. J-4.1, s. 6

151 Pomerant, *Multiculturalism*, p. 47.

Jury Vetting

2.103 Any communication with a juror or a person who has been summoned is forbidden. Such communication constitutes an abuse of the legal process. It is a criminal offence, that is, a contempt of court, under provincial jury legislation and at common law. In British Columbia the jury list is given to counsel for the prosecution and the defence a few days before the trial and they are able to run checks on the people listed, including locating their driving records and credit checks.[152] In Quebec the defence counsel gets the book of prospective jurors on the morning of the trial.[153]

Jury Selection

2.104 The names of each of the potential jurors are chosen at random from a list. They are then summoned and the names of people who are to sit on the panel are drawn at random. A jury in criminal cases consists of 12 jurors.[154]

2.105 The Criminal Code provides the procedure for empanelling a jury. The names and addresses of jurors are written on cards by the sheriff and delivered to the clerk of the court. They are then placed in a box and shaken together. The clerk draws out the names of the jurors and calls their name and number. The jurors are then sworn in.[155] The number of jurors drawn will depend on how many the judge thinks is needed in order to provide a full jury after allowing for orders to excuse, challenges and directions to stand by.[156] Directions to stand by may be made by the judge due to personal hardship or any other reasonable cause.[157]

2.106 If the number of jurors drawn turns out to be insufficient then the Clerk of the Court shall draw more jurors until twelve are sworn. If the panel is exhausted and there is not yet a full jury then the court may at the request of the prosecutor, order the sheriff to summon as many people as the court directs in order to provide a full jury.[158]

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152 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver 19 Jun. 1995, p. 9.

153 Mr Wayne Lora, a defence counsel from Hull, Quebec, Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995.

154 Criminal Code, s. 631(5).

155 Criminal Code, s. 631.

156 Criminal Code, s. 631.

157 Criminal Code, s. 633.

158 Criminal Code, s. 642.

2.107 Before the commencement of the trial the judge may excuse a juror from service or direct him or her to stand by on any of the following grounds:[159]

1. The juror has a personal interest in the matter.
2. The juror has a relationship with the judge, prosecutor, accused or counsel for the accused or a prospective witness.
3. Personal hardship or any other reasonable cause that justifies the juror's excusal.

Provided that the trial has not yet started, jurors after selection who are excused may be replaced.[160]

2.108 There appears to have been an increase in the number of prospective jurors who want to be excused. The way in which judges exercise their discretion to exclude may have attributed to this increase. Judges tend to be reluctant to force a person to serve on a jury who does not want to, particularly if the trial is likely to be a long one. During the Committee's meeting in Ottawa it was acknowledged that:[161]

> People who want to get off juries are increasing now and sometimes I find that someone will get the ball rolling and say I'm self employed and if I have to [serve on the jury] my business is going to suffer and I'll have no income. That's a nice line and if you excuse that one then you're going to have that line used a lot.

2.109 Excusals are more frequently given to men than women, which means that more women now serve on juries:[162]

> In the last ten years we've gone from perhaps five to six percent women on the jury to maybe sixty percent women on the jury. It seems that men always have the best excuses to get out of it.

2.110 When judges readily grant requests for excusal the representativeness of the jury is reduced. Those who remain available for jury service may tend to be 'people who can afford to give their time to sit on juries'.[163]

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159 Criminal Code, s. 632.

160 *Mohamed* (1991) 64 C.C.C. (3d) 1 (B.C. C.A.).

161 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 4.

162 ibid., p. 11.

163 Faculty of Law McGill University, Meeting with the VLRC delegation, Montreal, 26 Jun. 1995, p. 7.

Pre-Ballot Questionnaires

2.111 In Ontario a questionnaire is used. It asks for information about date of birth, citizenship, ability to understand English, ability to hear and whether the person suffers from a condition which would interfere with jury service. In British Columbia the summons includes a form which requires people to certify whether they are disqualified or exempt and if so why. In Quebec the summons provides room for a written application to invoke a disqualification or claim an exemption. A form from the Sheriff's Office must also be filled in. This form request information on the date of birth, citizenship, social insurance number, address, occupation marital status, fluency of language (French and English), children and transportation details. In Saskatchewan there is a Juror Information Return and Summons and an Application for Relief from Jury Service.

Peremptory Challenges

2.112 Under the Criminal Code both the accused and the prosecution are entitled to the following number of peremptory challenges:[164]

1. Twenty challenges may be made when the accused is charged with high treason or murder.
2. Twelve challenges are available when the accused is charged with an offence other than treason or murder where the punishment may be more than five years imprisonment.

Four challenges are available when the accused is charged with an offence other than one of those described above.

2.113 The purpose of the peremptory challenge is to allow the accused and the Crown to remove people whom they think are biased or people who are exempt. No evidence of bias is given when challenging. The making of these challenges is 'entirely discretionary and not subject to any condition'.[165] By giving the accused some control over the composition of the jury, these challenges encourage him or her to believe the jury will be fair and impartial. Nevertheless, the prosecution and defence may use their peremptory challenges in a relatively aggressive manner, as observed by a representative of the Canadian Department of Justice:[166]

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164 Criminal Code, s. 634.

165 *Cloutier v. The Queen* (1979) 48 C.C.C. (2d) 1 (S.C.C.), 20–22.

166 Criminal Law Policy Section, Department of Justice Canada, Meeting with the VLRC

> I have heard justification for a more graphic use of peremptory challenges by the Crown, [this] being that if the defence is using the peremptory challenge to [try and remove one gender from the jury then] the Crown is morally obliged to use their peremptory challenges to [obtain] a balance...It's an issue of what is the Crown's role in ensuring a fair trial, is it just letting everything happen before [his or her] eyes without participating graphically or is it countering what the Crown perceives to be [the] securing [of an] imbalance by the defence.

2.114 The unconditional nature of these challenges means that they may be used to obtain a favourable jury, rather than merely an impartial one. Usually when peremptory challenges are used to try and obtain a favourable jury the court will have no way of knowing that this has been the case. The court is left to assume that the challenges were made in order to obtain an impartial jury. It is only when counsel chooses to remark on his or her own use of challenges that this information becomes available. Such was the case in *R. v. Pizzacalla* where the prosecutor commented on his use of stand-asides. The prosecutor had excluded men so that an all women jury could be obtained for a sexual assault trial. He said that: ' [there might be men] who felt that somehow, a person in the workplace has a right to fondle, touch, make passes at or otherwise touch a person in the workplace'.[167] As a result of this comment a new trial was ordered. Comments of this kind are unlikely to be made often because of their consequences.

2.115 Generally, counsel for the prosecution and counsel for the defence will have little information about prospective jurors when making peremptory challenges. They will have the juror's name, address and occupation and be given a chance to observe the juror's appearance. This lack of information encourages the application of stereotypes based on these attributes. Not only does this lead to discrimination on the basis of race, gender and religion, but the application of stereotypes does not help to obtain an impartial jury. These challenges are used frequently in relation to potential jurors from minority groups and are particularly effective in securing their removal. This effectiveness results from the small number of people from minorities on the jury panel to begin with.

2.116 Consequently, an accused person who belongs to a minority group may feel that he or she has not been tried by a jury which is impartial, let alone one whose composition he or she has had a say in. This will be the case,

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delegation, Ottawa, 21 Jun. 1995, p. 5.

167 (1991), 7 C.R. (4th) 294 (C.C.A.), 295.

for example, when a black accused is denied a trial by a jury which is either representative of the community or made-up of his or her peers:[168]

> The peremptory challenge can work far more effectively to exclude minorities than to assure their presence...it is very difficult for a black defendant to reduce significantly the representation of whites on the jury or to prevent the elimination of black potential jurors.

2.117 For this reason, David Pomerant suggested that consideration should be given to abolishing peremptory challenges.[169] Two reasons were given for this position. First, it would accord with the approach taken in England, where the process originated. Secondly, if the restrictions on challenges for cause were also relaxed, then prospective jurors with a non-specific bias could be removed and the parties would still maintain some control over the composition of the jury. The Aboriginal Justice Inquiry of Manitoba also recommended that peremptory challenges should be abolished.[170] However, this recommendation is unlikely to be followed in Canada due to the profession's support of the retention of the system.[171]

2.118 There are three other options for reforming the system of peremptory challenges:[172]

1. The number of available challenges could be reduced. This step would not remove the potential for discrimination, but would lessen it.
2. The challenges could be subject to judicial review. Judicial review of challenges has been allowed in America with the Supreme Court of the United States finding the a black defendant will be denied 'equal protection' when trial is by a jury and all members of his or her race have deliberately been excluded.[173] This option may not solve the above problem

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168 Altman, T.L., 'Affirmative Selection: A New Response to Peremptory Challenge Abuse' [1986] 38 *Stanford L.R.* 781, 801. Cited in Pomerant, *Multiculturalism*, p. 65

169 Pomerant, *Multiculturalism*, viii.

170 *The Justice System and Aboriginal People,* Vol. I, Winnipeg, Queen's Printer, 1991, pp. 384–385, cited in Department of Justice, *Visible Minority Representation on the Criminal Jury*, p. 15.

171 Etherington, *Review of Multiculturalism and Justice,* Working Document, 1994, p. 41.

172 Pomerant, *Multiculturalism*, pp. 65–70.

173 *Batson v. Kentucky* 476 United States 79 (1986) 83, cited in Pomerant, *Multiculturalism*, p. 67.

because counsel would simple phrase the challenge in terms that indicated a legitimate reason.

3. The struck jury system which is used in America could be introduced. After questioning all prospective jurors on the panel and using challenges for cause counsel would list their preferred twelve jurors. The judge then selects any overlapping choices and then takes a juror from each list in descending order until twelve are selected. This approach would be inappropriate since the level of questioning of prospective jurors that is required is prohibited in Canada. According to Pomerant, there are two additional reasons why this option would be unacceptable. First, it may increase the number of hung juries (as the jurors who are selected are seen by each counsel as likely to favour his or her side); and secondly, the jury may not satisfy the Charter requirement of an impartial tribunal.

The Crown's Prerogative to 'Stand Aside' Jurors

2.119 In Canada the Crown no longer has the power to stand aside jurors. In *R. v. Bain* the Supreme Court of Canada found that s. 634 of the Criminal Code, which gave the Crown the ability to stand by up to 48 prospective jurors, infringed upon s. 11(d) of the Charter of Rights and Freedoms.[174]

Challenges for Cause

2.120 The categories of exemption and exclusion in the provinces are subject to the overriding power of the Federal Parliament to legislate on matters of criminal procedure which includes trials.[175] Consequently, the Criminal Code's provisions may cause 'some people who may be potential jurors under Provincial law [to be] disqualified from service at a later stage in selection'.[176] This occurs in relation to challenges for cause, any number of these challenges may be made by the prosecutor or the accused.

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174 (1992) 69 C.C.C. (3d) 481.

175 Constitution Act 1867 , s. 91(27).

176 Nova Scotia, Report, p. 3.

2.121 Challenges for cause are made against individual jurors when they are called forward. These challenges must be based on one or more of the following grounds:[177]

1. The name of a juror does not appear on the panel, and its absence is not the result of a misnomer or misdescription.
2. A juror is not indifferent between the prosecution and the accused.
3. A juror has been convicted of an offence carrying a sentence of more than twelve months imprisonment.
4. A juror is an alien.
5. A juror is physically unable to properly perform the duties of a juror.
6. A juror does not speak the official language of Canada, that is, either the language of the accused or the official language in which the accused can best give testimony or both official languages of Canada.

2.122 Challenges on the ground of partiality tend to be made where any of the following two factors could cause prejudice in the minds of the jurors, particularly in light of the prevailing community attitude:

1. the accused person's racial or religious status; or

the nature of the charge or allegations made against the accused.

This second factor tends to apply in cases involving sexual assault or where there has been extensive pre-trial publicity.

2.123 Furthermore, according to Austin Cooper Q.C., a challenge for cause may be desirable 'if one is defending a member of a recognisable racial minority group...particularly if the alleged victim is of a different race'.[178] But here difficulties arise in showing a 'realistic potential for the existence of partiality'. Racial bias is difficult to prove and before a juror can be questioned on his or her racial opinions extrinsic evidence must be found.[179]

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177 Criminal Code, s. 638.

178 Cooper, A.M., 'The ABCs of Challenge for Cause in Jury Trials: To Challenge or Not to Challenge and What to Ask if You Get It' (1994) 37 *Crim. L. Q.* 65.

179 Pomerant, *Multiculturalism*, p. 61.

2.124 However, it should be observed that the list of grounds does not specifically include racial bias. It has been suggested that a challenge for cause could not be made against a racially biased juror, even where his or her bias would threaten the jury's impartiality. This view may no longer be valid due to the effect of the right to a fair trial in s. 11(d) of the Charter.[180] Nevertheless, according to Pomerant racial bias should be included as an express ground for challenge:[181]

> Taking more time to conduct a careful questioning of prospective jurors in the selection process is an acceptable price to pay in order to demonstrate to the public and the parties that the system is concerned to ensure that discrimination of the kind proscribed in the *Charter* is not permitted to be a factor in the determination of guilt or innocence.

2.125 Those who argue against this additional ground either deny the existence of any bias in the community against ethnic groups or claim that the attributes of bias and virtue in various jurors tend to balance each other out and that the jury should therefore be regarded as impartial. These arguments were given in judgments delivered in 1975 and 1979 and may no longer reflect current attitudes.[182]

2.126 Accordingly, the Ontario Court of Appeal has sought to broaden the grounds for challenge to include racial bias. In *R. v. Parks* the Court allowed a challenge based on the influence of racial bias on the juror's decision.[183] The Supreme Court of Canada has refused to overturn this decision. Lawyers can now ask narrow and restricted questions to find out if a prospective juror is biased towards racial minorities. But evidence must still be given by the prosecution or defence counsel as to the matter's significance in terms of the above grounds for challenge. The reasons for allowing such questions to jurors are as follows:[184]

> Some potential jurors who would discriminate against a Black accused are eliminated. Prospective jurors who can arrive at an impartial verdict are sensitised from the outset of the proceedings to the need to confront potential racial bias and ensure that it does not impact on their verdict ... Lastly, permitting the question enhances the appearance of fairness in the mind of the accused.

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180 Department of Justice, Paper prepared for the Uniform Law Conference, *Visible Minority Representation on the Criminal Jury,* Aug. 1992, p. 19.

181 Pomerant, *Multiculturalism*, pp. 61–62.

182 *R. v. Makow* (1975) 28 C.R.N.S. 87 (B.C.C.A.) 95; *R v. Racco (No.2)* (1975), 29 C.R.N.S. 307 (Ont. Co. Ct.), 310 & *R. v. Crosby* (1979), 49 C.C.C. (2d) 255, 256.

183 (1993) 21 W.C.B. 2d 121 (Ontario Court of Appeal).

184 *R. v. Parks* (1993) 24 C.R. (4th) 81, 111.

2.127 This approach has been extended by the General Division of the Ontario Court of Justice to cases involving sexual assault. Jurors were asked in *R. v. C. (P.F.)* whether, knowing the allegations against the accused, they could set aside any preconceived prejudices and make an impartial decision.[185] The Court found that the requirement that there by an 'air of reality' before a challenge can be made was met because of the intensity of public opinion on the issue of sexual abuse and the difficulty many jurors may have in judging the case impartially. This point has been confirmed by a recent survey by Steven Skurka which found that 59 per cent of prospective jurors under oath said they could not judge the evidence fairly because of their personal experiences or views towards sexual assault.[186]

2.128 In the Canadian provinces there is a degree of difference in the courts' willingness to grant a challenge for cause. In Ontario it is very common to grant a challenge for cause and the list of prospective jurors is available ten days before the jurors are selected.[187] However, in Quebec it is necessary to be quite specific about the ground for challenge, even though the list of prospective jurors is only received by the defence that morning, and, therefore, these challenges rarely occur.[188]

Challenge to the Array

2.129 The panel may be challenged by the accused or the prosecutor on the ground of partiality, fraud or wilful misconduct by the sheriff or person who returned the panel. This is called challenge to the array.[189] Consequently, the array can be challenged on the ground of racial discrimination by the sheriff. In *R. v. Nahdee* an accused (who was a native Indian) successfully challenged the array on the ground of partiality. [190] The sheriff had not complied with the requirement in the Ontario Juries Act that he or she select names of eligible persons from the Indian reserve in the county.[191]

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185 (1994) 25 W.C.B 2d 544 (Ont. Court of General Division).

186 Tyler, T., 'Finding a jury to go distance. Hard to avoid bonding, conflict, bias, experts say' *Toronto Star* , 29 Apr. 1995, p. 131.

187 Criminal Lawyers Association in Ontario, Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 6.

188 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 10.

189 Criminal Code, s. 629.

190 *R. v. Nahdee et al.* (1993) 26 C.R. (4th) 109 (Ont. Gen. Div.)

191 ibid.

2.130 The panel can also be successfully challenged if the sheriff arbitrarily adds members of a particular race to the panel. It was found that this action would infringe upon the principle that there must be random selection of the panel from a representative population:[192]

> Artificially skewing the composition of jury panels to accommodate the demands of numberless distinct segments of [the] Canadian society would compromise the integrity of the jury systems...There [is] no provision in the present law for jury panels which [are] 'tailor-made' to suit the race, national or ethnic origin, or other discrete characteristics of an accused.

2.131 The array may also be challenged where there is an uneven number of males and females among the prospective jurors according to the decision in *R. v. Catizone*.[193] In this case the accused could not reasonably select jurors of a particular gender. But, Pomerant has asserted that this case was wrongly decided because no evidence was given of intentional discrimination by the selectors.[194]

2.132 All challenges to the array must be in writing. However, it is not necessary to include particulars of the reason for the challenge. The challenge must be made before the empanelling of the jury begins, that is, before the clerk begins to call out the names of potential jurors to come forward. Once the jurors are sworn in it is too late to challenge the array. Where both parties challenge the array it must be quashed. In other cases the judge decides the matter. The other side can counter-plead or deny the matter alleged. If he or she is satisfied that a challenge is true then there will be a new panel.[195]

2.133 However, where no impropriety by the sheriff is shown the array cannot be challenged, even where there is an absence of minority groups on the jury. This is because there is a presumption of propriety. To satisfy the requirement of impropriety it must be show that there was a 'conscious and deliberate plan by the person returning the panel to exclude a class or group of persons'.[196] Minority groups may form a significant proportion of the community but their absence on the panel without such a plan will not lead to a challenge to the array. Accordingly, Pomerant has argued for an extension of the grounds for challenging the array. He asserted that the grounds should

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192 *R. v. Born with A Tooth* (1993) 81 C.C.C. (3d) 393, 397.

193 (1972) 23 C.R.N.S. 44 (Ont. Co. Ct.).

194 Pomerant, *Multiculturalism,*, p. 56.

195 Criminal Code, s. 630.

196 *R. v. Chipesia* (1991) 3 C.R. (4th) 169 (B.C.S.C.), 171.

include lack of representativeness of community diversity.[197] He therefore recommended the adoption of the following five grounds for challenge:[198]

1. Discrimination based on a prohibited ground for disqualification in selecting the pool or panel.
2. Failure, without good cause, to consult sources specified in legislation when composing the jury pool.
3. Failure, without good cause, to include in a pool all qualified persons identified in the sources.
4. Failure to conduct a random selection of names from a pool when composing the panel.
5. Failure to follow the procedure specified by statute in selecting a pool or panel.

2.134 The Law Reform Commission of Canada also recommended extending the grounds for challenging the array. It considered that the standard of showing impropriety was too high. Challenge should be available when a panel is improperly selected due to a substantial failure to comply with the relevant legislation even if the sheriff acted in good faith.[199] But the Commission did not support the introduction of a ground for challenge where the panel was not representative of the community. Instead, it argued that the out of court selection procedures in provincial legislation ensured representativeness by randomly selecting jurors from within the community.[200]

Jury Challenges Conducted During a Voir Dire Process

2.135 The voir dire is a preliminary examination of the competence of a juror. Calling a potential juror as a witness on the issue of his or her partiality is allowed provided that the court has decided to rule in favour of the challenge for cause application. If no such ruling is made then questioning of the juror is not allowed.[201] For an application to be granted 'an air of reality' to the

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197 Pomerant, *Multiculturalism,* p. 80.

198 ibid., pp. 35–37. Cited in Etherington, *Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform*, Working Document, May 1994, p. 39.

199 Law Reform Commission of Canada, Report 16, *The Jury*, Ottawa, Minister of Supply and Services, 1982, p. 34.

200 ibid., p. 35.

201 Granger C., Charron, Judge L. & Chumak, P., *Canadian Criminal Jury Trials,* Toronto,

challenge must be shown.[202] This requirement is quite easy to show. And where the prosecution has conceded the right of the defence counsel to challenge and has suggested that the questions proposed be approved by the court, the court's approval will be highly likely. Applications should be supported by a statement containing the details of similar cases where judges have permitted the challenge(s) for cause.

2.136 Despite the relative ease in getting approval to hold a voir dire, tight controls are applied to questioning. The Judge will not allow an improper question to be put to the prospective juror. Prospective jurors are not to be questioned about their beliefs, prejudices, likes or dislikes, race, national origin, politics, religion, membership of minority groups or moral positions and they are not to be asked degrading questions. Furthermore, the process is not allowed to be used as a fishing expedition.[203] Where a question is improper the court must ask counsel to amend it. The lack of the opportunity to amend an improper question may mean that the accused is denied the right to a fair and proper trial.[204] The courts have provided guidelines as to what kind of questions may be asked. The following types of questions were approved of in the case of *R. v. Chaimovitz*:[205]

1. What kind of work do you do?
2. Have you read about this case in the papers or heard about it on television or radio?
3. Have you heard about this case from anyone, for example, friends or family?
4. Have you discussed this case with anyone?
5. Have you formed an opinion as to the guilt or innocence of the accused?
6. Following a description of the nature of the charge, the prospective juror can be asked: Do you believe that you can set aside any preconceived biases that you may hold and decide the case with a fair and impartial mind?

Carswell, 1989, pp. 173–174.

202 Cooper, op. cit., p. 62.

203 Granger et al., *Canadian Criminal Jury Trials* , Toronto, Carswell, 1989, pp. 178–179.

204 *R. v. Zundel* (1987) 31 C.C.C. (3d) 97, cited in Granger et. al., *Canadian Criminal Jury Trials,* 179.

205 Hamilton, Feb. 1994, Philp J., cited in Cooper, op. cit., p. 66.

7. Have you or any of your family or friends been a victim of sexual assault such that you would be unable to be impartial as between the prosecution and the defence? This question is asked because approximately 50 per cent of women in Canada experience some form of sexual assault at sometime and these women are often perceived as being unable to be impartial in cases involving sexual assault.[206]

2.137 According to Pomerant, a number of benefits would result from relaxing the current restrictions on challenges for cause. At present challenges for cause do not manage to exclude people who are partial. The information which is available about potential jurors before selection is limited as is the questions which may be asked during the voir dire. This means that potential jurors cannot be asked about their racial bias, even when the accused is a member of a racial minority. He suggested that generally questioning of potential jurors about their beliefs and prejudice would be useful in this situation.

2.138 In Canada the voir dire process is conducted in the following manner. If the ground for challenging is that the name of the juror does not appear on the panel then the judge alone determines the issue. But where challenge for cause is brought on any of the other grounds the matter is determined by the two jurors who were last sworn in.[207] If no jurors have been sworn in then two people will be appointed by the court and sworn in to decide the issue. They are given a description of their task by the judge. If they cannot agree, after discussing the issue among themselves, then two new persons are chosen to determine the matter. Submissions may be made by each counsel, although this is rarely done. The challenging party usually just calls the prospective juror as a witness. Other witness may also be called. The other side may question and call witnesses. And the judge has a discretion to allow counsel to address the decision makers.

2.139 The Criminal Code does not specify whether the voir dire should be conducted with or without the balance of the jury panel present. It is left to the judge to decide whether or not they remain. Typically, the panel enters the courtroom, the names of twenty prospective jurors are selected at random and

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206 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 5.

207 Criminal Code, s. 640.

each in turn enters the witness box. The triers' decision about the facts is made on the balance of probabilities. It is a final decision and no reasons need to be given.[208] If the prospective juror is found to be partial he or she will be excused. Where a person is found to be impartial he or she can still be peremptorily challenged. The questioning of the prospective juror in relation to the challenge for cause may assist counsel in making a peremptory challenge. If a peremptory challenge is not made then the person is sworn in as a juror. He or she then replaces one of the triers and the next juror who is tried on a challenge for cause and approved of replaces the second trier and 'as each juror is chosen after that, he or she becomes a trier and so on until all 12 jurors are selected for trial.'[209]

2.140 Several commentators have taken the view that this form of questioning does not taint those people who are selected as jurors:[210]

> It seems to me to be not a bad system because if they reject a respective juror than there can be no taint because that person is not on [the jury]...and if they accept that person then they've decided that [he or she] is an objective person so there's no sort of spill-over malice, the allegations about [him or her] have been rejected in their minds.

2.141 The voir dire process allows members of the public to be involved in the administration of justice. According to Justice Haines this feature of the system is highly desirable because:[211]

> In this manner the tribunal itself is enhanced in the eyes of the public. Lay triers have found the juror fair and impartial. Justice is at its highest when its administration is shared by our citizens.

Complex Litigation and the Jury System

Perceptions of Juror Competence in Canada

2.142 The Ontario Law Reform Commission recently concluded that juries in civil trials are competent.[212] Nevertheless, the Commission acknowledged that there is an inherent difficulty in measuring the competence of the verdict.

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208 Granger et al., *Canadian Criminal Jury Trials*, pp. 172–173.

209 Cooper, op. cit., p. 68.

210 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver 19 Jun. 1995, p. 5.

211 *R. v. Elliott* (1973), 22 C.R.N.S. 142, 152 (Ont. H.C.).

212 Ontario. Law Reform Commission, Consultation Paper, *The Use of Jury Trials in Civil Cases*, 1994, pp. 22–23.

It was suggested that a jury produces a better verdict than a judge because a jury reaches its decisions as a group. The basic position appears to be that as long as juries cannot be shown to be incompetent they will be presumed to be competent.

2.143 However, in 1973 the Ontario Law Reform Commission had recommended abolishing the use of juries in most civil claims. The Commission also supported the following conclusion by W.R. Cornish relating to the ability of the jury:[213]

> In moving towards a scheme under which the assessment of damages is based upon specific and complex social data, inevitably one is leaving behind the world in which the rough judgments of a random group of jurors has any useful role. A great deal remains to be discovered and discussed before an adequate new system emerges, but there can be little doubt that when it does emerge it will require the judgement of experienced professionals and not of untrained laymen.

2.144 Accordingly, the arguments against the use of civil juries centre on issues of incompetence and inconsistency in verdicts:[214]

> The opponents of civil jury trials argue that the quality of jury verdicts is poorer or less reliable than judgments reached in non-jury trials and that the uncertainty and unpredictability of jury verdicts are detrimental to the administration of justice.

2.145 Similarly, in fraud cases it has been suggested that juries may be inappropriate because 'dry accounting evidence is hard for 12 jurors' to evaluate.[215] Furthermore, Additionally, it has been suggested that in criminal cases juries in Quebec may have difficulty understanding the concept of 'reasonable doubt':[216]

> I am not sure the jurors understand or apply a reasonable doubt in the way it is meant to be understood. And a reasonable doubt, as you know, is a very difficult concept to articulate...

2.146 Moreover, jurors may not understand the problems associated with identification evidence. This evidence is very unreliable and due care must be

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213 Cornish, *The Jury,* 1971, 259, cited in Ontario Law Reform Commission, *Report on Administration of Ontario Courts,* Part I, 1973, p. 346.

214 Ontario. Law Reform Commission, Consultation Paper, *The Use of Jury Trials in Civil Cases*, 1994, p. 31.

215 Gordon, S., 'Jury is in' Apr. 1993 *Canadian Lawyer*, 15.

216 Criminal Law Policy Section, Department of Justice, Canada, Ottawa, Meeting with the VLRC delegation, 21 Jun. 1995, pp. 1–2. Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver 19 Jun. 1995, p. 11.

taken, particularly in the judge's charge, to ensure that jurors understand the problems associated with it.[217]

2.147 However, other commentators have expressed confidence in the jury's competence in reaching a verdict. For example, Paul Schabas, a Toronto lawyer, argued that greater respect should be accorded to jury verdicts. He therefore disapproved of the failure of the Canadian system to support the supremacy of the jury's verdict relating to an acquittal:[218]

> Canada is the only major country which permits an appeal court to void an acquittal and order a retrial. That is contrary to the fundamental principles of common law.

2.148 According to a survey conducted by Lee Stuesser in 1988 in some provinces lawyers believed that juries did not understand the law in complex cases. The belief was held by the following percentage of lawyers: in British Columbia 31 per cent (56.6 per cent disagreed), in Manitoba 50.8 per cent (26.9 per cent disagreed), in New Brunswick 59.1 per cent (27.3 per cent disagreed) and in Nova Scotia 37.5 per cent (40 per cent disagreed).[219] The remaining people surveyed were undecided on this issue.

2.149 Support for the use of juries in complex cases arises from the fact that parties are confident that they will receive fair treatment by the jury. The jury's verdict is preferred because it encourages the prosecution to make the case comprehensible to the jury and therefore to the accused and the community:[220]

> [With a more complicated case the prosecutor has] to spend a great deal of time considering how [he or she is] going to present it in a way that will make it comprehensible to the judge as well as to the jury. So having gone through that process I guess that by the time [he or she gets] to trial [he or she] has done the utmost to make it comprehensible.

2.150 If the jury does not understand the issues then the prosecutor's presentation was faulty and the jury is likely to acquit as guilt beyond a reasonable doubt has not been established. This approach to the role of the prosecutor assumes that 'there is no economic [or other] proposition which is

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217 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 6.

218 Criminal Code, ss. 676, 686. Gordon, op. cit, p. 16.

219 Stuesser, op. cit., p. 68.

220 Criminal Law Policy Section, Department of Justice, Canada, Meeting with the VLRC delegation, Ottawa, 21 Jun. 1995, p. 3.

so complicated [that] the ordinary educated person cannot understand it if it is properly expressed'.[221]

2.151 The contrasting position emphasises the complex nature of the law and the difficulty experienced by people in understanding the law. In conclusion, whether or not jurors are unable to understand complex issues has been an old and recurring issue.

Alternatives to Jury Trial

Special Juries

2.152 Special juries are no longer used in Canada. They were used to ensure that jurors were informed fact finders in some technical non-legal field or were of a higher social standing than those normally used. In Alberta these juries could be used in civil cases before 1982.[222] In British Columbia the use of special juries for civil cases ceased in 1979.[223] In Ontario a special jury consisting only of men or only of women had been used at the judge's discretion, upon application from one or more of the parties.[224] In Manitoba special juries had been used under the *Juries Act* 1970. Under this Act jurors (both male and female) were justices of the peace, bank officers, merchants, stock brokers, chief officers and managers.[225] The provisions in the 1970 Act dealing with special juries were repealed following a recommendation by the Law Reform Commission of Manitoba in 1975, which stated that:[226]

> In view of the fact that the special jury is unheard of in the day-to-day judicial workings of this province, and in light of the fact that the jurisdiction which gave birth to such a jury [England] has felt that it has outlived its usefulness, it is recommended that provisions regarding the special jury should be repealed.

Judge Alone Trials

2.153 In 1892 the Criminal Code of Canada provided that when an accused person was charged with an indictable offence he or she should normally

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221 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 2.

222 Jury Act 1980 R.S.A. c. J-2, s. 12.

223 Jury Act 1979 c.210, s. 20.

224 Juries Act 1980, c.226, s. 34.

225 Juries Act 1970 c.J30, s. 35.

226 Manitoba, Law Reform Commission, *Report on the Administration of Justice in Manitoba*, Part II, A Review of the Jury System, Report 19, 1975, p. 51.

have the opportunity of a jury trial. But, even at this time 'speedy' trials could occur, as noted by John Ekstedt and Margaret Jackson who wrote:[227]

> 'Speedy' trials, however, could occur, if the accused elected to be tried by a county or district court (higher courts) judge sitting alone without a jury.

2.154 In relation to those indictable offences where an accused may choose the mode of trial he or she must make an election in order to be tried by a judge alone, otherwise he or she is deemed to have chosen a jury trial.[228] Where the offence is punishable by more than five years imprisonment this right to elect the mode of trial is subject to the power of the Attorney-General to require that trial be by jury.[229] Furthermore, where an election for trial by judge alone has been made and two or more accused are jointly charged and they have not all chosen this mode, the provincial court judge may decline to record the election. In practice judges do not record the election unless there are strong and compelling reasons for recording it.[230] If the judge does not record the election then a preliminary inquiry is held. The end result of this difference in choice is that the accused must be tried by a judge and jury.[231]

2.155 If the accused chooses to be tried by a judge and jury and is committed for trial then he or she will be tried either by a superior court of criminal jurisdiction sitting with a jury or by a court of criminal jurisdiction sitting with a jury. The accused does not have a choice as to the level of court.[232]

2.156 The frequency of jury trials in Canada varies among the provinces, for example, in Ontario during 1994, 775 cases were resolved by trial by jury, 1108 cases were resolved by judge alone and 1091 other cases were subject to re-election to trial by judge alone.[233] In British Columbia most trials are before a

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227 Ekstedt & Jackson, 'Sentencing Reform in Canada'. In *1990 Meeting of Commonwealth Law Ministers* , Memoranda Part 1, Commonwealth Secretariat, Auckland, Apr. 1990, p. 57.

228 Criminal Code, ss. 565, 536.

229 Criminal Code, s. 568.

230 Salhany, *Canadian Criminal Procedure* , 5th ed., Ontario, Canada Law Book Inc., 1989, pp. 7–8.

231 Criminal Code, ss. 567 & 471.

232 Granger, *Canadian Criminal Jury Trials*, p. 46

233 Ontario Court, General Division, *Executive Information Report, Toronto* Region, Feb. 1995, Office of the Chief Justice, Tab. 10. Resolution in cases involving jury trial was as follows: guilty pleas before trial (11), guilty pleas at trial (163), found guilty after pleading not guilty (146), dismissed or acquitted (77) and withdrawn or stayed (378). Resolution in cases for Non-jury trial was as follows: guilty pleas before trial (6), guilty pleas at trial (708), found guilty after pleading not guilty (169), dismissed or acquitted

provincial court judge.[234] In Western Quebec the jury system sits for around three months a year in relation to all cases and the other trials are by judge alone.[235] In Montreal there are between 50 to 60 jury trials a year. Most of these are for offences where there is no right of election for the accused so that in practical terms the trial must be by a jury (under s. 469 of the Criminal Code). This is the case for homicide, with this type of offence making up around 12 to 15 jury cases a year. Only one percent of trials would be by a jury over a five year period for cases where the accused can elect to be tried by a jury, that is, where the offence is one for which the accused has an election.[236]

2.157 The accused may choose to be tried by a judge alone where an indictable offence is alleged, other than where this offence is triable only by a superior court as is the case for murder and treason. For these more serious offences the consent of the Attorney General is required before trial can be by judge alone. Murder cases make up around 95 per cent of jury trials in Ontario.[237]

2.158 In relation to hybrid offences the prosecutor may decide whether to prosecute by indictment or by summary conviction. Consequently, the prosecutor may choose whether to have such an offence tried by judge alone without regard to the accused person's preference. This decision by the prosecution must be made before the accused elects the mode of trial. The Crown discretion to proceed by summary conviction, which includes cases where sexual assault is alleged, works in this way:[238]

> For offences with a maximum punishment of less than five years some had the right to elect trial by jury but some recent Criminal Code amendments have reclassified those offences in such a way that the right to elect jury trial has been removed or can be removed on the Crown electing to proceed by summary proceedings. [These offences relate mostly to sexual assault, bodily harm, threatening and assault with a weapon.] That also removes the accused right to a preliminary inquiry.

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(185) and withdrawn or stayed (40).

234 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 9.

235 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 6.

236 Andre Vincent, Chief Crown Prosecutor, Meeting with the VLRC delegation, McGill University, Montreal, 26 Jun. 1995, pp. 9–11.

237 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 8.

238 Criminal Law Policy Section, Department of Justice, Canada, Meeting with the VLRC delegation, Ottawa, 21 Jun. 1995, p. 6.

2.159 Consequently, there are fewer cases now where there is a right to jury trial. The intention is to reduce the number of jury trials and the number of preliminary inquires. Trial by judge alone not only saves money and reduces delays in the Superior Courts but shelters witnesses and victims from a lengthy preliminary inquiry.

2.160 Furthermore, the prosecutor's election to precede by indictment or summarily (which ever is the case) is not subject to judicial review.[239] This is because the prosecutor is acting as an officer of the Crown and exercising an inherent power of the Attorney General, the First Law Officer of the Crown.

2.161 If the prosecutor chooses to have the indictable offences heard summarily then the accused benefits by having a lesser penalty applied (a maximum of six months and in certain cases 18 months),[240] but loses the chance to be tried by a jury. This situation where the accused lacks the choice of the mode of trial was not well received by the James Committee in the United Kingdom. The Committee supported leaving the choice of forum up to the accused. In so doing, they raised the following points:[241]

1. If the accused had the choice of forum then he or she would have responsibility for any injustice, perceived or real which resulted from his or her choice.
2. Producing guidelines for judges would be difficult and they may apply them differently even in apparently indistinguishable cases.
3. Public disapproval would result from abolishing the accused person's right of election.
4. Magistrates who were trying cases against the accused person's wishes would be placed in a difficult position.
5. Expense and greater burdens upon the courts (and perhaps delays) would result from the additional procedures and appeal procedures which would be needed.

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239 *Abarca* (1980), 57 C.C.C. (2d) 410 (Ont. C.A.). Salhany R.E., *Canadian Criminal Procedure*, 5th ed., Ontario, Canada Law Book Inc., 1989, p. 178.

240 Criminal Code, s. 722(1): A person convicted of an indictable offence tried summarily is liable to a fine of not more than $500 or imprisonment for no more than six months, or both, unless otherwise provided by law.

241 Scott, I.R., 'Comment on Report of James Committee' [1976] *Crim.L.R.* 166–167.

6. Accused persons who choose jury trial do so in order to get a fairer trial or a better chance of acquittal.

2.162 Similarly, the Law Reform Commission of Canada in 1986 asserted that every person charged with a crime for which the punishment might be 2 years imprisonment or more should have the right to trial by jury.[242] It recommended abolishing Crown election offences or 'hybrid' offences, so that those crimes carrying a lesser penalty would not be triable by a jury. For very serious crimes (those in s. 469 of the Criminal Code) trial by jury should be compulsory.

2.163 The option of trial by judge alone for criminal cases has existed in Canada for over forty years. It has been used extensively in this time; about 80 per cent of accused (perhaps more) elect this form of trial.[243] The advantages of using this mode of trial were described by the Criminal Law Revision Committee of New South Wales as being as follows:[244]

1. summary trial is already a recognised procedure;
2. trial by judge alone tends to take about one-fifth of the time of jury trials;[245]
3. there is no need for committal proceedings;
4. it is a more efficient and a more practical way of dealing with complicated issues;
5. it is likely to reduce the length of the trial;
6. it is fairer to the accused;
7. it removes the need to over-simplify complicated issues;
8. the decision maker has access to transcripts and exhibits; and
9. there is an unlimited time for deliberations.

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242 Granger, Charron & Chumak, *Canadian Criminal Jury Trials* ,Toronto, Carswell, 1989, p. 45.

243 Sallmann, Shorter Trials Committee, *Report on Criminal Trials*, Australian Institute of Judicial Administration, 1985, p. 199.

244 Department of the Attorney General and of Justice, Criminal Law Review Division, *Report on the Summary Prosecution in the Supreme Court of Corporate and/or ''White Collar' Offences of an Economic Nature*, Oct. 1978, para. 5.6, cited in Law Reform Commission of Victoria, Background Paper No.1, *The Role of the Jury in Criminal Trials*, Nov. 1995, p. 157.

245 Sallmann, Shorter Trials Committee, *Report on Criminal Trials,* Australian Institute of Judicial Administration, 1985, p. 199.

2.164 In reality the decision as to the mode of trial is usually made by the lawyer rather than by the accused.[246] In Quebec this may cause problems because lawyers whose clients are funded by legal aid find it financially disadvantageous to act in jury trials:[247]

> As for the jury, why it's not being used...I put the blame on lazy defence lawyers who want to make money. Really, [for] a jury trial you are not paid that much money by legal aid. You're paid $200 a day maximum if it's a murder trial, that's not very much, you don't get paid for your...hourly preparation. You can do $200.00 work and end up with a $2,000 retainer or bill at the end. ...[Furthermore,] you can't do 25 jury trials in a week, you can do 25 trials in front of a judge alone in a week.

2.165 In Ontario the payment to defence lawyers for jury trials is approximately five times higher than it is in Quebec and fewer cases are funded by legal aid.[248] In Quebec approximately 95 per cent of criminal cases are funded by legal aid, in Ontario it's around 70 per cent and in Nova Scotia the number is much lower.[249]

2.166 The preference for trial by judge alone is based upon the fact that jury trial costs more than a trial by judge alone to run, takes longer and is less predictable. In Quebec trial by jury may cost the accused around $100,000 whereas trial by judge alone will cost no more than $15,000.[250] This preference may also be a response to the following concerns relating to jury trials:[251]

> Juries [can be] somewhat influenced by a lot of the very heavy media reporting, mis-reporting of crime, crime statistics, nature of the crime and alleged prevalence of the crime and so many of us are tending to steer away from juries.

2.167 Accordingly, the choice of the mode of trial is partly a tactical decision. As observed by John Bascom, a lawyer in Calgary, certain cases a better suited to juries while other cases are better left to judges:[252]

> If the alleged offence is date rape, the defence is consent, and both the accused and the victim testify, a jury would be desirable. But if the alleged offence involves small children and involves technical and legal issues [trial by judge alone is preferred]. ...If

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246 Stuesser, op. cit., p. 75.

247 Mr Gaston St-Jean, Executive Director, Canadian Criminal Justice Association, Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 7.

248 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 7.

249 ibid., p. 9.

250 McGill Law Faculty, Meeting with the VLRC delegation, Montreal, 26 Jun. 1995, p. 6.

251 Meeting with the Law Reform Commission of British Columbia, VLRC delegation, Vancouver, 19 Jun. 1995, p. 5.

252 Gordon, op. cit., p. 15.

> you have good facts in the case but the law is against you, you want a jury; if you have bad facts but the law is in your favour, you want a judge.

A preference for trial by jury for sexual offences was also observed by the Department of Justice in 1995.[253] According to the then President of the Criminal Lawyers Association, Brian Greenspan, as a matter of tactics, where an accused will not testify the preferred mode of trial, is trial by judge alone.[254] In sexual assault cases the complainant may also prefer that the trial be by judge alone rather than by a jury of twelve, the former may be a less intimidating experience.[255]

2.168 Despite the infrequency with which jury trial is chosen, the right to jury trial is regarded as being important in securing a fair trial. Willard Estey described its significance in these terms:[256]

> When all is said and done, however, I am convinced that the jury trial, being a combination of a trained judge with a panel of community members, represents the best tribunal available for resolving the issues raised in many cases, and that it should be preserved and its use promoted... It is the right to demand a jury if desired that is important...and not the frequency with which that right is exercised.

Estey was not alone in expressing faith in the ability of the jury to determine the facts of a case. In a recent survey of lawyers by Lee Stuesser it was found that they generally viewed the jury favourably and had faith in its verdicts.[257]

Re-election

2.169 Even where the accused has chosen trial by jury he or she can elect to be tried by judge alone right up to the day of trial. An accused, who makes an election before the justice after the information has been read, has not lost the right to choose the mode of trial.[258] Where an accused has chosen to be tried by a provincial court judge re-election can be made right up until 14 days before the trial. Where he or she makes an election closer to trial the consent of the Crown is required. Where jury trial has been chosen the accused can re-

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253 Criminal Law Policy Section, Department of Justice, Canada, Ottawa, Meeting with the VLRC delegation, 21 Jun. 1995, p. 1.

254 Gordon, op. cit., p. 15.

255 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 8.

256 Estey, W., 'The Jury System and Its Place in the Judicial Process' in *The Second Annual Advocacy Symposium* (Ottawa: Canadian Bar Association, 1983), p. 4, cited in Stuesser, op. cit., pp. 61–62.,

257 Stuesser, op. cit., p. 75.

258 Criminal Code, ss. 536, 561–564.

elect before or after the preliminary inquiry with the consent of the prosecutor. However, in practice in Ontario the Crown does not insist on prior notice of the desire to re-elect to trial by judge alone. The prosecutor's consent is readily given in order to avoid any unreasonable delay and the greater expense associated with going before a jury:[259]

> Generally speaking out of a sense of fairness [the Crown does not] insist on that prior notice and what frequently happens is that on the morning of the jury selection the defence counsel sees what judge is assigned to the case and then [makes the] decision there.

2.170 An election of trial by jury initially preserves flexibility of choice to a greater degree than if trial by judge alone is chosen:[260]

> I think that the way it works practically is that your first election might automatically be [trial by] judge and jury because...it is much easier to go the other way [to trial by judge alone] and you'll maintain that [ease of election] after the preliminary [hearing] until the trial date is set.

This degree of flexibility encourages judge shopping. Mr John McMahon, the Executive Legal Officer to the Chief Justice of Ontario, the Hon. Roy McMurtry, advised the Law Reform Committee that the accused's option of re-election after choosing jury trial worked in this way:[261]

> So when they sees who is on the bench they look at the nature of the case and if they [see that] Judge S is [the judge and] that he's got a wide reasonable doubt in relation to sexual assaults so [they] think [that they] have a better shot at it [then they will] re-elect. If [the Judge is one] that they think is a little narrower they may elect to stay with the jury.

2.171 This system also encourages judges to stream into two groups: those who will do judge and jury trials and those who do only judge alone trials.[262] The first group develops some expertise in dealing with juries (limited by the infrequency of jury trials), while the second group of judges may completely lose touch with juries and the community standards which they voice.

2.172 When jury trial is chosen, judges doing pre-trials tend to place pressure on the accused to re-elect, because they want the cases tried quickly. This

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259 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 2. Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 8.

260 Canadian Speaker, Faculty of Law, Meeting with the VLRC delegation, McGill University, Montreal, 26 Jun. 1995, pp. 6 & 8.

261 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 8.

262 ibid., p. 2.

pressure is undesirable since it creates the perception of a 'very close connection' existing between the Crown Attorney's Office and the judiciary. This perception is also encouraged by the fact that they meet to discuss court schedules and the defence are not involved in these meetings.[263]

2.173 The tendency towards trial by judge alone has been recognised in Quebec, the VLRC delegation during its visit to McGill University was told that:[264]

> There's a trend to the reduction of preliminary inquires primarily be relying on extensive disclosure by the prosecution, also...there is going to be an increasing trend towards further reclassification of offences ... so as to allow expeditious cases. In other words, even for fairly serious offences, there's a progressive scaling down in the classification of the offences so that there will be dispositions without preliminary inquiry before judge alone and typically on an agreement [between accused and the Crown].

Mixed Juries

2.174 In Quebec mixed as well as unilingual juries can be used.[265] A unilingual jury is composed of either entirely French-speaking persons or entirely English-speaking persons. Mixed juries consist of French-speaking and English-speaking persons in equal portions. The French and English jurors are selected according to the way their names sound, so that 'if your name sounds English you are put on the English list'.[266]

Case Management Issues

Pre-Trial Proceedings

2.175 When the trial is to be by jury a pre-trial conference is held. The Criminal Code provides that a judge is to order a pre-trial conference between the prosecutor and the accused or counsel for the accused.[267] The conference is designed to consider matters which will promote a fair and expeditious trial. The precise nature of the hearing is governed by the rules of the

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263 Criminal Lawyers Association in Ontario, Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 13.

264 McGill University, Law Faculty, Meeting with the VLRC delegation, Montreal, 26 Jun. 1995, p. 4.

265 Jurors Act, J-2/4, s. 14. Section 627(2) of the Criminal Code gave an accused the right to demand a mixed jury in Quebec. This section has now been repealed by R.S. c.2 (1st Supp.),s. 1.

266 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 2.

267 Criminal Code, s. 625.1.

provincial superior courts. In British Columbia, for example, the meeting may be held in the judge's chambers or in open court. The procedure does not involve counsel filing any brief to the judge. The conference simply consists of the judge asking counsel questions and then filling in a one page form. The form usually lists any Charter matters or complex evidentiary issues—like the admissibility of a statement by the accused—and the estimated length of the trial.[268]

2.176 The conference may be held at any time before the trial, including a few weeks or even minutes beforehand. The pre-trial hearing is not regarded as being terribly important because it is seen as merely a procedural matter with no penalty applying under the Charter if it is not held.

2.177 However, there are moves toward pacing greater emphasis on the significance of pre-trial hearings and to increasing the role of judges in case management. The Ontario Court of Justice and the Ministry of the Attorney General in the First Report on *Civil Justice Review* suggested that an overall case flow management system should be applied to the civil justice system. They recommended that Ontario adopt (over the next four to five years) the following general time standards for the disposition of cases:[269]

- From filing to settlement conference: 9–12 months.
- From settlement conference to trial: 9–12 months.

2.178 The basis for their recommendation was the need to reduce delays, the backlog of cases and the cost of litigation. Such reductions will be achieved, according to the report, by giving the judiciary the principle responsibility for the management of the pace of litigation.

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268 Justice Bouck J. C., Supreme Court of British Columbia, *Criminal Law Reform: Helping the Juries Understand the Law*, Pattern Jury Instructions in Criminal Jury Trials, September 1991, pp. 14 & 49.

269 Ontario Court of Justice & the Ministry of the Attorney General, First Report, *Civil Justice Review,* March 1995, p. 179.

2.179 Expanded pre-trial procedures are also being used in British Columbia, Saskatchewan and Manitoba.[270] In Alberta the judicial mini-trial is available on an experimental basis where both parties agree to its use. In British Columbia the judge can order a mini-trial without the consent of the parties. Mini-trials give the parties a chance to settle the case outside the ordinary court process. The mini-trial is conducted in a flexible way, and can be particularly useful in complex cases.[271] Mini-trials are usually conducted after the conclusion of examination for discovery. The judges give a non-binding opinion at the end of the arguments.

Pre-Charge Hearings

2.180 A pre-charge hearings is held, without the jury being present, after the evidence has been presented but before the judge hands down his or her charge to the jury. It is conducted by most trial judges.[272] The hearing provides the judge with an opportunity to get each counsel's opinion on the charge and for counsel to be informed on the probable charge so that they can structure their final arguments.[273] One of the benefits of this system is that it reduces the likelihood of objections to the charge by the counsel because their opinions are considered when the judge is formulating his or her charge. At this time, counsel tend to offer general comments rather than commenting on details.

2.181 According to the Law Reform Commission of Canada the aim of holding these hearings is as follows:[274]

> Pre-address conferences are not intended to shift the responsibility for the charge from the judge to the counsel, but are only intended to involve counsel at an early stage in the preparation of the charge so they can present their arguments in light of the judge's instructions on the law.

2.182 The attitude of judges to the holding of such hearings has been favourable according to the Commission. It has been described as promoting the interests of fairness, because 'in fairness to the Crown and the defence, the

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270 British Columbia Supreme Court Rules, Rule 35; Saskatchewan Rules of the Court of Queen's Bench, Rule 191 & Manitoba Queen's Bench Rules, Rules 48.01 (3) & 50, cited in Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial*, Dispute Resolution—Special Series, Discussion Paper No.1, Aug. 1993, p. 1.

271 Alberta Law Reform Institute, *Civil Litigation: The Judicial Mini-Trial*, p. 14.

272 Justice Bouck, op. cit., p. 15.

273 ibid.

274 Canada, Law Reform Commission Working Paper 27, p. 91.

judge should indicate at least matters that might be in controversy that he intends to include or exclude from his [or her] charge'.[275]

Sources of Information for Jurors

Preliminary Sources of Information

2.183 In British Columbia, Ontario, Quebec, Manitoba and Saskatchewan information is provided to potential jurors on the selection procedures and jury service. In British Columbia potential jurors are sent a letter which specifies the length of the trial, when it is expected to go for a long time.[276]

2.184 In order for jurors to be able to fulfil their duties they must be well informed about the trial process. If they are not informed then they will be anxious about their task and unable to give their full attention to the evidence presented.

2.185 In British Columbia an information brochure is given to people who are selected to participate on a jury panel, together with a Jury Certification Form and Summons. They are told to contact the sheriff's office if they have any further questions. In Quebec an information brochure on jury duty is provided as well as an application form relating to the grounds of exemption. In Ontario an information sheet is provided. It discusses the jury selection procedure, court schedule, job security, financial compensation and juror criteria. There is also a brochure entitled: 'Playing Your Part in Our Justice System — A Guide to Jury Duty'.

2.186 The Law Reform Commission of Canada has expressed approval for the use of verbal instructions—given to the jury panel by the sheriff and given to jurors by the judge before the trial—as well as jury handbooks. The judge's instructions tend to be general in nature.[277] The Commission found handbooks were useful in providing uniform information to all jurors. It suggested that the handbooks contain detailed information on:[278]

1. the responsibility of jury service, the types of cases, and expected jury behaviour; and

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275 ibid.

276 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p.8.

277 ibid., p.15.

278 Canada, Law Reform Commission Working Paper 27, p. 71.

2. local matters, such as the normal court sitting hours, location of court, where jurors are to report to and the availability of parking.

2.187 The Commission also supported the introduction of mandatory preliminary instructions by judges. The following topics were suggested for inclusion in the instructions:[279]

1. the function of the indictment;
2. the function of the jury, the court and counsel;
3. the need for jurors to restrict their decision to the evidence and to avoid outside conversation and newspaper accounts;
4. the presumption of innocence and the benefit of reasonable doubt which is given to the accused;
5. credibility matters;
6. the elements of the crime charged;
7. a glossary of terms;
8. an explanation of procedure, the importance of cross-examination and the need for jurors to leave when matters dealing with the admissibility of evidence are heard;
9. the right of the accused to remain silent;
10. whether or not jurors can take notes;
11. how a verdict is reached; and
12. the secrecy of their deliberations.

The Law Reform Commission of Canada also recommended a videotape presentation. A presentation would assist jurors who had not read the handbook.

2.188 The Nova Scotia Law Reform Commission has recommended a number of measures which would assist in educating the general public about jury service.[280] For example, it recommended that information should be given to schools and be available in English, French, Mi'kmaq and other languages. Education would enhance jury representativeness by encouraging

279 ibid., pp. 71–72.

280 Nova Scotia, Report, p. 41.

jury service. This information would also assist people who were filling out questionnaires. In British Columbia the Education Society already shows elementary school level classes around the Superior courts.[281]

2.189 A number of recommendations relating to jury orientation in Ontario were made in 1992 by the Juries Act Project Team in its report to the Courts Administration Management Committee.[282] This Committee reports to the senior management of the Ministry of the Attorney General. Most of its recommendations on jury orientation have now been implemented. Consequently, the pamphlet which is now sent with the summons is simpler; it has a question and answer format and includes a map indicating the location of the court. It is also available at the courthouse. A video on the jury process is available for use by schools and community groups. A revised letter from the Attorney General is now sent to prospective jurors. This letter explains the random selection process and the preparation of the jury roll and the obligation upon the prospective juror to fill out the questionnaire. The report also recommended the use of a standard orientation speech for Ontario dealing with the history and importance of jury service, jury selection and local facilities. However, this particular recommendation was not followed.

Information Provided to Jurors Concerning Disputed Issues

Questioning of Witnesses by Jurors

2.190 There are limitations on the questions which jurors may ask to assist their understanding of the evidence before them, especially during the trial. Questions from jurors during the trial are regarded with greater reservation than those from them during their deliberations. There is no prohibition against the first type of questions, but a number of factors will affect the judge's decision whether or not to allow them. First, the answer which the witness may give to the question must be admissible according to the rules of evidence if the question is to be allowed. Secondly, procedural controls on questioning are applied. This is because the trial occurs in an adversarial environment and the evidence presented is largely a matter for counsel to

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281 British Columbia. Law Reform Commission, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 25.

282 *Report of the Juries Act Project to the Courts Administration Management Committee Ministry of the Attorney General,* Jun. 11 1992, pp. 13–15.

determine. Consequently, the jurors can ask questions through the sheriff to the judge but not to the witnesses themselves.[283]

2.191 The Law Reform Commission recommended that jurors should be told to only intervene in exceptional circumstances and that they must observe the following procedure:[284]

> [They] be instructed to wait until counsel have finished their questioning of the witness. They should then put their question in writing and hand it to the judge who will rule on whether the question is a proper one.

A similar procedure is followed in Quebec, where a juror writes down the question and it is left to the judge to decide whether it is asked.[285]

2.192 In Canada, the attitude of judges to whether jurors should be able to ask questions during the trial varies considerably. In 1980 the Law Reform Commission found that of the judges they surveyed only about half would allow questions to be asked by jurors during the trial.[286] This position has been adopted despite the fact that asking questions increases the ability of jurors to understand the evidence presented to them and may highlight errors in their understanding.

2.193 In contrast, during deliberations the jury's questions are regarded as being very important. And the suggested procedure for handling them reflects their importance:[287]

1. Counsel are told of the question and their submissions are heard as to the nature of the question and the content of the response.
2. A comprehensive response must be given, even if the issue has been covered earlier.
3. The response must be accurate.
4. If there is an error in the answer given to the jury then it will not be saved by an earlier correct charge.

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283 Criminal Law Policy Section, Department of Justice Canada, Meeting with the VLRC delegation, Ottawa, 21 Jun. 1995, p. 3.

284 Canada, Law Reform Commission Working Paper 27, Recommendation 19, p. 118.

285 Faculty of Law McGill University, Meeting with the VLRC delegation, Montreal, 26 Jun. 1995, p.1.

286 Canada, Law Reform Commission Working Paper 27, pp. 118–119.

287 *Jury Handbook*, 7–5. *R.. v. S. (W.D.)*, Supreme Court of Canada, unreported Oct. 20 1994, pp. 15–16, per Cory J.

Note Taking by Jurors

2.194 Whether jurors are encouraged to take notes or not varies among the individual provinces and courts. In Alberta jurors are given writing equipment and invited to take notes. In Ontario note taking is very rarely done by jurors during the trial. This reflects a preference for them relying on the group's memory and impressions rather than the notes of one juror. Jurors may be distracted by taking notes and therefore fail to observe the demeanour of witnesses. Furthermore, jurors are not meant to discuss the case among themselves until deliberations start. Nevertheless, some judges do allow note taking and even assure jurors that their notes will be shredded after the trial, thereby ensuring their privacy.[288]

2.195 According to the Law Reform Commission there are a number of benefits in allowing notes to be taken. These benefits include: assisting jurors in feeling at home in the court environment, reducing their confusion and helping them to recall the material presented, particularly in complex cases.

2.196 The above arguments against note taking by jurors were disputed by the Commission. Any pressure exerted by one juror over the others will occur whether or not notes are allowed. Indeed, the taking of notes may help to prevent such pressure because jurors can rely on their notes as a fall back when one juror seeks to control them. Jurors who take notes are still likely to give the proper weight to evidence because they are informed by counsels' summing up and the judge's charge. And if one juror fails to observe the demeanour of a witness then there are still eleven other jurors who may have observed it.

Technological Aids to Juror Comprehension

2.197 In British Columbia jury aids, such as charts, are used by counsel. Where it is necessary to reconstruct an accident for a jury computer simulation will be used.[289] In Ontario some judges will request that counsel agree on the number of charts, which will be referred to by their various witnesses during the trial and for the jury to have during deliberations.[290]

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288 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 8.

289 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 1.

290 Ontario Court of Justice (General Division), Meeting with the VLRC delegation,

Access to technical aids are particularly important when the jury is faced with complex scientific cases or a lot of expert evidence.

Provision of Transcripts of Testimony to Jurors

2.198 As a matter of practice in Canada the jury can bring the exhibits entered at trial into the jury room to examine during deliberations. For example, in British Columbia jurors are given all the exhibits at the beginning of their deliberations, except exhibits such as drugs.[291] However, written testimonial evidence, such as dying declaration, tends not to be allowed into the jury room. The accused persons statement is an exception to this principle.

2.199 If the jurors while deliberating cannot remember what was said by a witness they can make a written request to the judge to read it back. In British Columbia, the judge will either read from his or her notes or call in the reporter for the transcripts.[292] The judge's notes are also used in Quebec, with reference to the tapes occurring when counsel is not sure whether what the judge wrote was what was said.[293] In Ontario jurors are not given the transcripts, but they can request that they be read back. The reason for denying jurors access to sections of the transcript during deliberations is to prevent them focusing on one witness's evidence at the expense of what other witnesses have said.[294]

2.200 The judge has a duty in Canada to comply with the jury's request for the evidence to be re-read, failure to do so will lead to an error in law. If the judge reads his or her notes then the jury should be told that they can also have the evidence re-read if they feel that it is necessary. Furthermore, the evidence of a witness cannot be re-read without also re-reading all the cross-examination and qualifying evidence.[295] This is the case even where the jury

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Toronto, 23 Jun. 1995, p. 8.

291 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 19.

292 ibid., p. 20.

293 Faculty of Law McGill University, Meeting with the VLRC delegation, Montreal, 26 Jun. 1995,
p. 9.

294 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 9.

295 Granger et. al, *Canadian Criminal Jury Trials,* p. 303.

does not want to hear such evidence again. The nature of the assistance given by the judge will depend upon the availability of the transcript:[296]

> It thus seems clear that a trial judge has a duty to assist a jury in their recollection of the facts when requested. The form of assistance which [he or she] offers them is a matter, I think, within the discretion of the judge, but he cannot withhold [his or her] assistance because of the difficulties in giving it. Nor can [he or she] rely on the literal truth of a statement that the transcripts are not available. He must offer the jury some assistance, inquire of them what point is troubling them (and respond to it) or, at least, leave the door open for them to return if their collective memory proves insufficient.

The Judge's Charge to the Jury

2.201 In Ontario the judge's charge to the jury outlines those facts which must be proved by the Crown in order to establish guilt beyond a reasonable doubt. Precise instructions are given as to how the law applies, and advice is given on how to consider the evidence and return a verdict according to the law. If the jury during deliberations requests more information from the judge then it will be given after the judge consults with counsel for the Crown and for the defence.

2.202 Unfortunately, the guiding consideration for a judge when charging the jury is the need to meet the appellate court's approval rather than to make the law understandable to jurors.[297] Accordingly, the judge often reads to the jury judgments of higher courts or Parliamentary speeches, without reducing the concepts to plain English. There is a greater tendency to do this when the law is complex. To do otherwise is to risk a new trial being called on the grounds of misdirection. The judge will even avoid maintaining eye contact with the jury in order to ensure that no mistake in reading occurs. The result of this is that jurors may not understand, let alone remember, what they are told. The practical difficulties facing jurors in following the judge's charge were described by Justice Bouck, a judge of the Supreme Court of British Columbia, when he wrote:[298]

> Depending on the nature of the indictment and the length of the trial a charge can last from about 30 minutes to several days. Jurors may take notes of the charge but usually the words pass too quickly for anyone other than a short hand reporter to accurately record.

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296 *R. v. Foti* (1994), 87 C.C.C. (3d) 175, at 184 (Man.C.A.), cited in Balfour, *The Jury Handbook*, para. 7–2.

297 Justice Bouck, op. cit., p. 1.

298 ibid., 16.

2.203 In Canada jurors' comments about the judge's instructions tend not to be voiced due to the prohibition on commenting on jury deliberations. The Criminal Code makes it a summary offence for a juror to disclose any information relating to the proceedings of the jury when he or she was absent from the court room that was not subsequently disclosed in open court.[299] However, in 1977 commentators writing on the experience of jurors in America described the experience of jurors in these terms:[300]

> A not uncommon complaint of jurors is that they just do not understand the judge's charge to the jury. They suggest that it is too long, disjointed, repetitious and replete with technical legal terms and Latin expressions. Many times the charge is read in a sonorous monotone by a judge whose eyes are mechanically-glued to reams of paper and dozens of law books.

There is no reason to believe that the present situation in Canada would be any different.

2.204 The task of drafting the charge is also a difficult one because of the tight time frame under which the judge must work. The judge must review the evidence, including the facts, for the jury. There are problems with doing this within the expected time frame, particularly when the judge relates the evidence to each issue rather than going through it witness by witness:[301]

> Extracting the relevant evidence on any one issue from these four witnesses and inserting it in the appropriate part of the charge requires time for study, organization and thought. Due to the nature of the process that kind of deliberative exercise is often impossible to perform.

The judge must also review the theory of the Crown and the defence. The charge must include all the available defences whether or not they were mentioned by counsel. Counsel is then given an opportunity to comment on the charge.

2.205 On an appeal by the accused complaints about the charge to the jury may be heard. The Court of Appeal assumes that the jury in reaching a verdict understood and remembered the whole of the charge.[302] Consequently, the accused must show that there was an error in the charge leading to a miscarriage of justice and not merely that the jury did not

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299 Criminal Code, s. 649.

300 Devitt & Blackmar, *Federal Jury Instructions,* 3rd ed., West Publishing Co., 1977, p. 241, cited in Bouck, op. cit., p. 4.

301 Bouck, op. cit., p. 16.

302 ibid., p. 18.

understand it. Appeals are made more frequently in cases which were heard by a jury than in cases heard by a judge alone.[303] These appeals arise out of the judge's charge.

2.206 The danger inherent in this system is that the charge may be too difficult for jurors to understand and they may therefore discard it from their considerations, this may lead to an unjust verdict being delivered. So significant is the problem that the Law Reform Commission of Canada wrote:[304]

> It is often alleged that one of the most serious deficiencies of trial by jury, and indeed an aspect of it which is sometimes said to place the institution of the jury in jeopardy, is the jury's inability to follow and comprehend the instructions given by the judge.

2.207 Consequently, Justice Bouck has recommended that plain English be used by judges in their charge. He has also suggested that the American approach of using pattern jury instructions be adopted. Moreover, in order to gauge the success of these instructions when implemented he suggested that the prohibition against jurors disclosing information be lifted.[305]

2.208 The Law Reform Commission of Canada has also recommended making judge's directions more understandable to jurors. They asserted that this could be done by using jury instruction guidelines. Their use should not be mandatory since instructions still need to fit the individual facts of a case. A committee comprised of judges, defence and prosecution counsel, legal academics, lay persons and communication experts could produce the guidelines.[306] The use of guidelines would remove the difficulty faced by judges when having to prepare their own instructions on the law. At present the writing of directions is time consuming, difficult and the directions may lead to an appeal on the grounds of misdirection.[307]

2.209 Furthermore, the guidelines would increase the direction's accuracy and impartiality because it would be written by a committee after comprehensive research. Any errors would probably be picked-up because

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303 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 6.

304 Canada, Law Reform Commission Working Paper 27, p. 77.

305 Bouck, op. cit., pp. 34–37.

306 Canada, Law Reform Commission Working Paper 27, Recommendation 8, p. 75.

307 ibid., 79.

the guidelines are published documents. Guidelines would also assist in achieving uniformity.

Other Issues

General Conditions of Jury Service

2.210 In Ontario a number of reforms have been implemented following the Juries Act Project Team's finding that the facilities available for jurors were inadequate. At this time, many courthouses did not have separate facilities for jurors.[308] Due to the expense involved in building these facilities, the Team favoured using the available space more effectively.[309] The following reforms were recommended and subsequently implemented:[310]

1. All new designs for courthouses should include a jury assembly room and jury deliberations rooms.
2. Parking should be available in each court location together with arrangements for payment.
3. Each court location should provide a facility information sheet which is mailed out with the summons.
4. Food and drink facilities should be made available to jurors. The Team suggested installing vending machines or using small cafeteria concession areas. This reform has only been implemented to a limited extent.

2.211 In addition to these measures which seek to encourage people to participate in jury service, the feasibility of introducing child care facilities needs to be assessed. In Ontario there are no child care facilities and there is no fee given to allow jurors to buy this service elsewhere.[311]

2.212 In British Columbia the jury deputy is responsible for the comfort of the jury.[312]

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308 *Report of the Juries Act Team*, Courts Administration Management Committee, Ministry of the Attorney General, Jun. 1992, p. 19.

309 ibid.

310 ibid.

311 ibid., p. 1.

312 Law Reform Commission of British Columbia, Meeting with the VLRC delegation, Vancouver, 19 Jun. 1995, p. 13.

Debriefing and Counselling of Jurors

2.213 Jurors in British Columbia are not provided with debriefing or counselling by the system, instead they can go to their local doctor if they experience problems. One justification for not providing such a service is that jurors may experience distress some time after their service.[313] For this reason, in British Columbia it is 'largely in the hands of the judge at the outset of a very traumatic type of case...to take them very gently into the whole matter and put them on notice that this is going to be a shocking situation'.[314]

2.214 Recently, feedback on the experience of jurors has been sought in some provinces, for example, in Ontario there is a juror questionnaire for civil cases which is sent out after the trial. It asks people about what they thought of the service in the court house, whether time was spent waiting around and what they thought of the process.[315]

Majority Verdicts

2.215 Majority verdicts in civil cases are allowed in many of the provinces, for example, in Ontario and Manitoba a verdict may be given by five jurors after three hours of trying unsuccessfully to reach a unanimous verdict.

2.216 In criminal cases a majority verdict cannot be given in Canada. Where the jury cannot reach a unanimous verdict there is a hung jury and the accused must be retried or the charges dropped. According to Pomerant there is little reason to change the requirement of unanimity. The requirement does not appear to have been abused, no concerns have been raised that it is against the public interest or that it disadvantages minority groups.[316] There is no reason to believe that majority verdicts would improve efficiency. And if majority verdicts were introduced then the interests of minorities may be adversely affected:[317]

> The need for unanimity reinforces the requirement that juries be selected from a representative cross-section of the community because it gives each juror, even members of small minorities, a voice. [And] it sustains the 'delicate power balance'

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313 ibid., p. 2.

314 ibid., p. 3.

315 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Toronto, 23 Jun. 1995, p. 9.

316 Pomerant, *Multiculturalism*, viii.

317 Van Dyke, J.M., *Jury Selection Procedures*, Cambridge, Mass., Ballinger, 1977, pp. 209 & 210. Cited in Pomerant, *Multiculturalism*, p. 76.

between the government and the accused, it is a protection against government oppression, and it is a protection for minorities against majority oppression.

2.217 The Law Reform Commission of Canada also supported the retention of the unanimity requirement. The Commission emphasised the role in protecting minorities which is promoted by the 'right of one or two jurors to hang a jury'. The arguments for the introduction of majority verdicts are based on a perception that a few stubborn or corrupt jurors may prevent a guilty verdict from being reached. In cases where there is a retrial this leads to delays and expense.[318] However, according to the Commission, hung juries are a rare event and the introduction of majority verdicts would not do away with them.[319] It also found that the requirement promotes accuracy in determining the facts. This is because twelve people reach a verdict by applying their experiences and arguing out their ideas. Unanimity also promotes a verdict that is more acceptable to jurors, the accused and the community. The Commission noted that the unanimity rule has meant that justice is seen to be done: 'it has a symbolic value in informing the people that the State has taken all possible safeguards to ensure that innocent persons are not convicted.'[320]

Reserve Jurors

2.218 Reserve or alternate jurors cannot be used in Canada, not even for long cases. If a juror dies or is discharged either because he or she has become sick or for another reasonable cause then the trial will continue provided that there are still ten jurors remaining, unless the judge otherwise directs.[321]

Judicial Education

2.219 In Canada judicial education is conducted principally by the National Judicial Institute (established in 1988), with other organisations also providing this service. Indeed, many of these other organisations existed before the national college was established. [322] The National Judicial Institute is funded

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318 Canada, Law Reform Commission Working Paper 27, p. 20.

319 ibid.

320 ibid., p. 30.

321 Criminal Code, s. 644.

322 The major institutions that provided an educational service to judges when the National Judicial Institute was established included: the Canadian Judicial Council, Canadian Association of Provincial Court Judges, Western Judicial Education Centre, Canadian Institute for the Administration of Justice, Canadian Institute for Advanced Legal Studies and the Commissioner for Federal Judicial Affairs. Sallmann, P. A.,

by provincial and Federal governments and coordinates the delivery of all the education programs to judges. The education programs cover topics such as: case flow management, complex trial, early orientation for judges who are newly appointed, computers, gender bias, judicial ethics and cross-cultural and native perspective of the judicial system.[323] Judges are instructed by people from outside the judiciary. And they are encouraged to continue their education and to 'lead other judges'.[324]

2.220 Education is seen as being a tool for judges, rather than as infringing upon their independence. The National Judicial Institute's mission statement provides that the programs seek to 'stimulate continuing professional and personal growth, to engender a high level of social awareness, ethical sensitivity and pride of excellence, within an independent judiciary'.[325]

2.221 In Canada, judges appear to be supportive of the educational program. A survey conducted in December 1991 received responses from 41 per cent of all judges, with 89.8 per cent of respondents approving of the concept of an annual intensive study program and 76.4 per cent supporting the publication of manuals for judges.[326]

2.222 There is a great need for judicial eduction in Canada according to Kathleen Mahoney, a leading commentator in this field. In 1993 she wrote:[327]

> Extensive research over the past twenty years demonstrates that judicial decisions in many areas of the law are influenced by biased attitudes, sex stereotypes, myths and misconceptions about the relative worth of men and women. Consequently, women are often denied equal justice, equal treatment and equal opportunity by the Courts.

2.223 Mahoney argued that within the field of criminal law gender bias is particularly a problem in regard to judges' treatment of sexual assault and wife abuse. For example, there is a view in many jurisdictions that rape complainants are inherently suspect and may falsely accuse men. The dynamics and seriousness of wife abuse also tend to be misunderstood.

'Comparative Judicial Education in a Nutshell' (1993) 2 *Journal of Judicial Administration* 250.

323 ibid., p. 245.

324 Law Reform Commission of Australia, *Equality Before the Law*, Report 69 Part II, 1994, p. 175.

325 Sallmann, op. cit., p. 251.

326 Judges' Survey on Judicial Education in Canada, *Bulletin of the National Judicial Institute*, Vol. 4, No. 4, Dec. 1991, cited in Sallmann, op. cit., p. 252.

327 Mahoney, K. E., 'International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts' (1993) 1 *Australian Feminist Law Journal* 128.

Education programs aim to address this bias by '[showing] judges how their own beliefs and attitudes affect impartiality and fairness'.[328] It is particularly important to provide education about groups of people who may come from different backgrounds to those of many judges, such as: women, aboriginal people, children, racial, cultural and ethnic minority group members.[329]

2.224 Arguments have been made against the use of juries based on their lack of education in relation to gender issues. However, the claim that juries, unlike judges, cannot be educated in relation to gender issues (including, the battered women defence) ignores the role of expert evidence in certain cases. Expert evidence is allowed to be used to explain the experiences of battered women provided that the following three requirements are met:[330]

1. The subject matter of the inquiry is such that ordinary people are unlikely to form a correct judgement about it, if unassisted with special knowledge.
2. The witness must have gained his or her special knowledge by a course of study or previous habit which secures his or her habitual familiarity with the matter.
3. Expert testimony may be inadmissible if the state of pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by the expert.

2.225 Expert witnesses have also been used to educate jurors on cultural matters, the following example was given during the Committee's meeting with the Department of Justice in Canada:[331]

> The prosecution called not only the shop owner [who] said XYZ...but also called an expert in that particular culture to explain what XYZ actually means when properly understood in the real context.

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328 ibid., p. 134.

329 ibid., p. 135.

330 Brodsky, D. J., 'Educating Juries: The Battered Women Defence in Canada' (1987) 25(3) *Alta. Law Review* 461.

331 Criminal Law Policy Section, Department of Justice, Canada, Meeting with the VLRC delegation, Ottawa, 21 Jun. 1995, p. 5.

Focus Groups and Shadow Juries

2.226 In Canada opinion pollsters are now being used.[332] They conduct surveys of community attitudes and obtain assistance from psychologists in order to determine what type of jurors would be likely to be most sympathetic in a particular type of case. Questions for prospective jurors are also developed. Polls have been conducted to give support for an application to have the trial moved to a different venue on the ground that it is unlikely that an impartial jury can be assembled:[333]

> I think that it has happened on a number of occasions in Canada now [that] a polling company conducts a poll in the community asking certain questions like: Are you aware of this case? Would you be able to give a fair verdict? And then the results are of those polls are brought into Court...

2.227 Focus groups are also being used. They are given the evidence for both sides and their deliberations are observed. These observations can be used by lawyers to fashion their approach to the case in light of community attitudes. However, these techniques contradict the principle behind the jury selection process, that an impartial, not favourable, jury should be selected.

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332 Gordon, op. cit., p. 16.

333 Ontario Court of Justice (General Division), Meeting with the VLRC delegation, Ottawa, 22 Jun. 1995, p. 8.

'Right' to Trial by Jury

3.1 Hong Kong has a codified constitution, which comprises of the Letters Patent and the Royal Instructions. These documents were enacted by the Queen in the exercise of her prerogative. They provide for the institutions of government in Hong Kong and create certain rights, powers and duties. In relation to rights, the Letters Patent provides, for example, that: 'no Hong Kong law shall thenceforth restrict the rights and freedoms enjoyed in Hong Kong in a manner inconsistent with the *International Covenant on Civil and Political Rights 1966*'.[334]

3.2 However, the effect of the Letters Patent and the Royal Instructions will be reduced following the handover of Hong Kong, because 'their fundamental purpose is to announce and preserve control over its colony by the metropolitan power'.[335] The Joint Declaration and the *Hong Kong Act* provide that from the 1 July 1997 the United Kingdom will no longer have authority over Hong Kong as a territory and the government will follow the Basic Law. According to the draft version of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* jury trial shall retain its position within the criminal justice system. Article 85 of the draft constitution, provides that:[336]

> The principle of trial by jury previously practised in Hong Kong shall be maintained.

3.3 As part of the replacement of the constitutional system in Hong Kong, appeals will cease from the Hong Kong Court of Appeals to the Judicial Committee of the Privy Council.

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334 LP7. Cited in Wesley-Smith, P., *Constitutional and Administrative Law in Hong Kong*, China and Hong Kong Law Studies, p. 42.

335 ibid, p. 46.

336 A discussion of Article 85 of the Basic Laws is provided in Duff, P., Findlay, M., Howarth, C. & Tsang-fai, C., *Juries: A Hong Kong Perspective*, Hong Kong University Press Law Series, University of Hong Kong, 1992, (hereafter, 'Findlay et al, Juries'), p. 2.

The Legal Framework

Hierarchy of Courts

3.4 In Hong Kong the court structure comprises of the following courts from highest to lowest: the Judicial Committee of the Privy Council, the Supreme Court, the Court of Appeal, the High Court, the District Court and the Court.

3.5 The Judicial Committee of the Privy Council can hear appeals from Hong Kong, as of right, where the matter in dispute involves $500,000 or more, and at the discretion of the Court of Appeal if the question involved is regarded as being one which ought to be submitted to Her Majesty in Council for decision because of its great general or public importance or otherwise.

3.6 The Supreme Court has unlimited criminal and civil jurisdiction. *The Supreme Court Ordinance* distinguishes between judges on the High Court and the Justices of Appeal, which make up a separate Court of Appeal. The Court of Appeal hears appeals from the District and High Courts in both criminal and civil matters.

Incidence of Trial by Jury

Criminal Procedure

3.7 The High Court has exclusive jurisdiction to hear offences in Part III of the Second Schedule of the *Magistrates Ordinance*, these offences include: murder, rape and treason. Other offences may also be heard in the High Court if the prosecutor chooses to proceed in this court on the basis that the District Court's sentencing powers are inadequate. Trials in the High Court are heard with a jury. The jury consists of seven jurors, but may consist of nine jurors if the judge so orders.[337]

3.8 The District Court can hear civil matters and those criminal matters which are not within the exclusive jurisdiction of the High Court. For an indictable offence to be heard in the District Court the Attorney-General needs to make an application for transfer from the Magistrates' Court to the

337 *Jury Ordinance (Cap. 3)*, s. 3.

District Court. The District Court can only impose a maximum sentence of up to 7 years imprisonment, even were sentences are imposed consecutively.[338]

3.9 The Magistrates' Court hears summary cases, which may include all but the most serious criminal offences. Pursuant to the *Magistrates Ordinance* a permanent magistrate can deal summarily with all indictable offences other than those in Part I of the Second Schedule—these serious offences include: murder, rape, treason, illegal immigration offences, and offences relating to explosives, firearm, piracy or drugs.[339] Magistrates are not able to commit cases to a higher court for sentencing.

3.10 Jury trials in Hong Kong are quite rare. In 1988, for example, 296 cases were heard in the High Court, and of these cases around one-quarter were guilty pleas.[340] The District Court by comparison heard 1,824 cases and the Magistrates' Court heard 147,045 cases. Consequently, the proportion of criminal cases heard by a jury for 1988 was less than 0.1 per cent of criminal cases.[341]

Civil Procedure

3.11 The *Jury Ordinance* requires that in cases where the court or a judge orders that a cause shall be heard before a common jury, the party applying for this order must deposit with the registrar a sum which is sufficient to cover the jury's expenses.[342] The failure to make this payment within the prescribed time will lead to the case being heard without a jury. This expense is treated as part of the costs in a cause and is awarded and apportioned according to the *Rules of Court*.

Representativeness of the Jury System

General Concepts of Representativeness

3.12 The jury in Hong Kong has frequently been described as not being representative of a cross section of the community. In 1986, for example, the *Report of the Select Committee on the Problems Involved in the Prosecution and Trial*

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338 *District Court Ordinance (Cap. 336),* s. 82.

339 *Magistrates Ordinance (Cap. 227)*, s. 92, Schedule 2, Part I. See Findlay et al, Juries, pp. 40–41.

340 Findlay et al, Juries, p. 41.

341 ibid, p. 42.

342 *Jury Ordinance (Cap.3),* s. 15.

of Complex Commercial Crimes observed that the List of Common Jurors consists of a cultural, social and political elite.[343] In discussions with the Victorian Law Reform Committee, Mr Derry Wong, an associate professor at the Faculty of Law, City University of Hong Kong, described the numbers of people qualifying for jury service as being small compared to the overall population, that is, not more than 20,000 out of a population of around 6 million.[344]

3.13 There is a general acceptance in Hong Kong of the lack of representativeness of the jury and there has been little debate on the matter. The Victorian Law Reform Committee during its visit to the City University of Hong Kong was informed that:[345]

> in Hong Kong it doesn't seem that anybody has raised any serious objection to the fact that we don't have ... legislation requiring that the defendant be tried by his peers in the absolute sense of the word.

3.14 In Hong Kong there is little discussion about making the jury more representative. According to Professor Tyler, who referred to recent research done by the University of Hong Kong, there is a general acceptance of the system:[346]

> They had this system imposed upon them and it is almost as if they have learnt to live with it, and so until fairly recently there hasn't been much comment, let alone criticism. It's something which is imposed: We have to live with it , even if we don't understand it. What can we do about it?

3.15 This complacency may be beginning to change because of the approach taken towards the handover of Hong Kong to China in 1997. Commenting on this change of attitude Professor Tyler opined:[347]

> There has been more emphasis on democracy and participation over the last five years, I think. Naturally, as we move towards 1997 possibly a reaction of fear of the unknown, but certainly over the last five years there has been a lot more of this than when I came here, for example, in 1982.

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343 Legislative Council of Hong Kong, *Report of the Select Committee on the Problems Involved in the Prosecution and Trial of Complex Commercial Crimes*. (1986) Vol. 1 & 2, cited in Findlay et al, Juries, p. 57.

344 Mr Derry Wong, Associate Professor, Department of Professional Legal Education, Faculty of Law, City University of Hong Kong, Meeting with the Victorian Law Reform Committee (hereafter, 'VLRC'), 14 Jul. 1995, p. 3.

345 ibid, p. 4.

346 Professor Tyler, Faculty of Law, City University of Hong Kong, Meeting with the VLRC, 14 Jul. 1995, pp. 5–6, 11.

347 ibid, p. 6. (Tyler)

3.16 Accordingly, the jury is not representative of the community and no attempt has been made to ensure its representativeness. The lack of representativeness of the Hong Kong jury largely results from the English language requirement for eligibility.

Community Attitudes to Trial by Jury

3.17 In discussions with Mr Wong, the Victorian Law Reform Committee found that the Hong Kong community is very interested in the criminal justice system and juries. This interest is said to come from the existence of 'quite a lot of TV dramas which use the jury'.[348] However, within schools there is very little taught about the jury system.

3.18 Jury verdicts in Hong Kong are generally accepted by the media and the public. This point was made by Associate Professor M. Findlay in evidence given to the Victorian Law Reform Committee, when he asserted that the verdict of the jury is seen as 'a powerful legitimator that conveys enormous authority in the minds of the general population'.[349] The community's attitude to jury service was observed as being as follows:[350]

> The Hong Kong research we carried out surprisingly indicated a significant degree of public confidence throughout the Chinese community of Hong Kong, most of whom would have very little experience of a jury first hand and would know very little about what it did or stood for. Yet they have a firm commitment to the significance of it as a democratic institution and endorsed its importance.

3.19 According to Professor Tyler, there has only been one case where there was an outcry over the result and this involved the Carrion trial where the judge acquitted the defendants at the end of the prosecution's case.[351] Consequently, the jury were not asked to return a verdict.

3.20 The positive attitude of the community towards juries has encouraged debate about extending their use to the District Court.[352]

Jury District Formation

3.21 Jurors are chosen from the List of Potential Jurors. This list is supplied

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348 ibid.

349 Findlay, Evidence to the VLRC, *Hansard*, 30 Jan. 1995, p. 78.

350 ibid, p. 76.

351 Professor Tyler, op. cit,, p. 18.

352 Findlay, *Hansard*, 30 Jan. 1995, p. 81.

by the Immigration Department. The Immigration Department encompasses the Registration of Persons Office, Registries for Births, Deaths and Marriages.

Juror Eligibility Criteria

English Language Requirement

3.22 In order to qualify for jury service a person must have a knowledge of the English language which is 'sufficient to enable him to understand the evidence of witnesses, the address of counsel and the Judge's summing up'.[353]

3.23 The narrow jury franchise in Hong Kong is largely due to the requirement that jurors must have a sufficient understanding of English. The inclusion of this requirement within the list of eligibility criteria results from English being the language used in the courts. Yet, the overwhelming majority of people in Hong Kong speak Cantonese. According to the authors of a recent study into juries in Hong Kong, there are special circumstances which explain this lack of community representativeness:[354]

> Given that the Government of Hong Kong is appointed through the colonial power, rather than being democratically elected by the local community, democratic ideology is of less influence and has correspondingly less impact upon the jury ... More specifically, the language used in the courts is that of the colonial power rather than that of the local residents and, until that changes, the jury franchise cannot realistically be widened.

3.24 Another effect of the language requirement on the composition of the jury is that jurors tend to be highly educated. The quality of jurors in Hong Kong compared to those in countries that seek to have a broadly representative jury was described by Cruden J., a Hong Kong Judge, in this way:[355]

> Hong Kong juries are...of very much higher quality than English and other Commonwealth juries ... The Hong Kong juries are invariably very well dressed, attentive and relatively young. The Old Bailey juries generally are far less attentive, of the men only a minority wear ties and the average age is older. These superficial differences are not merely cosmetic, but reflect a substantial difference in the quality of Hong Kong and English juries.

3.25 Given the fact that jurors in Hong Kong tend to be well educated, many believe that they are better able to understand complex commercial

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353 *Jury Ordinance (Cap. 3)*, s. 4.

354 Findlay et al, Juries, p. 59.

355 Cruden J., 1986, cited in Findlay et al, Juries, p. 58.

facts than jurors in other jurisdictions. Associate Professor Findlay observed that 'some may say that the basic criteria for jury service in Hong Kong is such as to produce a fairly competent commercial cross-section to consider issues of complex commercial fraud'.[356]

3.26 Professor Tyler of the City University of Hong Kong described the jury franchise as also being very narrow. He referred to the jury pool as being comprised of expatriate business people and the upper class local Chinese. Accordingly, for the average accused, who may be poor and with a working class background, there is not a jury of one's peers.[357]

3.27 The Hong Kong jury project found that this lack of representativeness of the jury had the effect of alienating the criminal justice system from the community, and that for the accused this alienation tended to take the form of being tried by a jury who lacked a knowledge of his/her background. According to the authors of the project:[358]

> juries are unlikely to have an immediate familiarity with the life experiences of those whom they are required to try, the bulk of defendants before the criminal courts in Hong Kong being young, male, working-class Chinese, with low levels of education, and little understanding of English.

The project also discovered that: 'a significantly large proportion of respondents [do] not know what the jury is or what it does ... [and] that the vast majority of our respondents lacked immediate personal experience of the jury'.[359]

3.28 It is not surprising therefore that the general community's attitude towards the legal system reflects their inability to participate as jurors. People apparently lack an understanding of how the system works and they have 'an impression that the legal system is not something for them'.[360]

3.29 The language requirement may change after 1997, as the proposed constitution, the Basic Law, requires Chinese to be used in the courts. Article 9 of the *Basic Law of the Hong Kong Special Administrative Region* provides that:

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356 Findlay, *Hansard*, 30 Jan. 1995, pp. 8283.

357 Professor Tyler, op. cit., p. 5.

358 Findlay et al, Juries, p. 123.

359 ibid.

360 Mr Derry Wong, op. cit., p. 4.

> In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.

According to Professor Tyler the use of Chinese in the courts will lead to a widening of the jury franchise and the opening up of the system to more people.[361]

Qualification Criteria

3.30 In order for a person to qualify for jury service in Hong Kong he/she must comply with the following requirements.[362] He/she must be aged between 21 years and 65 years of age, of sound mind and not afflicted with deafness, blindness, or other such infirmity, and be a good and sufficient person resident within Hong Kong. As mentioned above, the person must also have a knowledge of the English language which is sufficient to enable him/her to understand the proceedings, that is, the evidence of the witnesses, address of counsel and the judge's summing up. The court may, of its own motion or on the application of the registrar or any interested party, discharge a prospective juror who is unable to satisfy the court or registrar that his/her knowledge of English is sufficient.

Disqualification, Ineligibility and Exemption Criteria

3.31 The categories of people who are exempt from jury service are quite extensive and cover a range of people who are not exempted from service in England. The wider range of exemptions in Hong Kong can be partially explained by the 'importance of trade and transport to the economic life of Hong Kong'.[363] The following people are exempt from jury service in Hong Kong:

- members of the Executive and Legislative Council;
- members of the Urban and Regional Councils;
- justices of the peace;
- consuls, vice-consuls and officers of equivalent status, of foreign governments and their salaried functionaries who are nationals of such governments and are not carrying out business in Hong Kong, and the spouses and dependent children of such persons;

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361 Professor Tyler, op. cit., p. 13.

362 *Jury Ordinance (Cap. 3)*, s. 4.

363 Findlay et al, Juries, p. 55.

- practising barristers and solicitors and their clerks;
- medical practitioners and dentists who are registered;
- members of the Royal College of Veterinary Surgeons of Great Britain and persons with an approved diploma of a British or foreign veterinary institution;
- editors of daily newspapers, and their staff (if the Registrar is satisfied that the publication of the newspaper would be disrupted if they served);
- chemists and druggist;
- clergymen, priests, and ministers of any Christian congregation or Jewish congregation;
- full time students;
- naval, military or air service officers of Her Majesty who are employed on full pay;
- pilots, the ship's master and crew members, navigators, wireless operators and other full time members of the crews of passenger or mail or commercial aircraft;
- police and special constables;
- members of religious orders living in monasteries, convents or other such religious communities;
- the wife of: the Chief Justice, a Justice of Appeal, a High Court Judge, a member of the Armed Forces of Her Majesty serving on full pay;
- commissioners, trade commissioners and trade officers of any Commonwealth Government and their staff if employed full time and not domiciled in Hong Kong, and the spouses and dependent children of any such person.

3.32 A range of public officers are also exempted from jury service, including:

- a judge, deputy judge, District Judge, deputy District Judge, registrar, deputy registrar, coroner, magistrate;
- a presiding officer, adjudicator or tribunal member and an officer or member of staff if his/her work is mainly concerned with the day to day administration of the court or tribunal;
- a legal officer;
- a public officer in the Legal Department, Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department;

- a member of Royal Hong Kong Police Force, Immigration Service, Customs and Excise Service or Fire Services Department;
- an officer of the Correctional Services Department;
- a member of the Government Flying Service;
- the Commissioner and Deputy Commissioner, an officer of the Independent Commission Against Corruption;
- a public officer carrying out the duties of the Royal Hong Kong Police Force, the Immigration Department, the Customs and Excise Department, the Fire Services Department, the Correctional Services Department, the Royal Hong Kong Auxiliary Air Force or the Independent Commission Against Corruption;
- a public officer serving in a training or apprentice rank;
- the principal probation officer or a probation officer;
- a social worker employed full time in any reformatory school etc.

3.33 Where a potential juror has a good reason for excusal the registrar may excuse him/her.[364] The court also has a discretion to exempt a person from jury service where service would cause him/her severe hardship.[365] Judges tend to use this discretion to excuse small business people from jury service and those people who seek excusal by claiming that their English is not good enough.[366]

Ethnicity and Gender Issues Affecting Jury Representativeness

Ethnicity

3.34 Due to the language requirement discussed above, the native Cantonese-speaking population are effectively disqualified from jury service. This feature of the Hong Kong jury franchise means that the franchise is quite unique among the other jurisdictions discussed. Findlay described this feature in the following way:[367]

> the principles of randomness and representativeness, which are at the heart of the legitimating ideology of juries, find little place in Hong Kong. Instead, the heavy hand of colonialism distorts conventional ideology. The language used in the courts is that of the colonial power with the overwhelming majority of the native Cantonese-speaking population disenfranchised. For those Chinese who appear on the jury list,

364 *Jury Ordinance (Cap. 3)*, s. 28(2).

365 *Jury Ordinance (Cap. 3)*, s. 28(1).

366 Professor Tyler and Associate Professor Hatham, City University of Hong Kong, Meeting with the VLRC, 14 Jul. 1995, pp. 16–17.

367 Findlay et al, Juries, p. xii.

> there is a clear bias in favour of the well-educated, middle class, professional or business people.

Gender Issues

3.35 The *Jury Ordinance* gives the judge a discretion to make an order that the jury shall be composed of men only or women only as the case may require.[368] This order may be made following an application by the parties (which includes the accused and the prosecution in criminal cases) or any of them or at the judge's own instance.

3.36 Furthermore, the judge can exempt a woman from jury service where she makes an application by reason of the nature of the evidence to be given or the issues to be tried.[369]

3.37 Despite the existence of these provisions, the Jury Project found that overall there was a fairly even distribution of female and male jurors. However, in rape cases female jurors tended to be challenged by the defence. The following typical example of the use of peremptory challenges was given by the Jury Project:[370]

> In case no.27, which was an attempted rape, the defence counsel used up the five peremptory challenges on the first five females who were balloted to serve on the jury for this trial. No challenges were made for cause, or by the prosecution.

Jury Management Issues

Jury Roll Formation and the Summoning Process

3.38 A list of Common Jurors is used to randomly select a panel of jurors. Jurors are summoned from this list to attend the High Court or the Coroner's Court. The List of Potential Jurors is compiled by the Registrar of the Supreme Court with the assistance of the Commissioner of Registration (who also acts as the Director of Immigration).

3.39 In order to select prospective jurors the Jury Office within the Department of Immigration uses certain applications which were submitted to it to obtain either an identity card or travel documents. Adult identity cards are issued to all residents once they are eighteen. A number of other sources may be used by the Commissioner or Registrar to obtain information about a

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368 *Jury Ordinance (Cap.3)*, s20.

369 *Jury Ordinance (Cap.3)*, s20.

370 Findlay et al, Juries, p. 67.

person's identity card number and whether he/she has passed any specified English language examinations. These sources include universities and institutions.[371] People who appear to meet the selection criteria are placed on the list.

3.40 According to Frank Choi, a provisional list of potential jurors is produced every three months. This list is published in the Government Gazette and one English and one Chinese newspaper, it may also be inspected at the Jury Section in the Supreme Court.[372] People have 14 days to apply for their names to be added or removed.

3.41 Potential jurors are then summoned from the list at random. Checks are done to ensure that they have not served within the last two years and that they have not been excused from further service.

3.42 A summons for jury service is issued by the Registrar of the Supreme Court and is served either personally or by post. The failure to attend for jury service will mean that an officer of the court or a police officer is able to give a warning to attend and if this warning is not complied with then the person may be brought before the court.[373] Jurors are advised in the summons that should they fail to attend a fine which does not exceed $3,000 will be imposed.

3.43 Unfortunately, the process used to prepare the jury list tends to exclude certain people who may have a sufficient understanding of English to qualify for jury service. These people include the following groups:[374]

> those who have left school before Form Six; those who, after obtaining an identity card at eighteen, have no reason subsequently to visit a main office of the Immigration Department; [and] those who undergo tertiary education overseas.

3.44 A further problem in selecting prospective jurors arises from the fact that many people within the expatriate population may be employed in Hong Kong for only short periods of time which in turn leads to the jury list becoming out of date quickly.[375]

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371 *Jury Ordinance (Cap. 3)*, s. 4.

372 Choi, F., for the Judiciary Administrator, 'How juries are chosen' Letter, *South China Morning Post* 14 Jul. 1995.

373 *Jury Ordinance (Cap.3)*, s. 17.

374 Findlay et al, Juries, p. 57.

375 ibid

Jury Vetting

3.45 The *Jury Ordinance* provides that the Registrar shall cause a list containing the names, places of residence and additions of persons summoned to be made out as soon as is convenient after the summons have been served.[376]

Jury Selection

3.46 The Jury Project found that judges and barristers generally approve of the jury selection process. Of the nine High Court judges who were surveyed three believed that the manner of selection, including the use of challenges, led to a fair and impartial jury, while the other judges believed that this system probably produced such a jury.[377] Of the barristers who responded to the questionnaire 68 per cent thought that such a jury would definitely be obtained, 12 per cent were undecided and 10 per cent felt that the selection procedure did not produce a fair and impartial jury.[378]

3.47 In Hong Kong difficulties have been experienced in empanelling sufficient jurors. This occurred, for example, in the Carrian case, which was a complex fraud case. The trial was expected to be long and turned out to be 18 months (the longest a trial has been in Hong Kong). In order to ensure that there would be sufficient jurors to reach a verdict during the trial legislation was passed which enabled a jury of nine to sit where the judge so orders, instead of merely seven.[379] This meant that four jurors could be excused before the trial would need to be abandoned. In the Carrian case, 103 perspective jurors were summoned, 20 peremptory challenges were used and two jurors were stood aside, 70 jurors were excused on the grounds of hardship relating to the probable length of the trial.[380]

Crown's Prerogative to 'Standing Aside' Jurors

3.48 The Crown can require jurors to stand by, that is, it can ask a juror to stand aside until the panel is exhausted. No reason need by given by the Crown, unless the panel is exhausted.

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376 *Jury Ordinance (Cap.3)*, s. 18.

377 Findlay et al, Juries, p. 64.

378 ibid, p. 63.

379 *Jury Ordinance*, s. 3 as amended in 1986 by the *Jury (Amendment) Ordinance* (No. 3 of 1986).

380 Findlay et al, Juries, p. 64.

Challenges for Cause

3.51 Any number of challenges for cause are available to the accused. Jurors may be challenged on the ground that they are not qualified or liable to serve as a juror, or are exempt. Challenges for cause must be made before the person is sworn in. Challenges for cause may be made by the Crown and by the defence.

Peremptory Challenges

3.52 Each accused is entitled to five peremptory challenges.[381] These challenges can be effectively used to obtain an unrepresentative jury because of the small size of the jury. The jury will usually consist of only seven jurors. In this way, peremptory challenges can be used to obtain a jury consisting of expatriates. It was suggested to the Victorian Law Reform Committee by Professor Tyler that local Chinese defendants would 'feel, depending on the nature of the offence, ... that they are more likely to get off or have more sympathy with an expatriate jury'.[382] The same observation was also made by the Jury Project in relation to drug cases.[383]

3.53 Despite the ease with which the composition of the jury can be altered by using peremptory challenges, there is general support for retaining these challenges. The Jury Project found that among the barristers surveyed 50 per cent were happy with the existing system, 27 per cent favoured increasing the number of challenges and only 6 per cent favoured their abolition.[384] Similarly, of the judges who were surveyed, nine High Court Judges supported the continuation of peremptory challenges and the power of the Crown to stand-by.[385]

Complex Litigation and the Jury System

3.54 In Hong Kong complex litigation has been seen as presenting a problem for jurors, because the case may be long and the evidence difficult to follow. There were a number of factors which the Jury Project found reduced

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381 *Jury Ordinance (Cap. 3)*, s. 29.

382 Tyler, op. cit., p. 9.

383 Findlay et al, Juries, p. 67.

384 ibid, p. 63.

385 ibid.

the ability of jurors to concentrate during proceedings, with these factors being exasperated in long complex trials. These factors included:[386]

> the similarity of witnesses' evidence; lengthy, repetitive cross-examination; delays and interruption as a result of the interpretation process; and more generally, tiredness and boredom.

3.55 Concern about the jury's ability to deal with complex, long fraud cases was raised during the Victorian Law Reform Committee's meeting with academics from the City University of Hong Kong. Associate Professor Hatham asserted that:[387]

> I have every sympathy with jurors. I think it is totally unrealistic and almost cruel and inhumane to expect the jury to sit there day after day and listen to complicated discussions about the movement of stocks and shares — those sort of things — or computer generated accounts; it is unrealistic.

These concerns carry particular weight in Hong Kong due to the high incidence of relatively significant commercial crime.

3.56 In order to address some of the difficulties that complex litigation causes for jurors the *Complex Commercial Crimes Ordinance 1988* was introduced. This legislation enables a preparatory hearing to be held before the jury is empanelled. The hearing is intended to define the material issues, assist the judge and jury, and to speed up proceedings. Furthermore, the judge is able to allow explanatory material to be submitted in such a form as is likely to aid the jury's comprehension if he/she considers it necessary.[388] These changes address the following problem discussed by the Hong Kong Government at the 1986 Meeting of Commonwealth Law Ministers and Senior Officials:[389]

> It is our view that unless there is full disclosure between the prosecution and the defence then it is unlikely that the issues can be isolated sufficiently to ensure that the trial is significantly shortened and that the case can be presented in its simplest form to the jury. The present pre-trial procedure depends basically on the goodwill of counsel, and in our view that it is unsatisfactory.

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386 Findlay, *Hansard*, 30 Jan. 1995, p. 79.

387 Hatham, Associate Professor, City University of Hong Kong, Meeting with the VLRC, 14 Jul. 1995, 22.

388 *Complex Commercial Crimes Ordinance 1988*, s. 13.

389 Government of Hong Kong, 'Proposed Procedures to Simplify the Presentation of Complex Commercial Criminal Cases' in Meeting of the Commonwealth Law Ministers and Senior Officials, Harare, Zimbabwe, 26 Jul.–1 Aug. 1986, *Memoranda*, Commonwealth Secretariat, London, p. 556.

3.57 Sir Michael Thomas, as Attorney-General, referred to the need to address the problems for juries which arose from complex litigation. During the second reading of the Trial of Commercial Crimes Bill he warned that these problems would otherwise lead to a high acquittal rate:[390]

> There is ... [a] fear that the traditional system of trial may not be able to cope satisfactorily with the complexities of the task. Criminals will sometimes go free simply because, as one High Court judge has pointed out, "complication is a weapon for the defence".

3.58 However, figures from the Commercial Crime Unit of the Attorney-General's Department did not point to a high acquittal rate for these types of cases. Instead the figures released towards the end of 1987 showed that 44 commercial cases had been prosecuted since 1984 with 83 people being convicted and only 3 people being acquitted.[391]

3.59 The Jury Project also found that most of the jurors who had difficulty concentrating sat on juries which convicted.[392] Similarly, according to Professor Tyler, some commentators believe that if jurors find it difficult to understand complex litigation they tend to convict the accused. This view suggests that the higher proportion of convictions by Hong Kong juries compared to English juries results from a difference in attitude:[393]

> There is, if you like, a tradition of law-abiding here and there's a cynical suggestion, there's almost a suggestion that if the jury can't understand they are going to take the easy way out and convict.

3.60 This attitude was also referred to by Findlay during his evidence to the Victorian Law Reform Committee. He suggested that the attitude of jurors is one of the reasons why the long term future of juries in Hong Kong might be called into question:[394]

> The juries in Hong Kong seem to be anxious to convict because they feel that it is necessary to find someone who is responsible and the person they have before them might be the best person to bear that responsibility. So our concept of reasonable doubt and our ideas of proof do not sit well with Hong Kong juries and the way they like to make decisions.

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390 Hong Kong Legislative Council, 13 March 1985: 811, cited in Findlay et al, Juries, p. 44.

391 Findlay et al, Juries, p. 47.

392 Ibid, p. 79.

393 Professor Tyler, op. cit., p. 9.

394 Findlay, *Hansard,* 30 Jan. 1995, pp. 78–79.

3.61 Nonetheless, the criticism of the use of jury trial for complex fraud cases also seems somewhat misplaced, according to the authors of the Jury Project. The project concluded that 'considerably more charges of the type that would be brought to prosecute complex commercial crimes were heard before the District Court than the High Court' and that there was a lack of evidence to suggest that juries in cases heard in the High Court experienced problems.[395] Jury competence was seen by Associate Professor Mark Findlay as not being a real problem in complex cases. However, he did suggest that the presentation of evidence and the use of pre-trial agreements needs to be addressed.[396]

Perceptions of Juror Competence in Hong Kong

3.62 During the Jury Project jurors were asked about how they could be assisted in reaching their verdict. The survey found that 34 of the 58 jurors surveyed favoured their being able to take material into the jury room. Other suggestions covered a range of matters, including the provision of:[397]

> site visits; more witnesses; a video tape reconstruction of the crime; tape recordings of the evidence, with a replay function; a co-ordinator appointed by the courts to liaise with jurors and to discuss with them any difficulties or findings; personal consultations with the judge; a precis of the judge's summing-up; an interpreter to translate the judge's summing-up into Cantonese; the trial being conducted in Cantonese; an accountant to advise jurors; lunch arrangements; a tea and coffee making machine; comfortable seats; clean toilets; and in the words of one juror, 'We need practice'.

3.63 Although there is an English language requirement for eligibility to serve on juries, evidence in court is usually given in Cantonese. Jurors, having met the English language requirement, may still have difficulty with English. For this reason, the tendency for evidence to be given in Cantonese is beneficial. As observed by one academic: 'they will hear the evidence initially in their own language and then hear it translated so they shouldn't have too much of a problem with the actual evidence'.[398] The work of the Jury Project suggests that a large number of jurors would benefit from hearing the evidence in Cantonese. It found that 80 per cent of jurors sampled nominated Cantonese as their preferred language at home.[399]

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395 Findlay et al, Juries, pp. 50–51.

396 Findlay, *Hansard*, 30 Jan. 1995, p. 78.

397 Findlay et al, Juries, p. 88.

398 Tyler, op. cit., p. 8.

399 Findlay et al, Juries, p. 75.

3.64 Interpreters are used to enable communication between the accused and witnesses (who tend to speak Cantonese) and the judge and counsel (who conduct proceedings in English). According to the Hong Kong Law Reform Commission one of the reasons why more Cantonese is not being brought into the courts is that 'even Chinese barristers prefer to conduct their cases in English [as] many aspects of the law don't happily translate into Cantonese'.[400]

3.65 Accordingly, it is only when the jurors come to hear each of the counsel's address that they may have difficulty. The risk that jurors will not fully understanding the barrister's address is exacerbated by the standard of English of some of the barristers and their accents:[401]

> the standard of English of a large number of the barristers is very poor as well, which raises a complication that in a jurisdiction like this, you have so many different types [of accent] as well, that there are certain accents that are more difficult for the local ear to comprehend.

Local jurors may also find it difficult to follow the judge's summing up.

3.66 However, even when jurors do not have problems with the language itself, they may still experience difficulties in following the evidence. The Hong Kong jury project found that 22 (or 38%) of the 58 jurors who responded to the questionnaire had experienced difficulty at some stage during the trial.[402] Legal terms posed a difficulty for 5 of these jurors. The other jurors had difficulty with medical terms, legal procedures, imprecise cross-examination, translations and difficulty in deciding the relevancy of the evidence.[403] However, Ian Freckelton suggested that this sample may not have been very reliable. He said that 'it may well have been those who were concerned about their performance in the trials in which they engaged who responded to the questionnaire'.[404] Furthermore, Freckelton suggested that this type of study is very sensitive to any bias in the questionnaires.[405]

3.67 The Hong Kong Jury Project also found that two thirds of the jurors surveyed were confident about their ability to follow 80 per cent of evidence.

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400 Hong Kong Law Reform Commission, Meeting with the VLRC, 4 Sept. 1995.

401 Wong, op. cit., p. 8.

402 Findlay et al, Juries, p. 71.

403 ibid.

404 Freckelton, I., 'The Challenge of Junk Psychiatry, Psychology and Science' in Selby H., ed., *Tomorrow's Law*, The Federation Press, 1995, p. 58.

405 ibid.

Judges tended to also be confident about the jury's ability to understand the trial process. Eight out of the nine judges surveyed felt that jurors understood proceedings 'thoroughly' or 'most of the time'.[406] However, only 65 per cent of barristers regarded the jury as being able to understand trials most of the time.[407] In relation to complex trials, only 55 per cent of barristers surveyed expressed confidence in juries, and 30 per cent felt that jurors were not able to follow these cases.[408] Judges generally thought that jurors could understand complex trials, with six out of the eight judges who responded forming this view.

3.68 A further issue relating to the competence of the jury is the ability of jurors to individually form a view on the evidence. Findlay suggested that the many jurors in Hong Kong were not doing this and that they were merely adopting the view of the foreman:[409]

> Again, the idea that it would be a democratic decision-making process does not seem to be popular with Hong Kong juries. They prefer to identify an important person among the jury to be the foreman and then they highly regard the advice of that person, particularly if he or she is a successful business person or has aged and distinction measured in some other form. From the discussions that we had with jurors in Hong Kong, it seems quite clear that they prefer to accede to the views of senior members of the jury rather than have prolonged debates about the views of individuals.

3.69 The above observations may become particularly relevant given the Court of Appeal's approach to jury verdicts where a juror clearly has not followed the proceedings. The Court of Appeal in 1989 allowed the verdict of the jury to be successfully challenged in relation to six former senior executives of the Conic group of companies because one of the jurors had at times fallen asleep and therefore had not followed the proceedings.[410]

Alternatives to Jury Trial

Special Juries

3.70 Special juries were recently abolished in Hong Kong by the *Administration of Justice (Miscellaneous Provisions) Ordinance 1995*. Despite the fact that special juries were rarely summoned in Hong Kong, a list of potential

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406 Findlay et al, Juries, p. 80.

407 ibid, p. 81.

408 ibid, p. 82.

409 ibid, p. 79.

410 ibid, p. 85.

special jurors was maintained. These jurors were chosen based on their position in a company or their profession.[411] *The Jury Ordinance* provided that a provisional list of special jurors had to be compiled by the Registrar each alternate year.[412] The list included the names of not more than 350 people. Seventeen people were selected to be summoned for the jury panel. A special jury was used when the Attorney-General gave written notice to the registrar or when the judge ordered that a special jury should be summoned for a trial. The judge could make such an order at his/her own instance or on the application of a private prosecutor or the accused.[413]

Panel of Judges

3.71 In complex fraud cases some commentators have suggested that a panel of three judges, instead of a jury, should be used. Associate Professor Hatham of the City University of Hong Kong, for example, favoured the use of a panel because this would enable criminal judges to develop areas of expertise in the same way that civil judges are able to.

3.72 In 1986 the Government of Hong Kong presented a paper to the Meeting of the Commonwealth Law Ministers and Senior Offices in which it made a number of recommendations aimed at simplifying the presentation of complex commercial criminal cases. These recommendations included the use of a panel of judges appointed to determine complex commercial criminal cases.[414] It was envisaged that the judges would become specialists in the area, having undergone training or attended meetings with senior bankers who would explain banking practices.[415] To assist these judges advice would be received from the commercial community about commercial practices.

3.73 However, one problem was foreseen as resulting from the introduction of trial by a panel of judges for complex commercial fraud cases:[416]

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411 United Kingdom, *Fraud Trials Committee Report,* Chairman Lord Roskill, HMSO, London, 1986, p. 218.

412 *Jury Ordinance*, s. 8.

413 *Jury Ordinance*, s. 19.

414 Government of Hong Kong, 'Proposed Procedures to Simplify the Presentation of Complex Commercial Criminal Cases' in Meeting of the Commonwealth Law Ministers and Senior Officers, Zimbabwe 1986, *Memoranda*, Commonwealth Secretariat, London, Recommendation 73, p. 566.

415 ibid, p. 564.

416 Hatham, op. cit., p. 22.

> The problem is if you start saying, we're going to take some cases away from the jury, aren't you then saying we don't trust juries to do the right job here? Can you then trust the jury to do the right job anywhere? That's the danger of this.

The same concern was raised by Professor Tyler during the Victorian Law Reform Committee's meeting in July 1995.[417]

Trial by Judge and Lay Members

3.74 Before the introduction of the *Complex Commercial Crimes Ordinance 1988* consideration was given to having complex commercial crimes tried before a District Court Judge and assessors or a High Court Judge alone, rather than before a jury. This proposal was contained in the Trial of Commercial Crimes Bill. The Bill first suggested that a judge sit with two commercial adjudicators and was revised to suggest that the judge sit with three adjudicators. Under this proposal an order would be made for this mode of trial by the Chief Justice, following an application by either the Attorney-General or the defendant. The Chief Justice would need to be satisfied that the case involved a commercial crime where the evidence would be difficult to understand due to its quantity or technical nature.[418]

3.75 The Bill, which was prepared in February 1984, received a great deal of criticism from the Hong Kong Bar Association and, in 1985, from the media. The arguments raised against this alternative to trial by jury centred on the belief that the jury is capable of dealing with most complex cases and on concerns that the proposed changes represented the 'thin edge of the wedge'.[419]

Sources of Information for Jurors

3.76 Where a person summoned claims that he/she does not have a sufficient understanding of English an informal interview is conducted to see the extent to which he/she has been exposed to English.[420]

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417 City University of Hong Kong, Meeting with the VLRC, 14 Jul. 1995, p. 26.

418 United Kingdom, *Fraud Trials Committee Report,* Chairman Lord Roskill, HMSO, London, 1986, p. 218.

419 Findlay et al, Juries, p. 46.

420 ibid, pp. 60–62.

3.77 Those people who are qualified for jury service are notified of their eligibility. They are included on the List of Common Jurors unless, within 14 days, they seek exemption or claim that they are not qualified.[421]

Jury Information and Education

3.78 Prospective jurors receive information about jury service in the summons and the notice of jury service.[422] The information in the summons includes the date on which they are to serve, the penalty for not responding to the summons and the time they are required to arrive at the court. The notice of jury service includes information about the criteria for eligibility for jury service, disqualifications and exemptions, and a notification that there is fourteen days in which to notify the registrar that an exemption is sought.

Jury Asking Questions

3.79 Occasionally jurors ask questions, these questions tend to related to whether their verdict needs to be unanimous or whether a majority verdict can be given.[423] The Hong Kong Jury Project found that questions were sometimes asked during the trial: 24 per cent of their sample asked for assistance from the judge when they did not understand the evidence.[424] Most of these questions were asked while the evidence was being given, rather than during deliberations. Of those jurors within the sample who did not ask questions, most felt of them felt that it was not necessary to ask questions either because the evidence was clear or they could confer with each other for assistance. Nevertheless, the Project found that ten jurors believed that they were discouraged from asking questions.[425]

Note Taking by Jurors

3.80 Jurors are able to take notes during the trial. The Hong Kong Law Reform Commission observed that jurors tend to take quite a lot of notes.[426]

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421 *Jury Ordinance (Cap. 3)*, s. 7.

422 Schedule, Form 1 & Form 2 of the *Jury Ordinance (Cap.3).*

423 Tyler, op. cit., p. 19.

424 Findlay et al, Juries, p. 73.

425 ibid, 73–74.

426 Hong Kong Law Reform Commission, Meeting with the Victorian Law Reform Committee, 4 Sept. 1995, Tape 1, Side A, p. 21.

Judge's Charge to Jury

3.81 The Hong Kong Government recommended in its paper entitled *Proposed Procedures to Simplify the Presentation of Complex Commercial Criminal Cases* that the jury be given a copy of the judge's summing up and that they be given certain questions to address during their deliberations. These questions should be formulated by the judge after discussions with counsel.

3.82 Furthermore, the following recommendation was made in order to assist the judge in preparing his/her charge:[427]

> Prior to summing up the judge should indicate to counsel how he intends to direct the jury on the law applicable to the case. He should invite counsel to make any submissions upon the proposed direction. Furthermore, we recommend that it should be the duty of counsel to intimate their objection to any matter in the proposed summing up to which counsel disagree. The Court of Appeal should only in the most exceptional cases allow Counsel to be heard on a matter where no objection or protest was made to the Trial Judge.

3.83 The Jury Project found that of the jurors sampled most (that is, 45 jurors) described the judge's charge as helpful in terms of explaining the law, summarising the facts, distinguishing between the types of evidence and explaining their duty.[428] Most of the judges surveyed (that is, eight judges) believed that the jury was able to understand the charge. And 80 per cent of the barristers surveyed believed that the jury could follow the judge's charge.

3.84 Despite the jurors' praise of the judge's charge, one significant problem was raised during the Jury Project. The judge's directions and charge often referred to a second version of the evidence presented, while jurors regarded their own version as correct. This problem arises as witnesses tended to give their evidence in Cantonese which is then interpreted into English for the judge and lawyers to understand. Due to inaccuracies or differences in the translation, the directions of the judge can be brought into disrepute.[429] According to Findlay this is also a cause of confusion for the jury:[430]

> When [jurors] seek clarification judges refer to the English transcript and say that is what it means. That is an unsatisfactory resolution and seems [to] have caused a

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427 Government of Hong Kong, 'Proposed Procedures to Simplify the Presentation of Complex Commercial Criminal Cases' in Meeting of the Commonwealth Law Ministers and Senior Officials, Harare, Zimbabwe, 26 Jul.–1 Aug. 1986, *Memoranda*, Commonwealth Secretariat, London, p. 565.

428 Findlay et al, Juries, p. 78.

429 Findlay, *Hansard*, 30 Jan. 1995, p. 81.

430 ibid, p. 87.

> range of confusion and loss of respect for the judiciary, especially among those jurors who feel the difference in meaning is significant.

Transcripts of Testimony

3.85 In order to assist the jury in its deliberations, the Hong Kong Government in 1986 recommended that the jury be given the following material:[431]

- a glossary of terms;
- a copy of the opening speeches;
- a statement of matters agreed;
- a copy of the judge's summing up; and
- a series of specific questions to address during their deliberations.

It was also suggested that the jury be given the chance to read the evidence of the witnesses. In making these recommendations consideration was given to the need to avoid giving too much material to the jury.

3.86 However, some concern has been expressed about giving the jury this information. For example, according to Professor Tyler of the University of Hong Kong, jurors should only receive a copy of the charge sheet, because the provision of additional material would cause the following problem:[432]

> The trouble is, if you start doing that where do you stop? How much do you give them? How much can the jury absorb? How do you give them information that's understandable [to] all members of the jury given their different backgrounds [and] different attitudes? If you give information that say, two out of seven can't readily cope with, aren't you in effect disqualifying them from an active participation in the debate?

3.87 Professor Tyler also suggested that if jurors were provided transcripts of the evidence then they would be confused by the sheer volume of the paper placed before them.[433] At present evidence given in the High Court is recorded by short hand.

Other Issues

General Conditions of Jury Service

3.88 Workers who are summoned for jury service may be disadvantaged by serving. Their employer may tell them that they are to take their seven days of

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431 Hong Kong Government, op. cit., pp. 564, 566.

432 Tyler, op. cit., p. 21

433 ibid.

annual holiday; or that during this time they may not be paid or that they need to find a replacement worker.[434] As a result of these pressures prospective jurors may say that: 'they are too busy earning a living' or ' haven't got time to spend on this even if they want to'.[435] Furthermore, according to Anthony Hatham:[436]

> Life is so competitive here, people are worried if they are away on a jury, say for a two months trial, is their job going to be there when they come back, or [is] their understudy going to have taken over for the lack of proper employment protection.

3.89 This situation occurs despite the statutory prohibition on an employer discriminating against an employee due to jury service. The *Jury Ordinance* provides that: 'no employer shall terminate, or threaten to terminate, the employment of, or in anyway discriminate against, any person employed by him' due to their serving or being summoned for jury service.[437] A fine of $25,000 and a penalty of three months imprisonment may apply to employers who breach this prohibition.

3.90 Jurors receive an allowance of $240 for each day of jury service, in whole or part. In addition, an allowance of not more than $240 for each day, or part of a day, may be paid where the Chief Justice or the Trial Judge so orders.[438] There is no make-up payment by employers.

Majority Verdicts

3.91 Majority verdicts may be given in civil and criminal cases provided that the requirements described in the *Jury Ordinance* are followed. These verdicts have been allowed in Hong Kong since 1851. In civil cases a majority verdict is allowed after reasonable consultation has occurred.

3.92 There are two advantages in allowing majority verdicts: first, that the number of retrials caused by hung juries is reduced, and secondly, that the demand placed upon the people on the List of Common Jurors is lessened.[439]

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434 Hatham, op. cit., p. 15.

435 Tyler, op. cit., p. 15.

436 Hatham, op. cit., p. 15.

437 *Jury Ordinance (Cap.3)*, s.33.

438 *Jury Ordinance (Cap. 3)*, s. 31, *Allowances to Jurors Order* (Cap.3 sub. leg. A).

439 Findlay et al, Juries, p. 39.

3.93 In criminal cases a majority of at least five jurors may give a verdict where seven persons are sworn. If there are only six jurors, because a juror has died or been discharged, then there must still be a majority of five. Where there are only five jurors the verdict must be unanimous.

3.94 For criminal case where the jury consists of nine persons, the verdict can be given by a majority of not less than seven jurors. The majority will be reduced to six where the jury consists of only eight jurors, due to a person dying or being discharged, and if there are only six or seven jurors remaining then the majority verdict may be given by not less than five jurors.

3.95 In both civil and criminal trials the judge has a discretion to direct the jury to consider its verdict further.[440]

Reserve Jurors

3.96 The judge may order that there be a jury consisting of nine jurors, instead of seven.[441] Where nine jurors sit, four jurors can withdraw from the trial before it is abandoned.

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440 *Jury Ordinance (Cap. 3)*, s. 24.

441 *Jury Ordinance (Cap. 3)*, s.3.

'Right' to Trial by Jury

4.1 In Ireland for criminal cases there is a general right to jury trial under Article 38 of the *Constitution of Ireland 1937* which provides that:

> save in the case of the trial of offences under section 2, section 3 and section 4 of this Article no persons shall be tried on any criminal charge without a jury.

This right is mandatory and therefore cannot be waived or adopted at the option of the accused.[442] However, there are a number of exceptions to it which are specified in the Constitution. First, minor criminal offences may be tried by 'courts of summary jurisdiction'.[443] Secondly, there is provision enabling trials to be conducted by either military courts or by special courts.[444] Special courts hear cases where the ordinary courts are regarded as being 'inadequate to secure the effective administration of justice and the preservation of public peace and order'.[445]

4.2 In civil matters there is no constitutional right to trial by jury.

The Legal Framework

Hierarchy of Courts

4.3 The court structure in Ireland from highest to lowest court is as follows:[446]

(1) The Supreme Court hears appeals from decisions of the High Court on civil and criminal matters. It comprises of the Chief Justice and four other judges.

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442 *In re Haughey* [1971] I.R. 217 at 252.

443 Article 38.2 of the Constitution (or the Bunreacht na hEireann).

444 Articles 38.4 and Article 38.5 of the Constitution.

445 Dowling, D., Department of Finance, Analysis and Operations Research Section, *The Irish Jury Selection System*, Report Number 3/93, p. 4.

446 *The Europa World Year Book 1995*, Europa Publications Limited, p. 1586.

(2) The Court of Criminal Appeal hears appeals, where leave is granted, from persons convicted on indictment. Decisions of the court are final unless the court or the Attorney-General or the Director of Public Prosecutions certify that the point of law involved should be taken to the Supreme Court as a matter of public interest.

(3) The Special Criminal Court hears matters which the Director of Public Prosecutions brings before it having certified that they cannot be adequately heard by the ordinary courts, as well as those offences that have been scheduled by the Government as being such that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.[447]

(4) The High Court hears all civil and criminal cases.[448] When conducting criminal trials the High Court is known as the Central Criminal Court. This court has exclusive jurisdiction over trials for treason, murder, piracy, genocide, certain offences against the State and certain sexual offences. It is also an appeal court from the Circuit Court.

(5) Circuit Courts can hear civil matters in contract and tort and actions founded on credit-sale and hire purchase agreements which are limited to IR£30,000 and actions in equity, probate and administration not greater than a rateable value of IR£200. However, where the parties consent to have the matter heard by the Circuit Court, the Court's jurisdiction is unlimited. The Circuit Court can hear also all criminal matters other than serious offences such as murder, piracy, rape and treason. Because the District Court is limited with regards to the sentence that it can impose, persons convicted of an offence which the District Judge believes is particularly serious are sent to the Circuit Court for sentencing.[449] The Circuit Court hears also appeals from the District Court.

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447 *Offences Against the State Act, SI 142 of 1972*.

448 *Offences Against the State Act, 1939*; *Criminal Law (Rape) (Amendment) Act 1990*. See Ireland, Law Reform Commission, *Consultation Paper on Sentencing*, Mar. 1993, p. 50.

449 ibid., pp. 50–51.

(6) The District Court hears summary criminal matters and most civil matters in contract and tort where the claim is not greater than IR£5,000. The District Court cannot hear matters relating to slander, libel, seduction, malicious prosecution and false imprisonment. There are no jury trials in this court. Limits on sentencing are set in the District Court. The maximum term of imprisonment is 12 months for an offence, with two years being the maximum aggregate term for a consecutive sentence. The maximum fine which can be imposed where an indictable offence is tried summarily is IR£1,000.[450] The District Court hears over 85 per cent of criminal cases.[451]

4.4 In Ireland the independence of judges is protected. Judges appointed to the District, Circuit, High and Supreme Courts can only be removed by the President for 'stated misbehaviour or incapacity' on the resolution of both Houses (the House of Representatives or Dail Eireann and the Senate or Seanad) of the National Parliament (the Oireachtas).

Incidence of Trial by Jury

Criminal Procedure

4.5 Under the Constitution offences may be classified as minor or non-minor. The Constitution does not expressly provide a manner for determining whether an offence is a minor offence and, therefore, to be dealt with by the courts of summary jurisdiction. Accordingly, the distinction between minor and non-minor offences has been left to the courts to determine.[452] When doing so the Courts look at the severity of the maximum punishment which the offence carries, as well as at the 'moral quality of the act' and the 'state of law and public opinion' in 1937 (which was when the Constitution was enacted).[453]

4.6 Where the State does not provide by implication, as above, or expressly that an offence is to be a summary one, it must be tried by judge and jury.[454]

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450 ibid., pp. 49.

451 Justice Hederman, Chairman of the Law Reform Commission of Ireland, Meeting with the VLRC delegation, Ireland, 12 Jul. 1995, p. 4.

452 *Melling v. O Mathghamhna* [1962] I.R. 1; *Conroy v. Attorney General* [1965] I.R. 411.

453 ibid.

454 *The State (McEvitt) v. Delap* [1981] I.R. 125 at 129, cited in Ireland Law Reform

4.7 The State, when exercising its power under Article 38.2 to classify an offence as minor, may either decide that summary trial is compulsory or may allow an election for summary trial. In the latter instance, the State is said to have delegated its discretion to determine whether the offence can be tried summarily. Where the relevant statute allows an election, this election may be left to either the accused or the judge.[455] The *Criminal Justice Act 1951*, for example, provides that certain offences may be tried summarily at the election of the accused. Trial will be by summary proceedings if the accused person, once informed by the court of the right to jury trial, does not object.[456] The accused may favour summary trial because the maximum penalty would be less.

4.8 However, where a summary trial is chosen the court will decline jurisdiction if it thinks that the offence is not a minor one, so that the trial must then be by judge and jury.[457] The Law Reform Commission of Ireland pointed out that this may even happen once the evidence has been produced.[458]

4.9 Nonetheless, with respect to certain offences, for example common law assault, the High Court has held that the prosecution alone has a discretion as to whether offences are prosecuted on indictment or summarily, and that the accused does not have an election as to the mode of trial.[459]

4.10 Not surprisingly, the Ireland Law Reform Commission observed that there has been considerable confusion resulting from the law relating to the classification of offences, and therefore whether or not there is a right to jury trial:[460]

> a considerable measure of confusion as to the requirements and ramifications of Articles 38.2 and 38.5. Definitive Supreme Court Judgements would be desirable to clarify the many issues upon which the authorities are divided.

Commission, *The Law Relating to Jury Trial in Criminal Cases In Ireland*, 1995, p. 2.

455 ibid.

456 *Criminal Justice Act 1951,* s. 2(2)(a)(ii). See the discussion by the Ireland Law Reform Commission, op. cit., p. 3.

457 Ireland Law Reform Commission, *The Law Relating to Jury Trial in Criminal Cases In Ireland*, op. cit., pp. 2–3.

458 Justice Hederman, Chairman of Law Reform Commission of Ireland, Meeting with the VLRC delegation, Ireland, 12 Jul. 1995, p. 3.

459 *Attorney General (O'Connor) v. O' Reilly* High Court, Unreported, 29 Nov. 1976; *The State (Clancy) v. Wine* [1980] I.R. 228 (High Court), cited in Ireland Law Reform Commission, op. cit., p. 3.

460 Ireland Law Reform Commission, op. cit. p. 3.

4.11 In Ireland a preliminary examination is held. However, in 1992 the Law Reform Commission recommended that this step be abolished and that the accused should be able to apply to the court of trial for an order directing that he or she be discharged on the basis that there is no case to answer.[461]

Civil Procedure

4.12 According to the Department of Finance, the number of juries used in civil cases is small, with these trials occurring only in the Dublin High Court.[462] The reason for this is that the availability of jury trial has been greatly restricted in Ireland. In 1988 jury trials were abolished by the *Courts Act 1988* for the following actions:

(1) damages actions for personal injury caused by negligence, nuisance or breach of duty;
(2) actions under the *Civil Liability Act 1961* s. 48 relating to a person's death;
(3) actions against carriers where a passenger has died (*Air Navigation and Transport Act 1936*, s. 18);
(4) actions for damages for both personal injuries or death and another matter; and
(5) actions for damages for a matter other than personal injuries or death where the claim arises from an act or omission that has also resulted in personal injuries or death.

4.13 Those groups which supported the abolition of jury trials for these actions did so in the belief that this would bring down insurance premiums.[463] For example, in 1984 the Confederation of Irish Industry in its Submission on Employers Liability argued against jury trials for civil cases, on the grounds that judges would give lower awards of compensation using a Book of Quantum of Damages than would juries.[464] This belief that insurance premiums would be lowered was dismissed at the time by the General

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461 Ireland, Law Reform Commission, *Report on the Law Relating to Dishonesty*, 1992, p. 348.

462 Department of Finance, Analysis and Operations Research Section, *The Irish Jury Selection System* Report 3/93, Des Dowling, Jun. 1993, p. 4.

463 University College, Dublin, Meeting with the VLRC delegation, Ireland, 12 Jul. 1995, p. 6.

464 Confederation of Irish Industry, Press Release, *Juries in Civil Liability Cases*, Jun. 1985, pp. 56; Confederation of Irish Industry, *Submission on Employers Liability Insurance*, Dec. 1984.

Council of the Bar of Ireland.[465] The Council's view has since been shown to be correct. Accordingly, insurance companies are now in favour of reintroducing jury trials: 'Judges are giving more damages than juries and now the insurance companies want to revert to bringing back the juries'.[466]

4.14 In Ireland jury trial is still available for defamation actions.[467] The Law Reform Commission of Ireland recommended the retention of the right to have juries determine issues of fact in defamation cases. The Commission even recommended the restoration of the right of parties to have these issues determined by a jury in the Circuit Court.[468] Its recommendations were based on the view that:[469]

> Retaining the jury in actions for defamation — and actions of a similar nature, such as assault and malicious prosecution, where more intangible aspects of human behaviour [are] require[d] to be evaluated — is a valuable institution in a democratic society and one that should not be too readily abandoned.

Despite the Commission's support of trial by jury, it suggested that the assessment of damages not be left to juries, on the ground that they tend to give seriously excessive awards.[470] According to the Commission, the only exception to this should be where a nominal award of damages would be given, as would occur when the plaintiff though defamed had no reputation worthy of vindication.[471]

4.15 Jury trial is also available where there is an action for false imprisonment or intentional trespass to the person.[472] For example, in relation to actions where damages are claimed for trespass and negligence a jury trial may take place unless the court thinks it is not reasonable to claim damages for trespass.[473]

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465 General Council of the Bar of Ireland, 17 Jun. 1985, *Press Conference*, p. 3.

466 University College Dublin, Meeting with the VLRC delegation, Ireland, 12 Jul. 1995, p. 5.

467 *Courts of Justice Act 1924*, s.94.

468 Ireland, Law Reform Commission, *Report on The Civil Law of Defamation*, Dec. 1991, p. 106.

469 Ireland, Law Reform Commission, *Consultation Paper on The Civil Law of Defamation*, Mar. 1991, Dublin, p. 390.

470 Ireland, Law Reform Commission, *Report on The Civil Law of Defamation*, Dec. 1991, pp. 76 & 77.

471 ibid., p. 77.

472 *Courts Act 1988* /14/03, s. 1(3).

473 ICLSA R. 36: January 1994, General Note, *Courts Act 1988* /14/04.

Representativeness of the Jury System

General Concepts of Representativeness

4.16 In Ireland it is assumed that the jury will be able to determine beyond reasonable doubt whether or not a person is guilty. The reason for having a jury is that 'twelve ordinary people, selected at random and applying their commonsense, will be able to arrive at a verdict'.[474] It is therefore vital to the administration of justice that the jury be comprised of 'ordinary people'. As observed by Justice O'Flaherty of the Supreme Court trial by a 'reasonable cross-section of people' is integral to the concept of trial by jury. In *O'Callaghan v. The Attorney General* His Honour said that:[475]

> The purpose of trial by jury is to provide that a person shall get a fair trial, in due course of law, and be tried by a reasonable cross-section of people acting under the guidance of the judge, bound by his directions on law, but free to make their findings as to the facts. The essential feature of a jury trial is to interpose, between the accused and the prosecution, people who will bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused.

4.17 Judge Henchy in *de Burca v. Attorney General* even went so far as to say that the Constitution, by providing a right to trial by jury under Article 38.5, required that the jury be broadly representative of the community.[476]

4.18 His Honour then suggested a test which is to be applied when determining whether the system of jury selection is exclusionary to the point of being unconstitutional. The court must consider:[477]

> whether, by intent or operation, there is an exclusion of any class or group or citizens (other than those excluded for reasons based on capacity or social function) who, if included, might be expected to carry out their duties as jurors according to beliefs, standards, or attitudes not represented by those included. If such a class or group is excluded, it cannot be said that a resulting jury will be representative of the community. The exclusion will leave untapped a reservoir of potential jurors without whom the juror's list will lack constitutional completeness.

4.19 According to Judge Henchy both of the categories of exclusion which were presented to the court for consideration—the property exclusion and the conditional exclusion of women—breached this test. In reaching this conclusion two general observations about jury representativeness were made. First, showing that a jury does not 'fairly represent' the community is

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474 Ireland, County Registrar's Office, *Jury Service an Explanatory Leaflet*

475 [1993] 2 I.R. 17 at 25.

476 [1976] I.R. 38 at 76.

477 *de Burca v. Attorney General*. [1976] I.R. 38 at 76.

not accomplished by merely demonstrating that particular classes are under-represented. Secondly, the jury needs to be broadly representative of the community in order to ensure that the verdict will be seen as fair and acceptable, and it is for the legislature to ensure that this occurs. Judge Henchy's observations are based upon the fact that:[478]

> Competence to fulfil the duties of a juror is an individual rather than a class attribute. No group or class can lay claim to have any special qualification to produce representative jurors. Ideally, as many identifiable groups and classes as possible should be included by the standard of eligibility employed, so that a jury drawn from the panel will be seen to be a random sample of the whole community of the relevant district. But, because jurors are drawn by lot, a particular jury may turn out to be quite unrepresentative of the community.

4.20 Consequently, the *Juries Act 1976* requires that the panel of jurors be drawn up by each county registrar using a procedure of 'random or non-discriminatory selection' from the Dail Electoral Register.[479]

Community Attitudes to Trial by Jury

4.21 In Ireland the community tends to accept that juries are essentially reaching the right verdicts.[480] Furthermore, the attitude towards jury service in Ireland appears to be quite positive, although prospective jurors are concerned about loss of wages. The following view was expressed during the Victorian Law Reform Committee (hereafter, 'VLRC') delegation's meeting with Paul O'Connor and other legal academics at the University College Dublin:[481]

> The percentage of people who want to be on the jury is far higher than the percentage of people who don't want to be on the jury. I'm talking about you know the shop-keeper, I'm talking about the person employed in the bank and business...Provided that they are not going to lose a lot of money in their own business they want to be part of the legal process.

4.22 However, other commentators have described the attitude of prospective jurors in less glowing terms. Mr Quinlan, for example, said: 'the perception of the juror is ... "do I have to go and do this!", because he is

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478 *de Burca v. Attorney General*. [1976] I.R. 38 at 75.

479 *Juries Act 1976*, s. 11.

480 University College, Dublin, Meeting with the VLRC delegation, p. 12.

481 ibid., p. 5.

getting no remuneration and if his employer isn't a measure benevolent, he has got no pay'.[482]

Jury District Formation

4.23 Each administrative county is a jury district, with the county boroughs of Dublin, Cork, Limerick and Waterford being part of their respective counties for the purpose of defining the jury districts.[483] Provision also exists for the Minister to divide a county into two or more jury districts or limit the district to part(s) of the county.

4.24 The *Juries Act 1976* requires that each county registrar summon jurors from the area near where the case is to be heard. This is because the county registrar uses the register received from the county council or corporation of a county borough to summon jurors. The county councils and corporations of a county boroughs act as registration authorities under the *Electoral Act 1963*.

4.25 Consequently, it may be the case that in certain counties people may not serve as jurors as there are no jury trials heard there. The Department of Finance in 1993 observed that Dublin, Cork, Galway and Kildare had most of the Circuit Court jury trials, and of these places, Dublin had the greatest amount of jury trials; namely, '200 cases out of a total of between 350 to 400 held nationally'.[484] The Department of Finance also found that around 85 jury trials were held in the Central and High Courts in Dublin.[485] It may therefore be assumed that the jury is generally representative of the district where the case is to be heard, but that it is not representative of the Irish community as a whole. Indeed, according to Mr Quinlan, the County Registrar for Dublin, of the 2.6 million people who are eligible to vote only 0.8 million (or 31 per cent of the electoral register) is in Dublin City and County.[486]

4.26 The high concentration of trials in Dublin may disadvantage court users. For example, according to Justice Hederman, the Chairman of the Law Reform Commission, the effect is particular apparent in relation to rape cases

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482 Mr Michael Quinlan, County Registrar, Meeting with the VLRC delegation, Dublin, 11 Jul. 1995, p. 21.

483 *Juries Act 1976*, s. 5.

484 Dowling, Department of Finance, Analysis and Operations Research Section, *The Irish Jury Selection System*, Report 3/93, p. 7.

485 ibid.

486 Mr Quinlan, Court Registrar, Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 1.

where the victim(s) and the accused person(s) must be accommodated away from their families and existing support networks.[487]

Juror Eligibility Criteria

4.27 To be qualified and liable to serve on a jury a person must be a citizen aged between 18 and 70 years who is on the electoral register and not ineligible or disqualified from service.[488]

Electoral Register

4.28 The electoral register includes only those people who have chosen to exercise their constitutional right to be placed on the register. This right is given to citizens over the age of 18 years who are not disqualified by law from being on the register.[489] The register is compiled each year by the local county council or county borough corporation.[490] A draft register is publicly displayed each November to allow claims relating to corrections.[491] The register then comes into force in February.

4.29 According to Mr Michael Quinlan, the County Registrar for Dublin, an electoral revision court is held each year, where anyone can request that they be added or removed from the electoral register.[492] This is easy to do because people deal with the local authority that supplies the electoral register for their area. The percentage of people who register to vote is very high, around 99.9 per cent.[493]

Other Eligibility Criteria

4.30 In 1976 the qualification criteria for jury service in Ireland was drastically altered in response to the decision of the Supreme Court in *de*

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487 Law Reform Commission of Ireland, Meeting with the VLRC delegation, 12 Jul. 1995, p. 5.

488 *Juries Act 1976*, s. 6.

489 Institute of Public Administration, *Administration Yearbook & Diary* 1994, p. 2. Residents who are British citizens may also be placed on the register.

490 Department of the Environment, *How the Dail is Elected (Lower House of Parliament)*, Nov. 1992, p. 2.

491 Department of the Environment, *How the Dail is Elected*, Leaflet, Sept. 1994.

492 Mr Quinlan, County Registrar Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 7.

493 ibid., p. 8.

Burca v. Attorney General.[494] Before this decision the *Juries Act 1927* had provided for the exclusion from the jury list of citizens who were not ratepayers and the conditional exclusion of women, because this provision ensured that women hardly ever served.[495] The Minister was then required to 'prescribe for every jury district the rateable value of land which is to be the minimum rating qualification for jurors in that jury district'.[496] The majority of the Supreme Court found that these provisions of the Act were inconsistent with the Constitution.

4.31 The Constitution allows the National Parliament to legislate in relation to jury qualifications where the minimum standards relate to the jurors 'ability or personal competence without which jury trial might fail to serve as an essential part of the administration of the criminal law'.[497] But according to Walsh J., the property qualification and the conditional exclusion of women could not be justified in this way as these provisions discriminated between citizens without relating to the 'physical or moral capacity of a prospective juror' or his or her social function, and therefore breached Article 40 of the Constitution.[498] Article 40 provides that:

> All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

4.32 The Chief Justice also found that the property qualification was unconstitutional, but suggested that the conditional disqualification of women, though discriminatory, was not 'invidious' discrimination and therefore did not breach Article 40 of the Constitution. The exclusion of women was viewed as being justified in terms of their 'social function' within the home.

4.33 The effect of the *de Burca* decision on subsequent cases where the jury was selected according to the *Juries Act 1927* was determined by the Supreme Court in the case of *The State (Byrne) v. Frawley.*[499] The Supreme Court precluded Michael Byrne from asserting that the jury selected by the jury list prepared under the *Juries Act 1927* was unlawfully constituted, because he

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494 [1976] I.R. 38.

495 *Juries Act 1927*, ss. 2, .5 & Schedule I, Part II

496 *Juries Act 1927*, s. 2(1).

497 *de Burca v. Attorney General*. [1976] I.R. 67.

498 The Constitution, Article 40, s. 1.

499 [1978] I.R. 326.

had accepted the jury while knowing of the decision in *de Burca*. This was the case even though the new criteria for eligibility under the *Juries Act 1976* would have promoted the representativeness of the jury to a greater degree than under the old Act.

4.34 In Ireland consideration was given to changing the age requirement for eligibility for jury service. However, the Law Reform Commission opposed this move because it was thought to be incompatible with the need for juries to be able to deal with cases involving complex fraud.[500]

Disqualification, Ineligibility, Exemption and Excusal Criteria

4.35 The *Juries Act 1976* provides a list of persons who are ineligible and disqualified and persons who shall be excused from jury service.

Disqualification

4.36 The following categories of persons are disqualified from jury service in Ireland:

(a) persons sentenced to imprisonment for life or a term of 5 years or more or to detention under section 103 of the *Children Act 1908* (or corresponding law in Northern Ireland);

(b) a person who within the last 10 years has served any part of a prison sentence of at least three months; and

(c) a person who has served any part of a sentence of detention which is at least three months in the Saint Patrick's Institution or a corresponding institution in Northern Ireland.

4.37 An extension of the categories has been suggested by the Law Reform Commission. The Commission, in its Report on the Law Relating to Dishonesty, asserted that people who had been convicted of an offence involving dishonesty should be excluded from jury service, even if a minor penalty was imposed.[501]

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500 Ireland, Law Reform Commission, *Report on the Law Relating to Dishonesty,* 1992, p. 348.

501 Law Reform Commission, op. cit. p. 349.

Ineligibility and Exemption

4.38 The following categories of person are ineligible to serve on a jury: persons concerned with the administration of justice; members of the Garda Siochana; members of the Defence Forces; and incapable persons.[502] Each of these categories are discussed below.

4.39 Within the first category of ineligibility are:

- persons who hold or have held any judicial office;
- persons who are appointed to fill the office of coroner temporarily and coroners and deputy coroners;
- the Attorney-General and his or her staff members;
- the Director of Public Prosecutions and members of his or her staff;
- solicitors' apprentices, solicitors' clerks and other persons employed on work of a legal character in the solicitors' offices;
- court officers, officers attached to the President of the High Court and persons employed in an office attached to a court or the President of the High Court; and
- court recorders, employed from time to time in any court.

4.40 Members of the Garda Siochana consist of each of the following persons:

- prison officers and others employed in a prison or place where people are kept in military custody, their chaplains, medical officers and members of visiting committees;
- persons employed in the welfare service of the Department of Justice;
- forensic science laboratory staff; and
- members of the Defence Forces, the Permanent Defence Force and Army Nursing Service, as well as members of the Reserve Defence Force while receiving pay for their service.

4.41 The following groups are defined as being persons who are incapable of performing jury service:

- persons who are unable to read;
- persons who are deaf or have a permanent infirmity; and

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502 *Juries Act 1976*, Sch I, Part I.

- persons who have suffered mental illnesses or mental disabilities if they were a resident in a hospital or are regularly attending a doctor for treatment.

4.42 The Department of Finance has found that around 30 to 35 per cent of people summoned for jury service who do not serve consist of those who are ineligible or not qualified to serve.[503] Despite the unnecessary expense in summoning these people, the Department could not suggest an alternative. The reason why summons are sent to people who are ineligible or not qualified is that many of the categories of disqualification and ineligibility are not permanent. The effect of this was described in the following manner:[504]

> Most of the characteristics under the legislation which disqualify or make a person ineligible are impermanent and would not rule out an individual becoming eligible or qualified to serve on a jury at some future time. Also this category includes many who are excused on medical grounds.

Excusal as of Right

4.43 The legislation enables certain people to be excused from jury service as of right, provided that they notify the county registrar of their wish to be excused. The list of persons who can be excused in this way is fairly extensive and comprises of:

- members of either House of the Oireachtas;
- member of the Council of State;
- the Comptroller and Auditor General;
- the clerks of the Dail Eireann and Seanad Eireann;
- a person in Holy Orders; a regular minister of any religious denomination or community; and vowed members of any religious order living in a monastery, convent or other religious community;
- persons who are practising and registered as: medical practitioners; dentists; nurses; midwives; veterinary surgeons or pharmaceutical chemists.
- heads of government departments and offices;
- chief officers of local authorities, health boards, and harbour authorities.

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503 Department of Finance, Analysis and Operations Research Section, *The Irish Jury Selection System*, Report 3/93, Des Dowling Jun. 1993, p. 17.

504 ibid.

- a head or principal teacher of the college of a university, school or other educational institution.
- the secretary of the Commissioners of Irish Lights and any employee of the Commissioners once a certificate is provided from the secretary that he or she performs services that cannot reasonably performed by another or postponed.
- masters of vessels, pilots and aircraft commanders who are duly licensed.
- persons aged between 65 years and 70 years.

4.44 Priests etc. are excused as of right because Ireland is a very small country and has a 'fairly religious culture' which means that people tend to know priests.[505]

4.45 The following categories of people are excused as of right provided that they first obtain a certificate which states that their serving on a jury would be contrary to public interest because they perform an essential and urgent service of public importance that cannot reasonably be performed by another or postponed:

- staff members of either house of the Oireachtas can seek excusal as of right once they have obtained a certificate from the Clerk of the House;
- any civil servant who obtains such a certificate from their head of department or office.
- any civilian employed by the Minister for defence who obtains a certificate from the Secretary of the Department of Defence.
- employees of chief officers of local authorities, health boards and harbour authorities once a certificate has been obtained from their chief officer.[506]
- lecturers or members of the teaching staff in an educational institution such as a college of a university or school, who obtains a certificate from the head of the institution.

4.46 Additionally, teachers will generally be excused in Dublin. Excusal is based upon the written statement of the principal, to the effect that the school

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505 Mr Quinlan, Court Registrar, Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 16.

506 Department of Finance, Analysis and Operations Research Section, *The Irish Jury Selection System*, Report 3/93, Des Dowling Jun. 1993, p. 18.

is short staffed and that were the teacher to serve it would be administratively difficult.[507]

4.47 Excusal as of right will also be granted to persons who have served within the last three years or have been excused for a period of time that has not yet expired.[508] Furthermore, the *Juries Act 1967* gives the judge a discretion to exclude jurors from jury service for such a period as he or she thinks fit where the trial was of an 'exceptionally exacting nature'.[509]

4.48 The county registrar also has a discretion to excuse potential jurors where good reason can be shown. Certificates and other documents are used to support an application to be excused.

4.49 The Department of Finance in its 1993 report on jury selection procedures recommended that the county registrars' excusal patterns be effectively monitored in order to identify current trends and so that a written statement of local practice could be produced.[510] The study found that most excusals were for professional reasons, where people are excusable as of right, or due to prior work, study or travel arrangements. Furthermore, the department found that there is little room for major reductions in the numbers of people excused, because each request for excusal is considered individually on its merits.

4.50 However, in relation to some groups of people there could be a reduction in the numbers excused. Certain persons who are eligible for jury service are excused as a matter of practice because of the lack of court facilities to enable them to participate. For example, persons who are in a wheelchair are unable to serve because the jury box is not large enough to accommodate the wheelchair. Despite these persons being needlessly excluded from jury service, the manner in which the discretion to excuse is exercised has not been challenged to date.[511]

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507 Mr Quinlan, op. cit., p. 16.

508 *Juries Act 1976*, s. 9.

509 *Juries Act 1976*, s. 9(8).

510 Department of Finance, op. cit. iv.

511 Mr Quinlan, County Registrar Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 15.

Ethnicity and Gender Issues Affecting Jury Representativeness

4.51 The Law Reform Commission of Ireland in 1987 and 1988 considered the possibility of ensuring juries were equally composed of men and women in rape trials. The Commission dismissed this approach largely on the basis that it would erode the principle of random and non-discriminatory jury selection. Furthermore, the Commission suggested that the use of quotas would introduce 'enormous and unnecessary complications in the selection of juries'.[512] This decision was also based on a study by the Department of Justice which provided a 'statistical breakdown which showed that the rate of acquittals in rape cases didn't seem to have any relationship to the composition of juries in those cases'.[513]

4.52 Furthermore, the Commission suggested that this system, if introduced, could lead to the application of quotas to other groups, including people of ethnic origin:[514]

> If such a requirement were introduced into our law, it is difficult to see why there should not be a similar requirement that persons in certain groups, which could be defined by age, religion, ethnic origins or social classifications, should only be tried by juries on which their peers were thought to be given adequate representation.

In taking this position, the Commission dismissed as mere speculation arguments that women were being removed on the basis of their gender, by the use of peremptory challenges. However, in 1987 the Joint Oirecachtas Committee on Women's Rights recommended that quotas could be used to make the court environment less unfriendly to women.[515]

The Conditions of Jury Service and Representativeness

4.53 The representativeness of juries in Ireland is affected by the conditions of jury service, including the cost of jury service for individuals. Jurors are not paid by the State. In 1993 the Department of Finance found that the 'average imputed cost for individuals and/or their employers of serving on a Circuit Court jury [was] estimated to be [IR]£211' and that over a year this cost for all

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512 Ireland, Law Reform Commission, *Rape,* Consultation Paper, Oct. 1987, p. 81; Ireland, Law Reform Commission, *Rape and Allied Offences*, Report 24, 1988, p. 21.

513 Paul O'Connor, Dean, Faculty of Law University College Dublin, Meeting with the VLRC delegation, 12 Jul. 1995, p. 10.

514 Ireland, Law Reform Commission, *Rape,* Consultation Paper, Oct. 1987, p. 81.

515 Joint Oirecachtas Committee on Women's Rights, Sexual Violence, Fourth Report, 1987. Cited in Ireland, Law Reform Commission, *Rape,* Consultation Paper, Oct. 1987, p. 78.

courts was IR£2.3m.[516] It was suggested to the Law Reform Commission of Ireland that employees could be encouraged to serve on juries if they did not suffer loss of their wages. However, this proposal was deemed beyond the terms of the Commission's Inquiry into the Civil Law of Defamation and therefore no recommendation on the issue was made.[517]

4.54 The travelling expenses of jurors are not paid for by the State and there are no car parking facilities provided. Jurors are advised in the Explanatory Leaflet to catch public transport to the court house and that if they drive there and incur a parking fine the county registrar cannot pay it.[518] Some of the counties are quite large which means some people may have to travel a long way to serve on a jury. For example, according to the Court Registrar in Dublin, Mr Quinlan, 'the border county north of the city would be about 15–20 miles, west of the city would be about eight miles out of town'.[519]

4.55 In Ireland jury service normally lasts 10 working days and jurors are advised to raise with the court registrar any questions they may have about the length of the trial.[520]

Payments to Persons Summonsed for Jury Service

4.56 Jurors do not receive payments from the State. If jurors sit over lunchtime, they receive lunch, and if they deliberate over night, they will be kept in a hotel. Jury service cost the State very little.[521] In addition, jurors are expected to be very independent and are given little assistance; for example, 'they are not given any help in getting to Court, and they are not given any note pads.'[522]

Make-up Payment by Employers

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516 Department of Finance, *The Irish Jury Selection System*, Report Number 3/93, Des Dowling, Jun. 1993, iii.

517 Ireland, Law Reform Commission, Report on *The Civil Law of Defamation*, Dec. 1991, p. 76.

518 County's Registrar's Office, *Jury Service: An Explanatory Leaflet*.

519 Mr Quinlan, Court Registrar, Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 23.

520 County Registrar's Office, *Jury Service: An Explanatory Leaflet.*

521 Mr Quinlan, op. cit., p. 20.

522 Hon James Guest MLA, then chairman of the VLRC. This comment met with the approval of those in attendance at the meeting at University College Dublin 12 Jul. 1995, p. 7.

4.57 Prospective jurors are advised that they 'may be entitled to their wages from their employers, while absent from work on jury service'.[523] Jurors are told to obtain a certificate of attendance from the Jury Office to give to their employer.[524]

4.58 The legislation provides that for the purpose of a contract of service or apprenticeship, a person shall be treated as employed during any period when he or she is absent from employment in order to comply with a jury summons. Furthermore, a provision of a contract which provides that an employee or apprentice will not be paid during this time, or will be paid less, is void.[525]

Jury Management Issues

Jury Roll Formation and the Summoning Process

4.59 Each county registrar compiles a panel of jurors for each court, using the register of Dail electors from the county or county borough. The register is sent to the county registrar as soon as practicable after is publication. The registrar uses a process of random or other non-discriminatory selection and omits persons from the panel whom he or she knows or believes are not qualified for jury service.[526] A summons is then sent to the prospective juror directing that he or she attend in court on a given day and time.

4.60 Additional jurors may be summoned if the judge thinks that a jury will or may be incomplete, and any person may be required to be summoned by the county registrar for this purpose.[527] The area from which these jurors are summoned and the method of summoning are specified by the judge. Persons are then selected by ballot to serve on a particular jury.[528]

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523 ibid.

524 Ireland, County Registrar's Office, *Jury Service an Explanatory Leaflet*.

525 *Juries Act 1976*, s. 29.

526 *Juries Act 1976*, s. 11.

527 *Juries Act 1976*, s. 14.

528 *Juries Act 1976*, s. 15.

Jury Selection

Pre-Ballot Procedures

4.61 The county registrar randomly selects from the electoral registers the names of persons who are to be summoned for jury service. Prospective jurors in Dublin are summoned by post because there is insufficient staff to personally serve the summons.[529] The rate at which persons who are summoned are available to serve was found to be relatively low, for every 100 to whom a summons was sent only 30 to 40 people were available for service.[530] There is a high wastage rate for the summons because people are randomly summoned without any real screening occurring beforehand. This problem was observed by the County Registrar for Dublin, Mr Quinlan, who stated:[531]

> Out of the percentage of summons that we issue those that are not qualified [or not] eligible are excusable as of right or given discretionary refusal, in Dublin [consist of] 51 per cent. [The number of] no replies to summons, [is] ... 9 per cent. And in other words, there will be 40 per cent attended... And of that we have 6 per cent [removed by] the prosecution.

4.62 In order to address the problem of a high number of people who are summoned not serving, the Department of Finance made four recommendations for change to the current laws and practices.[532] First, prospective jurors should be informed that there will be a daily roll call. Secondly, the practice of discretionary excusal should be reviewed. Thirdly, changes should be made to the way in which people who are permanently excused or ineligible for jury service are identified, perhaps by the introduction of computerised electoral registers. And finally, prosecution policy for failing to attend when summoned for jury service should be reviewed to encourage greater rates of compliance. According to the Court Registrar in Dublin, the fine of IR£50 is viewed as being a bit like a parking ticket and is not being enforced due to the cost of pursuing the penalty.[533]

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529 Mr Quinlan, Court Registrar, Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 18.

530 Department of Finance, *The Irish Jury Selection System*, Report Number 3/93, Des Dowling, Jun. 1993, ii.

531 Mr Quinlan, County Registrar Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 9.

532 Department of Finance, op. cit., iv–v.

533 Mr Quinlan, op. cit., p. 4.

4.63 In Ireland each court carries out separate selections and issues of summons. This practice was criticised as being inefficient by the Department of Finance in its 1993 Report entitled *The Irish Jury Selection System*:[534]

> There is a case for combining this process so that jurors would be summoned for jury service in either of the three courts. There should be benefits from the administrative stream-lining involved (and depending on the manner in which juries are sworn from the panel) there could, through a shared provision for challenges, be scope to further reduce the number of summons.

4.64 If there is no reply to a summons then the *Juries Act 1976* provides for the application of a fine.[535] Fines can be imposed for other breaches of the summons, such as: failing to attend for jury service without providing a reasonable excuse or being unable or unfit to serve; making a false representation or causing one to be made; serving on a jury with a knowledge that one is ineligible; giving the presiding judge a false or misleading answer about one's qualification for jury service, and making a false representation in order to enable a person summoned to evade jury service.

4.65 Where a reply to the summons is received and the person seeks to be excused or claims that he or she is ineligible the county registrar assesses the application. In Dublin a vast number of prospective jurors can be excused by the County Registrar, but in some counties there may not be that option. For example in Wicklow there is a lower excusal rate because it is difficult to get enough people to come and serve on a jury since they will not leave the land due to farming commitments.[536]

4.66 Prospective jurors who are asked to attend a case will serve unless they are challenged or their summons is dismissed by the judge. A judge will dismiss the summons where the juror has a connection with one of the parties or an interest in the trial. Jurors are told in the explanatory letter to let the judge know of such an interest before they are sworn or have been affirmed.[537]

4.67 According to the Department of Finance, the numbers of prospective jurors who are summoned should take into account the fact that challenges may be made and that extra prospective jurors may be necessary. The

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534 Department of Finance, op. cit., v.

535 *Juries Act 1976,* s. 34.

536 Mr Quinlan, op. cit., p. 10.

537 Ireland, County Registrar's Office, *Jury Service an Explanatory Leaflet.*

department suggested that an additional 20 prospective jurors should be available to serve.[538] The department also favoured the use of a further reserve of 15 per cent in order to avoid trials being delayed due to insufficient jurors being available, this would mean that 37 people would be summoned for each trial.[539]

Jury Vetting

4.68 At any time between the issue of jury summonses and the close of the trial, the panel of jurors may be inspected by any person.[540] Reasonable facilities to allow such an inspection must be provided and the inspection is free of charge. The parties to proceedings who are to be tried before a jury are entitled to a copy of the panel if they make an application to the court registrar.

Pre-Ballot Questionnaires

4.69 The 'Reply to Jury Summons' form requires that prospective jurors provide information such as their name, address and occupation.[541] They are also required to declare whether to the 'best of [their] knowledge and belief' they are qualified or not for jury service and whether they are entitled to be excused as of right. Reasons must be given where they believe they are not qualified or where they seek excusal.

Jury Section

The Balloting Process

4.70 Before the jurors are selected the judge must warn them that they must not serve on a jury if they are ineligible or disqualified and that there is a penalty for serving while not qualified. Prospective jurors are also told that if they are not qualified or are in doubt about whether they are able to serve or have an interest or connection with the case or the parties they must bring this to the judge's attention if selected on the ballot.[542]

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538 Department of Finance, *The Irish Jury Selection System*, Report Number 3/93, Des Dowling, Jun. 1993, ii.

539 ibid.

540 *Juries Act 1976*, s. 16.

541 Form J.2., *Reply to Jury Summons*, Attached to the Jury Summons for the Circuit Court, Central Criminal Court and High Court.

542 *Juries Act 1976,* s. 15.

4.71 Jurors are then selected by ballot in open court. Once selected by ballot jurors may be challenged for cause or challenged peremptory, those jurors who are successfully challenged leave the jury box and may be called to serve in relation to a different trial.

Peremptory Challenges

4.72 In civil cases and criminal cases each side may challenge seven prospective jurors without cause.[543] Accordingly, jurors are informed that they may be challenged and that where this occurs it is not a reflection upon them personally.[544] Jurors are advised that the purpose of peremptory challenges is to ensure that there is 'absolute fairness in the proceedings'.[545]

4.73 The Government Advisory Committee on Fraud has recommended that the right to peremptory challenge jurors should be abolished.[546] The Committee argued that peremptory challenges were being used by the defence as a tactical devise to select a favourable jury. This selection may be based on the clothes worn by potential jurors and whether or not they carried a newspaper. Furthermore, the Committee argued that the use of peremptory challenges infringed upon the principle of randomly selecting jurors and that the best way of ensuring fairness in a jury was by genuine random selection. For this reason, the use of peremptory challenges was not seen as necessary to give the accused confidence that the jury will be a fair and independent tribunal.

4.74 The Law Reform Commission, in its Discussion Paper on Dishonesty, recommended that peremptory challenges should be abolished. However, the Commission changed its position following the lack of support expressed for this view, especially amongst legal practitioners.[547]

Challenges for Cause

4.75 Where cause is shown, any number of jurors may be challenge in civil and criminal cases.[548] Despite the fact that each party has an unlimited

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543 *Juries Act 1976*, s. 20.

544 County Registrar's Office, *Jury Service: An Explanatory Leaflet*.

545 ibid.

546 Ireland, Stationary Office, *Report of the Government Advisory Committee on Fraud,* Dublin, p. 56.

547 Ireland, Law Reform Commission, *Report on the Law Relating to Dishonesty,* 1992, p. 349.

548 *Juries Act 1976*, s. 21.

number of challenges for cause, few challenge are actually made. One practitioner advised the Victorian Law Reform Committee that in his 23 years of practice he had never seen any juror challenged for cause.[549]

4.76 A juror may be challenged after his or her name is called out provided that the challenge is made before the oath is administered.[550] The cause must be shown immediately after the challenge is made and the judge determines the matter then and there, depending on what he or she thinks proper.[551]

Juror Challenges Conducted During a Voir Dire Process

4.77 The *Juries Act 1976* does not make provision for a voir dire to be conducted. Instead, the judge has the power to invite jurors who are selected on the ballot to indicate either that they are not qualified or may not be qualified, or that they have an interest in or connection with the case or the parties.[552]

Complex Litigation and the Jury System

4.78 According to the Advisory Committee on Fraud, complex litigation causes a number of problems for jurors. Not only may jurors have difficulty in understanding the issues raised, but jury service may last for weeks, even months, and during this time they will be unable to attend their work.[553]

Perceptions of Juror Competence in Ireland?

4.79 Jurors may find it difficult to understand the issues raised in serious fraud cases as they lack specialist knowledge and training. The evidence tends to be complex and technical and of a 'sustained intensity that few will have previously experienced'.[554]

4.80 Nonetheless, the Law Reform Commission of Ireland acknowledged that without knowing how juries reached their verdict conclusion about their

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549 O'Connor, Paul, Dean, Faculty of Law, University College Dublin, Meeting with the VLRC delegation, 12 Jul. 1995, p. 13.

550 *Juries Act 1976*, s. 17.

551 *Juries Act 1976*, s. 21.

552 *Juries Act 1976*, s. 15.

553 Dublin, Government Advisory Committee on Fraud, *Report of the Government Advisory Committee on Fraud* Pl. 9409, Stationary Office, p. 56.

554 ibid.

ability could not be made.[555] The manner in which jurors reach their verdict may not be inquired into, because their deliberations are confidential.[556]

4.81 Accordingly, the Commission favoured limited disclosure of jury deliberations. In the Commission's consultation paper and final Report on Contempt of Court, the following tentative conclusions were reached. Disclosure would be reasonable in three circumstances: first, in relation to offences committed in the jury room; secondly, in relation to a miscarriage of justice in the jury room; and thirdly, for the purpose of carrying out bona fide research into how juries reach their verdict.[557] In relation to this third area, it was suggested that the approval of the Chief Justice, the President of the High Court or the President of the Circuit Court should be necessary before research could be done.

4.82 The ability of the jury to understand issues relating to defamation was considered by the Law Reform Commission in its Report on the Civil Law of Defamation. The Commission asserted that they were not convinced that juries were unable to understand the difference between evidence on the meaning of a publication and evidence on its effect. They suggested that 'to assume that juries may not perform this function without confusing the issues seems to us unduly paternalistic'.[558] Nevertheless, should such confusion occur the Commission suggested that the judge might tell the jury that they should 'decide the "libel or no libel" question according to the views of reasonable members of the community'.[559] The Commission did, however, recommend that the issue of damages be decided by a judge alone.[560]

4.83 In order to educate jurors about matters of accountancy, which would in turn assist their understanding of complex fraud cases, the Commission recommended that explanatory evidence be given by an accountant who would be called as a prosecution witness. The Commission stressed that this witness would only act to educate the jury on accountancy practices and would not express any views on the facts of the case.[561]

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555 Ireland, Law Reform Commission, *Report on the Law Relating to Dishonesty,* 1992, p. 349.

556 *O'Callaghan v. The Attorney General* [1993] I.R. 17 at 26.

557 Ireland, Law Reform Commission, *Report on Contempt of Court,* 1994, p. 52.

558 Ireland, Law Reform Commission, *Report on the Civil Law of Defamation*, 1991, Dublin, p. 9.

559 ibid.

560 ibid., pp. 10 & 106.

561 Ireland, Law Reform Commission, *Report on the Law Relating to Dishonesty*, 1992, p. 349.

4.84 The Commission rejected the suggestion that a minimum educational requirement could be set for eligibility for jury service. Not only would such a requirement possibly be unconstitutional, but it would be unlikely to improve the jury's level of understanding.[562] The Commission also believed that this requirement would be socially discriminatory.

Alternatives to Jury Trial

Trial by Judge and Lay Members

4.85 In order to help the judge and jury understand the evidence presented in complex fraud cases the Advisory Committee on Fraud recommended that an assessor be able to sit with the judge.[563] The assessor would provide the jurors with expert advice in a neutral manner in response to technical questions. This model was favoured by the Committee because it was regarded as not being 'dramatically new'. This is the case because in Ireland a tribunal may sit with an external assessor, there being provision in the Rules of the Superior Courts for assessors.[564]

4.86 The Advisory Committee on Fraud concluded that it would be constitutionally doubtful to allow expert assessors to sit with the jury and to attend its deliberations. There were two reasons for this: first the judgment of Walsh J. in *de Burca v. the Attorney General* placed doubt upon whether the use of such an assessor would be constitutional. His Honour opined that the essence of trial by jury presupposed that the trial should be 'in the presence, and under the authority, of a presiding judge having the power to instruct the jury as to the law and to advise them on the facts, and that the jury should be free to consider their verdict alone without the intervention or presence of the judge or any other person during their deliberations'.[565] Secondly, it was

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562 ibid.

563 Dublin, Government Advisory Committee on Fraud, *Report,* Pl. 9409, Stationary Office, p. 58.

564 *The Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, s. 2; *Rules of The Superior Courts*, Order 36, Rule 41 provides that: Trials with assessors shall take place in such a manner and upon such terms as the Court shall direct.

565 *de Burca v. the Attorney General*. 1976 I.R. 38 at 67, cited in Dublin, Government Advisory Committee on Fraud, *Report, of the Government Advisory Committee on Fraud* Pl. 9409, Stationary Office, p. 57.

thought that such a recommendation would breach the requirement, under Article 34.1 of the Constitution, that justice be administered in public.[566]

Special Criminal Court

4.87 Article 38 of the Constitution provides that special courts are to deal with offences in cases where the ordinary courts may be inadequate in securing the effective administration of justice and the preservation of public peace and order. The Special Criminal Court comprises of a panel of three judges and the verdict is the opinion of the majority of the judges. Offences dealt with by this court tend to have terrorist connotations and may include offences under the *Offences Against the State Act, 1939* (for example, obstruction of Parliament, or interference with military or other employees of the State) and offences against the *Malicious Damage Act 1861*; *Explosive Substances Act 1883*; *Firearms Acts 1925–1971* and s. 7 of the *Conspiracy and Protection of Property Act 1875*.[567]

4.88 The role of this kind of legislation was described by Walsh J in the case of The *People (D.P.P.) v. Quilligan*. His Honour described the *Offences Against the State Act 1939* as constituting a 'legislative intervention designed to secure and make effective the rights guaranteed by the Constitution and to provide punishment for and otherwise deal with the breaches of the Constitution envisaged in the Articles [of the Constitution]'.[568] The *Offences Against the State Act 1939* was enacted to deal with cases of a 'political nature where juries could be open to intimidation and threats of various types'.[569] Walsh J. envisaged a greater role for this type of legislation, with the Government being likely to enact similar legislation to deal with 'ordinary gangsterism or well financed and well organised large scale drug dealings'.[570]

4.89 Some commentators have expressed disapproval of the use of a Special Criminal Court, for example, during a meeting between the VLRC and academics from the University College Dublin it was stated that:[571]

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566 Dublin, Government Advisory Committee on Fraud, op. cit., p. 57.

567 Ireland, Law Reform Commission, *Consultation Paper on Sentencing*, Mar. 1993, p. 50.

568 [1986] I.R. 495 at 505.

569 Ibid, p. 510.

570 ibid.

571 Paul O'Connor, Dean, Faculty of Law, University College Dublin, Meeting with the VLRC delegation, 12 Jul. 1995, p. 6.

> I've never been satisfied that the Special Criminal Court is ever justified. Apart from anything else it's an insult to your democracy and you as politicians, all it says is we don't trust our own people, the politicians are saying that political wind is blowing in such a way that juries will not convict IRA men. That's tough. I think, few believe in democracy.

Judge Alone Trials

4.90 Based on the constitutional protection of the right to trial by jury in serious criminal cases which is contained in Article 38.5 of the Constitution, the Government Advisory Committee on Fraud did not consider in any depth the alternatives to jury trial. The Committee merely acknowledged that juries are placed under 'an enormous burden' in serious fraud trials.[572]

4.91 The Law Reform Commission of Ireland was also unable to make any recommendations in relation to whether or not juries should be replaced by judges in serious fraud cases. It concluded that the judiciary would not favour trial by judge alone over trial by jury. This is because if trial by judge alone was introduced the credibility of the judiciary would be open to attack from the media or public.[573]

4.92 When looking at the law relating to civil trials for libel, the Law Reform Commission considered the advantages and disadvantages of having a trial by jury instead of a trial by judge alone. The Commission favoured retaining jury trial. This decision was partly based on the view that jury trial did not operate unfairly against the defendant. The following points in favour of jury trial were also found to be persuasive:[574]

(a) The jury is better placed than a judge to understand the ordinary meaning of the words relating to the complaint.

(b) Where the reputation of a person is at stake the jury is a more suitable tribunal than a judge sitting alone.

(c) The public has confidence in the jury's verdict.

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572 Dublin, Government Advisory Committee on Fraud, *Report of the Government Advisory Committee on Fraud* Pl. 9409, Stationary Office, p. 56.

573 Ireland, Law Reform Commission, Meeting with the VLRC delegation, 12 Jul. 1995, Dublin, p. 13.

574 Ireland, Law Reform Commission, *Consultation Paper on The Civil Law of Defamation*, Mar. 1991, Dublin, p. 386.

(d) The jury is able to restore a balance between the plaintiff and the defendant in civil trials for libel, where the defendant is often a media group with the capacity to shape public opinion.

4.93 The Commission found that there were five arguments against the use of juries, but that these arguments did not justify their abolition in civil trials for libel:[575]

(a) Defamation cases tend to be long and complex and juries may have difficulty understanding the evidence. The Commission suggested that if the elements of the defence were simplified this problem would largely be resolved.

(b) If judge alone trials were introduced then the verdict would consist of a reasoned judgement.

(c) Awards by juries are unpredictable and higher than those given by judges.

(d) Jury trials are longer and more expense than judge alone trials.

(e) In the Circuit Court defamation trials are normally conducted without a jury and they are considered satisfactory.

Professional Jurors

4.94 The Advisory Committee on Fraud initially supported the idea of including one or more jurors from a panel of accountants or others possessing a knowledge of the technical matters likely to arise in fraud cases. However, it later dismissed the idea because it would breach the requirement of representativeness laid down by the Supreme Court in *de Burca v. the Attorney General*.[576]

Case Management Issues

Pre-Trial Procedures

4.95 The introduction of a pre-trial review process was recommended by the Law Reform Commission in its discussion paper, because these proceedings would save money and time and assist the judge and jury in

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575 ibid., pp. 387–390. The advantages and disadvantages of civil jury trials were also considered in Third and Fourth Interim Reports of the Committee on Court Practice and Procedure, *Jury Trial in Civil Actions*, Stationary Office Dublin, 1965, pp. 1425.

576 1976 I.R. 38; Dublin, Government Advisory Committee on Fraud, *Report of the Government Advisory Committee on Fraud* Pl. 9409, Stationary Office, p. 56.

understanding the issues.[577] However, it was acknowledged that the use of pre-trial review would mean that prosecutors would have to prepare their cases better and that the defence may be reluctant to agree to the review. Despite its initial stance, the Commission after further consultation chose to make a recommendation against the introduction of statutory imposed pre-trial reviews.[578] Its decision was in response to criticism from members of the profession, including judges and lawyers, who favoured the existing informal practice whereby counsel seeks to focus the issues for trial, with the approval of the judge.

Sources of Information for Jurors

Preliminary Sources of Information

4.96 The jury summons is accompanied by information describing the categories of people who are qualified and liable to serve, ineligible, disqualified and those who may be excused as of right from service. Jurors are informed that it is an offence to give a false statement or to serve if ineligible or disqualified. Furthermore, prospective jurors are told that if they are not qualified for any reason or wish (or are entitled) to be excused then they may make representations to the county registrar with the intention of having the summons withdrawn.[579]

Information Provided to Jurors Concerning Disputed Issues

4.97 The Second Interim Report of the Committee on Court Practice and Procedure, acting under terms of reference given by the Minister for Justice in 1962, noted that insufficient information was given to jurors.[580] Not only did jurors not know whether they were able to ask questions, but more disturbingly, they did not understand their role in the court system. The County Registrar's Office now produces a short explanatory leaflet for jurors in criminal trials. Jurors are told of the reason for having juries and the role of juries. Information is also provided on the following topics:[581]

- length of service;

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577 ibid., p. 350.

578 ibid., pp. 350–351.

579 *Juries Act 1976*, s. 12(2).

580 Ireland, Second Interim Report of the Committee on Court Practice and Procedure, *Jury Service*, Stationary Office, Dublin, Pr. 8328, p. 9.

581 County Registrar's Office, *Jury Service: An Explanatory Leaflet.*

- the need for jurors to be impartial;
- the secrecy of jury deliberations—jurors must not discuss the case with any body, except other members of the jury, and it is an offence for any other person to influence them in any way;
- courtroom procedure and the role of the judge and the lawyers;
- the swearing-in and challenging process;
- who decides what evidence is presented;
- who has to prove what;
- note taking and asking questions;
- speeches and summing up;
- inside the jury room and the nature of the verdict;
- sentencing by the judge;
- offences under the *Juries Act 1976*;
- court delays; and
- conditions of jury service, including issues such as: illness, transport and payment.

4.98 Information is also provided in the jury summons about whether a person qualifies for jury service or is ineligible, disqualified or able to be excused as of right. The summons also advises people that it is an offence to make false representations as to whether or not they are qualified etc.

4.99 The Department of Finance in its 1993 report into the Irish Jury Selection System recommended that the general information given to jurors should be improved, because they currently receive limited information in the summons and this tends to lead to the Jury Office having to individually answer their inquiries.[582]

4.100 In addition to the information provided in the summons, jurors are informed by the judge about their duties on the first day at court.

Questioning of Witnesses by the Jury

4.101 Jurors are able to ask questions during the trial. The procedure to be followed is described in the explanatory leaflet on jury service.[583] Jurors who wish to ask a question must write it down and give it to the foreman or forewoman to ask. Jurors are advised to wait and see if their question is about

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582 Ireland, Department of Finance, Dowling, *The Irish Jury Selection System,* Report 3/93, vi.

583 Ireland, County Registrar's Office, *Jury Service an Explanatory Leaflet.*

to be addressed before raising it. Furthermore, jurors are told that certain questions may not be asked due to the rules of evidence.

4.102 Jurors are able to ask questions during their deliberations. According to Mr Quinlan, the County Registrar for Dublin, there is a high acceptance of trial by jury and their process of deliberation:[584]

> No barristers, prosecution or defendant would ever under-estimate the power of the jury. You might think they have mucked it, but you would be surprised at what they are listening to and quite often the jury are asking more and more questions. They go back out, deliberate and come back into court and ask a question.

Note Taking by Jurors

4.103 The explanatory leaflet on jury service advises jurors that they may take notes during the trial, although they are not obliged to do so.[585] During the judge's charge jurors may also choose to take notes. The leaflet suggests that this is 'often helpful'.[586]

Technological Aids to Juries

4.104 The introduction of technical aids for juries was favoured by the Law Reform Commission in its 1992 Report on the Law Relating to Dishonesty.[587] The Commission suggested that the following aids should be available to assist juries in understanding the evidence: computers, overhead projectors and slide projectors.

Provision of Transcripts of Testimony to Jurors

4.105 In criminal trials jurors must rely on their memories of the evidence. The Advisory Committee on Fraud recommended in its report that the judge be able to order that jurors be given access to various documents when he or she believes that it is appropriate. The following documents could be made available:[588]

(a) the case statement and response of the defence;

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584 Mr Quinlan, Court Registrar, Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 21.

585 County Registrar's Office, op. cit.

586 ibid.

587 Ireland, Law Reform Commission, *Report on the Law Relating to Dishonesty*, 1992, p. 351.

588 Dublin, Government Advisory Committee on Fraud, *Report of the Government Advisory Committee on Fraud*, Pl. 9409, Stationary Office, p. 58.

(b) documents admitted as evidence;

(c) statements of facts;

(d) counsels' opening and closing speeches;

(e) graphics, charts and summaries of evidence;

(f) transcripts of evidence;

(g) the judge's charge; and

(h) any document which the judge thinks fit.

Judge's Charge to Jury

4.106 The quality of the judge's charge will greatly affect the jury's ability to return a verdict. According to the County Registrar for Dublin: 'How good a jury is often depends on how good the judge is in telling them what they are to think about, summing it up'.[589]

4.107 In complex fraud cases the judge's summing up tends to be long and complex. The Advisory Committee on Fraud saw this as leading to difficulties for jurors, especially because they tend to rely heavily on the judge's charge.[590] The Committee suggested that jurors would be assisted in their deliberations if they received a written copy of the judge's charge.[591] The Law Reform Committee was told that this recommendation is still being considered by the Minister of Justice.[592]

Other Issues

General Conditions of Jury Service

4.108 The Government Advisory Committee on Fraud recommended that conditions should be improved for jurors hearing complex fraud cases. The Committee found that the conditions for juries were hopelessly inadequate and that there was a need for suitable courts to be provided at specific venues so that serious fraud cases could be transferred.[593]

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589 Mr Quinlan, Court Registrar, Dublin, Meeting with the VLRC delegation, 11 Jul. 1995, p. 22.

590 Dublin, Government Advisory Committee on Fraud, *Report of the Government Advisory Committee on Fraud*, Pl. 9409, Stationary Office, p. 58.

591 ibid.

592 University College Dublin, Meeting with the VLRC delegation 12 Jul. 1995, p. 2.

593 ibid.

4.109 The *Juries Act 1976*, unlike the *Juries Act* of 1927, does not set standards for the treatment of jurors. The current Act merely mentions that jurors may separate before considering their verdict, unless the judge otherwise directs.[594] Consequently, the circumstances in which jurors deliberate are now covered in a practice direction. The relevant practice direction, which was issued in September 1993, sought to address the problem of jurors deliberating in serious criminal cases 'without a break for a long period of time, and particularly late into the night'.[595] Prior to the practice direction, it was not uncommon for deliberations to go into the night or early hours of the morning, perhaps without the provision of a full meal.[596] The three directions contained in the memorandum provide as follows:[597]

(1) When it appears likely to the trial judge, on what will probably be the second last day of the trial, that the jury will not retire until after lunch time on the following day and that they are likely to require more than three-and-a-half hours deliberation in order to reach a verdict, then the trial Judge should inform the jury of the position and invite them to bring with them overnight clothing the following day.

(2) At the same time the trial Judge should instruct the Registrar of the Court to have arrangements made to reserve provisionally 12 bedrooms in a suitable hotel and for the attendance of a male and female member of the Gardai to act as jury-keepers the following day.

(3) The jury should not be permitted to deliberate beyond 7.30p.m. or for more than three-and-a-half hours, whichever comes sooner. However should the foreman indicate to the trial Judge that the jury are close to reaching a verdict and are likely to do so within approximately a further half hour then the further half hour may be afforded to the jury. Otherwise they should be told to suspend their deliberations until the following morning and

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594 *Juries Act 1976,* s. 25.

595 Justice Declan Costello, *Memorandum on Certain Aspects of Criminal Jury Trials*, Sept. 1993.

596 Morrissey, P., Circuit Criminal Court Office, *Green Sheet,* Dublin, p. 7, cited in Ireland, Law Reform Commission, *Summary of the Law Relating to Jury Trials in Criminal Cases in Ireland,* Paper provided to the VLRC during its meeting with the Law Reform Commission of Ireland.

597 Justice Declan Costello, op. cit.

> transported to the hotel where they should be afforded the opportunity to make a phone call, for the purpose of informing relatives or friends that these arrangements are being operated.

4.110 The Court of Criminal Appeal has held that the failure to follow these directions will not normally be a ground for successful appeal by the accused, since to establish that there has been a material irregularity it must be shown that undue hardship has been placed on the jury.[598] Moreover, it was found that the Court tends to regard the trial judge as being best placed to assess what should be done in regard to the treatment of the jury:[599]

> What should be done in relation to the sequestration and disposal of a jury after they have been sent out to consider their verdict must, in the ordinary way, be left to the good sense and discretion of the particular trial judge. He is in the position to gauge the particular atmosphere in the court and very often would have built up such a rapport with the members of a jury as to know best the pace at which they may wish to proceed.

Majority Verdicts

4.111 Majority verdicts may be given in civil and criminal cases. In civil cases nine jurors may reach a majority verdict. In criminal cases majority verdicts may be given where at least 10 jurors agree on the verdict and there are not fewer than 11 jurors.[600] Where a majority verdict of guilty is reached the foreman must state the numbers of jurors who agreed to it. If the verdict is not guilty then the verdict is taken without indicating whether the verdict was unanimous or by a majority.

4.112 However, in a criminal case the court will not accept a majority verdict where it thinks that the jury has not deliberated for a reasonable time given the nature and complexity of the case.[601] The jury must have deliberated for at least two hours for a majority verdict to be accepted.

4.113 The Supreme Court in *O'Callaghan v. The Attorney General* affirmed that where a majority verdict is reached in criminal cases the decision retains its character as a verdict of the jury.[602] Unanimity was not seen by the court as

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598 *People (D.P.P.) v. Courtney* (O'Flaherty J, unreported, Court of Criminal Appeal, 21 Jul. 1994), pp. 46–47.

599 ibid, p. 46.

600 *Criminal Justice Act 1984*, s. 25.

601 *Criminal Justice Act 1984*, s. 25(4).

602 [1993] 2 I.R.17.

being an essential feature of a jury trial, and therefore it is not entrenched in the Constitution by the right to jury trial. O'Flaherty J reached this conclusion after defining the essential purpose of jury trial in this way:[603]

> The essential feature of a jury trial is to interpose, between the accused and the prosecution, people who will bring their experience and commonsense to bear on resolving the issue of the guilt or innocence of the accused. The requirement of unanimity is not essential to this purpose.

4.114 According to the Supreme Court there are two advantages in allowing majority verdicts: first the risk of disagreement is lowered; and secondly, 'the aim of the zealot who glories in dissent and who may make his or her way onto a jury from time to time is defeated'.[604] The court did not see majority verdicts as having any disadvantages. Indeed, the court took the view that the two hours of deliberation required by the legislation could even allow the minority to persuade the majority, so that both points of view would be considered.

Judicial Education

4.115 The Law Reform Commission recommended in 1992 that a Judicial Studies Board be established in Ireland and that there be seminars for judges on topics such as information technology and accountancy.[605]

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603 *O'Callaghan v. The Attorney General* [1993] 2 I.R. 17 at 25.

604 ibid., p. 26.

605 Ireland, Law Reform Commission, *Report on the Law Relating to Dishonesty*, 1992, p. 351.

5. THE UNITED KINGDOM: ENGLAND WALES AND NORTHERN IRELAND

'Right' to Trial by Jury

5.1 In England, Wales and Northern Ireland there is no constitutional right to trial by jury such as exists under the United States Constitution or the Canadian Bill of Rights. As Lord Devlin observes, in Britain such a right 'is protected only by the reluctance of Parliament to interfere with what is seen as a venerable institution still, as in the past, necessary or at least highly desirable to protect individual liberty'.[606]

5.2 It was the famous English jurist Sir William Blackstone, writing in the eighteenth century, who popularised the notion that clause 39 of the Magna Carta of 1215 embodied a right to trial by jury.[607] However, this view is no longer regarded as being historically accurate. The clause provides:[608]

> No free man shall be taken or imprisoned or desseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.

Modern scholars generally accept that there are three reasons for rejecting a correlation between the terms of clause 39 and trial by jury as we know it.[609]

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606 Lord Devlin, 'Trial by jury for fraud', a memorandum submitted to the Fraud Trials Committee (Lord Roskill chairman), Oct. 1984.

607 Blackstone, W., *Commentaries on the Laws of England*, vol. 3, Oxford, Clarendon Press, 1768, p. 350.

608 The translation is taken from Holt, J. C., *Magna Carta*, Cambridge University Press, Cambridge, 1965, p. 327.

609 See e.g., Forsyth, W.M.A., *History of Trial by Jury*, 2nd edn, rev. Morgan, J. A., London, 1878, pp. 91–95; Pike, L. O., *A Constitutional History of the House of Lords*, London, Macmillan, 1894, pp. 169-170; Pollock, F and Maitland, F. W., *The History of English Law before the Time of Edward I*, vol. 1, Cambridge University Press, Cambridge, 1895, p. 152; McKechnie, W.S., *Magna Carta: A Commentary on the Great Charter of King John*, Glascow, James Maclehose & Sons, 1905, pp. 158–163, 436–459; Powicke, F.M., 'Per judicium parium vel per legem terrae', in *Magna Carta Commemoration Essays*, ed. Malden, H.E., Royal Historical Society, [London], 1917, pp. 78–95; Holt, J.C., op. cit., pp. 63–64, 226-229. Cf. Vinogradoff, P., 'Clause 39', in Malden, H.E. ed., op. cit., pp. 96-121; Ullmann, W., *Principles of Government and Politics in the Middle Ages*, London, 1961.

First, the clause could not have been intended to refer to the criminal petty jury, because it did not exist in 1215. Secondly, the word *peers* is used in the sense of the Latin *pars* or *equals*, and the phrase *judgment of his peers* refers not to the jury, but to 'a tribunal in which they [the barons] would not be judged by their inferiors'[610] as, for example, the King's justices—who were not *peers* (that is, earls or barons). Thirdly, 'from the time when trial by jury first commenced, either in civil or in criminal cases, to [the] present ... no jury ever did or could give judgement on any matter whatsoever'.[611] A judgment is given by a judicial officer, not by a body comprised of witnesses. Holt observes: 'Cap. 39 owes its greatness to the assertion of the principle that judgement should precede execution'.[612]

5.3 McKechnie rightly contends that the mistaken interpretation of clause 39 'probably owes its origin to a not unnatural tendency of later generations of lawyers to explain what was unfamiliar in the great Charter by what was familiar in their own experience'.[613] Put at its highest, in England and Wales there is a right to trial by jury which has developed over time according to constitutional convention.[614] In Lord Devlin's opinion this right arose from a popular misreading of the Magna Carta which has 'nurtured a custom that is now three centuries old'.[615]

The Legal Framework

Hierarchy of Courts

5.4 The structure of the court system in relation to criminal cases in ascending order of seniority is as follows:

(1) The Magistrates' Court hears summary offences and those offences triable either way[616] where a summary trial is conducted. About 98 per cent of all criminal cases are heard in

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610 Holdsworth, W., *A History of English Law*, Vol. 1, 7th edn., eds. Goodhart A.L. & Hanbury, H. G., Methuen & Co & Sweet & Maxwell, London, 1956, p. 59.

611 Pike, loc. cit.

612 Holt, op. cit., p. 229.

613 McKechnie, op. cit., p. 456; cf. Holt, op. cit., pp. 1–2.

614 Darbyshire, P., 'The lamp that shows that freedom lives—is it worth the candle?" [1991] *Crim. L. R.* pp. 740 & 743.

615 Lord Devlin, 'Trial by jury for fraud' (1986) 6 *O. J. L. S.* p. 312.

616 In relation to either way offences see below paras. 5.9–5.21.

this court and most of these involve summary offences.[617] The Magistrates' Court usually consists of three unpaid lay magistrates called justices of the peace. They receive advice on points of law from a legally qualified clerk to the justices.[618] The busier courts have a full-time legally qualified stipendiary magistrate.[619] The maximum penalty of imprisonment which can be imposed by the Magistrates' Court for a single offence is six months or, where the accused is convicted of several offences at the one hearing, a cumulative sentence of up to one year imprisonment.

(2) The Crown Court conducts trials for the more serious offences and hears appeals from the Magistrates' Court against conviction or sentence. The Crown Court can sentence offenders convicted in the Magistrates' Court when that Court commits the accused to the higher court for sentence.

(3) The Court of Appeal (Criminal Division) hears appeals from the Crown Court against conviction and sentence. A supervisory jurisdiction over the Crown Court is also exercised by the Queen's Bench Division of the High Court, however, this is restricted to judicial review of the decision making process and 'for the most part, [does not apply to] matters relating to trial on indictment'.[620]

(4) The House of Lords hears appeals from the Court of Appeal (Criminal Division) where leave is granted. Appeals are usually heard by five Lords of Appeal in Ordinary. In 1994 seven petitions for leave to appeal in criminal cases were allowed.[621]

5.5 In the civil jurisdiction the court structure in ascending order is as follows:[622]

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617 United Kingdom, Lord Chancellor's Department, *Judicial Statistics:: England and Wales For the Year 1994*, HMSO, London, Jul, 1995, Cm. 2891(hereafter '*Judicial Statistics*'), p. 94.

618 Whitaker's Almanack 1995, J. Whitaker & Sons Ltd, London, 1995, p. 370.

619 ibid.

620 *Judicial Statistics*:, op. cit., p. 14.

621 ibid., p. 9.

622 See generally, United Kingdom, Civil Justice Review, *Report of the Review Body on Civil Justice*, HMSO, London, Jun. 1988. Cm 394, p. 2.

(1) The County Court, which generally speaking has a jurisdictional limit of £5,000, hears most civil litigation. There are 274 County Court trial centres. Where the amount at issue exceeds £1,000, the trial is heard by a circuit judge, otherwise a county court registrar presides; there are no jury trials. There are 395 circuit judges and 213 registrars.

(2) The High Court handles the more substantial civil cases. Trials take place at the Royal Courts of Justice in London and at 26 provincial trial centres. There are 80 High Court judges. Provisions exist for the transfer of cases between the High Court and the County Courts.

The High Court has three divisions. The Queen's Bench Division (which also contains the Commercial Court, the Admiralty Court and the official referees) is presided over by the Lord Chief Justice and deals with common law business, including debt claims and personal injury cases, and administrative law matters. This is the only Division which conducts jury trials, however, almost all civil actions are heard by a judge without a jury.[623]

The Chancery Division (which also contains the Patents Court) is presided over by the Vice-Chancellor and deals with corporate and personal insolvency, disputes in the running of companies and between landlords and tenants, intellectual property matters, and the interpretation of trusts and wills.

The Family Division is presided over by a President and is concerned with family law, including adoption and wills.

(3) The Court of Appeal (Civil Division) is presided over by the Master of the Rolls and hears appeals from the County Court and the High Court. There are 27 Lord Justices who also hear appeals in the Criminal Division of the Court.

The term 'the Supreme Court' is sometimes used to generically describe all Divisions of the High Court and the Court of Appeal in both the civil and criminal jurisdictions.

(4) The House of Lords in its judicial capacity is the final appellate

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623 See below para. 5.22.

forum. It is presided over by the Lord Chancellor and has a number of Lords of Appeal in Ordinary.

Incidence of Trial by Jury

Criminal Procedure

5.6 To a large extent the incidence of jury trials in the criminal courts depends upon the categorisation given to offences, either as indictable (triable by jury), summary (triable by magistrates) or as a hybrid category known generically as 'either way' offences.

5.7 Indictable offences are of a serious character such as, murder, manslaughter, wounding with intent to kill, rape, blackmail and armed robbery. They can be heard only in the Crown Court where they constitute about 18 per cent of all cases disposed of in a year.[624]

5.8 Summary offences, which include motoring offences, are heard before a Magistrate. In 1988 several either way offences were reclassified to summary offences. These offences included: driving while disqualified, common assault and battery and criminal damage between £400 and £2,000 (now £5,000).[625] The reclassification enabled the Magistrates' Court to hear more cases and also removed the discretion of the Magistrate to transfer these cases to the Crown Court.

5.9 Either way offences are more serious than summary offences and can be tried either summarily in a Magistrates' Court, or by a judge and jury in the Crown Court. Offences in this category include: theft, burglary and handling stolen goods. The mode of trial adopted will depend on the exercise of a magistrate's discretion and the consequent election by the accused.

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624 United Kingdom, The Royal Commission on Criminal Justice, *Report*, (Viscount Runciman, Chairman), HMSO, London, 1993, Cm. 2263 (hereafter 'Runciman, *Report*'), p. 85.

625 United Kingdom, Home Office, *Mode of Trial – A Consultation Document*, HMSO, London, Jul. 1995, Cm. 2908, p. 3; Criminal Justice and Public Order Act 1994 (UK), s. 46.

5.10 In accordance with published guidelines,[626] and after hearing defence and prosecution submissions, the magistrate must form a view as to whether one or more of the factors listed in the guidelines are present, and whether his or her sentencing powers are adequate to properly dispose of the case. If the magistrate decides that the offence is one suitable for a summary hearing, the accused is given an option whether to submit to the magistrate's jurisdiction or have the matter heard by a judge and jury in the Crown Court.

5.11 Fifty-two per cent of the either way offences that are heard in the Crown Court are remitted there in the exercise of magistrates' discretions, while a further 30 per cent of such cases are dealt with in the Crown Court because of elections by accused persons.[627]

5.12 Elections for trial by jury rather than by a magistrate tend to be based on a perception that the trial will be fairer, there is a greater chance of acquittal and the sentence imposed will be more lenient. The belief that there is a greater chance of an acquittal before the Crown Court is supported by a study by Julie Vennard. She found that for contested cases there was a 57 per cent chance of acquittal in the Crown Court compared to a 30 per cent chance in the Magistrates' Court.[628]

5.13 One other factor which may influence the accused's decision whether or not to elect a summary hearing is the availability of legal aid funding. If a case is to be heard in the Crown Court, the magistrate **must** grant legal aid under the Legal Aid Act 1988, whereas, in cases heard in the Magistrates' Court there is a discretion whether to grant such aid.[629]

5.14 In 1993 the Royal Commission on Criminal Justice recommended that the absolute right of an accused person to elect trial by jury in the Crown Court ought to be abolished. If the Royal Commission's recommendation were to be adopted then the 'right to insist on jury trial' would be lost in over

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626 See, *Practice Note (Mode of Trial: Guidelines)* [1990] 1 W. L. R. 1439. See also, United Kingdom, Crown Prosecution Service (CPS), *A Statement of Prosecution Policy – Domestic Violence*, CPS, London, Apr. 1993, p. 7. United Kingdom, CPS, *A Code For Crown Prosecutors*, CPS, London, Jun. 1994, p. 13.

627 Runciman, *Report*, p. 85.

628 Vennard, J., 'The outcome of contested trials', in Moxon, D. (ed.), *Managing Criminal Justice*, HMSO, London, 1985, cited in Runciman, *Report*, p. 86.

629 Ashworth, A., *The Criminal Process: An Evaluative Study*, Clarendon Press, London, 1994, p. 6.

35,000 cases.[630] As the Royal Commission acknowledged, the implementation of this recommendation could be expected to meet with considerable opposition:[631]

> There has been continuing resistance to any further diminution of the defendant's right to trial by jury, both on the grounds that jury trial should in principle be used and because it is argued that jury trial should be available in any case in which a defendant may if convicted suffer damage to his or her reputation. Some also believe that, if defendants feel that they have a better chance of an acquittal from a jury than from the magistrates, then they should have a right to jury trial for that reason.

5.15 One English academic lawyer has also noted that past attempts to implement steps that 'begin to restrict a defendant's right to jury trial' have been met by a 'vociferous outcry of objection from virtually every component of the criminal justice system and campaigning legal groups'.[632]

5.16 The Royal Commission favoured an approach whereby the prosecution and the defence could reach a legally binding decision on the mode of trial, and if no agreement could be reached then the magistrate would determine the venue.[633] The Royal Commission recommended that under such a scheme there should be legislative guidelines indicating the matters to be considered by a magistrate, including any potential loss of reputation for first time offenders. However, according to the Lord Chief Justice, Lord Taylor, this recommendation should not be adopted because it involves a 'two-tier' justice system. Jury trial would be more available to people without a criminal record because they have the most reputation to lose, whereas, trial before a magistrate would become the norm for those people with a criminal record.[634] Lord Taylor believes that 'those with criminal records should have no lesser right to have their cases heard in the Crown Court'.[635]

5.17 The basis for the Royal Commission's recommendation was that substantial savings would result from increasing the cases dealt with in the Magistrates' Courts. In England and Wales the administration of justice is getting substantially more expensive. The Home Office Consultation Paper on the Mode of Trial noted that one reason for rising costs is the increase in

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630 Home Office, *Mode of Trial*, op. cit., p. 4.

631 Runciman, *Report*, p. 88.

632 Slapper, G., 'Awaiting a decision' [1994] *N. L. J.*, p.1566.

633 Runciman, *Report*, p. 87.

634 Home Office, *Mode of Trial*, op. cit., p. 4.

635 Lord Taylor in McLeod, J., 'Taylor defends jury trials', (1993) 90 *Law Soc. Gaz.*, 28 Jul. 1993 (no. 29), p. 4.

committals to the Crown Court which has:[636]

> contributed to an increase in remand and the sentenced prison population and has had substantial resource implications for the police, the Crown Prosecution Service, other prosecutors, the Courts and the legal aid fund.

5.18 According to Professor Zander there are two further concerns which motivated the Royal Commission's recommendation. First, the fact that a high proportion of people who opt for trial by jury end up pleading guilty. This causes the following problems:[637]

> On the practical level a very high proportion of those who opt for trial by jury end pleading guilty, so they don't get trial by jury although they have asked for it. And in the meanwhile they've clogged up the works, they've caused an enormous [amount] of expense in preparation for the case which never takes place. They've cluttered up the prisons in so far as they're detained in custody. They probably will get, statistically they're more likely to get, longer sentences at the end of the day than they would have got if they'd gone to the Magistrates' Court.

Secondly, giving the accused the choice of the forum for the trial is wrong in principle, in the same way as it would be inappropriate to give him or her the choice of judge. The accused in both instances is 'really looking for ... a better chance of an acquittal'.[638]

5.19 Rather than removing the right to trial by jury for either way offences, the Government proposes the amendment of the Magistrates' Courts Act 1980 to provide for a procedure whereby a Magistrates' Court is required to invite a person charged with an offence which is triable either way to give an indication of his or her plea before the court decides whether the case is more suitable for summary trial or for trial on indictment. If the accused indicates an intention to plead guilty, the court proceeds to a summary hearing and the indication is deemed to be the plea entered. If the accused indicates an intention to plead not guilty, the court proceeds in the usual manner.[639]

5.20 There have also been moves to reclassify certain offences. The reclassification of minor theft from an either way offence to a summary offence was recommended by the James Committee (1975). However, the

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636 Home Office, *Mode of Trial*, op. cit., p. 1.

637 Zander, M., Professor of Law, London School of Economics and Political Science, transcript of meeting with VLRC delegation, London, 4 Jul. 1994, p. 6.

638 ibid.

639 Criminal Procedure and Investigations Bill 1996, cl. 41 which inserts s. 17A into the Magistrates' Courts Act 1980. See also, United Kingdom, Home Office, *Mode of Trial*, op. cit., p. 5.

Royal Commission on Criminal Justice (1993) argued against this on the grounds that a conviction for minor theft could adversely affect a person's reputation. Consequently, in these cases the accused retains the right to trial by jury.

5.21 More recently, the Home Office's Consultation Document on the Mode of Trial sought responses as to whether a number of either way offences, including possession of an offensive weapon, making off without payment, and theft from a machine, should be reclassified as summary offences.[640]

Civil Procedure

5.22 In civil actions trial by jury is available on the application of any party in cases involving allegations of fraud, libel, slander, malicious prosecution or false imprisonment. Even in this restricted class of cases, jury trial is not available where the court forms the view that the trial will require a prolonged examination of documents or accounts or any scientific or local investigation which cannot be conveniently conducted with a jury.[641] In all other civil cases heard in the Queen's Bench Division—most notably, personal injury litigation—the court has a discretion as to whether or not the trial will be before a judge and jury.[642] However, this discretion will be exercised in favour of a jury trial in only exceptional cases, and consequently, jury trials rarely occur in civil cases.[643]

Representativeness of the Jury System

General Concepts of Representativeness

5.23 In order to ensure that the jury is representative of the community, jurors are randomly selected from the electoral register. The question of what is meant by a 'representative jury' was discussed during the Cropwood Round-Table Conference held in 1974. Geoffrey Marshall considered that there are two possible meanings of the word 'representative' in this context:[644]

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640 ibid., p. 7.

641 Supreme Court Act 1981 (UK), s. 69.

642 Supreme Court Act 1981 (UK), s. 69(3).

643 See, *H. v. Ministry of Defence* [1991] 2 W. L. R. 1192; *Taylor v. Anderton (Police Complaints Authority Intervening)* [1995] W. L. R. 447.

644 Marshall, G., 'The judgement of one's peers—some aims and ideals of jury trial'. In N. Walker (ed.), *The British Jury System*, Papers presented to the Cropwood Round-Table Conference December 1974, University of Cambridge, Institute of Criminology,

> In one sense a representative selection is merely a reflection or reproduction on a smaller scale of some larger entity or group. But in another sense, one who is a representative may take himself to have the duty of protecting or supporting the interest of the section or group that he is considered to represent. It could be argued that the function of such a representative juror is only to help the jury 'understand (the) mind and feelings' of a member of a minority group.

5.24 The preferred method to be adopted in order to maximise the representativeness of the jury system was enunciated by Lord Denning MR in *R. v. Crown Court at Sheffield, ex. p. Brownlow*,[645] where His Lordship said:

> Our philosophy is that the jury should be selected at random, from a panel of persons who are nominated at random. We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole and thus represent the views of the common man... The parties must take them as they come.

5.25 Accordingly, the jury is representative of the community only to the extent achieved by random selection. Judges have no discretion to ensure that jurors are representative of the general community or any particular section of it, nor should they have such power in the view of Lord Lane CJ in *R. v. Ford*.[646] In that case His Lordship proffered three reasons for his opinion. First, the Lord Chancellor under the Juries Act 1974 is responsible for summoning jurors. The judge has no obligation to change either the composition of the panel or the district from which prospective jurors are drawn. Secondly, if a judge were to remove a juror in order to obtain a particular ethnic or gender balance then he or she would be assuming bias on the part of that juror where none had been proved. The mere fact that a juror, for example, belongs to a particular race is not a basis for challenge for cause on the grounds of bias. Finally, any change to the principle of random selection is best left to the legislature, it is not a matter for the courts. As Lord Taylor of Gosforth CJ has observed, the jury is: [647]

> The impartial arbiter of the facts of what actually happened, drawn at random from the local community. [Its members must not be regarded] as representing the views of the community, or of discrete parts of it, nor indeed of "representing" either the complainant or the defendant.

5.26 A number of factors can have a significant impact on the representativeness of the jury system. These include: community attitudes to

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Cambridge, 1975, pp. 8–9.

645 [1980] Q. B. 530, 541, cited with approval by Lord Lane CJ in *R v Ford* [1989] 3 All E. R. 445, 448.

646 [1989] 3 All E. R.445 at 448–449.

647 Gibb, F., 'Race quota on juries rejected as insidious by Lord Chief Justice' *The Times*, 1 Jul. 1995, p. 9.

jury service, the manner in which jury districts are formed, eligibility and exemption criteria, issues relating to ethnicity and gender balance on the jury, and the conditions of jury service.

Community Attitudes to Trial by Jury

5.27 Community support for trial by jury is very strong in England and Wales. This support was described by J. Engel of the Crown Prosecution Service, during a meeting with the Victorian Law Reform Committee (hereafter 'VLRC') delegation, in this way: 'trial by jury is something anyone who finds themselves in trouble with the law would actually want in the majority of cases'.[648] This view was supported by the Crown Court Study. Defendants were asked: 'If the law was changed so that you could have chosen either a trial by jury in the Crown Court, or a trial by a judge in the Crown Court (with no jury) which would you have chosen?' Of those who replied, 70 per cent preferred trial by jury.[649]

5.28 The study also found that there was general support for jury trial among members of the legal profession. When asked whether the 'jury system is sensible?' 79 per cent of judges, 88 per cent of prosecution barristers and 91 per cent of defence barristers said they believed the system was 'very good' or 'good'.[650] A senior member of the English Criminal Bar who spoke with the VLRC delegation, Michael Hill, QC, described the support for the retention of trial by jury in these terms:[651]

> There are a number of reasons that were advanced against moving away from trial by judge and jury, but whatever those arguments may have been, there was an overwhelming opposition to it ... because the jury trial was regarded as one of the principle safeguards of our non-existent Constitution.

5.29 However, according to the Roskill Committee, the community's support for trial by jury may fail to take into account the alleged inability of jurors to understand complex matters. The Committee further contended that this support would be greatly reduced if the following facts were publicly

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648 Engel, J., Head of Criminal Justice Policy Division, Policy Group, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 10.

649 United Kingdom, Royal Commission on Criminal Justice, *Crown Court Study*, Zander, M. & Henderson, P., HMSO, London, 1993, p. 172.

650 ibid., pp. 172–173.

651 Hill, M. QC, transcript of meeting between senior members of the English Criminal Bar and VLRC delegation, London, 4 Jul. 1995, p. 3.

known:[652]

> (a) trial by jury selected at random is sometimes a major contributory cause in preventing fraud cases from being brought to trial;
>
> (b) the difficulty of presenting a complex case often results in a decision to opt for less serious charges than the facts warrant;
>
> (c) there is no requirement that jurors selected at random should be able to read or write the English language;
>
> (d) the principle of random selection is eroded by the exclusions which take place in practice.

Nevertheless, knowledge of these matters appears not to have changed the attitudes of judges and barristers who, according to the Crown Court Study, generally support trial by jury.

Jury District Formation

5.30 One factor which can significantly influence the representativeness of a jury system is the manner in which jury districts are constituted. Although England and Wales are not strictly divided into jury districts, and theoretically jurors can be summoned from anywhere, in practice it is generally considered that jurors should not be required to travel too great a distance to attend court.[653] Consequently, jurors are required only to serve at a courthouse which is situated within a reasonable day's travel of the juror's home. The Royal Commission on Criminal Justice (1993) observed that this method of selection can cause problems in ensuring that juries are representative of the broad community and not merely some sections of it:[654]

> some of the catchment areas from which potential jurors are drawn for individual courts produce an inadequate geographical spread with the result that people are selected to serve on a jury who live close to each other and may also be known to the defendant.

5.31 The Royal Commission recommended that summoning officers should take reasonable steps to prevent this problem occurring. For larger court centres it was suggested that widely separated parts of the electoral register should be used.[655] This contradicted the views of the Roskill Committee which in 1986 asserted that the only practical and acceptable way to summon

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652 United Kingdom, Fraud Trials Committee, *Report* (Lord Roskill, Chairman), HMSO, London, 1986 (hereafter 'Roskill, *Report*'), pp. 135–136.

653 Juries Act 1974 (UK), s. 2.

654 Runciman, *Report*, p. 132.

655 ibid.

jurors is by using the existing method.[656]

Juror Eligibility Criteria

5.32 As the Royal Commission on Criminal Justice noted: 'all law-abiding citizens have a common interest in a system of criminal justice in which the risks of the innocent being convicted and of the guilty being acquitted are as low as human fallibility allows'.[657] This interest has led to citizens, where eligible, having an active duty and right to serve on a jury.

5.33 The electoral register is used to select potential jurors from the relevant catchment area.[658] To be qualified and liable to serve on a jury a person must be registered as a parliamentary or local government elector, be between the ages of 18 and 70 years and have been resident in the United Kingdom for at least five years since reaching the age of 13. If a person is ineligible for the time being or disqualified then he or she is not qualified to serve. [659]

5.34 The electoral registration requirement does not ensure that juries are representative of the general community. Some people who are legally entitled to serve on juries, particularly members of ethnic minorities, may be excluded from the system because the electoral roll is not comprehensive or up-to-date. The Royal Commission on Criminal Justice acknowledged the need to 'continue and expand present efforts to persuade people from the ethnic minority communities to register'.[660] However, the Royal Commission did not elaborate on how this could be achieved. The Commission for Racial Equality (CRE) has also expressed its concern at the relatively small number of members of ethnic minorities who serve on juries. The CRE suggested that the low rate of participation may be a result of the electoral registration and residency requirements.

5.35 According to a research study undertaken on behalf of the Royal Commission on Criminal Justice in 1992, juries are generally representative of the community in age distribution. Some 22,000 questionnaires, relating to over 3,000 cases, were distributed to judges, barristers, defence solicitors, the

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656 Roskill, *Report*, p. 120.

657 Runciman, *Report*, p. 2.

658 Juries Act 1974 (UK), s. 3.

659 Juries Act 1974 (UK), s. 1.

660 Runciman, *Report*, p. 131.

Crown Prosecution Service, police, court clerks, jurors and defendants.[661] The study concluded that a wide diversity of ages was represented on most juries and that no age group dominated disproportionately with the general population.[662] The study also found that the age distribution of the foremen and forewomen was similar to that of the other jurors.[663]

Disqualification, Ineligibility and Excusal Criteria

5.36 Schedule 1 of the Juries Act 1974 lists those people who are disqualified, ineligible, or entitled to be excused from jury service. The VLRC delegation was told by a senior officer with the Crown Prosecution Service that in his opinion there are too many categories of people who are ineligible or entitled to be excused from jury service. The exclusion of certain categories of people from jury service could have an affect on the decision making process. The result he said is that the jury is not representative of the community:[664]

> If one assumes that they [the jury] do act as a body of people then in a cross section of the community you would have, not to sound condescending or anything, but you would have the odd professional or member of the clergy, for example, who might take a very important role within the jury in debating with the jury and perhaps feeding its considerations.

5.37 Similar views were held by the shadow Home Secretary, Mr Jack Straw, MP. If a Labour Party Government were elected, it would 'stop people avoiding jury service by citing business commitments, holidays or minor illness'.[665] The categories of automatic exemption and the list of those who have a legal right to be excused also would be reviewed. Mr Straw believes that the categories of exemption from jury service have made the English jury system unrepresentative and it has become 'skewed towards the working class and the unemployed who [in his opinion] are often unsympathetic to the police and more likely to acquit criminals'.[666] Mr Straw was rebuked for this comment by Mr Jonathan Evans, MP, Parliamentary Secretary in the Lord

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661 United Kingdom, Royal Commission on Criminal Justice, *Crown Court Study*, Zander M. & Henderson, P. HMSO, London, 1993. See also Runciman, *Report*, p. 2.

662 Zander & Henderson, op. cit., p. 236.

663 ibid.

664 Jeans, L., Senior Crown Prosector, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 11.

665 Sherman, J., 'Jury dodging "must stop"', *The Times*, 7 Feb. 1996, p. 1.

666 ibid.

Chancellor's Department, and by the authors of a number of letters to the editor of *The Times*.[667]

Disqualification

5.38 The list of persons who are disqualified from jury service includes: those who are serving sentences of imprisonment or youth custody for a term of five years or more, persons sentenced to be detained during Her Majesty's pleasure, persons who have served within the last ten years any part of a sentence for imprisonment, youth custody or Borstal detention or who have been given a suspended sentence or community service order, persons who have been placed on probation within the last five years, and persons currently on bail in criminal proceedings.[668] This last category was added following a recommendation by the Royal Commission on Criminal Justice. The category was thought to be necessary so as to prevent people serving on juries who are on bail for an offence of a similar nature to that for which the accused is to be tried.[669]

5.39 The Crown Prosecution Service supports the list of disqualified people. A spokesman told the VLRC delegation:[670]

> I think that there is a good case that can be made for all of [the categories of disqualification]. Certainly the extensions there have been in terms of disqualification so far as people with criminal records [is] concerned is quite important; and I think that before the recent tightening of the legislation, there was concern ... on both sides, both the prosecution and the defence, that you actually could find on juries people [who] had been themselves in trouble with the law and in such situations the decision of the jury in that way [may] be tainted.

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667 'Juries not guilty', *The Times*, 13 Feb. 1996, p. 31; Schaffer, L. & Bunting, J., 'Letters to the Editor', *The Times*, 8 Feb. 1996, p. 19.

668 Juries Act 1974 (UK), sch. 1; Criminal Justice and Public Order Act 1994 (UK), s. 40.

669 Runciman, *Report*, p. 132.

670 Engel, J., Head of Criminal Justice Policy Division, Policy Group, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 10.

5.40 Following suggestions that the categories of disqualification should be broadened to preclude persons with otherwise non-disqualifying criminal convictions from serving on juries, the Roskill Committee (1986) recommended that the legislature should re-examine this area.[671] It contended that the policy objectives of disqualifying those persons who may not act impartially, and thereby ensuring that public confidence in the administration of justice is maintained, may not be achieved by the present categories.[672] The Roskill Committee did not suggest any specific categories of disqualification.

5.41 The Royal Commission on Criminal Justice recommended the use of a new national criminal record system in order to assist the courts to identify persons who are disqualified from jury service due to a relevant criminal record.[673]

Ineligibility

5.42 The categories of ineligibility for jury service are divided into four groups: the judiciary, others concerned with the administration of justice, the clergy and certain vowed members of religious orders, and mentally disordered people. [674]

5.43 The term 'members of the judiciary' includes recorders, masters, registrars, magistrates, justices of the peace and the members of certain tribunals. These persons are excluded from jury service for life. 'Others concerned with [the] administration of justice' are ineligible for 10 years'. This group includes: barristers and solicitors and their clerks, the Director of Public Prosecutions and his or her staff, certain public servants, court staff, coroners, court shorthand writers, court security personnel, persons associated with penal establishments and the custody of prisoners, and members of the police forces and civilian personnel employed by them. The clergy and vowed members of religious orders who live in a religious community are excluded only while the terms of the exemption continue to apply to them.

5.44 The category relating to mentally disordered persons applies to a

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671 Roskill, *Report*, recommendation 77, p.124.

672 United Kingdom, Home Office, *Report of the Departmental Committee on Jury Service* (Lord Morris, Chairman), HMSO, London, 1965, Cmnd, 2627 (hereafter 'Morris, *Report*'), pp. 42–43.

673 ibid., recommendations 220 & 207.

674 Juries Act 1974 (UK), sch. 1.

person who suffers or has suffered from a mental illness, psychopathic disorder or mental handicap, and on account of that condition is a resident in a hospital or institution or regularly attends for treatment by a medical practitioner.

5.45 The Royal Commission on Criminal Justice largely approved of these categories. The only category which it did not consider to be justified was that of the clergy and members of religious orders.[675] The Royal Commission saw no reason for making these people ineligible for jury service. The Commission concluded that should jury service be incompatible with their beliefs, then they could seek to be excused.

5.46 The ineligibility of members of the legal profession is based upon their legal knowledge and training, which may unduly dominate a jury's deliberations.[676]

Involuntary Exclusion from Jury Service

5.47 In addition to the categories of disqualification and ineligibility previously discussed, two further groups within society may be involuntarily excluded from participating in the jury system: persons with a physical disability and persons with an insufficient understanding of the English language.

5.48 As a consequence of a recent amendment to the *Juries Act 1974* there is now a statutory presumption in favour of disabled persons serving on juries.[677] A judge retains the pre-existing discretion to discharge a summons sent to a disabled person; however, the judge must uphold the summons unless he or she forms the view that the disability is likely to prevent the person from effectively acting as a juror. For example, it has been held that a person who is profoundly deaf, and therefore unable to follow the proceedings in court or the deliberations in the jury room without the services of an interpreter in sign language, should be discharged pursuant to the provision, because the person would not be able to follow the whole of the evidence and 'it would constitute an incurable irregularity in the proceedings

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675 Runciman, *Report*, p. 132.

676 Thomas, D.A., Institute of Criminology, Cambridge University, transcript of meeting with VLRC delegation, Cambridge, 5 Jul. 1995, p. 7.

677 Juries Act 1974 (UK), s. 9B inserted by the Criminal Justice and Public Order Act 1994 (UK), s. 41.

if an interpreter were to retire with the jury to the jury room'.[678]

5.49 The Juries Act 1974 also gives a judge an unfettered discretion to discharge a person from jury service on the ground that the person is unable to understand English sufficiently.[679] The general approach taken by judges depends on the issues involved in the case. If the case concerns extensive documentary evidence then an illiterate person would be at a significant disadvantage. Conversely, illiteracy may not be a problem where the determination of the case depends on the credibility of witnesses giving oral testimony.[680] However, according to the Morris Committee (1965) in all cases the ability of jurors to understand English is essential to the carrying out of their duties:[681]

> It is ... self-evident that a juror will not be able to understand what is going on in court unless he has a good command of the English language. He may have to study documents, and perhaps to take notes. We therefore recommend that no one should be qualified to serve on a jury who cannot read, write, speak and understand English without difficulty.

5.50 The approach of the Morris Committee was supported by the Roskill Committee. The latter asserted that in any fraud case the ability to understand English—which ought to include the ability to read and write—was imperative.[682] In fraud cases jurors need to be able to understand documents and tables, and be able to take notes. The Committee found that potential jurors generally are not excused because their applications state that they have difficulty reading or writing English. Instead, it is left to judges acting on an ad hoc basis before empanelment to inquire of them whether they would have difficulty understanding some of the evidence. Any potential juror who indicates difficulty is discharged to the jury pool for possible selection in another court.[683]

Excusal as of Right

5.51 A number of categories of persons are entitled to be excused as of right from jury service, that is, provided that they satisfy the requirements for

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678 *Practice Note, In re Osman*, [1995] 1 W. L. R. 1327.

679 Juries Act 1974 (UK), s. 10.

680 Thomas, loc. cit.

681 Morris, *Report*, para. 80.

682 Roskill, *Report*, p. 122.

683 ibid.

excusal they must be excused. [684] The numerically largest group in this category is persons aged over 65 years. The age limit for jury service was raised in 1988 from 65 years to 70 years, with those over 65 years of age being entitled to request excusal as of right. In 1972 the upper limit was raised from 60 years to 65 years in accordance with the recommendation of the Morris Committee.[685] The Morris Committee and the Roskill Committee argued for an upper limit of 65 years of age, rather than 70 years, for the following reasons:[686]

(1) Persons above 65 years of age should not be required to serve on juries because jury service is a new experience for most jurors. Any comparison between the age of judges and magistrates, who are often over 65 years of age, and that of jurors is not appropriate because the former have many years of judicial experience.

(2) Jury service may be tiring for jurors who are older than 65 years.

(3) Elderly persons may suffer impaired hearing or sight.

(4) It is unreasonable to require elderly persons to travel large distances to attend court, particularly in winter.

(5) Jury service is a duty of citizenship which perhaps should not 'be demanded of people at an age when they are entitled to the freedom that comes in retirement'.

5.52 Members of the House of Lords, the House of Commons, as well as representatives of the Assembly of the European Communities, are entitled to be excused as of right, as are members of Her Majesty's naval, military or air forces serving full-time.[687] This exemption appears to be based on the importance to the community of the functions they perform.

5.53 In similar vein are exclusions apparently justified on the grounds of public safety. This category includes: practising and registered medical practitioners, dentists, nurses, midwives, veterinary surgeons and pharmaceutical chemists.[688] Excusal as of right is available also to persons

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684 Juries Act 1974 (UK), sch. 1, part III.

685 Halsbury, Notes, vol. 22 Juries, p. 482; Morris, *Report*, p. 23.

686 Morris, *Report*, p. 23; Roskill *Report*, p. 121.

687 Juries Act 1974 (UK), sch. 1, part III.

688 ibid.

who have served on a jury within the previous two years, and who have been excused by the Crown Court for a period which has not yet terminated.[689]

Conscientious Objection to Jury Service

5.54 A right to be excused extends to a person who has a conscientious objection to jury service, provided he or she is a practising member of a religious society or order the tenets or beliefs of which are incompatible with jury service.[690] For an application for excusal on the basis of conscientious objection to be successful, the belief must be such that it would stand in the way of the person 'fulfilling properly, responsibly, and honestly [his or her] duties as a member of the jury'.[691] Thus, the critical issue is not whether the prospective juror has a conscientious objection to jury service, but whether the aversion is such as to prevent the person from being an effective juror.[692]

Discretionary Excusal and Deferral

5.55 A discretion to excuse from jury service may be exercised in a person's favour by the appropriate officer of the Crown Court or a judge where good reason can be shown.[693] Likewise, jury service may be deferred for good reason.[694] A prospective juror may seek the exercise of these discretions on the grounds of personal hardship.[695] In determining whether jury service would constitute sufficient personal hardship, court officers are required to have regard for such matters as: the needs of mothers who care for small children, the needs of proprietors of small businesses, the needs of employers and the existence of long arranged holidays.[696]

5.56 People who are resentful towards jury service tend also to be excused. According to Mr Lloyd of the Crown Prosecution Service 'the judge will exercise his discretion pretty freely because judges understand that a resentful jury member is not going to fulfil his or her duty'.[697] Indeed, Mr Owen, the

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689 Criminal Justice and Public Order Act 1994, s. 42.

690 ibid.

691 *R v Guildford Crown Court ex parte Siderfin* [1990] 2 Q. B. 683.

692 J.C.S., 'Commentary' on ibid. in [1990] *Crim. L. R.* 417, pp. 418–419.

693 Juries Act 1974 (UK), s. 9.

694 Juries Act 1974 (UK), s. 9A.

695 *Practice Direction (Jury Service: Excusal)* [1988] 1 W. L. R. 1162.

696 Roskill, *Report*, p. 120.

697 Jeans, L., Senior Crown Prosector, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 5.

Chief Clerk of the Central Criminal Court, acknowledged that as a matter of policy, court officers assess requests for excusal liberally because they do not want to force people to serve.[698] According to Mr Lloyd, the public's perception of jury service reflects the fact that a vast array of people may be excused. They think that 'there are numerous ways of "getting out of" jury service, and they will try themselves to do so generally if they can, because of the onerous burden'.[699]

5.57 The Crown Court Study, conducted by Professor Zander for the Royal Commission on Criminal Justice, found that 85 per cent of jurors serving had not asked to be excused from jury service. Only 9 per cent sought to defer service and 6 per cent requested unsuccessfully to be excused.[700] Those jurors who had sought deferral or excusal mainly did so because of work commitments (50 per cent), holiday plans (24 per cent), being self-employed (12 per cent) or family commitments (12 per cent).[701]

Ethnicity and Gender Issues Affecting Jury Representativeness

Ethnicity

5.58 There is no requirement for specific representativeness of ethnic minorities on juries and race is not a factor which can be taken into account in the course of jury selection.[702] Nevertheless, the Royal Commission on Criminal Justice (1993) recommended that in exceptional cases considerations relating to the racial composition of a jury should be taken into account. The Royal Commission suggested that this should occur where the accused believes that he or she would not receive a fair trial because of the ethnic composition of the jury and such belief is reasonable because of some unusual or special features of the case.[703]

5.59 Recently in England there have been calls for the use of a jury quota system to ensure ethnic minorities are represented on juries in certain cases. These calls gained force following the decision in June 1995 to clear three

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698 Owen, J., Chief Clerk, Central Criminal Court, transcript of meeting with VLRC delegation, London, 4 Jul. 1995, p. 5.

699 Jeans, op. cit., p. 9.

700 Zander & Henderson, op. cit., p. 204.

701 ibid., p. 205.

702 *R v Ford* [1989]3 All E. R. 445.

703 Runciman, *Report*, p. 133.

police officers of the manslaughter of Joy Gardner, an illegal immigrant.[704]

5.60 The Royal Commission on Criminal Justice recommended that in exceptional cases judges be empowered to order, on an application by the defence or prosecution, that three people from ethnic minorities be included on the jury. The judge would be entitled to require that one or more of these three jurors be selected from the accused or victim's ethnic minority. In order to be an exceptional case, the accused would need to believe that 'he or she cannot get a fair trial from an all-white jury' and this belief would need to be reasonable.[705] The Royal Commission gave the following example of an instance which might be viewed as exceptional: where 'black people [were] accused of violence against a member of an extremist organisation who they said had been making racial taunts against them and their friends'.[706]

5.61 The Royal Commission in making this recommendation acknowledged the significance of the principle of random selection, but went on to say that:[707]

> We are, however, anxious that everything possible should be done to ensure that people from the ethnic minority communities are represented on juries in relation to their numbers in the local community.

5.62 The test suggested by the Royal Commission on Criminal Justice is stricter than that proposed by the Commission for Racial Equality (CRE). The latter's test for imposing a quota merely required the accused to believe that he or she is unlikely to receive a fair trial as a result of there being a racial dimension to the case.[708] The CRE suggested in such cases that a quota of three jurors from the ethnic minority communities should be applied. Due to the practical difficulty in obtaining jurors from the accused or victim's ethnic minority, the CRE felt that the three jurors could come from any ethnic minority community. The bailiff need then only randomly draw names from the jury pool until three such persons were selected.

5.63 These calls for the introduction of a quota have been rejected by the Lord Chief Justice, Lord Taylor of Gosforth, as being 'the thin edge of a

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704 Gibb, F., 'Race quota on juries rejected as insidious by Lord Chief Justice' *The Times*, 1 Jul. 1995, p. 9.

705 Runciman, *Report*, p. 133.

706 ibid., p. 134.

707 ibid., p. 133.

708 ibid.

particularly insidious wedge ... We must on no account introduce measures which allow the State to start nibbling away at the principle of random selection of jurors'.[709] This sentiment was echoed by the Crown Prosecution Service in its submission to the Royal Commission on Criminal Justice which supported the proposition that the integrity of the jury system depends upon the random selection of jurors. In a meeting with the VLRC delegation, an officer of the Crown Prosecution Service described the situation in these terms:[710]

> One of the difficulties ... is where do you rule the line? Because there will be other minority groups clearly who would feel perhaps the same considerations ought to be applied to them in terms of representation on juries, and do you do it in terms of sexual orientation or religion, etc.?

5.64 However, the problem of how to deal with possible bias among jurors remains. Studies have consistently shown that the current methods of jury selection have led to women, ethnic minorities and young people being under-represented on juries.[711] The Chair of the Society of Black Lawyers, D. P. Herbert, argues that 'reforms to the selection process are needed urgently in order to ensure that race training of judges is not dissipated by racist juries and to guarantee impartiality for all, regardless of colour or ethnic origin'. [712]

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709 Gibb, F., 'Race quota on juries rejected as insidious by Lord Chief Justice' *The Times*, 1 Jul. 1995, p. 9.

710 Engel, op. cit., p. 1.

711 Gobert, J., "The Peremptory Challenge—An Obituary" [1989] *Crim. L. R.,* p. 528.

712 Herbert, D.P., 'Racism, impartiality and juries' [1995] *N. L J.,* 1138, p. 1140.

5.65 The Royal Commission on Criminal Justice further stated that juries would be more representative if all people from ethnic minority groups, where eligible, were included on the electoral role.[713] The Royal Commission also recommended that judges be required to warn jurors against being biased in cases where there is a black defendant or other racial dimension.[714] Such a requirement would alert judges to the importance of giving a warning. However, the Royal Commission felt that the judge should have a discretion as to whether or not such a warning was given because 'there may ... be cases in which the warning would be inappropriate or even counter-productive'.[715] This approach was taken because 'discrimination on racial grounds does not necessarily only occur when somebody is consciously motivated by racial prejudice [and] it may also take the form of indirect discrimination',[716] and it is particularly important to warn jurors against behaving in a discriminatory manner.

5.66 For those people working within the criminal justice system, including those who have a role in jury selection, there are a number of reminders against engaging in conduct which is discriminatory. For example, prosecutors when carrying out their functions, including standing aside jurors or engaging in jury vetting, must follow the *Code for Crown Prosecutors*. The Code requires that they 'not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions'.[717] Moreover, the Criminal Justice Act 1991 provides that judges and others when carrying out their duties must not discriminate. The Secretary of State, to ensure that people are reminded of the need to avoid discrimination, has an obligation each year to publish information that is expedient in: 'facilitating the performance by such persons of their duty to avoid discrimination against any persons on the ground of race or sex or any other improper ground'.[718]

Ethnicity and the European Court of Human Rights

5.67 Protection against racism in jury selection procedures and the

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713 Runciman, *Report*, p. 133.

714 ibid., 135.

715 ibid.

716 United Kingdom, Home Office, *Race and the Criminal Justice System – a Home Office publication under section 95 of the Criminal Justice Act 1991*, HMSO, London, 1992, p. 5.

717 United Kingdom, CPS, *The Code for Crown Prosecutors*, June 1994, p. 3.

718 Criminal Justice Act 1991 (UK), s. 95.

consequent under-representation of ethnic minorities on juries, may be available from the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which the United Kingdom signed and ratified in 1951. In 1965 the British Government agreed to submit to the individual complaints procedure under the Convention.[719] The Convention does not mention the right to trial by jury, but it does provide for a right to a fair hearing by an independent and impartial tribunal.[720] This right, like others provided by the Convention, is to be secured 'without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.[721]

5.68 Recently, the European Commission on Human Rights determined to be admissible a petition lodged by a United Kingdom citizen, Mr David Gregory, which raises the issue of racism in the British jury system. The European Court of Human Rights will now decide the matter. In Gregory's trial for robbery, after the jury had retired to consider its verdict, a juror submitted a note to the judge which said: 'jury showing racial overtones, one member to be excused'.[722] The judge brought the jurors back, reminded them of their oath and told them that 'any prejudice ... for or against anybody, must be put out of your minds', but no inquiry was made by the judge.[723] Gregory was subsequently found guilty by a majority of ten jurors to two and sentenced to six years imprisonment. The Court of Appeal had approved of the judge's approach, describing it as showing tact and sensitivity.[724]

Gender Issues

5.69 In jury trials for rape it is generally accepted in the United Kingdom (and elsewhere) that there is a need for both sexes to be adequately represented on the jury because, as the Advisory Group on the Law of Rape (1975) commented, 'a proper balance of the views of both sexes is of importance, indeed we feel of paramount importance, in reaching a proper

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719 Wilcox, M.R., *An Australian Charter of Rights?* Law Book Co., Sydney, 1993, p. 220.

720 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6.

721 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 14.

722 Herbert, D.P., 'Racism, impartiality and juries' (1995) *N. L .J.,* p. 1139.

723 ibid.

724 Court of Appeal, Ward J, 19 Jan. 1993, unreported.

view about the attitude of the man and of the woman'.[725]

5.70 A 1975 study found that fewer women than men served on juries in rape cases because they were excused from jury service at a higher rate than were men. This was partly caused by the fact that many women were married with young children.[726] Another cause was the use of the peremptory right of challenge to systematically exclude women from juries in rape cases. The Advisory Group reported: [727]

> In cases of rape we believe it to be crucial that both sexes should be adequately represented. The principle of random selection taken together with the scope for peremptory challenge is not able to guarantee this in every case and, therefore, we believe that a change is essential.

5.71 The change that the Advisory Group recommended was to require that a minimum of four men and four women be empanelled on all juries.[728] To prevent a reduction in the minimum quotas through the use of peremptory challenges, it was proposed that where the representation of either sex would otherwise fall below four, the juror who replaces the challenged juror should be of the same sex.

5.72 The Advisory Group's report was written before the abolition of peremptory challenges in 1988 and therefore this recommendation is no longer as relevant as it was in 1975. In any event, because less than four women serve on juries in under nine per cent of all cases, the Advisory Group's recommendation, if adopted, would have limited operation.[729] Nevertheless, it is noteworthy that this figure does not differentiate between rape cases and other cases.

5.73 The 1993 the Crown Court Study conducted on behalf of the Royal Commission on Criminal Justice found that women are still slightly under-represented on juries generally; 53 per cent of jurors were male and 47 per cent were female.[730] Significantly, the Study found that in 78 per cent of trials the foreman of the jury was male.[731] The Home Office in London conducted

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725 United Kingdom, Home Office, *Report of the Advisory Group on the Law of Rape,* (R. Heilbron, Chair), HMSO, London, 1975, p. 33.

726 ibid., p. 32.

727 ibid.

728 ibid., p. 37.

729 Zander & Henderson, op. cit., p. 235.

730 ibid., p. 233.

731 ibid.

its own study during 1994 and found the same ratio of men to women.[732]

5.74 Despite these observations, attempts to erode the principle of random selection have generally been met with strong criticism. Random selection is taken to be the best way to ensure that juries are impartial and representative of the community. The comments of Lord Taylor of Gosforth relating to racial quotas which were quoted above are typical of the resistance voiced to any change to this principle.

The Conditions of Jury Service and Representativeness

5.75 The conditions of jury service can adversely affect the representativeness of juries. This would be the case where service is so onerous (for financial or other reasons) as to require that a particular group or groups of people to be routinely excused. The problem is especially evident in long trials, such as serious fraud cases, where it is often asserted that juries are not sufficiently representative of the community.[733] For example, a senior member of the English Bar with considerable experience in conducting long trials expressed the view to the VLRC delegation that the selection process generally leads to the jury being comprised of 'the unemployed and the unemployable'.[734]

5.76 In the recent trial in London of Kevin and Ian Maxwell and others,[735] which was estimated to take six months, the jury was selected after the most extensive selection process ever undertaken in a criminal trial in the United Kingdom.[736] Two groups (each of 350 people) were summoned to the Old Bailey on two separate days. As a result of the initial screening process 550 prospective jurors were excused on account of ill health, work, child care, holiday and other commitments. A further 50 were excused at a later stage because of their unsuitability owing to illiteracy, probable prejudice against the accused or for other reasons. One hundred prospective jurors remained, from whom the seven women and five men who formed the jury were

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732 Stewart, C., Head C4 Division, Home Office, transcript of meeting between VLRC delegation and officers of Home Office, London, 5 Jul. 1995, p. 29.

733 Eg., Goldberg, H., 'A random choice of jury?' *The Times*, 13 Jun. 1995, p. 5.

734 Hill, M., QC, transcript of meeting between senior members of the English Criminal Bar and VLRC delegation, London, 4 Jul. 1995, p. 21.

735 *R. v. Kevin Maxwell, Ian Maxwell, Robert Bunn and Lawrence Trachtenberg*, Crown Court London, Phillips J, 31 May 1995–20 Jan. 1996, unreported (hereafter 'the Maxwell trial').

736 See further below at paras 5.89, 5.91-5.92.

randomly selected.[737]

5.77 Some commentators expressed surprise at the large number of excuses which were allowed, and thought that people had been excused with 'considerable ease'.[738] There was some concern also regarding a perceived lack of general community representativeness in the final pool from which the jury was selected. One journalist, who observed the pre-ballot excusal process, commented to the effect that 'they almost had a panel of people who didn't read broadsheet newspapers and knew as little as possible about the case'.[739] A solicitor wrote in *The Times* that: 'as it stands, the jury would appear to be weighted on the side of those who, for one reason or another, are available'.[740]

5.78 The judge in the Maxwell trial endeavoured to increase the prospect of obtaining a more representative jury by 'introducing a new court day of 9.30 a.m. to 1.30 p.m., with the afternoons reserved for legal argument'.[741] This meant that fewer excuses were accepted because jurors could return to their jobs or other activities after 1.30 p.m.[742] Apparently, the jurors considered that the early finish was advantageous to them.[743] 'It meant that [they] did not have to concentrate all day and saved them having to keep coming in and out of court while counsel discussed legal points in their absence.'[744] The judge told the VLRC delegation that as the trial progressed the afternoon sessions set aside for legal argument became shorter and counsel preferred to use the time for case preparation. Areas of dispute became more frequently resolved by discussions between counsel rather than argument before the judge.[745]

5.79 The large number of excuses from jury service which are usually given in long trials are frustrating to the court officials who administer the jury system. This is particularly so because, as one senior officer observed, despite

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737 Gibb, F., 'Not-guilty verdicts put system back in the dock', *The Times*, 20 Jan. 1996, p. 3. Cf. Goldberg, loc. cit.

738 Dickson, C.W., Senior Assistant Director, Serious Fraud Office (SFO), transcript of meeting with VLRC delegation, London, 3 Jul. 1995, pp. 1–2.

739 ibid., p. 4.

740 Goldberg, loc. cit.

741 Gibb, loc. cit.

742 Hill, QC, loc. cit.

743 Phillips J, Queens Bench Division, meeting with VLRC delegation, Old Bailey annexe (Chichester Rents), London, 4 Jul. 1996, (no transcript) (hereafter 'Phillips J, meeting').

744 Gibb, loc. cit.

745 Phillips J, meeting.

an initial reluctance to serve on a jury, people tend to enjoy jury service and there are even requests to stay on.[746]

Length of Jury Service

5.80 A person summoned for jury service is required to attend for so many days as may be directed by the summons or the appropriate officer.[747] Jury summonses generally require attendance in court for 10 days.

5.81 In England and Wales the one jury may hear two or more cases if the trial of the second or last case begins within 24 hours of the jury being first empanelled.[748] In 13 per cent of cases more than eight jurors from a previous case served together on the next case. In consideration of this propensity for jurors to serve on more than one trial, the Royal Commission on Criminal Justice recommended that research should be undertaken to determine if there are serious disadvantages in keeping juries together, in whole or in part, from one case to the next.[749]

Payments to Persons Summonsed for Jury Service

5.82 Persons summonsed for jury service and those empanelled as jurors are entitled to a maximum allowance paid by the state of £44.80 per day to compensate them for financial loss occasioned by jury service such as, loss of earnings, benefits, fees paid to child carers and certain other payments. After 10 days service the maximum allowance increases to £89.60 per day. In addition, a travelling allowance to cover the reasonable cost of travel to and from the court, and a subsistence allowance (to a maximum of £9.30 per day) to cover the cost of food and drink, is also payable. These allowances were recently increased after a recommendation of the Royal Commission on Criminal Justice, in order to encourage more people to serve on juries.[750]

5.83 Some employers, for example the government and large companies, continue to pay normal wages while their employees are performing jury service.[751] This payment is not required by any jury legislation, however, it

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746 J. Owen, Chief Clerk, Central Criminal Court, London, transcript of meeting with the VLRC delegation, London, 4 Jul. 1995, p. 8.

747 Juries Act 1974 (UK), s. 7.

748 Juries Act 1974 (UK), s. 11(5).

749 Runciman, *Report*, p. 136.

750 ibid., recommendation 215, pp. 132, 207.

751 Engel, J., Head of Criminal Justice Policy Division, Policy Group, CPS, transcript of

may be provided for under some industrial awards.

Jury Management Issues

Jury Roll Formation and the Summoning Process

5.84 Officers of the Lord Chancellor's Department are responsible for summoning jurors, determining the number of prospective jurors to be summoned and when and where they are to attend. There is no restriction on the places in England and Wales from which a person may be summoned. However, as noted above, regard must be given to the convenience of the person summoned and his or her place of residence. It is generally thought to be desirable for jurors to be selected within a reasonable daily travelling distance of the court.[752]

5.85 Once the register of electors is published for a particular area, the electoral registration officer delivers a copy to the relevant summoning officer. The copy of the register indicates those people on the register who are less than 18 years of age and older than 70 years.[753] Lists of persons to be summoned, which are called panels, are then prepared. The parties to the litigation may inspect the panel from which the jurors will be drawn.[754] Jury vetting by prosecuting authorities to identify panellists who have criminal records usually occurs at this stage. Defence lawyers tend not to engage in this practice because the size of the panel makes the cost of doing background checks prohibitive.

5.86 Under *The Courts Charter* jurors are normally given at least four weeks' notice of being required to attend for jury service.[755] But in exceptional circumstances, such as where there are insufficient summoned jurors to complete a panel, the court may require persons within the proximity of the court to serve as jurors without written notice.[756] Although it is an offence not to comply with a summons, approximately one third of people fail to

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meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 6.

752 Juries Act 1974 (UK), s. 2.

753 Juries Act 1974, s. 3.

754 Juries Act 1974, s. 5(2).

755 'The Court Charter', Summary Leaflet of The Citizen's Charter First Report, 1992, p. 7. See also United Kingdom, White Paper, *Citizen's Charter, First Report,* 1992, Cm. 2101.

756 Juries Act 1974, s. 6.

attend.[757]

5.87 People required for jury service receive a summons which states the categories of persons who are qualified and those who are disqualified or entitled to be excused. They are also informed of the power of discretionary excusal and asked their name, date of birth, address, whether they are qualified or not, whether deferral or excusal is sought and whether they have a disability for which the court will need to make special arrangements. The summons states that it is an offence to make a false representation to the appropriate officer in order to evade jury service or to serve on a jury when ineligible or disqualified. A local information leaflet and information booklet are included with the summons. The summons indicates that people can contact the jury bailiff if they require further information.[758]

Jury Selection

Pre-Ballot Procedures

5.88 When prospective jurors arrive at court a procedure takes place which is designed to identify and exclude those who are connected with the parties or who have knowledge of the case or who have other good reason to be excused. The summoning officer has a statutory duty to put to a person summoned those questions that the officer thinks proper in order to establish whether or not the person qualifies for jury service.[759] Some of the circumstances in which jurors should be excused were described by Lord Lane CJ in a 1988 practice direction:[760]

> There will however be circumstances where a juror should be excused, for instance when he or she is personally concerned in the facts of the particular case [or] is closely connected with a party or prospective witness. He or she may also be excused on grounds of personal hardship or conscientious objection to jury service.

Pre-Ballot Questionnaires

5.89 Usually pre-ballot procedures are conducted orally. However, in a few long trials in the last 15 years a written questionnaire has been administered

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757 Juries Act 1974, s. 20; *R. v. Maxwell & Ors,* Crown Court London, Phillips J, ruling, 27 Apr. 1995, unreported, p. 5. (hereafter 'Phillips J, ruling').

758 Juries Act 1974 (UK) ss. 1, 2(5), 9(1), 10 & 20(5).

759 Juries Act 1974 (UK), s. 2(5).

760 Phillips J, ruling, pp. 7–8.

before the balloting process begins.[761] A recent ruling made before the commencement of the Maxwell trial observed that:[762]

> the administration of a questionnaire to jurors before ballot is ancillary to the performance by the appropriate officer and the Judge of their respective duties in relation to excusing jurors and ensuring that jurors do not serve who ought not to sit on the particular case.

5.90 Where excuses relating to hardship are to be considered by the court officer or the judge, input from counsel in relation to the nature of the questions in any written questionnaire is usually unnecessary. The assistance of counsel is often helpful when forming questions designed to identify jurors who may have a connection with, or preconceived view of, the case.[763] In these circumstances the representatives of the parties discuss and attempt to agree on the questions which are proposed to be included.[764] The answers obtained from questionnaires may also be used to base a challenge for cause.[765]

5.91 In the Maxwell trial, which was estimated to take six months, the jury was selected after an 'American-style procedure' which was unprecedented in the United Kingdom.[766] A representative from the Serious Fraud Office who discussed the process with the VLRC delegation said:[767]

> to some extent it was beginning to follow what happens in the American courts, though not, I think, as nearly intensely ... as has happened in the American courts. So that [the administration of the questionnaire] whittled the panel down considerably.

5.92 As mentioned in para. 5.76, the first questionnaire resulted in 550 prospective jurors being excused from serving. A two week jury selection process followed in which the remaining 150 members of the jury pool completed the second part of the questionnaire. This dealt with their connection with the case and the effect on them of pre-trial publicity,[768] and asked questions concerning their jobs, what papers they read and what they

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761 ibid., pp. 5–6.

762 ibid., p. 8.

763 ibid.

764 Jeans, L., Senior Crown Prosector, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 7.

765 See below paras. 5.104-5.110.

766 Gibb, F., 'Not-guilty verdicts put system back in the dock', *The Times*, 20 Jan. 1996, p. 3.

767 Dickson, C.W., Senior Assistant Director, SFO, London, transcript of meeting with VLRC delegation, London, Jul. 3 1995, p. 2.

768 ibid., pp. 18–19.

had read about the Maxwells.[769] The responses were examined by the trial judge and counsel, and based on them, members of the pool were allocated to one of three groups, A, B and C. Twenty-five per cent fell into group C and were excluded on grounds of illiteracy and 'in the interests of justice'.[770] Nearly three-quarters went into group B because their answers were incomplete, ambiguous or inconsistent. A handful went into group A, which comprised of persons for whom there was no apparent reason for exclusion. Those in group B were orally questioned concerning their answers to the questionnaire and some were excluded at this stage. From the final short list, twelve jurors were drawn at random.[771]

5.93 The procedure adopted has received support from Professor Zander who proffered the view that 'there ought to be [a] discretion in exceptional circumstances for the judge to satisfy himself that the jury pool is appropriately drawn'.[772]

The Balloting Process

5.94 A group of fifteen people are randomly selected by the court official from the jury waiting room and their names are written on cards which are handed to the court clerk in the courtroom who then draws twelve names at random. The names are called out in turn and prospective jurors sit in the jury box. Once all the prospective jurors have been selected by ballot and are seated, their names are called out again and any challenges made. It is then open to the judge 'to ask any questions that [he or she] may consider appropriate in considering whether to exercise [his or her] powers to excuse or discharge the juror and it [is] open to Counsel, where appropriate, to challenge the juror for cause'.[773] In exercising this power in the Maxwell trial, Phillips J (as he then was) played 'quite a part in deciding who should and who should not be on the jury'.[774] Ultimately, the panel consisted of people who did not read the papers and who knew as little as possible about the

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769 See Gibb, loc. cit.

770 ibid.

771 ibid.

772 Zander, M., Professor of Law, London School of Economics, transcript of meeting with VLRC delegation, London, 4 Jul. 1995, p. 6.

773 Phillips J, ruling, p. 19.

774 His Honour was promoted to the Court of Appeal mid-way through the trial.

case.[775]

Peremptory Challenges

5.95 Peremptory challenges were abolished in England in 1988.[776] A peremptory challenge is one where no reason is required for the challenge. These challenges can be used to prevent persons serving on a jury who are perceived to be biased.[777] Prior to its abolition, the right of peremptory challenge had been steadily eroded from seven such challenges in 1974 to just three in 1977.[778]

5.96 The abolition of peremptory challenges does not seem to have been justified on the basis that they were used extensively. It appears that they were used in only 22 per cent of criminal cases heard outside London; the figures for London are not available. Nevertheless, the decision to abolish them was based upon growing public concern about their perceived use by defence lawyers to secure favourable juries.

5.97 In 1986 the Roskill Committee observed that peremptory challenges were, together with exclusions and releases, eroding the principle of random selection.[779] Certain groups of people were being excluded because of their appearance, age and demeanour. This practice was particularly apparent in cases involving more than one accused where their challenges were pooled to achieve a combined effect. Concerns about the pooling of challenges were expressed about this time in a United Kingdom Government White Paper.[780] However, the Roskill Committee was concerned to prevent accused persons 'rigging the jury in their favour'. The Committee saw this as a danger because of the availability of the names and addresses of the prospective jurors before the trial:[781]

> It is not unrealistic to foresee that determined defence teams in a serious fraud case

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775 Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 4.

776 Criminal Justice Act 1988 (UK), sch. 16.

777 33 Halsbury, Statutes of England, pp. 139–140. Cited in Pomerant, D., *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases,* Working Document, Apr. 1994, p. 66.

778 Criminal Law Act 1977, s. 43.

779 Roskill, *Report*, p. 125.

780 United Kingdom, *Criminal Justice: Plans for Legislation*, HMSO, London, 1986, Cmnd. 9658.

781 ibid., p. 126.

> involving several defendants might employ inquiry agents to check on the addressees listed on the jury panel with a view to pooling their challenges and challenging off those jurors whose area of residence might suggest either that they are likely to have a moral outlook favourable to the prosecution of fraudsters or that they are better qualified to understand the complexities of the case.

5.98 According to the Committee, this danger was increased in complex fraud cases because challenges could be made in an effort to replace 'those who on superficial appearance may be thought (rightly or wrongly) to show a greater possibility of understanding complex business transactions by those less well advantaged'.[782] However, the recent acquittal of Kevin and Ian Maxwell and Lawrence Trachtenberg following a lengthy serious fraud trial by a jury which was not challenged in this manner, and which in the view of the trial judge was likely to comprehend and fairly judge the issues in the case,[783] suggests that the Roskill Committee's fears may have been overstated, if not ill-founded. Nonetheless, the issue has reared its head again in the wake of the acquittals.[784]

5.99 Concerns were also raised following the acquittal in 1986 of the seven defendants in the Cyprus secrets trial. It was alleged that peremptory challenges had been pooled and were exercised on grounds of the age and the appearance of the prospective jurors.[785] This pooling of challenges to gain a favourable jury was regarded by the government as being an abuse of the system.

5.100 A 1993 study, which surveyed barristers and judges to ascertain whether they believed that the accused should have the right to make peremptory challenges, found that a majority of the legal profession did not want the right restored: 56 per cent of prosecution barristers, 56 per cent of defence barristers and 82 per cent of judges thought the status quo should be maintained.[786] Initial fears that the abolition of peremptory challenges would result in a greater use of jury vetting and challenges for cause, have been unjustified.[787]

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782 ibid., p. 130.

783 Phillips J, meeting.

784 See e.g., Gibb, loc. cit.

785 Vennard, J. & Riley, D., 'The Use of Peremptory Challenge and Stand by of jurors and their Relationship to Trial Outcome' [1988] *Crim. L. R*. 731, p. 733.

786 Zander & Henderson, op. cit., p. 174.

787 Stewart, C., Head C4 Division, Home Office, transcript of meeting between VLRC delegation and officers of Home Office, London, 5 Jul. 1995, p. 25.

The Crown's Prerogative to 'Stand Aside' Jurors

5.101 The Crown can require a juror to stand aside (that is, not enter the jury box) in the first instance without giving a reason. However, a reason will be required where the entire jury panel is exhausted before the jury is empanelled. Where a reason is required, it need not be such as would be sufficient to justify a challenge for cause. Guidelines promulgated to limit the exercise of the power to stand jurors aside state that the power should only be exercised in cases where national security or terrorism is involved and the authority of the Attorney-General has been obtained, and in cases in which the defence agrees that the juror is obviously unsuitable to serve.[788] According to an officer of the Serious Fraud Office, in practice the Crown's power to stand aside jurors is 'really never exercised, and perhaps if it is exercised it would only be done in conjunction with the defence if there was some very stark reason why it was clear that a particular juror was not going to be faithful to the jury oath'.[789]

The Judicial Discretion to Discharge an 'Unsuitable' Juror

5.102 A trial judge has a discretion, without the need for challenge by the Crown or the accused, to refuse to allow a juror to be sworn whom the judge believes is incapable, by reason of any physical or mental incapacity, of properly judging the issues in the case.[790] This discretion is concomitant with the general power to ensue that the trial is conducted fairly, and may be exercised where a ground exists that would found a challenge for cause; for example, where the person would not be able or was unwilling to properly perform the duties of a juror.[791] Whether it would ever be appropriate for a judge to intervene more generally so as to influence the composition of a particular jury; for example, by ensuring that a racial minority is sufficiently represented, is an unresolved question.[792]

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788 *Attorney-General's Guidelines on Exercise by the Crown of its Right to Stand-by* (1989) 88 Cr. App. R. 123.

789 Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 1.

790 *Mansell v. R,* (1857) 8 E. & B. 54, 81, 109.

791 *R v. Ford* (1989) 89 Cr. App. R. 278, 280, per Lord Lane CJ.

792 Cf *R. v. Binns* [1982] *Crim. L. R.* 522 with *R. v. McCalla* [1986] *Crim. L. R.* 335; *R. v. Thomas* (1989) 88 Cr. App. R. 370 & *R. v. Ford*, (1989) 89 Cr. App. R. 278, 280.

5.103 Typically, the power to stand a juror aside is exercised when the judge believes that the juror is not sufficiently literate to understand written evidence. The discretion may be exercised during the pre-balloting excusal phase or at any time before or (in an extreme case) after the jury is empanelled. A hypothetical example of this practice was given by Dr Thomas of the Institute of Criminology at Cambridge University during discussions with the VLRC delegation:[793]

> If anyone works in a place like Cambridge, small town with a few major employers ...[and] there was a crime committed at Marshall's, a big aeroplane maintenance company, ... a judge might say, if any of you are employed by Marshall's will you please stand down.

Challenges for Cause

5.104 At common law jurors may be challenged for cause; for example where they are shown to be ineligible or disqualified from jury service, or where bias is demonstrated or there is a reasonable suspicion of bias, maliciousness or ill will towards the defendant. A reasonable suspicion of bias will be established where the juror is a relative or friend of one of the parties, or where the juror has formed a view regarding his or her desired outcome of the case. The accused and prosecution may challenge all or any of the jurors for cause. The judge then tries the issue on the balance of probabilities.

5.105 In 1989, the Judicial Studies Board recommended the following procedure be adopted for determining challenges for cause:[794]

(1) The twelve jurors are called to the jury box and any challenge is made before they are sworn.

(2) A juror who is challenged should leave the jury box while the other jurors are sworn.

(3) The challenge may be dealt with in open court, provided this is not likely to prejudice the trial or embarrass the juror. In cases where this informal procedure cannot be adopted, the judge should ask the sworn jurors to retire and the remainder of the panel to leave the court room; the press and public may also be asked to leave.

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793 Thomas, D.A., Institute of Criminology, Cambridge University, transcript of meeting with VLRC delegation, Cambridge, 5 Jul. 1995, pp. 8–9.

794 Phillips J, ruling, pp. 20–22.

(4) Where the ground of challenge appears to be valid and the facts are contested, the judge should determine the facts on the balance of probabilities. Evidence can be heard and the juror may be questioned on the particular ground of challenge.

(5) The judge's findings should be announced and recorded in the court record.

(6) Where the challenge is disallowed, the juror is cautioned not to disclose to the other jurors the matters considered during the hearing, and not to allow them to influence him or her in any way. If the challenge is allowed a new juror is called and the challenged juror is discharged.

(7) An order may be made pursuant to section 4(2) of the Contempt of Court Act 1981 postponing the publication of any report of the proceedings where the matters raised in the challenge could prejudice the trial.

5.106 These procedures were approved of by Phillips J in the Maxwell trial.[795] His Honour added that where a large number of jurors are likely to be challenged, the challenge for cause should be tried at the time the prospective juror is challenged and before the rest of the panel of twelve jurors is selected.[796] However, because the practice of orally examining jurors is regarded as being justified only in exceptional circumstances, it should not be considered 'a licence to interrogate prospective jurors as to what they believe and do not believe'.[797]

5.107 Challenges for cause are rarely used in England. The last reported case in which jurors were orally examined during a challenge for cause was in 1969 in *R. v. Kray*[798] where the jurors were questioned in order to ascertain whether any of them were biased by reason of exposure to pre-trial publicity. The rarity of the challenge for cause may be attributed to a lack of definite information concerning jurors on the part of defence counsel who, unlike their American counterparts, have no experience in how to conduct a challenge for

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795 ibid., pp. 20–23.

796 ibid., p. 23.

797 Marshall, G., 'The judgement of one's peers: some aims and ideals of jury trial'. In N. Walker, ed., *The British Jury System*, Papers presented to the Cropwood Round-Table Conference December 1974, University of Cambridge, Institute of Criminology, Cambridge, 1975, p. 8.

798 (1969) 53 Cr. App. R. 412 cited in Phillips J, ruling, p. 12.

cause.

5.108 This lack of information concerning jurors is highlighted by the fact that in 1973 the Lord Chancellor directed that in future jurors' occupations should be excluded from the list of prospective jurors so as to prevent challenges on the basis of occupation alone.[799] In 1986 the Roskill Committee recommended that juror's occupations should be disclosed in order to provide counsel with more information on which to base challenges for cause.[800] To date this recommendation has not been implemented. If challenge for cause is to be an effective tool for discovering bias, lawyers need either to be able to conduct a voir dire, investigate jurors or use extensive pre-trial questionnaires. [801]

5.109 The result is that in the United Kingdom 'it is facile to say that a defendant retains the right to challenge jurors for cause; without the tools to make it effective, this right is meaningless'.[802] In practice what will often occur is that the prosecution will stand aside a doubtful juror.[803]

5.110 It should be further noted that under the Juries Act 1974 (UK) it is possible to challenge the array—that is, the whole panel of jurors—on the ground that the person who summoned the panel acted in a biased or improper manner.[804] Such challenges are extremely rare and are almost always unsuccessful.[805]

Juror Challenges Conducted during a Voir Dire Process

5.111 In the United Kingdom the parties are not permitted to question prospective jurors in order to test whether there may be grounds to justify a challenge for cause; there is no voir dire process as exists in the United States. The introduction of this procedure—which examines prospective jurors concerning their history, employment and family background, beliefs and attitudes—was not supported by the Roskill Committee, which expressed the

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799 See *Archbold, Criminal Pleading, Evidence and Practice*, 43rd edn., para. 4-139.

800 Roskill, *Report*, p. 129.

801 ibid.

802 Gobert, J., "The Peremptory Challenge—An Obituary" [1989] *Crim. L. R.* 528, p. 534.

803 Thomas, D. A., Institute of Criminology, University of Cambridge, transcript of meeting with VLRC delegation, Cambridge, 5 Jul. 1995, p. 9.

804 Juries Act 1974 (UK), s12.

805 See e.g., *O'Connell v. R.* (1844) 11 Cl. & Fin. 155; *R. v. Sheppard* (1773) 1 Leach. 101.

view that:[806]

> We have no reason to believe that this practice would ever be entertained by the judiciary in this country... We would expect judges to continue to be firm and adhere to well-established principles in carrying out their statutory duty of determining the propriety of a challenge for cause and of following the well established practice of not permitting such a challenge and the cross-examination of a prospective juror unless first a defendant or his [sic] counsel can show a clear *prima facie* case for the suggested challenge.

The Use of Questionnaires to Justify a Challenge for Cause

5.112 It was noted above that the answers obtained from pre-ballot questionnaires may be used as a basis for a challenge for cause.[807] In the Maxwell trial Phillips J gave particular attention to whether or not questionnaires can be directed to ascertaining the affect of pre-trial publicity on the minds of the prospective jurors. His Honour concluded:[808]

> In the exceptional circumstances of the present case I have decided that the jury questionnaire should include questions designed to show whether a juror has been, or may have been, infected with bias as a result of the pre-trial publicity. The answers to the questionnaires will be of assistance to me in deciding whether there are jurors who ought not to sit on this case and will provide assistance to Counsel in considering whether to challenge for cause. I shall have regard to the submissions of Counsel as to the content of the questionnaire.

5.113 His Honour's approach enabled closed questions and some open-ended questions to be asked of prospective jurors, so that more was known about the jurors than is usually the case. Some concern was expressed that there may be a danger in allowing this type of questionnaire; in the sense that: 'we will begin to acquire a culture in which the idea of voir dire in [relation to] jurors will become more acceptable'.[809]

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806 Roskill, *Report*, p. 129.

807 See above at para. 5.90.

808 Phillips J, ruling, p. 18.

809 Transcript of meeting between senior members of the Criminal Bar and VLRC delegation, London, 4 Jul. 1995, p. 37.

Complex Litigation and the Jury System

The Problem of Complex Trials

A Fundamental Assumption

5.114 A fundamental assumption underlying the administration of criminal justice is that an accused person must receive a fair trial. It is an essential ingredient of a fair trial that:[810]

> a jury determines guilt or innocence upon evidence which they are able as humans both to comprehend and remember, and upon which they have been addressed at a time when the parties can reasonably expect the speeches to make an impression upon the deliberations.

In the words of Bridge LJ in *R. v. Novac*:[811]

> In jury trial brevity and simplicity are the hand-maidens of justice. Length and complexity its enemies.

5.115 A question which has been discussed extensively in the United Kingdom in recent years is whether these objectives can be achieved in complex trials, particularly those involving allegations of serious fraud. In considering this issue it is necessary to determine first whether there is a problem of juror comprehension, and then, if such a problem exists, how it is best resolved. This latter issue is very contentious. On the one hand there are those who would scrap the jury system in favour of some alternative form of fact finding tribunal. Others argue that despite its imperfections, the jury system is the best method of determining criminal guilt and strategies should be adopted in an effort to assist jurors to comprehend even the most complex case.

The Meaning and Extent of Complexity

5.116 A majority of the members of the Roskill Committee recommended that juries should be abolished in complex fraud cases, falling within certain guidelines, and be replaced by a 'Fraud Trials Tribunal' consisting of a judge sitting with two expert lay assessors.[812] The Committee's guidelines describe

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810 *R. v. Cohen & Ors.* (1992) *N. L. J.* 1267, 1268 per Mann LJ.

811 (1976) 65 Cr. App. R. 107, 119.

812 Roskill, *Report*, recommendation 82, p. 147. See further discussion below at paras. 5.143–5.151.

the characteristics of the kind of cases which it considered should be classified as 'complex fraud cases':[813]

> A complex fraud case is not necessarily one in which enormous sums of money are involved, or one in which the documentation is copious, or the list of witnesses long, although it would be normal if some—if not all—of these ingredients were present.
>
> It is a fraud in which the dishonesty is buried in a series of inter-related transactions, most frequently in a market offering highly specialised services, or in areas of high finance involving (for example) manipulation of the ownership of companies.
>
> The complexity lies in the fact that the markets, or areas of business, operate according to concepts which bear no obvious similarity to anything in the general experience of most members of the public, and are governed by rules, and conducted in a language, learned only after prolonged study by those involved...
>
> The concept of the market must be understood before the fundamental dishonesty of the fraudulent transaction can be recognised. To explain or to understand such market concepts in "classroom" conditions represents a very considerable intellectual challenge, to which only the exceptional could rise.

The Committee went so far as to declare that in some complex fraud cases, 'a knowledge of accountancy or book-keeping may be essential to an understanding of the case'.[814]

5.117 The Roskill Committee identified a number of problems that may be experienced by jurors in understanding complex litigation. These it is said arise from the juror's lack of familiarity with the trial process and inability to understand the corporate world and to comprehend and recall evidence.[815] The Committee considered that in long trials—which it defined as those lasting more than twenty sitting days—these problems are aggravated to a stage where 'the average juror [is unable to] retain in his memory all the essential facts and figures upon which his verdict should ultimately depend'.[816]

5.118 A Home Office spokesperson told the VLRC delegation that in her opinion the perceived inability of juries to understand evidence is a cause for concern in long and complex cases other than serious fraud trials; such as, conspiracy trials, trials in which money laundering is alleged, and in drug trafficking trials.[817]

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813 Roskill, *Report*, p. 153.

814 ibid., p. 140.

815 ibid., pp. 140–141.

816 ibid., pp. 141–142.

817 Stewart, C., Head C4 Division, Home Office, transcript of meeting between VLRC delegation and officers of Home Office, London, 5 Jul. 1995, pp. 5–6.

5.119 According to some commentators, this alleged inability of juries to sufficiently understand the issues in complex cases is attributable to the length of these trials. This causes 'potential jurors, who might hope to understand the financial manipulations and complex dealings usually involved in these trials, ... to excuse themselves from jury duty'.[818]

5.120 Advocates of non-jury trials in complex cases contend that the need to clearly explain the issues involved in a case inevitably leads to longer trials. Consequently, arguments against using juries for fraud trials have focused not only on issues of jury comprehension, but also on the length of such trials.[819] According to an officer of the Serious Fraud Office who met with the VLRC delegation, the extent to which the prosecution can simplify issues relating to complex transactions is limited, particularly given that, in his view, jurors tend to have little knowledge of the banking system.[820] He believes that in these circumstances jurors tend to base their verdicts on instinctive judgments as to whether or not the accused person has been dishonest, rather than on a clear understanding of the relevant issues.

5.121 The same spokesperson told the VLRC delegation that members of the Serious Fraud Office investigating a case bear in mind the need to ensure that the case is manageable for the jury. In an effort to simplify cases and render them comprehensible to the of jury the number of charges is often reduced and a great deal of evidence may not be called.[821] The Maxwell trial is a case in point. There the charges were reduced at the suggestion of the trial judge from ten to two in an endeavour to 'present a straightforward case to the jury'.[822]

5.122 The Roskill Committee went further. It expressed concern that prosecutors may be negatively influenced in their decision whether or not to prefer any charges in a case by the difficulty in presenting complex matters to juries.[823] The Committee was very troubled by this prospect, particularly in view of the increasing incidence of serious corporate fraud. According to one

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818 Judicious, 'Law shapes up to fraud' *Australian Business*, April 23, 1986, p. 64. Roskill, *Report*, p. 142.

819 ibid.; Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 15.

820 Dickson, op. cit., p. 7.

821 ibid., p. 12.

822 Tehan, P. & Miller, R., 'Fraud office is in the dock again', *The Times*, 20 Jan. 1996, p. 1.

823 ibid., pp. 142–143.

senior British police officer, 'in response to the growing complexity of financial offences, some minor suspects in fraud were no longer being prosecuted'.[824]

5.123 These problems are exacerbated by the fact that no matter how much the prosecution tries to simplify a case, it is likely to remain lengthy and jurors may have difficulty in remembering evidence long after it has been given. A study conducted by the Applied Psychology Unit of the Medical Research Council, undertaken for the Roskill Committee in 1986, found that individual volunteers who listened to evidence for one and a half hours could answer correctly only 45 per cent of the multiple choice questions which were asked concerning the evidence they had heard.[825]

5.124 The difficulties that can be encountered by the prosecution in conducting complex trials are exemplified by a recent decision of a Crown Court judge who ruled that the evidence in a six month fraud trial (which had an estimated four months to run) was too difficult for the jury to understand. His Honour accepted a defence submission that the enormous amount of evidence had become 'oppressive and unmanageable'. His Honour discharged the jury from giving verdicts against six accused and directed the jury to return not-guilty verdicts on two other charges. He took this exceptional course because he doubted whether the jury would be able to comprehend or remember much of the evidence at the end of a 10 month trial.[826] This was not an isolated case. In April 1994 another Crown Court judge halted a fraud trial involving the alleged misappropriation of £400,000 after 10 weeks because, in his opinion, the jury's task was 'beyond the realms of possibility'.[827]

5.125 Another concern was raised by the Serious Fraud Office in its discussions with the VLRC delegation. The spokesperson thought that perceptions concerning the inability of juries to understand serious fraud cases encouraged accused persons to plead not guilty. He said:[828]

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824 McStravick, A., Detective Chief Superintendent in charge of Metropolitan Police Fraud Squad, reported in Hetherington, A., 'Fraud chief calls for panel of judges, *The Times*, 26 Jan. 1993.

825 Judicious, 'Law shapes up to fraud' *Australian Business*, April 23, 1986, p. 64.

826 Gibb, F., 'Judge abandons six-month fraud trial that cost £2m' *The Times*, 23 Mar. 1995.

827 Gibb, F., '"Impossible task" halts fraud trial', *The Times*, 15 Apr. 1994.

828 Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 15.

> If I were advising a defendant in a serious fraud case, if he were facing a long time in prison whether he pleaded guilty or not, I would advise [him] to fight it, you never know what the jury are going to understand or not going to understand about it.

5.126 The Roskill Committee's proposed abolition of trial by jury for certain complex fraud cases was not implemented by the Government and has not been generally accepted by the legal profession. The Royal Commission on Criminal Justice (1993) was not prepared to make a recommendation concerning the competence of the jury system to deal with these cases, because it felt impeded by the prohibition on the conduct of research into jury deliberations.[829] Nevertheless, the Royal Commission made a number of recommendations aimed at assisting juries to comprehend the issues raised in complex litigation. It recommended that judges be carefully selected for long trials on the basis of specialist knowledge and experience, and that they be permitted to summarise the issues in the case for the jury at the start of the trial.[830]

5.127 In an effort to relieve some of the difficulties encountered in conducting complex criminal trials, the Royal Commission also recommended that judges should be encouraged to provide jurors with greater sources of written information including: judicial directions concerning legal and factual issues which are expected to arise (or have arisen) in the trial, counsels' summary explanation of the facts of the alleged wrongdoing and the defence(s) thereto, lists of each side's witnesses, agreed summaries of written evidence and the statements of expert witness and, where necessary, weekly summaries of the evidence given during the trial.[831] The Royal Commission maintained that in long and complex cases the judge ought to give the jurors a summary of the issues raised in the case before the evidence commences and a written list of questions for them to consider during their deliberations.[832] The Roskill Committee had earlier recommended that juries should be given similar categories of written material where the court forms the view that this would benefit the jury's understanding of the issues.[833]

5.128 The Crown Prosecution Service, which is charged with the prosecution of all serious criminal cases in England and Wales (other than those which are

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829 Runciman, *Report*, p. 136.

830 ibid., pp. 136–137, recommendations 233 & 237.

831 Runciman, *Report*, p. 135.

832 ibid., pp. 137 & 135.

833 ibid., pp. 156–159.

handled by the Serious Fraud Office), supports the continuation of the jury system in complex cases. A Senior Crown Prosecutor told the VLRC delegation that if the prosecutor presents the case clearly, then the jury ought to be able to understand even complicated issues:[834]

> The prosecution ought to be in a position to present its case in such a way that issues are capable of being reduced, despite their complexity, to a level that they can actually be properly understood by jurors, and [this]...acts as a discipline as far as the prosecution is concerned generally.

Research into Juror Competence

5.129 Research into the deliberations of juries is prohibited in the United Kingdom by the Contempt of Court Act 1981 which provides that it is a contempt of court 'to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations'.[835] For this reason information concerning juror competence is only available to a very limited extent; for example, factual questions of a house-keeping nature can be asked of discharged jurors.[836]

5.130 The Royal Commission on Criminal Justice (1993) recommended that research should be allowed into a wide range of issues relating to juries including matters such as: whether the age limit for eligibility should be raised, whether there should be a literacy requirement, whether there should be changes to the categories of disqualification and the availability of majority verdicts.[837] Despite the limitations on jury research, the Crown Court Study conducted for the Royal Commission did illicit some information regarding juror competence. The study asked jurors how well they understood the information presented to them and whether they remembered the evidence.[838] Ninety-five per cent of jurors believed that they had understood the evidence and about 90 per cent of barristers shared their confidence. Ninety-three per cent of judges surveyed had confidence in the jurors' capacity to understand scientific evidence. Jurors were similarly confident about their ability to remember the evidence; a confidence which was shared by lawyers.

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834 Engel, J., Head of Criminal Justice Policy Division, Policy Group, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 1.

835 Contempt of Court Act 1981 (UK), s. 8.

836 Engel, loc. cit.

837 Runciman, *Report*, p. 2.

838 Zander & P. Henderson, op. cit. pp. 177–178, 206–209.

5.131 Professor Michael Zander, the author of the study, expressed his confidence in the jury system to the VLRC delegation. He believes that juries are not only capable of understanding complex evidence but that they are able to remain attentive even through long trials, so long as the case is not too boring.[839]

5.132 The results of the Crown Court Study are consistent with two earlier studies conducted by Professor M. McConville. In the first study, conducted at the Birmingham Crown Court during a 20 month period in the mid-1970s, Professor McConville and Dr J. Baldwin used questionnaires to interview police, lawyers and judges involved in 370 trials. They were asked their views concerning the reasons for the verdict. 'Their view was that mostly the jury had got it right'.[840]

5.133 In the second study, conducted at the Liverpool Crown Court in 1992 as part of a television documentary called *Inside the Jury*, a shadow jury watched a series of trials and their deliberations were filmed and matched with a real jury. In the 'vast majority' of cases, the shadow jury arrived at the same result. Professor McConville believes that: 'The film showed their deliberations to be rational and thoughtful and that they had insight into gaps or mistakes in the prosecution or the defence case'.[841]

5.134 The ban on inquiries into the conduct of jurors was questioned following the Court of Appeal decision in *R. v. Young*.[842] The Court in that case held that, although it could not inquire into what had passed between the jurors during their deliberations in the jury room, it could examine what had occurred while the jury was sequestrated at a hotel. This was because 'the jury's stay in an hotel is in fact a hiatus between sessions in the jury room in which the jury as a whole is in the course of its deliberations'.[843] Some of the jurors had used an ouija board at a seance to seek messages from the deceased victim on points raised in the evidence. The Court held that this conduct amounted to a material irregularity because the jurors may have believed that

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839 Zander, M., Professor of Law, London School of Economics and Political Science, meeting with VLRC delegation, London, 4 Jul. 1995, p. 31.

840 McConville, M., 'Putting juries on trial', *The Times*, 30 Jan. 1996, p. 31. See further, Baldwin, J. & McConville, M. , *Jury Trials*, Clarendon Press, Oxford, 1979, passim.

841 McConville, loc cit. Contra, B.S. Jackson, *The Times*, 'Letters to the Editor', 8 Feb. 1996, p. 19.

842 [1995] 2 W. L. R. 430.

843 ibid., p. 435.

the answers were those of the victim and they may have been influenced by them.[844] The accused's conviction for murder was quashed and a retrial was ordered.

5.135 When the VLRC delegation was in London in July 1995, the Lord Chancellor's Department was considering means which would allow jury research to be conducted provided that it would not prejudice the integrity of the verdict. A Home Office spokesperson told the delegation that the main problem in this area is how to devise 'a system which will enable you to conduct research without giving rise to the possibility of increased appeals because of the sort of information that ... might emerge'.[845]

5.136 Calls for an end to the prohibition on research into jury competence were heightened by the acquittal of the accused in the Maxwell trial. Lord Mackay of Clashfern, the Lord Chancellor, is in favour of allowing such research. However, the Lord Chief Justice, Lord Taylor of Gosforth, suggested that 'research could lead to criminals seeking to overturn their convictions on the basis of disclosures about jurors' thinking'.[846]

Perceptions of Juror Competence in Complex Trials

5.137 During a meeting with the VLRC delegation senior members of the Criminal Bar in London generally expressed the view that the competence of juries was under-estimated by many commentators. It was said that 'juries understand a great deal more than I believe we give them credit for'.[847] This view is supported by Farquharson LJ in his judgment in *R. v. Kellard, Dwyer & Wright*:[848]

> There is perhaps a tendency in the legal profession to underrate the capacity of juries in this country ... it should not be too readily assumed that a jury cannot properly understand a case merely because of its length. Juries might well resent such condescension.

5.138 The findings of the Crown Court Study together with the above comments contradict the Roskill Committee's view that jurors are unable to

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844 ibid., pp. 437–438.

845 Stewart, C., Head C4 Division, Home Office, transcript of meeting between VLRC delegation and officers of Home Office, London, 5 Jul. 1995, p. 20.

846 McConville, loc. cit.

847 Transcript of meeting between senior members of the Criminal Bar and VLRC delegation, London, 4 Jul. 1995, p. 6.

848 [1995] 2 Cr. App. R. 134, 149.

understand complex fraud cases. The Roskill Committee asserted that because jurors are unable to understand the evidence presented there is a serious risk that they may convict since 'they mistakenly think they have understood it when they have in fact done little more than applied the maxim "there's no smoke without fire"'.[849]

5.139 Very often, the complex issues in a fraud trial are ultimately reduced to a decision as to whether the accused has acted honestly or dishonestly in the circumstances. A lay person is just as able to assess what behaviour is honest and what is dishonest as is a judge or panel of experts.[850] The Maxwell trial itself exemplifies this point, with the judge having charged the jury to the effect that it was for them to decide whether Kevin Maxwell was telling the truth concerning his claim that his father had shown him a particular document. His Honour said that if the jury believed Kevin Maxwell's claim, 'then he had to be found not guilty of fraud'.[851] One journalist summarised the position when she wrote:[852]

> Only the jury could decide whether Kevin Maxwell was telling the truth when he claimed his father told him that ownership of shares at the centre of the alleged pension funds fraud had been transferred to the private Maxwell companies. Yesterday they unequivocally did so.

5.140 The jury in the Maxwell case, one of the longest and most complex fraud trials ever conducted in the United Kingdom, had the opportunity to assess the credibility of the accused persons in the witness box. Kevin Maxwell, for example, gave evidence over a period of 21 days. The judge is reported to have said in his summing-up to the jury that in his opinion 'no jury has ever had a better opportunity to assess the honesty of a witness' than in this case.[853] After 12 days of deliberations the jury did not apply the maxim 'there's no smoke without fire' rather, they acquitted all accused on both counts because the prosecution had failed to satisfy them, to the required standard, that the accused had acted dishonestly.

5.141 After the Maxwell trial acquittals were announced, senior members of

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849 Roskill, *Report* , p. 142.

850 Lord Donaldson of Lymington [formerly Master of the Rolls], 'Use of juries in fraud trials', *The Times* (letters to the editor), 23 Jan. 1996, p. 15; J. Engel, op. cit., p. 16.

851 Ashworth, J., Midgley, C. & Horsnell, M., 'Maxwell brothers are cleared', *The Times*, 20 Jan. 1996, p. 2.

852 Gibb, F., 'He is in court because he is his father's son', *The Times*, 20 Jan. 1996, p. 3

853 Ashworth, et. al., loc. cit.

the English Bar and a law professor observed that one has to be careful not to presume that juries which acquit in cases of this type have done so because they have failed to understand the evidence or have acted perversely.[854] Such a presumption, if generally accepted, would render the whole criminal trial process redundant. In the words of one senior barrister it would amount to 'equating accusation with guilt'.[855] Some prosecutors and law enforcement officers have a tendency to propound this type of flawed reasoning,[856] while others see their role differently. George Staple, the Director of the Serious Fraud Office, is reported to have said after the conclusion of the Maxwell trial:[857]

> We must respect the jury's decision...
>
> I believe that in this case the system has worked as it was designed to work.
>
> We are supposed to be neither pleased nor displeased at the outcome of these cases. We simply have to ensure that the evidence is put before the court and the defendants receive a fair trial. That has happened in this case. To that extent the system has worked as it ought.

5.142 Accepting for the moment that despite the best efforts of the trial judge and the prosecution, assisted by the latest technological aids, cases exist which are too complex for a jury to understand; then, the question arises whether the knowledge and experience of a single judge is to be preferred to the collective knowledge and experience of twelve members of the community selected at random. Moreover, the argument concerning the capacity of the jury system to handle complex cases leaves the essential question unanswered: If the facts on which judgments concerning guilt and non guilt are to be made are so complicated that a member of a modern industrial society possessing an average standard of education and ordinary intelligence cannot reasonably be expected to comprehend them, then, can the accused's alleged conduct be such as deserves to be sanctioned by the criminal law?

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854 Sallon, C. QC, reported in Gibb, F., 'Not-guilty verdicts put system back in the dock', *The Times*, 20 Jan. 1996, p. 3; Rhodes, R., QC, 'Use of juries in fraud trials', *The Times* (letters to the editor), 23 Jan. 1996, p. 15; McConville, loc. cit.

855 Rhodes, R., QC, ibid., alluding to Alexander Solzhenitsyn's *The Gulag Archipelago*.

856 E.g., D. Lee, a former SFO assistant director, and J. Wood, founding Director of the SFO, reported in Tehan & Miller, op. cit., pp. 1–2.

857 Reported by Ashworth, J., Midley, C. & Horsnell, M., 'Maxwell brothers are cleared', *The Times*, pp. 1–2. Cf. *The Times*, 20 Jan. 1996, 'In the dock' (editorial), p. 5.

Alternatives to Jury Trial

Trial by Judge and Lay Members

5.143 It was noted earlier that the Roskill Committee recommended in 1986 that complex fraud cases which fall within certain guidelines should be tried by a 'Fraud Trials Tribunal' consisting of a judge sitting with two expert lay assessors.[858] To date, these recommendations have not been implemented. However, in the wake of the acquittals in the Maxwell trial, there were renewed calls for the abolition of trial by jury in these cases.[859] Three days after the acquittals the Attorney-General, Sir Nicholas Lyell, announced that the Government was considering reformation of the system for trying serious fraud cases by replacing trial by jury with trial by judge alone.[860]

5.144 Under the scheme proposed by the Roskill Committee, the prosecution or defence could apply to a High Court Judge (other than the trial judge) for an order that the case be tried by a Fraud Trials Tribunal. The Committee recommended that there should be a right to appeal against such an order to the Criminal Division of the Court of Appeal.[861]

5.145 In hearings before the Tribunal the judge would decide questions of law and be responsible for the exercise of judicial discretion. The facts would be determined equally by the judge and the lay members. A verdict by simple majority would be sufficient with only one judgment being given; any dissenting opinion would not be disclosed. The judge alone would be responsible for sentencing.[862]

5.146 The lay members of the Tribunal would be being selected from a panel of persons who possess 'skill and expertise in business generally and experience in complex business transactions'.[863] The Lord Chancellor would be responsible for compiling and maintaining the list of available lay members who initially could remain on the list for 3 years. At the end of that time, the continuation of their appointment would be subject to a review. The

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858 See above para. 5.116.

859 See eg. Gibb, F., 'Not-guilty verdicts put system back in the dock', *The Times*, 20 Jan. 1996, p. 3.

860 See *Keesing's Record of World Events*, 1996 edn., Cartermill Publishing, Avenel, NJ, 1996, p. 40918; Tehen & Miller, op. cit., p. 1.

861 Roskill, *Report*, recommendations 82–84, pp. 147–149, 153, 154.

862 ibid., recommendations 92–95, 97, pp. 150–151, 154–155.

863 ibid., p. 147

lay members taking part in a particular trial would be selected by the Lord Chancellor in consultation with the nominated trial judge. In order to avoid potential conflicts of interest, the parties would be entitled to make a written submission to the Lord Chancellor outlining any possible areas of conflict for prospective lay members. The lay members would be remunerated for time spent in preparation and sitting in court at a daily rate equivalent to a circuit judge's salary. [864]

5.147 The arguments raised in favour of trial by judge and lay members are that this mode of trial would increase the rate of conviction and save time and expense. However, according to Michael Hill, QC the rate of conviction would not increase under this method of trial, and savings in time and money can be achieved in other ways. He contended that prosecutors should shape their case in a more manageable way.[865]

5.148 Even if it is accepted that juries are incapable of understanding the issues in complex fraud cases, the use of a judge sitting with lay members may not be a desirable alternative. Dr Thomas of the Institute of Criminology in Cambridge told the VLRC delegation that, in his opinion, there would be 'a terrible tendency for the lay people, unless they are very strong minded, to defer to the judge'.[866]

5.149 Representatives of the Crown Prosecution Service suggested that if the policy decision was made to abandon jury trials in complex fraud cases, then an experiment should be conducted to see how a judge sitting with expert assessors would work in practice.[867] It would be interesting to ascertain whether judges sitting with lay assessors were generally harsher or more lenient with defendants than common jurors. A Home Office spokesperson said:[868]

> if you had a judge and assessors—people who had some knowledge of financial institutions or whatever—it's arguable, I suppose, that they are going to be harsher [than some members of the public] on the defendant in that they would want to, as it were, make sure the integrity of the system is maintained ... but you could argue the other way.

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864 ibid., recommendations 86–91, pp. 149–150, 154.

865 Hill, M., QC, transcript of meeting between senior members of the English Criminal Bar and VLRC delegation, London, 4 Jul. 1995, p. 18.

866 Thomas, op. cit., p. 19.

867 Engel, op. cit., p. 12.

868 Stewart, C., Head C4 Division, Home Office, transcript of meeting between VLRC delegation and officers of Home Office, London, 5 Jul. 1995, p.16.

5.150 Difficulty would be encountered in establishing a pool of expert assessors who were competent, likely to be impartial, and who were prepared to hold their careers on hold while they served in such a capacity. The relatively select group of people possessing the requisite specialised knowledge may well have attitudes which would make it difficult for them to be unbiased in the determination of the issues in a particular case. Furthermore, there may be an actual or potential conflict of interest for a lay assessor which requires the discontinuation of a trial. This conflict may not become evident until after many months of evidence. Michael Hill, QC told the VLRC delegation that it would be difficult to ensure that the assessors selected to hear a case did not have 'skeletons rattling in their own cupboards'.[869]

5.151 The Roskill Committee in reaching its conclusion on the preferred method of trial in complex fraud cases (that is, trial by a Fraud Trial Tribunal) rejected three other alternatives: special juries; trial by judge alone; and trial by a panel of judges.[870]

Special Juries

5.152 Special juries existed in England and Wales until 1949 when they were eliminated in all trials except commercial cases heard in the Queen's Bench Division of the High Court. To be qualified to sit on a special jury a person was required to be an esquire, a banker, a merchant or the occupier of a property with a higher rateable value than that required for entitlement to sit on a common jury. Special juries were abolished altogether in 1971; having be used on only three occasions in the intervening years.

5.153 The Roskill Committee did not support the reintroduction of special juries to hear complex criminal cases. In reaching this conclusion it considered a number of options including:[871]

(a) A jury selected generally from people with a higher than average standard of education, training or experience.

(b) A jury selected from lay magistrates.

(c) A jury comprised of people knowledgable in matters pertaining

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869 Hill, M, QC, op. cit., p. 7.

870 Roskill, *Report*, pp. 144–146.

871 ibid., pp. 144–145.

to trade and finance.

5.154 The Committee rejected the use of special juries because the jurors would probably lack the necessary degree of specialist knowledge and, given the likely length of jury service that would be required in cases which warranted a special jury, it would be impracticable to empanel even seven or eight jurors with special qualities.[872]

5.155 According to Professor John Spencer, the introduction of special juries would meet with public disapproval, 'on the ground that in criminal cases it was going to be the means of seeing people didn't get their just deserts [because they are] being tried by people who are sympathetic to them'.[873] Nevertheless, he acknowledged that there were sound reasons for the use of special juries or the use of a judge sitting with lay members in complex cases.[874]

Judge Alone Trials

5.156 In the United Kingdom there is no option for an accused person charged with a serious criminal offence to be tried other than by a judge and jury. The possible introduction of judge alone trials in some cases was recently suggested by Lord Justice Henry, then head of the Judicial Studies Board. His Lordship said that although he continued to support jury trial, 'he questioned whether jurors should deal with all cases where imprisonment was an option'. [875] He suggested that the jury system was intended to deal with cases which involved 'less paperwork, shorter hearings and the simple memory of witnesses'. In His Lordship's opinion in serious fraud cases 'there is a risk that a system designed for other trials may be tested to destruction'.[876]

5.157 There is also support among the British business community for the introduction of judge alone trials. A survey conducted by the international accounting firm Ernest and Young found that most of the 106 executives who responded supported an entitlement vested in the Serious Fraud Office to

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872 ibid., p. 145.

873 Spencer, J., Professor of Law, Selwyn College, University of Cambridge, meeting with VLRC delegation, Cambridge, 5 Jul. 1995, p. 7.

874 ibid.

875 Tendler, S., 'End duplication in fraud trials, top judge urges' *The Times* 19 Apr. 1994.

876 ibid.

request trial without jury in complex cases.[877]

5.158 In 1986 the Roskill Committee rejected trial by judge alone for complex serious fraud cases while advocating the use of a judge sitting with two lay experts.[878] Very few of the submissions made to the Committee supported trial by judge alone in complex fraud cases. The Committee believed that trial by judge alone would place too onerous a burden on judges as the sole decision maker. A similar concern was expressed to the VLRC delegation by a Cambridge University law professor.[879]

5.159 Judging from comments made to the VLRC delegation during a meeting with senior members of the Criminal Bar in London, defence lawyers would be unlikely to advise their clients to opt for trial by a judge alone or a judge sitting with lay assessors where there was a choice of being tried by a judge and jury. One barrister present at the meeting observed:[880]

> I cannot imagine that it would be routine for legal advisers to advise their clients to be tried by judge alone or judge with assessors. It seems to me it would be very likely to be much the same as when you are advising your client whether to be tried by the Magistrate or by a jury. Most legal representatives advise their clients that if they want to have the best chance of acquittal, to be tried by a jury ... Magistrates will acquit, but the point is that they don't very [often] acquit the guilty ...

5.160 The preference for trial by jury reflects the statistically high probability of acquittal. According to recent Crown Court statistics there is a three out of five chance of acquittal for an accused person who pleads not guilty.[881] However, the arguments for introducing alternative methods of trial for fraud cases cannot be justified on the basis that the acquittal rates for these cases are 'outstandingly high' because, when compared to those for other serious crimes, they are not.[882]

5.161 At the 1974 Annual Conference of Justice, an all-party organisation for law reform, Mr Wigoder, QC outlined three very persuasive reasons for a person to prefer to be tried by a jury trial rather than a judge:[883]

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877 Ashworth, J., 'Jury-free fraud trials favoured' *The Times* 27 March 1995.

878 Roskill, *Report*, pp. 145–146.

879 Spencer, op. cit., p. 10.

880 Meeting between senior members of the Criminal Bar and VLRC delegation, London, 4 Jul. 1995, pp. 4–5.

881 Slapper, G., 'Awaiting a decision' [1994] *N. L. J.,* p. 1566.

882 Rice, R., 'Editorial: Fraud Trials' (1984) 134 *N. L. J.*, p. 977.

883 Wigoder, B., QC, 'How can the system be improved?' In Justice, *The Future of Trial by Jury* , Annual Members' Conference, March 1974 (Chaired by Rt. Hon. Lord

> [1] if a man is to be convicted of a crime, a serious crime, it is desirable in the public interest that it should be done by a body of people who can be seen impartially to have considered the evidence as his equals ... [2] trial by jury ... involve[s] the public in the criminal process: it...mean[s] that members of the public do not regard what goes on in court as a matter for lawyers alone, they come and see what is happening, they take part in it, and they realise that it is a matter that concerns them intimately ... [3] ... although both judges and magistrates and juries can make mistakes juries have got one great advantage over the professional tribunal, and that is that they have got the right, when they feel like it, of giving a perverse verdict.

Mr Wigoder, QC later asserted that juries are 'essential in matters in which a defendant's character or reputation or honesty or integrity are at stake'.[884] Similar sentiments were expressed by the organisation, Justice, in its submission to the Roskill Committee: 'There is in our view no compelling reason why the defendant in such a case should be deprived of his fundamental right to be tried by a jury'.[885]

5.162 In his submission to the Roskill Committee, Lord Devlin said that trial by judge alone should not replace jury trial in complex and long cases unless there is a limited non-jury jurisdiction. He submitted that where the issues in a case could not be made comprehensible for lay jurors the trial should be conducted before a judge sitting alone, provided this method of trial was subject to a maximum penalty upon conviction of twelve months imprisonment.[886] It would then be up to the prosecution to decide whether to seek jury or non-jury trial. This decision could well depend on whether the accused had previous convictions.

5.163 Lord Devlin also stressed that limiting the right to jury trial should be viewed as a last resort:[887]

> I think that before Parliament would abrogate the constitutional right, it would (and in my opinion should) expect the Committee to satisfy it not only that trial by jury had broken down in serious fraud cases but that all possible procedural improvements to trial by jury had been considered by the Committee and rejected as inadequate. A finding that there were other more economical and expeditious methods should not be enough.

His Lordship based this view on a number of considerations. First, that the requirement of the capacity to understand expert evidence does not make the

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Kilbrandon), Justice, London, 1974.

884 ibid.

885 Gibb, F., 'Reform group of lawyers defends trial by jury' *The Times* 11 December 1984, p. 12.

886 Lord Devlin, 'Trial by jury for fraud' pp. 319–320.

887 ibid., p. 314.

jury unsuitable. Even a judge or assessors may not have sufficient expertise to settle conflicts between two experts. Secondly, there is a need to keep justice comprehensible to the ordinary citizen. Thirdly, the task of the jury can be made easier by ensuring that there is a high quality of representation for both sides so that counsel have the necessary skills to be able to present their opposing cases clearly to the jury. [888]

5.164 The Royal Commission on Criminal Justice (1993) decided not to consider whether or not juries should be replaced in complex fraud trials. It suggested that the statutory bar on conducting research into the decision-making processes of juries had meant that there was no reliable foundation for making any recommendations for discarding juries.[889]

5.165 In discussions with the VLRC delegation, Michael Hill QC expressed the view that trial by judge alone necessarily requires that a judge's reasons for his or her findings in a case would need to be carefully constructed and delivered, because they could be subjected to review line by line in an appellant court.[890] The same point was relied upon by staff of the Serious Fraud Office when suggesting potential benefits of trial by judge alone over jury trials:[891]

> [Trial by judge alone] has had great advantages in terms of appeals, in that if you're convicted by a jury, you can't really go into the reason the jury convicted you. They just may not have liked the look of you. They may have taken all sorts of things into account that they shouldn't have. Whereas if you have a judge alone he has to produce a reasoned written judgment as to why and what his findings have been on the evidence that can then be perused carefully in the Court of Appeal.

Trial by a Panel of Judges

5.166 The Roskill Committee also rejected the use of a panel of three judges in place of a common jury. The Committee suggested that the proposal would place a 'strain on judicial manpower' and, in any event, the judges would probably lack sufficient knowledge and experience of business practice.[892] This knowledge was seen as being of vital importance in complex fraud cases.

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888 ibid., pp. 315–316.

889 Runciman, *Report*, p. 136.

890 Hill, M., QC, transcript of meeting between senior members of the English Criminal Bar and VLRC delegation, London, 4 Jul. 1995, p. 3.

891 Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 20.

892 Roskill, *Report*, p. 146.

5.167 The Home Office also suggested that there would be problems with using a panel of judges to decide complex fraud cases. The question of whether the accused would have any rights in relation to the selection of the judges would be difficult to resolve, and there would be difficulty in obtaining judges for the trial, because there would be a small number of judges with expertise in specialist areas.[893]

'The Diplock Courts' in Northern Ireland

5.168 In Northern Ireland certain trials involving allegations of terrorism or relating to State security are conducted before a single High Court or County Court judge. This mode of trial resulted from the recommendations of the Diplock Commission. The Commission was appointed in 1972 to 'consider whether changes should be made in the administration of justice in order to deal more effectively with terrorism without using
internment under the Special Powers Act'.[894] The Diplock trials were introduced as a solution to the prospect of jurors being subjected to threats and intimidation while reaching a verdict in cases dealing with acts of terrorism.[895]

5.169 The Diplock courts hear those offences listed in Schedule 1 of the Northern Ireland (Emergency Provisions) Act 1991. These include offences which may have a terrorist connection, for example, murder, manslaughter, arson, robbery, riot and offences involving firearms and explosives. Where a matter comes before a Diplock court and there is no apparent connection to an emergency situation, the Attorney-General can grant a certificate that the offence is not to be treated as a scheduled offence, but is to be directed back to a jury trial court.[896] Some offences cannot be redirected to a jury trial court; for example, robbery and aggravated burglary where an explosive or firearm is used. As a matter of practice, the Director of Public Prosecutions for Northern

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893 Stewart, C., Head C4 Division, Home Office, transcript of meeting between VLRC delegation and officers of Home Office, London, 5 Jul. 1995, p. 26.

894 H.C. Debates, vol. 855, col. 276, 17 April 1973 (William Whitelaw, then Secretary of State for Northern Ireland). Cited in Jackson, J. & Doran, S., *Judge Without Jury—Diplock Trials in the Adversary System*, Clarendon Press, Oxford, 1995, p. 8.

895 Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 22.

896 Northern Ireland (Emergency Provisions) Act 1991, sch. 1, note 1. A discussion of the legislation is provided in Jackson & Doran, op. cit., pp. 19–28. See also, J. Jackson & S Doran, 'Diplock and the presumption against jury trial: a critique', [1992] *Crim. L. R.*, p. 755.

Ireland recommends at the start of proceedings whether or not an offence should remain scheduled, and the Attorney-General then makes a decision based on the information provided by the Director.[897]

5.170 In cases tried before a Diplock court the judge must set out in a written statement the reasons for convicting the accused and there is an automatic right of appeal against conviction and sentence on points of fact as well as of law.[898] Consequently, this form of trial ensures the 'transparency of the decision making process ... you know exactly what the facts were which the judge decided the case on, which of course you can't do with a jury verdict, it's totally inscrutable'.[899]

5.171 Nevertheless, there are disadvantages with this form of trial. Whereas a jury can, as a matter of conscience, take a lenient view of the case, a judge has no other option but to strictly apply the law to the facts as he or she finds them. The case of *R. v. Clegg* illustrates this point.[900] Private Clegg, a 22 year old soldier on active service with the British Army in Northern Ireland, fired at a car which had failed to stop at a checkpoint in West Belfast. As the car approached he fired three shots, the fourth shot, which he fired after the car had passed, killed the passenger whom it transpired was not a terrorist, but a joyrider. Clegg's defence was that he was acting in self defence. This was rejected and he was convicted of murder.

5.172 On his appeal to the Court of Appeal in Northern Ireland and later to the House of Lords, an issue was raised as to whether what would otherwise constitute the crime of murder—necessitating a sentence of life imprisonment—could be reduced to manslaughter—permitting a lesser sentence—on the ground that Clegg had used excessive force while acting in self defence. It was accepted that Clegg deserved to be punished for the unlawful killing of the passenger. In the joint judgment of the Court of Appeal delivered by Hutton LCJ the Court held that manslaughter was not open where a person uses excessive force in self defence. However, the Court considered that this was an unsatisfactory result. The Lord Chief Justice

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897 Jackson, J., Kilpatrick, R. & Harvey, C., *Called to Court: A Public Review of Criminal Justice in Northern Ireland*, SLS, Belfast, 1991, p. 171.

898 *Britain 1995: An Official Handbook*, HMSO, London, 1994, p. 91.

899 R. Lam, Reader in Law, University of Warwick, transcript of meeting with the VLRC delegation, Coventry, 6 Jul. 1995, p. 7.

900 [1995] 2 W. L. R. 80.

said:[901]

> But this court considers, and we believe that many other fair-minded citizens would share this view, that the law would be much fairer if it had been open to the trial judge to have convicted Private Clegg of the lesser crime of manslaughter on the ground that he did not kill Karen Reilly from an evil motive but because, his duties as a soldier having placed him on the Glen Road armed with a high-velocity rifle, he reacted wrongly to a situation which suddenly confronted him in the course of his duties.

5.173 To similar effect was the speech of Lord Lloyd of Berwick in the House of Lords:[902]

> In most cases of a person acting in self-defence, or a police officer arresting an offender, there is a choice as to the degree of force to be used, even if it is a choice which has to be exercised on the spur of the moment, without time for measured reflection. But in the case of a soldier in Northern Ireland, in the circumstances in which Private Clegg found himself, there is no scope for graduated force. The only choice lay between firing a high-velocity rifle, which, if aimed accurately, was almost certain to kill or injure, and doing nothing at all.

Lord Lloyd stated that the point for decision by the House was 'whether the offence in such a case should, because of the strong mitigating circumstances, be regarded as manslaughter rather than murder'.[903] With regret his Lordship said that to so hold would 'be to make entirely new law' and it is for the legislature to decide when murder should be reduced to manslaughter in a particular class of case.[904]

5.174 Had this case been tried before a jury the outcome may have been different and more just. As the custodians of the community's standards of morality and fair play, jurors have the unreviewable power to acquit an accused person, or convict him or her of a lesser offence.[905] In murder trials this power has been used by juries to return a 'merciful verdict of manslaughter'.[906] A jury in the Clegg trial may well have adopted this course. In the event, it required a petition signed by over a million people to induce the authorities to release him on a bond to be of good behaviour, after having

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901 ibid, p. 85.

902 ibid, p. 90.

903 ibid, pp. 90-91.

904 ibid, pp. 90–91.

905 See *Bushell's Case*, (1670) Vaugh. 135; *United States ex rel McCann v. Adams*, 126 F. 2nd. 774 (1942), 775.

906 See eg., *R. v. Shipley* (1784) 4 Doug. 171; Devlin, P., *Trial by Jury*, Stevens & Sons, London, 1966, pp. 78–79, 83–88.

served two years of his life sentence. [907]

Case Management Issues

5.175 Rather than searching for an alternative to the jury trial in complex cases, the United Kingdom has sought to develop and implement case management techniques which are designed to assist the jury to understand the issues better, while simultaneously shortening trials, and thereby saving costs. Accompanying and supporting this development has been a growing awareness by the Government and senior judges of the need to encourage a more robust approach by the judiciary to intervention in pre-trial procedures and the conduct of the trial itself. This approach accords with the views of most chief constables of police and senior investigators, who support the retention of trial by jury, while stressing the importance of streamlining court procedures by methods such as pre-trial reviews.[908]

Pre-Trial Procedures

5.176 Pre-trial procedures can have a significant effect on the efficient operation of the jury system in a number of important respects. They can reduce the number of 'cracked' trials; that is, cases that are listed at the Crown Court for a contested trial before a jury but where the accused pleads guilty, often on the day of trial.[909] The early identification of these cases can avoid causing great inconvenience to jurors who would otherwise attend the court unnecessarily. Moreover, the use pre-trial hearings provides a process whereby the material issues in a case can be identified and simplified. This will generally assist jurors' comprehension and expedite and shorten the proceedings. This in turn should encourage more people to participate in the jury system and help to reduce any public perception that jury service is boring or unrewarding. The Royal Commission on Criminal Justice (1993) held the firm view that:[910]

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907 'Key figure in Belfast killing out of jail early' *The Age*, 4 Jul. 1995, p. 10.

908 Tendler, S., 'Police chiefs in favour of jury trials in fraud cases, but urge reforms' *The Times*, 21 Dec. 1984, p. 5.

909 See, Runciman, *Report*, p. 104; Law Commission, Criminal Law Team, *Counts in an Indictment – a Consultation Paper*, Law Commission, London, Sep. 1994, p. 15; Bredar, J. K., 'Moving up the day of reckoning: strategies for attacking the "cracked trials" problem' [1992] *Crim. L. R.*, p. 153.

910 Runciman, *Report*, p. 102.

> the best means of enabling the jury to reach its verdict on the clearest possible appreciation of the facts of the case is a pre-trial procedure in which the issues are clarified and defined in advance of the jury's being empanelled.

The British Government has recently affirmed its acceptance of this view.[911]

5.177 An early attempt to advance the achievement of these goals was the procedure known as the 'pre-trial review' which commenced as an experimental scheme in the Central Criminal Court in London in 1974. It was initially confined to complicated and lengthy cases, in particular complex fraud trials. Under the scheme 'cases could be set down for "practice directions" in advance of the trial for the purpose of identifying the essential points in issue, and settling various preliminary matters affecting the conduct of the trial'.[912]

5.178 The scheme was extended and formalised by the issue of practice rules in November 1977.[913] These rules, which remain operative, have no statutory force, but they are used in Crown Court centres across the United Kingdom. Their purpose is to enable discussions to take place and decisions to be made regarding such matters as: the probable length of the trial, any special arrangements which may be necessary, the number and identity of prosecution witnesses required at the trial, formal admissions by the defence, agreed summaries of facts, lists of exhibits and other schedules, the determination of preliminary points of law and questions relating to the admissibility of evidence, and identifying other points of law which may arise at the trial and the legal authorities relevant to their resolution.[914]

5.179 In 1986 the Roskill Committee made a number of recommendations for improving the effectiveness of pre-trial reviews by using a more formal procedure, which the Committee labelled 'preparatory hearings'.[915] These recommendations were largely adopted with respect to complex serious fraud cases by the enactment of the Criminal Justice Act 1987 (UK).[916]

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911 United Kingdom, Home Office, *Improving the Effectiveness of Pre-Trial Hearings in the Crown Court – A Consultation Document*, HMSO, London, Jul. 1995, Cm 2924, p. 6.

912 Roskill, *Report*, p. 79.

913 See, Central Criminal Court Rules, 21 Nov. 1977 extracted in *Archbold Criminal Pleading, Evidence and Practice*, Sweet & Maxwell, London, 1995, paras. 459–461.

914 Runciman, *Report*, p. 103.

915 ibid., pp. 79–118, recommendations 31–73.

916 ss. 7–11.

5.180 The Act states that the purpose of a preparatory hearing is:[917]

(a) to identify issues which are likely to be material to the verdict of the jury;

(b) to assist their comprehension of any such issues;

(c) to expedite the proceedings before the jury; and

(d) to assist the judge's management of the trial.

5.181 A preparatory hearing may be ordered after an application from the prosecution or the person or persons indicted, or of the judge's own motion where:[918]

> it appears to the judge that the evidence on an indictment reveals a case of fraud of such seriousness and complexity that substantial benefits are likely to accrue from a hearing ... before the jury is sworn.

The trial begins with the preparatory hearing, and for this reason arraignment usually takes place at the start of the hearing.[919]

5.182 At a preparatory hearing the judge is empowered to determine any question as to the admissibility of evidence and any other question of law relating to the case.[920] The judge has the power also to order the prosecution to do any or all of the following:[921]

(a) supply the court and the accused with a case statement specifying (i) the principal facts of the prosecution case; (ii) the witnesses who will speak to those facts; (iii) any relevant exhibits; (iv) any proposition of law on which the prosecution propose to rely; and (v) the relevance of the aforementioned to any of the counts in the indictment;

(b) prepare their evidence and other explanatory material in a form that appears to the judge to be likely to aid comprehension by

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917 Criminal Justice Act 1987 (UK), s. 7.

918 Criminal Justice Act 1987 (UK), s. 7.

919 Criminal Justice Act 1987 (UK), s. 8.

920 Criminal Justice Act 1987 (UK), s. 9(3)

921 Criminal Justice Act 1987 (UK), s. 9(4); and see the excellent summary of this and the next sub-section contained in United Kingdom, Home Office, *Improving the Effectiveness of Pre-Trial Hearings in the Crown Court – A Consultation Document*, HMSO, London, Jul. 1995, Cm 2924, p. 13.

the jury (and to supply it in that form to the court and the accused);

(c) give the court and the accused notice of matters, which in their view, ought to be agreed (including, where appropriate the truth of the contents of documents relevant to the case); and

(d) amend the case statement in the light of objections from the defence.

5.183 Once an order requiring the prosecution to supply a case statement has been complied with, the judge may order the accused to do any or all of the following:[922]

(a) give the court and the prosecution a written statement setting out in general terms the nature of the defence case and indicating the principal matters on which they take opposition with the prosecution;

(b) give the court and the prosecution notice of any objection they have to the prosecution case statement;

(c) inform the court and the prosecution of any point of law (including one of admissibility of evidence) which they wish to take and the authorities on which they will be relying; and

(d) give the court and the prosecution a notice stating the extent to which they agree with the prosecution as to documents and other matters which the prosecution have asked to be admitted, together with the reason for any refusal to agree.

5.184 An order made at or for the purposes of a preparatory hearing has effect during the trial unless it appears to the judge that the interests of justice require him or her to vary or discharge it.[923] Failure to comply with such an order, or a party's departure at the trial from the case which it had disclosed previously, may result in the judge or, with the leave of the judge any other party, making such comment to the jury as appears to be appropriate. The jury then may draw such inferences as appear proper.[924] According to the Serious Fraud Office this procedure is 'all very well in theory but [in] practice [it] has been very disappointing because judges have not been prepared to

922 Criminal Justice Act 1987 (UK), s. 9(5).

923 Criminal Justice Act 1987 (UK), s. 9(10).

924 Criminal Justice Act 1987 (UK), s. 10(1).

push it'.[925]

5.185 The legislation provides for appeals by leave against orders made at a preliminary hearing concerning the admissibility of evidence and points of law.[926] Notwithstanding that leave to appeal has been granted, the judge may continue the preparatory hearing up to (but not including) the stage of swearing in the jury.[927]

5.186 The effectiveness of pre-trial procedures was re-visited in 1993 by the Royal Commission on Criminal Justice, which recommended that a variety of procedures should be implemented in order to clarify and define the issues likely to arise in a trial before a jury is empanelled.[928] The Royal Commission recommended that in less complicated cases the parties could merely exchange documents, while in more complex cases a party (or the court) should be permitted to require that a preparatory hearing be held before a judge. Such hearings should take place after the arraignment and form part of the trial, so that decisions are made binding on the parties.[929]

5.187 The Royal Commission's proposals envisaged that during the preparatory hearing the judge could rule on issues relating to the admissibility of evidence and preliminary points of law. The trial judge would be bound by any orders or rulings made by the judge who presided over the preparatory hearing.[930] The Royal Commission also recommended that practice directions should be issued requiring the conduct of a preparatory hearing in all trials which are estimated to go for a certain length of time, with this time period to be determined later.[931]

5.188 A Practice Direction, which goes some way towards implementing the Royal Commission's recommendations in this area, came into force in July 1994.[932] It establishes a system of 'Plea and Directions Hearings (PDH)' in the Crown Court, which applies to all cases other than serious fraud trials and

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925 Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 21.

926 As to the extent of the right of appeal, see *R. v. Gunawardena & Ors.* [1990] 1 W. L. R. 703.

927 Criminal Justice Act 1987 (UK), s. 9(13).

928 Runciman, *Report*, pp. 101–109 & recommendations 139–155, pp. 201–202.

929 ibid., p. 102 & recommendations 139 & 140 on pp. 200–201.

930 ibid., pp. 107–108 & recommendations 147 & 149, p. 201.

931 ibid., p. 105 & recommendation 14, p. 201.

932 *Practice Direction (Crown Court: Plea and Directions Hearings)*, [1995] 1 W. L. R. 1318.

some child abuse cases. The PDH pleas are taken and, in contested cases, prosecution and defence counsel are expected to assist the judge in identifying the key issues, as well as providing additional information necessary for the proper listing of the case. The date for the PDH is fixed at the committal hearing in the Magistrates' Court, and should be within six weeks of committal in cases where the accused is on bail, and four weeks where he or she is in custody. It is expected that the advocate briefed to conduct the trial will appear in the PDH 'wherever practicable'.

5.189 Fourteen days prior to the PDH the defence must supply the Court and the prosecution with a full list of the prosecution witnesses they require to attend at the trial. In certain more serious, lengthy and complex cases, a case summary should be prepared by the prosecution for use by the judge at the PDH. The hearing is normally held in open court with all defendants present. Prior to the commencement of the PDH, the parties must hand to the court a detailed questionnaire, completed as far as possible with the agreement of both advocates.

5.190 The trial judge or a directions judge presides and is empowered to 'make such order or orders as lie within his or her powers as appear to be necessary to secure the proper and efficient trial of the case'. However, in the more serious class of case, directions judges may 'deal only with those matters necessary to see that such cases are prepared conveniently for trial, including identifying any issues suitable for a preliminary hearing before the trial judge'. Subject to some exceptions, matters formally admitted at the PDH may be used at the trial.

The Criminal Procedure and Investigations Bill 1996

5.191 At the time of writing this chapter, the latest contribution to improvements in criminal case management through the use of pre-trial procedures was the Criminal Procedure and Investigations Bill 1996. The Bill introduces improved procedures to enable issues to be identified and narrowed in advance of the trial with the objective of achieving shorter and more efficient trials.[933] The Bill, which has passed through the House of Lords, is expected to be passed by the House of Commons at the end of April 1996 and should receive the Royal Assent in July.

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933 United Kingdom, Home Office, *Improving the Effectiveness of Pre-Trial Hearings in the Crown Court – A Consultation Document*, HMSO, London, Jul. 1995, Cm 2924, p. 2.

5.192 The Bill is divided into six Parts, of which three are relevant to the present discussion. Part I deals with prosecution and defence disclosure in criminal cases. Part III provides for preparatory hearings to be conducted in long and complex cases tried in the Crown Court. Part IV empowers a judge conducting a preparatory hearing to make binding rulings in relation to the admissibility of evidence and preliminary points of law.

Prosecution and Defence Disclosure

5.193 In accordance with Part I of the Bill prosecution and defence disclosure takes place in three stages. The first stage is primary prosecution disclosure, which is more limited than the present common law principles. This requires the prosecutor to disclose to the accused previously undisclosed material which in the prosecutor's opinion might undermine the prosecution case.[934] In indictable cases the second stage imposes an obligation on the defence to disclose 'sufficient particulars of its case to identify the issues in dispute before the start of the trial'.[935] Defence disclosure is voluntary where the accused is charged only with summary offences or either way offences tried summarily.[936] The incentive for the accused to make sufficient disclosure of the defence case is that the issues which are disclosed will determine the degree of disclosure required of the prosecution at the third stage. At this stage, which is called secondary prosecution disclosure, the prosecution must disclose any previously undisclosed material which it believes might be 'reasonably expected to assist the accused's defence as disclosed by the defence statement'.[937]

5.194 If the accused either fails to give the prosecutor a defence statement, sets out inconsistent defences in such a statement, or at trial puts forward a defence which is different from any defence set out in such a statement, the court (or, with the leave of the court, any other party) may make such comment as appears appropriate, and the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.[938] A dispute concerning the extent of disclosure would be

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934 Criminal Procedure and Investigations Bill 1996 (UK) (hereafter CP&I Bill), cl. 3.

935 United Kingdom, Home Office, *Disclosure – A Consultation Document*, HMSO, London, May 1995, Cm 2864., pp. 9 & 16; CP&I Bill, cl. 5.

936 CP&I Bill, cl. 6.

937 CP&I Bill, cl. 7.

938 CP&I Bill, cl. 10.

resolved at the PDH or, more usually, at a preparatory hearing conducted under Part III of the Bill.[939]

Preparatory Hearings in Long or Complex Cases

5.195 A Home Office consultation document entitled 'Improving the Effectiveness of Pre-Trial Hearings in the Crown Court' was tabled in the United Kingdom Parliament in July 1995. It emanated from Government concerns that: [940]

> under the present arrangements it is difficult for trials to be managed as efficiently or effectively as they could be. Issues frequently arise which need to be resolved in the absence of the jury, causing disruption and inconvenience and adding to the length and cost of the proceedings.

The consultation document acknowledges 'the valuable contribution of PDHs to improving the pre-trial preparation of cases'.[941] This contribution reflects the fact that PDHs 'act as a focal point for ensuring that cases listed for trial in the Crown Court are properly prepared and that cases which are likely to be uncontested are disposed of quickly'.[942] Nevertheless, the consultation document concludes that because PDHs are brief—typically lasting only 15 minutes—they are not suitable for considering pre-trial issues in detail.[943]

5.196 Accordingly, Part III of the Bill introduces a scheme of preparatory hearings similar to that applicable to serious fraud cases under the Criminal Justice Act 1967 for all complex and potentially lengthy cases tried in the Crown Court.[944] Such cases would include those involving money laundering or international drug trafficking. A judge conducting the PDH is empowered to order a further preparatory hearing on the application of a party or on the judge's own motion where he or she is satisfied that substantial benefits are likely to accrue from the management of the case being undertaken by a designated judge having power to direct a preparatory hearing.[945] The procedures followed at preparatory hearings, the powers of the judge, the availability of appeals from interlocutory orders, and the restrictions on

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939 Home Office, *Disclosure* , op. cit., p. 20.

940 Home Office, *Pre-Trial Hearings*, op. cit., p. 2.

941 ibid., p. 6.

942 ibid., p. 3.

943 ibid.

944 See above paras. 5.179–5.185.

945 CP&I Bill, cl. 23.

reporting proceedings are essentially the same as for preparatory hearings in fraud cases.[946]

Binding Pre-Trial Rulings

5.197 The Home Office consultation document on pre-trial hearings concluded that a major deficiency in the current system of PDHs was that the judge conducting the hearing 'has no powers to make binding rulings to resolve issues in advance of the trial'.[947] In order to remedy this situation Part IV of the Bill provides for a judge conducting a pre-trial hearing to make binding rulings on any question as to the admissibility of evidence and other questions of law relating to the case, on the application of a party to the case or of the judge's own motion.[948]

5.198 A ruling made under this Part, in general, has binding effect from the time it is made until the case is disposed of by acquittal, conviction or discontinuance. However, a judge may vary or discharge a binding ruling made at the preparatory hearing where the interests of justice require it, on the application of a party—but only where there has been 'a material change of circumstances'—or of the judge's own motion.[949]

Judicial Intervention in the Trial Process

5.199 It can be seen from the discussion relating to pre-trial procedures that there has been a tendency in recent years to encourage a greater degree of judicial intervention in the trial process in civil and criminal cases. In an address to the Bar Council in October 1993 the Lord Chief Justice expressed his belief that judges should be more interventionist and take whatever steps they properly can to discourage prolixity in counsel's speeches and the examination of witnesses.[950] Similar sentiments have been expressed in relation to criminal trials by Barbara Mills, QC, the Director of Public Prosecutions, who said that: 'we need judges who will take a tough line—

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946 CP&I Bill, cll. 22–32. Cf. Criminal Justice Act 1967, ss. 7–12. Proposed amendments to the latter Act will make its provisions the same as those provided for under the Bill, see CP&I Bill, cl. 56 & sch. 2.

947 Home Office, *Pre-Trial Hearings*, op. cit., p. 3.

948 CP&I Bill, cl. 34.

949 CP&I Bill, cl. 34.

950 Referred to in the evidence of Sir T. Legg, QC to the House of Commons Committee of Public Accounts, United Kingdom, House of Commons, Session 1994-1995, Committee of Public Accounts, *Administration of the Crown Court – Minutes of Evidence*, 25 Jan. 1995 (HC 173-i), pp. 19–20.

who, if the prosecution comes in with 50 files, will tell them to come back with five'.[951]

5.200 Judicial intervention can take place at different stages of the pre-trial and trial process and can take a variety of forms. At the pre-trial stage the judge can assist counsel to identify and simplify the issues in the case. At this time, the judge can also influence the prosecution's decisions concerning the number of accused and the number of charges brought against each accused. At trial, to an increasingly greater extent, the judge can have a significant influence on the manner in which the evidence is presented.

5.201 In order to promote this trend, the provisions relating to preparatory hearings have been designed to encourage the judiciary to adopt a more proactive approach to pre-trial and trial management. For example, the judge is specifically empowered by the Criminal Justice Act 1987 and the Criminal Procedure and Investigation Bill 1996 to order the prosecution 'to prepare their evidence and other explanatory material in such a form as appears to [the judge] to be likely to aid comprehension by the jury'.[952]

5.202 The need for judges to take an active role in the trial process in complex cases had been emphasised as early as 1967. In *R. v. Simmonds* the Court of Criminal Appeal said that:[953]

> it is the duty of prosecuting counsel in the interests of justice as a whole to see that the case is prepared so that it can be presented to the jury in as simple a way as is practicable ... Experience of recent years has demonstrated the need for the trial judge being able to form an independent judgment on [which counts should be tried on a particular occasion] ... If upon examination of material before him the judge considers that the presentation of the case in the way proposed by the prosecution involves undue burdens on the court in general and jurors in particular, and is for this or other reasons contrary to the interests of justice, he has a right and, indeed, a duty to ask that the prosecution recast their approach in those interests.

5.203 More recently the role of the pre-trial review in the case management process was discussed by the Court of Criminal Appeal in *R. v. Landy*.[954] The trial of charges of conspiracy to defraud against the directors of a bank had lasted 90 sitting days. The judge conducting the pre-trial review (who was to

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951 McKeone, M., 'Call for 'brisk' fraud trials' (1992) 35 *Law Soc. Gaz.*, p. 7.

952 Criminal Justice Act 1987 (UK), s. 9(4)(b); Criminal Procedure and Investigations Bill 1996, cl. 25(4)(b).

953 [1969] 1 Q. B. 685, 691–692 per Atkinson LJ. See further, *R. v. Novac & Ors.* (1977) 65 Cr. App. R. 107, 118;

954 [1981] 1 All E. R. 1172.

be the trial judge) had been provided with the extensive papers in the case only a day or two before the review. In the words of Lawton LJ:[955]

> The review produced no worthwhile result. This was not the fault of the judge. He could not be expected to master this complicated case in the time available to him. Had he been able to do so we have no doubt that **he would have done some extensive pruning**. **That would be an important object of a pre-trial review in cases of this kind.** Prosecuting counsel who have been immersed in the details of a case for months sometimes do not appreciate the difficulty which a judge and a jury may have in assimilating the evidence. At the pre-trial review the judge ... should be ready and willing to take the initiative to ensure that all unnecessary detail is omitted ... We are sure that a robust pre-trial review in this case would have resulted in a shorter more satisfactory trial. (emphasis added)

5.204 Following the 1992 decision of the Court of Criminal Appeal in *R. v. Cohen & Others* (the Blue Arrow case)[956] serious concerns regarding the management of complex fraud trials were expressed again.[957] The length of the trial was described as 'awesome' because it covered 184 days. From the outset defending counsel had warned the court that the extent of the cases being alleged against the 10 defendants would render its conduct unmanageable. At a later stage this proved to be the case and an attempt by the trial judge to save the situation miscarried. The Court of Criminal Appeal held that the convictions were unsafe and unsatisfactory in part because of 'the awesome time-scale of the trial, the multiplicity of issues, the distance between evidence, speeches and retirement and not least the two prolonged periods of absence by the jury (amounting to 126 days)'.[958]

5.205 Although their Lordships considered that the trial 'will rightly be regarded by the public as having been a costly disaster',[959] this was not because the allegations were not capable of prosecution. Instead, the indictment had been unnecessarily complex. In the Court's opinion prosecutors must not overload an indictment with unnecessary particulars, and they must exercise restraint so that 'only essential evidence is produced and inessential but relevant evidence is not'.[960] The judgment also provides guidance for judges when conducting such trials:[961]

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955 ibid, p. 1178.

956 (1992) 142 *N. L. J.* 1267.

957 See e.g., Gibb, F., 'Blue Arrow appeal renews campaign for trial reform', *The Times*, 17 Jul. 1992, p. 18.

958 (1992) 142 *N. L. J.* 1267, p. 1268.

959 ibid.

960 ibid.

961 ibid.

> A lack of restraint [by the prosecutor] can be corrected by the trial judge expressing his view that evidence albeit relevant is inessential and has a volume and complexity which would threaten to prejudice the achievement of a manageable and fair trial ... The trial judge has the ultimate responsibility of ensuring that the indictment is one upon which a manageable trial is possible and to achieve that end he can use his power of severance ... Judges must not be reluctant to exercise their power in order to secure that end but, and importantly, they will seldom have occasion to do so if when performing their difficult task the prosecuting authorities frame indictments which have due regard to the limitations of a jury trial.

5.206 More recently, in *R. v. Kellard, Dwyer & Wright*,[962] in which the trial of serious fraud charges had lasted 252 sitting days, the Court of Criminal Appeal observed that the length of a trial does not in itself constitute a sufficient ground for quashing a conviction as unsafe or unsatisfactory, otherwise, 'cases would have to be tried within a time limit'. The Court held that the correct approach 'is to consider whether the length of the trial created a situation at any point whereby a fair trial was not possible'. Among other considerations, the most important one is to determine whether the jury 'was unable to understand the evidence, or [if] the directions it received were not reliable or accurate'. [963]

The Responsibility of the Prosecution for Ensuring the Manageability of Trials

5.207 It can be seen from the judgments discussed above that much of the blame for inordinately long trials is laid at the feet of prosecuting counsel. However, often they are in an unenviable position because they fear that, if they do not call all the relevant evidence available to them, the accused may be unjustly acquitted. This is a problem particularly where there is a need to show a pattern of fraudulent behaviour over a lengthy period of time.

5.208 Notwithstanding an understandable reluctance on the part of prosecutors to eliminate counts and particulars from an indictment, and witnesses and evidence from a trial, the Court of Criminal Appeal in *R. v. Kellard, Dwyer & Wright*[964] has emphasised that no trial by jury should be permitted to last 252 sitting days. The Court said:[965]

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962 [1995] 2 Cr. App. R. 134, 149.

963 ibid.

964 ibid, p. 134.

965 ibid, p. 161.

> The risk of an accused not getting a fair trial because of the pressure upon judge or jury is too great ... In any large fraud case—or indeed any case of potentially unusual length—it is the duty of the prosecutor to consider carefully before the preparatory hearing whether the case can properly be tried in parts rather than as a whole ... Prosecution counsel must be reconciled to the fact that their case may be weaker as a result of being split into a number of trials, but that is the price that must be paid to avoid the situation which arose in the present case [that is, an unduly long and complicated trial]. Severance may not be possible in all cases but a determined effort to do so should be made where it will best serve the interests of justice and the tax payer.

5.209 The principal burden of preparing, and then making a working reality of, an efficiently managed trial to a large extent must fall on the prosecution. An important tool in setting an agenda for the trial is the indictment which is produced by the prosecution and charges the accused with a criminal offence or offences. Indictments must contain sufficient particulars of the offences charged to give the accused proper notice of the case he or she has to meet. The British Government has recently given consideration to the role of the particulars in an indictment, at the start of and during the trial, as a means of giving the jury 'an adequate and reliable formulation of the issues which the prosecution think it will have to decide' and as a means of setting 'an *agenda for the trial*, and so promote the just and efficient disposal of the case'.[966]

5.210 The Criminal Law Team of the Law Commission has considered whether the indictment used in criminal trials could be drafted in a form that made the trial easier to conduct, and which gave the jury clearer guidance as to the issues that they have to decide.[967] The Team concluded that:[968]

> there are strong reasons of justice and efficiency why the jury should be given a written document containing sufficiently clear factual allegations to inform it of the issues it will have to decide, and more generally, to operate as a practical agenda for the trial.

5.211 The Team put forward two alternative schemes: a straightforward particularisation of the counts in the indictment to the extent necessary to achieve the stated objectives; or a 'case statement' which would be provided to the jury as a supplement to the existing form of indictment.[969]

5.212 According to a senior officer of the Crown Prosecution Service (CPS)

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966 Law Commission, Criminal Law Team, *Counts in an Indictment – A Consultation Paper*, Lord Chancellor's Department, London, Sept. 1994, p. 11. (original emphasis)

967 See, ibid., p. 4.

968 ibid., p. 6.

969 ibid., pp. 31–34.

the goal of providing the jury with a document at the commencement of the trial which sets out the issues in the trial should be achieved by a 'case statement' separate from the more formal indictment. The CPS prefers this approach to the particularisation of every averment which the prosecution is intending to prove in the indictment, because there is a risk that a failure to prove one minor averment could undermine the credibility of the whole Crown case in the eyes of the jury.[970]

5.213 At present there is no statutory requirement for a prosecution case statement to be provided to the jury. Additionally, the Criminal Justice Act 1967 and the Criminal Procedure and Investigations Bill 1996 specifically forbid any defence case statement, or any other information relating to the accused which was given pursuant to their respective provisions, being disclosed 'at a stage in the trial after the jury have been sworn without the consent of the accused concerned'.[971]

Case Management in the Civil Justice System

5.214 Case management in civil litigation is not as relevant to the efficient operation of the jury system as it is in criminal cases. This is because a trial by jury is available on the application of a party only in cases involving allegations of fraud, libel, slander, malicious prosecution, false imprisonment and civil assault.[972] Cases in these categories represent a very small number of trials per year. Nevertheless, it should be noted that the Lord Chief Justice has stated recently that:[973]

> The paramount importance of reducing the cost and delay of civil litigation makes it necessary for judges sitting at first instance to assert greater control over the preparation for and conduct of hearings than has hitherto been customary.

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970 Engel, J., Head of Criminal Justice Policy Division, Policy Group, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 19.

971 CP&I Bill, cl. 28(4); Criminal Justice Act 1987 (UK), s. 10(3) as proposed to be amended by CP&I Bill, cl. 56 & sch. 2.

972 See above para. 5.22.

973 *Practice Direction (Civil Litigation: Case Management)*, [1995] 1 W. L. R. 262. See also [1995] 1 W. L. R. 508.

5.215 In announcing a recent Practice Direction the Lord Chief Justice said:[974]

> The aim is to try and change the whole culture, the ethos, applying in the field of civil litigation. We have over the years been too ready to allow those who are litigating to dictate the pace at which cases proceed.

The Practice Direction strongly advises judges to exercise their discretion to limit discovery of documents, the length of oral submissions, the time allowed for examination and cross-examination of witnesses, the issues on which the court is to be addressed, and the reading aloud of passages from documents and reported cases.[975]

5.216 The Practice Direction requires that a pre-trial review should take place in all cases in the Queen's Bench and Chancery Divisions of the High Court which are estimated to last more than ten days. Where practicable, the review should take place before the trial judge, and counsel briefed for the trial should appear. A further management tool in all Queen's Bench and Chancery Division cases is the 'pre-trial check-list', which must be lodged with the court two months before the trial date.

5.217 In 1994 Lord Woolf (a Lord of Appeal in Ordinary) was appointed by the Lord Chancellor to review the current rules and procedures of the civil courts in England and Wales. The aims of this review were: to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; and to remove unnecessary distinctions of practice and procedure.[976]

5.218 In his Interim Report his Lordship asserts that the civil justice system does not comply with the basic principles which need to be met in order to ensure access to justice. According to these principles the civil justice system should be just in the results it reaches, fair, and seen to be fair. There should be as much certainty as the nature of the case can allow. Costs and procedures should be proportionate to the nature of the issues involved, delays should be reduced, and the system should be understandable and responsive to the

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974 Quoted in Lord Woolf, *Access to Justice – Interim Report to the Lord Chancellor on the civil justice system in England and Wales*, Lord Chancellor's Department, London, Jun. 1993, p. 6.

975 *Practice Direction (Civil Litigation: Case Management)*, [1995] 1 W. L. R. 508.

976 Lord Woolf, op. cit., introduction.

needs of its users. Finally, the system should be effective, adequately resourced and organised, so as to give effect to the basic principles.[977]

5.219 Lord Woolf concludes that 'the present system does not conform with or support' the principles he propounds because of the 'unrestrained adversarial culture of the present system'.[978] There are, in his view, a number of primary problems the cumulative effect of which is to restrict access to justice. These problems are:[979]

> (a) the excesses of and the lack of control over the system of civil litigation;
>
> (b) the inadequate attention which the system gives to the control of costs and delay and to the need to ensure equality between the parties;
>
> (c) the complexity of the present system; and
>
> (d) the absence of any satisfactory judicial responsibility for the effective use of resources within the civil system.

5.220 According to Lord Woolf, the cure is 'a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts'.[980] His Lordship suggests that this would increase the judiciary's responsibility for the way in which cases proceed through the system to final hearing, and its responsibility for the form of the final hearing. 'The introduction of judicial case management is crucial to the programme of change' which his Lordship recommends: 'It is the means by which [he] intends to achieve many of [his] objectives'.[981]

5.221 The crux of the programme of change Lord Woolf proposes is the introduction of a new system of case management by the courts, with cases being allocated to one of three 'tracks': a small claims track for cases up to a financial limit of £3,000;[982] a fast track, with limited procedures and costs proportionate to the amount in issue, for relatively straightforward cases up to £10,000;[983] and a multi-track for more complex cases over £10,000.[984] A procedural judge is responsible for allocating cases to the appropriate track.

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977 ibid., pp. 2–3.
978 ibid., p. 18.
979 ibid.
980 ibid.
981 ibid., pp. 19–21.
982 ibid., pp. 36, 102–118.
983 ibid., pp. 35–36, 41–47.
984 ibid., p. 36, 48–53.

Fast track cases have a fixed timetable of 20 to 30 weeks from issue of proceedings to conclusion. Discovery is limited and only written expert evidence is received. Trials should last no more than three hours, and there will be a fixed scale of costs. The multi-track system commences with a case management conference conducted by the procedural judge, followed later by a pre-trial review to be held by the trial judge. A fixed timetable also applies to these cases. [985]

5.222 Jury trials in civil cases are not mentioned specifically in the Interim Report, however, it is implicit that the same system would apply. Lord Woolf will present his Final Report to the Lord Chancellor in July 1996. It is expected that it will be accompanied by a single draft code of procedural rules for all general civil litigation in the High Court and the county courts.[986]

Sources of Information for Jurors

Preliminary Sources of Information

5.223 In addition to an information booklet which is sent to persons summoned for jury service, a video presentation is given by a court official when prospective jurors arrive at court. The Royal Commission on Criminal Justice recommended that the video should include general reference to the use of pre-trial discussions in order to narrow down the issues for trial, and a discussion of the role of the judge when intervening during the examination of witnesses (where intervention is either to prevent irrelevant questions or argument by counsel, to protect witnesses, to clarify matters, or to keep matters within the timetable).[987] The Royal Commission warned that it was 'most important that jurors should not regard such intervention as indicating bias on the part of the judge towards one side or the other'.[988]

5.224 The Courts Charter is a major source of information for court users including jurors. It was introduced in January 1994 to set the standards of staff service which court users are entitled to expect. It has been described as a 'remarkable document, [which is] likely to bring big changes in the way courts are administered and in their culture and ethos as community service

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985 See generally the summary of recommendations in ibid., pp. 223–233.

986 United Kingdom, Lord Chancellor's Department, Press Notice 96/29, 'Lord Woolf issues consultation papers', Jan. 1996, p. 4; ibid., introduction.

987 Runciman *Report*, p. 134.

988 ibid.

institutions'.[989] Jurors are informed in the Charter of what will happen in court, what is expected of them and the steps which are being taken to improve services. The Charter requires that jurors be sent a map, details of public transport and nearby car parks, information about the date of the hearing, opening hours of the court building, facilities available (and those which are not), and the name and phone number of a court contact person who can provide further information.

5.225 The Charter also informs jurors about their role in criminal cases. They are advised that they are required to attend for about ten working days, and where the case is likely to last longer than this, the judge will ask them if this will cause them any inconvenience. The Charter lays down as a performance target for outside London, that jurors should spend at least 70 per cent of the days they attend for court sitting on trials. Inside London the target is 85 per cent of the days.[990] The Charter also refers to a telephone service which enables jurors in many courts to check whether they need to attend in court on a particular day.

5.226 A general procedure for dealing with telephone and written enquires is specified in the Charter. Court staff are also required to be available to give advice from 30 minutes before the first scheduled hearing until the end of the court's daily sittings. Court staff must wear name tags and clear sign posting is to be provided.

5.227 Judges have an educative role in connection with juries. Before a trial commences a judge will usually explain the general features of the criminal justice system; including the burden of proof which rests upon the prosecution. The Royal Commission on Criminal Justice approved of this practice, but it recommended that the judge should also explain to the jury that they are able to take notes and ask questions during the trial.[991]

5.228 It appears that persons summoned for jury service and those who serve as jurors are generally satisfied with the amount of information they receive. The Crown Court Study examined three stages in the process where this information is provided: before coming to court, when first attending court,

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989 Sallmann, P.A., 'Towards a More Consumer-orientated Court System' (1993) 3 *J. J. A.* 47, p. 56.

990 United Kingdom, *The Court Charter*, Summary Leaflet of The Citizen's Charter, First Report, 1992, p. 7.

991 Runciman *Report*, p. 134.

and prior to the commencement of a trial. Seventy-five per cent of the jurors surveyed found that the information received before coming to court was adequate, 88 per cent found it to be adequate when they first attended court, and 91 per cent believed that the information given at the start of the trial was adequate.[992]

Information Provided to Jurors Concerning Disputed Issues

5.229 At present the only information which jurors generally receive concerning the issues in dispute between the parties in a criminal trial is a copy of the indictment, which contains a legal (and usually unhelpful) description of the charges, and limited particulars of the allegations said to constitute the commission of the offence. In addition, prosecutors give an opening address to the jury in which the issues likely to emerge are outlined. It is unusual for jurors to be given a written copy of the oral opening address.

5.230 In its consultation paper on *Counts in an Indictment* the Criminal Law Team of the Law Commission concluded that at the commencement of the trial the jury should be given a written document which provides 'sufficiently clear factual allegations to inform it of the issues it will have to decide, and more generally, to operate as a practical agenda for the trial'.[993] Such a document is vital if the jury is to gain a clear idea of the issues to be decided by them at an early stage in the proceedings. In the absence of research into the extent of juror comprehension it is uncertain whether the present form of indictment provides sufficient clarification of the disputed issues for the jury's purposes. The Criminal Law Team stated that 'it is legitimate to question whether greater particularisation in every case is desirable in the absence of clear evidence that juries are confused'.[994] At present the agenda for trial is contained in the prosecution's opening address. The Team expressed the view that this situation is inadequate because:[995]

> in the absence of any existing written framework available to the court or the jury, the prosecution's opening speech has to provide all there will be by way of an agenda for trial; this seems unlikely to enhance the clarity or brevity of that speech.

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992 Zander & Henderson, op. cit., pp. 203–204.

993 United Kingdom, Law Commission, Criminal Law Team, *Counts in an Indictment – A Consultation Paper*, Lord Chancellor's Department, London, Sep. 1994, p. 6.

994 ibid., p. 12.

995 ibid., p. 13.

Questioning of Witnesses by Jurors

5.231 Jurors are entitled to ask questions of witnesses during a trial, however, a strict procedure must be followed. The question must be written down and taken by the usher to the judge, who may seek the opinion of counsel in the absence of the jury when deciding whether the question should be asked by counsel, the judge, or not at all. If the latter is the case, some explanation for the decision will be given to the jury by the judge. The guide to jury service entitled *You and your Jury Service* informs jurors of their ability to ask questions. The Royal Commission on Criminal Justice observed that the orientation video shown to potential jurors informs them that they may pass notes to the judge, but it does not encourage questioning of witnesses by a jury.[996]

5.232 A 1993 study found that despite the provision of this information, requests by jurors to ask questions of witnesses (or questions about their evidence) were rarely made. Of the 70 per cent of jurors who said that they had been told of this right, only 17 per cent said that they had the courage to ask a question. Moreover, 59 per cent of judges believed that jurors should not be told that they are entitled to ask questions, compared to 29 per cent of judges who thought that jurors should be so informed.[997]

5.233 Jurors feel far more confident about asking the judge questions after they have retired to consider their verdict. The Crown Court Study found that where jurors wanted further directions, questions were asked in 73 per cent of the cases.[998] In the other cases, the reasons given by jurors for not asking questions varied.[999] In 33 per cent of cases the answer was discovered after further discussion, in 30 per cent of cases the jury did not know that they could ask questions and in 10 per cent of cases the jury felt that the question was not sufficiently important to justify asking.

Note Taking by Jurors

5.234 Jurors are provided with pens and paper so that they can take notes, and many do so. The 1993 Crown Court Study found that according to the barristers surveyed in about two-thirds of cases one or more jurors had taken

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996 Runciman *Report*, p. 134.

997 Zander & Henderson, op. cit., p. 174.

998 ibid., p. 214.

999 ibid.

notes.[1000] About two-fifths of jurors surveyed said that they took notes. The attitude of judges to this practice was largely favourable; 46 per cent of those surveyed believed that jurors should be encouraged to take notes, compared to 23 per cent of judges who felt that note taking should be discouraged.[1001] The main concern which has been voiced is that note taking by jurors may cause them to be less attentive to the proceedings, especially in relation to their ability to properly observe the demeanour of witnesses. This problem would be heightened in the case of jurors who are not used to taking notes.[1002]

Technological Aids to Juror Comprehension

5.235 The Royal Commission on Criminal Justice supported the use of technological aids to juries where they would be of assistance, such as in complex cases or where experts are giving evidence.[1003] Technological aids include coloured charts or tables, photographs and documents displayed on screens and monitors located around the courtroom. This sort of technology was used to great effect in the Maxwell trial.[1004] In complex cases, jurors usually receive individual sets of the major documents and flow charts, which describe the issues which need to be addressed.[1005]

5.236 The Roskill Committee acknowledged the importance of using visual aids, even if they are used only to ensure jurors are looking at the correct document during the trial. The Committee favoured the use of the overhead projector instead of slide projectors and computers, because the overhead projector is cheap, flexible and easy to use.[1006]

5.237 However, there has been considerable technological advancement since 1986. Information in complex serious fraud cases can be placed on CD-Roms and laser discs which reduce the quantity of paper which needs to be handled, and enables documentary and photographic evidence, graphics and videos to be viewed on screen so that jurors can be more effectively informed

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1000 ibid., p. 173.

1001 ibid.

1002 Thomas, D.A., Institute of Criminology, University of Cambridge, transcript of meeting with VLRC delegation, p. 24.

1003 Runciman, *Report*, recommendations 229, 297, pp. 208, 214.

1004 Gibb, loc. cit.

1005 Thomas, op. cit., p. 23; Spencer, J., Reader in Common Law, Selwyn College, Cambridge, transcript of meeting with the VLRC delegation, Cambridge, 5 Jul. 1995, p. 8.

1006 Roskill, *Report*, pp. 161–162.

of relevant issues.[1007] According to an English Judge who recently presided over a complex fraud trial, by using computerised evidence: [1008]

> the time savings were significant. It meant that the jury and others were not regularly spending time looking for numerous documents in bundles. The trial lasted four months but I estimate the time saved because of the technology was some 25 to 30 per cent.

Provision of Transcripts of Testimony to Jurors

5.238 In England transcripts of the evidence are not made available to the jury. In most cases the evidence is recorded, but transcripts are only produced if there is an appeal.[1009] Consequently, instead of transcripts, jurors may be given a summary of the main evidence in the case which has been agreed upon by the prosecution and the defence.[1010]

5.239 In the Maxwell trial, although the judge, counsel, the jury and the public gallery were all provided with 'the most advanced computer equipment used in a British criminal trial, capable of delivering simultaneous on screen text of [the evidence given in] the hearing',[1011] no written transcript was provided to the jury. This was because 'it has been thought undesirable to give the jury in permanent form one part of the total evidence lest they give it disproportionate weight or attention'.[1012] It is also a generally held view that too much attention to the written transcript may cause the jury not to recall the 'manner and demeanour of the witness or the inflection of his or her speech'.[1013]

5.240 After retirement the jury may wish to be reminded of a witness's oral evidence. Where this occurs the conventional practice is for the judge to read out to them the relevant part of his or her note of the witness's testimony. The

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1007 Hill, M., QC, transcript of meeting between senior members of the English Criminal Bar and VLRC delegation, London, 4 Jul. 1995, p. 6.

1008 Gibb, F., 'Computerised evidence speeds course of justice', *The Times* 22 Mar. 1995 quoting Judge May, who presided over the mortgage fraud trial of Roy Wharton.

1009 Thomas, D.A., Institute of Criminology, transcript of meeting with VLRC delegation, p. 25; Roskill, *Report*, para. 9.8

1010 Dickson, C.W., Senior Assistant Director, SFO, transcript of meeting with VLRC delegation, London, 3 Jul. 1995, p. 9.

1011 Horsnell, M. & Ashworth, J., 'Maxwell jury told of "double take" from pension cash', *The Times*, 1 Jun. 1995, p. 6.

1012 *Rawlings & Broadbent v. R.* [1995] 2 Cr. App. R. 222, 225 per Lord Taylor CJ. See also, *Welstead v. R.* [1996] 1 Cr. App. R. 59, 68.

1013 *Rawlings & Broadbent v. R.* [1995] 2 Cr. App. R. 222, 225

practice developed when there was no other record of the evidence apart from the notes taken by the judge and counsel. Although shorthand writers are often available to take a verbatim note of the evidence and produce a typed transcript, the practice has remained the same. 'The judge assists the jury from his notes.'[1014]

The Judge's Charge to the Jury

5.241 In the United Kingdom, after the conclusion of the evidence in a trial and counsel's addresses, the judge instructs the jury on the factual issues in the case and the legal principles it is to apply. The judge's summary of the evidence is not binding on the jury, they are entitled to form their own views, however, his or her instructions regarding the law are binding. Before instructing the jury, the judge may obtain the assistance of counsel in relation to any difficult factual or legal point that has arisen in the trial. After the jury retires the judge will usually ask counsel if there are any exceptions (that is, disagreements) with the charge. Any matters raised will be argued by counsel and ruled upon by the judge. If an error has been made, the jury can be recalled to the jury box and re-directed as required.

5.242 Concerns have been raised regarding the ability of jurors to understand the judge's charge where complex factual issues or legal principles are involved. According to one commentator, the judge's charge tends to consist of language which is 'rich in abstract words' and of 'sentences which are too long'.[1015] As concluded by one academic lawyer: 'merely to entertain doubt as to whether juries can follow instructions which defy reason seems unduly cautious. It is almost certain they cannot'.[1016]

5.243 Concern was expressed to the VLRC delegation regarding the ability of juries to comprehend judges' charges, especially given the need of judges to adhere to technical formulations of the law in order to avoid making appealable errors. The delegation was told that training of judges was needed in this area:[1017]

1014 ibid., pp. 224–225.

1015 Griew, E., 'Summing up the law' [1989] *Crim. L. R.* 768, p. 773.

1016 Cooper, S., 'How to confuse the jury' (1990) 54 *J. Crim. L.* 125. Cited by Bouck, J. in *Criminal Law Reform, Helping the Jury Understand the Law: Pattern Jury Instructions in Criminal Jury Trials*, 1991, p. 46.

1017 Jeans, L., Senior Crown Prosecutor, CPS, transcript of meeting between VLRC delegation and officers of the CPS, London, 3 Jul. 1995, p. 15.

> Judges should, I think, be trained here. A judge when summing up to a jury, in my view, should be attempting to clarify and make simple to a jury the issues, the factual matters which the jury should be deciding. But judges aren't doing that. They're thinking right, it's been a four month trial, there has been expenses, I'm summing this up for the jury, the defence will be getting a transcript of my summary and if I make a mistake in law, they're going to appeal. If they appeal and they are successful it will be a black mark on my career.

An academic lawyer who met with the VLRC delegation made a similar point when he said that 'the great mistake that has been made in this country is [that there is] too much appellant prescription of what the judge must say [which] makes summing up something of a nightmare'.[1018]

5.244 Despite these concerns, the Crown Court Study found that 68 per cent of judges thought that it was easy for the jury to understand the judge's summing-up on the facts, while 29 per cent thought that it was fairly easy.[1019] Only 4 per cent of judges thought that it was difficult or fairly difficult. However, 48 per cent of jurors said that 'managing without the judge's summing-up on the facts would have made no difference'.[1020] Jurors were confident about their ability to understand the law as summarised by the judge; only 10 per cent had difficulties understanding the judge's summing-up on the law.[1021] Judges were also confident that jurors could understand their summing-up on the law; 85 per cent thought that it was easy or fairly easy for jurors to understand this aspect of the charge.

5.245 In an effort to promote more uniform and simpler instructions to juries, specimen directions were published by the Judicial Studies Board in 1991.[1022] A Canadian commentator has observed that the English specimen directions are fairly general in nature, in that they 'do not descend into the minute academic detail of the criminal law that is demanded of Canadian trial judges'.[1023]

5.246 English judges have been warned against giving too much assistance to juries by way of further explanations of the meaning of legal phrases such as

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1018 Thomas, D.A., Institute of Criminology, Cambridge University, transcript of meeting with VLRC delegation, Cambridge, 5 Jul. 1995, p. 20.

1019 Zander & Henderson, op. cit., p. 176.

1020 ibid.

1021 ibid., p. 179.

1022 English Criminal Committee, Judicial Studies Board, *Specimen Directions*, 1991.

1023 Bouck, op. cit., p. 44.

'beyond reasonable doubt'. In 1976 Lawton LJ stated:[1024]

> judges would be well advised not to attempt any gloss upon what is meant by 'sure' or what is meant by 'reasonable doubt' ... [Such comments] are more likely to confuse than help... if judges stopped trying to define that which is almost impossible to define, there would be fewer appeals.

Comments such as these have been criticised on the basis that 'a legal concept so central to every criminal trial has been considered by the English judiciary to be so fragile that any attempt to explain it for the benefit of lay people risks confusion and error'.[1025]

5.247 In the Maxwell trial, Phillips J provided the jury with a summary of his three and a half day summing-up, however some lawyers were critical of his Honour's refusal to allow the jury to have a daily transcript of the proceedings.[1026]

5.248 In complex cases the provision to the jury by the trial judge of written directions in law, or written questions for them to consider, has been approved recently by the Court of Appeal.[1027] Where the judge considers such directions or questions necessary, they should be submitted to counsel for their consideration in good time before they begin their closing addresses, to enable counsel to invite the judge to correct any errors and so they may fashion their closing speeches with the proposed directions in mind.[1028] According to the Court of Criminal Appeal, the trial judge should regard the use of any written directions as being an integral part of the summing-up, referring the jury to the written directions, one by one, as the points are dealt with orally.[1029]

1024 Pannick, D., QC, 'Jurors who are in reasonable doubt' *The Times*, 17 Jan. 1995.

1025 ibid.

1026 Gibb, loc. cit.

1027 *Kellard, Dwyer & Wright v. R.* [1995] 2 Cr. App. R. 134, 150.

1028 *McKechnie, Gibbons & Dixon v. R.* (1992) 94 Cr. App. R. 51.

1029 ibid.

Other Issues

General Conditions of Jury Service

5.249 The Royal Commission on Criminal Justice recommended that in long cases judges should be able to 'stagger the court's normal hours so that jurors have some time off during normal working hours'.[1030] It was thought that this would enable jurors to deal with their business affairs. The Royal Commission saw no problem with the court sitting into the evenings, after giving the jurors a long break at midday. It suggested that the jurors' views on this matter could be sought. As was earlier noted, in the Maxwell trial Phillips J managed the trial so that jurors were brought in for four hours in the morning and during the rest of the day they could attend to their own business and other activities.[1031]

5.250 The Royal Commission on Criminal Justice also observed that the conditions of jury service were generally unsatisfactory. A number of areas where improvement was needed were identified. The Royal Commission commented that jury boxes required greater leg room, refreshment facilities need to be improved, smoking and non-smoking areas should be designated, parking should be improved and facilities should be made available for disabled people. The Royal Commission suggested that these improvements could be incorporated into the design of new court buildings, and that existing court buildings could be progressively improved over time.[1032] It also recommended that greater efforts should made to protect the identity of individual jurors; for example, by not positioning jury boxes opposite the public gallery, and by providing separate eating and rest room areas for jurors.[1033]

5.251 The Crown Court Study offered jurors the opportunity to suggest changes to the conditions of jury service. In response to a question which listed possible improvements to the court facilities and asked: 'How important would they be for you personally, to make jury service more pleasant?', 75 per cent of those surveyed wanted better refreshment facilities, 76 per cent sought separate smoking facilities, 73 per cent wanted a drinks

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1030 Runciman, *Report*, p. 134.

1031 See above at para. 5.78.

1032 Runciman, *Report*, p. 143.

1033 ibid.

vending machine and 72 per cent believed magazines and newspapers should be provided in the waiting rooms.[1034]

5.252 Following an amendment passed in 1994, the court can now permit a jury to separate at any time before or after it has retired to deliberate.[1035] The discretion not to sequestrate the jury is particularly useful in long trials where the jurors are unable to reach a verdict in the one day.

Debriefing and Counselling of Jurors

5.253 Jurors in England and Wales are not provided with formal debriefing or counselling. The results of the Crown Court Study did not indicate that there was a need for these services, however, its author, Professor Zander, acknowledged that jurors could become very upset in cases where the evidence was especially gruesome and distressing. He told the VLRC delegation that 'it would be nice if it were there but the trouble is to make it available in ninety courts, it would be impossible'.[1036] In practice, if a juror requires psychological counselling as a result of jury service, an approach is generally made by the juror (or by someone on his or her behalf) to court officials who make the appropriate arrangements. The cost would usually be borne by the Government through the National Health Service.[1037]

Majority Verdicts

5.254 The requirement that a jury's verdict must be unanimous was removed in 1967 to allow for majority verdicts. Majority verdicts can be taken in proceedings before the Crown Court and the High Court, provided that the jury has spent a reasonable time deliberating. What is a reasonable time will depend on the complexity and nature of the case, however, at least two hours must have been spent by the jury in deliberation. Where there is a guilty verdict, a majority verdict will only be accepted if the foreman states the number of jurors who agreed to and dissented from the verdict. The agreement of ten jurors will be accepted as a verdict where there are not less

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1034 Zander & Henderson, op. cit., pp. 228–229.

1035 Criminal Justice and Public Order Act 1994, s. 43 which amended s.13 of the Juries Act 1974.

1036 Professor Zander, Meeting with the Victorian Law Reform Committee, London School of Economics and Political Science, 4 Jul. 1995, p. 17.

1037 Owen, J., Chief Clerk, Central Criminal Court, transcript of meeting with VLRC delegation, London, 4 Jul. 1995, pp. 25–26.

than eleven jurors, and the agreement of nine is required where there are ten jurors.[1038] A trial cannot continue where there are less than ten jurors.

5.255 The decision to introduce majority verdicts was motivated by a desire to reduce the opportunities for criminal interference with juries. The Secretary of State for the Home Office introduced the Bill by saying that the institution of majority verdicts would mean that one or two jurors could not, having been persuaded by bribery or intimidation, 'hold out against the evidence'.[1039] This approach raised protests in the Parliament. Lord Denning argued that there was no basis for the belief that any mischief, as described by the Secretary of State, was occurring.[1040] Hung juries (that is, those where the jurors are unable to agree on a verdict) were then quite rare. There was a hung jury in only 3½ to 4 per cent of cases in London and only 1 per cent in re-trials.[1041]

5.256 The use of majority verdicts has been criticised on the ground that they detract from the principle that an accused should be convicted only if guilt is proved beyond reasonable doubt.[1042] In 1966, Lord Devlin argued against the introduction of majority verdicts in criminal cases.[1043]

> Whatever its origin, unanimity is now so ingrained in our procedure that its eradication would seem to take from the verdict a virtue that in the criminal law it needs. The criminal verdict is based on the absence of reasonable doubt. If there was a dissenting minority of a third or a quarter, that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict.

5.257 Nonetheless, Lord Devlin did acknowledge that where there was a majority of eleven, public confidence in the verdict would probably not be reduced. The need to ensure the retention of public confidence in the administration of justice has found no better expression than in the famous words of Lord Hewart CJ who said that it is 'of fundamental importance that

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1038 Juries Act 1974 (UK), s. 17.

1039 Cited in Hans, V.P. & Vidmar, N., *Judging the Jury* , Plenum Press, New York, 1986, p. 172.

1040 Findlay, M. & Duff, P., *The Jury Under Attack*, Butterworths, Sydney, 1988, p. 45.

1041 ibid., p. 213.

1042 Freeman, M.D.A., The Jury on Trial *Current Legal Problems*, 1981, pp. 65–111. Cited in Findlay, & Duff, loc. cit.

1043 Devlin, P., *Trial by Jury*, Stevens & Sons Limited, London, 1966, pp. 56–57.

justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[1044]

5.258 In 1994 of the 11,737 cases that resulted in a conviction following a jury trial majority verdicts with one dissentient were returned in 7 per cent of cases and there were two dissenters in 12 per cent of majority verdict cases.[1045] According to the Crown Court Study, the likelihood of a majority verdict increases with the length of the trial. Jurors surveyed said that majority verdicts occurred in 2 per cent of cases where the trial went for a day compared to 23 per cent of cases lasting three to five days.[1046]

Reserve Jurors

5.259 There is no provision in England and Wales for empanelling alternate or reserve jurors. According to the Roskill Committee (1986) the 'problem of jurors dying or falling ill during long fraud trials is not sufficiently serious to warrant provisions being made' to introduce such a system.[1047]

Judicial Education

5.260 In 1979 the Judicial Studies Board was established to conduct programs for Crown Court judges which address criminal issues, particularly questions relating to sentencing. In 1985 the Board extended its training programs to include civil and family law matters. Among the Board's objectives are: [1048]

(a) to review standards and objectives for judicial studies;

(b) to improve study programs and monitor their effectiveness;

(c) to identify new areas for training in judicial administration; and

(d) to look at new methods of training and new equipment.

5.261 In England there is general acceptance of the need for judicial education at all levels of seniority within the judiciary.[1049] Training in relation

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1044 *R* v. *Sussex Justices, ex. p. McCarthy* [1924] 1 K. B. 256, 259.

1045 United Kingdom, Lord Chancellor's Department, *Judicial Statistics: England and Wales for the Year 1994*, July 1995, Cm. 2891, 68, Table 610.

1046 Zander & Henderson, op. cit., p. 162.

1047 Roskill *Report*, p. 132, recommendation 81.

1048 Sallmann, P., 'Comparative Judicial Education in a Nutshell: A Cursory Exposition' (1993) 2 *J. J. A.*, pp. 248–249.

1049 Thomas, D.A., Institute of Criminology, Cambridge University, transcript of meeting with VLRC delegation, Cambridge, 5 Jul. 1995, p. 16.

to managing long trials is becoming increasingly important because of the greater role played by judges in trial management. According to a former head of the Metropolitan Police Fraud Squad, judges who hear long and complex fraud cases need specialist training 'as it is a managerial problem as much as a legal problem if a trial is going to last six, nine or twelve months'.[1050] He recommended the introduction of a special panel of judges who were considered sufficiently qualified and experienced to preside over complex jury trials.

5.262 The Roskill Committee (1986) also stressed the importance of education programs for judges on issues relating to managing long and complex fraud cases. The Committee noted that in 1985 a number of High Court and circuit judges attended courses on information technology and accounting. The Committee recommended that further programs should be arranged for judges to attend.[1051]

1050 McStravick, T., reported in Hetherington, T., 'Fraud Chief calls for panel of judges' *The Times* 26 Jan. 1993.

1051 Roskill, *Report* , p. 168.

Focus Groups and Shadow Juries

5.263 It was earlier noted that the prohibition on research into jury deliberations in England and Wales makes it is difficult to draw any firm conclusions concerning the manner in which juries reach their verdicts.[1052] At the request of the Home Office, Dr Sally Lloyd-Bostock recently attempted to reproduce the conditions under which real juries operate in order to examine one aspect of their deliberative processes.[1053] The study, which is ongoing, is designed to ascertain whether the provision to a jury prior to verdict of information concerning an accused person's criminal history is likely to influence the verdict. A similar study conducted in 1973 by Dr Sealy and Professor Cornish found that where the conviction was for a similar offence to that charged the experimental jury was more likely to convict, whereas, if the conviction was dissimilar the experimental jury was more likely to acquit.[1054]

5.264 Studies into jury deliberations and shadow juries have been undertaken also by Sarah McCabe and Robert Purves.[1055] They observed that the shadow jury tended to leave the court room with a high level of agreement about their ultimate verdict, although:[1056]

> [They] showed considerable determination in looking for evidence upon which convictions could be based; when it seemed inadequate, they were not prepared to allow their own "hunch" that the defendant was involved in some way in the offence that was charged to stand in the way of an acquittal.

The study also found that the extent of the influence exerted by the foreman or forewoman on the other jurors depended upon his or her personality and ability, rather than the person's status as foreman or forewoman.[1057] However, in considering the usefulness of these findings it should be borne in mind that it is questionable whether studies of shadow juries accurately

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1052 See above paras. 5.129.

1053 Lloyd-Bostock, S., Director, Centre for Socio-Legal Studies, Wolfson College, Oxford, transcript of meeting with VLRC delegation, Oxford, 7 Jul. 1995. Lam, R., Reader in Law, University of Warwick, transcript of meeting between VLRC delegation and staff of Law School, University of Warwick , Coventry, 6 Jul. 1995, p. 1.

1054 See the discussion of the study in McCabe, S., 'Is jury research dead?'. In Findlay & Duff, op. cit, p. 33.

1055 McCabe, S. & Purves, R., *The Jury at Work – A study of a series of jury trials in which the defendant was acquitted*, Oxford University Penal Research Unit, Occasional Paper No. Four, Basil Blackwell, Oxford, 1972. McCabe, S. & Purves, R., *The Shadow Jury at Work – An account of a series of deliberations and verdicts where 'shadow' juries were present during actual trials*, Oxford University Penal Research Unit, Basil Blackwell, Oxford, 1974.

1056 McCabe & Purves (1974), op. cit., pp. 60–61.

1057 ibid., p. 61.

reproduce the performance of real juries.[1058]

[1058] Mr Leng, University of Warwick, Coventry, Meeting with the Victorian Law Reform Committee, 6 July 1995, p. 9.

6. UNITED KINGDOM: SCOTLAND

The Scottish Legal System

6.1 When the Parliaments of England and Scotland were united in 1707 the Treaty of Union expressly preserved the separate identity of the Scottish legal system.[1059] This system differs in many major respects from that in England and Wales. It has a completely different history and course of development which includes the adoption of elements from other European legal systems based on Roman law; the system 'was profoundly influential in the [sixteenth century] ... and its force is not yet exhausted'.[1060] The result now is that Scotland has its own body of statute and judge made laws, a separate system of courts, its own judiciary and legal professions with distinct training and qualifications, and different procedures and terminology. 'In many respects Scots law stands in a position intermediate between a civil law and a common law system'.[1061] Despite these differences, Scotland retains trial by jury for the more serious criminal cases and in some civil actions.

The Legal Framework

The Hierarchy of Courts

6.2 In Scotland there are four tiers of courts which deal with criminal offences. In ascending order they are as follows:

(1) The District Court hears minor summary offences. The maximum period of imprisonment which may be given by this Court is 60 days. These courts are presided over by a lay justice of the peace or, as is the case in Glasgow, by a stipendiary

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1059 Act of Union 1707, Arts. XVIII, XIX; United Kingdom, The Scottish Office, *Scotland in the Union – a Partnership for Good*, HMSO, Edinburgh, 1993, Cm 2225, p. 16.

1060 Walker, D.M., *The Scottish Legal System*, 5th edn. revsd., Green, W. & Sons, Edinburgh, 1981, p. 160.

1061 Walker, D.M., *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980, p. 1108.

magistrate. Where the offence is tried by a stipendiary magistrate, he or she also has the summary criminal jurisdiction and powers of a sheriff.[1062]

(2) The Sheriff Court, sitting with a jury, can try moderately serious cases on indictment; that is, cases other than murder, rape or those where a statute expressly or implied excludes it hearing the offence.[1063] Where a solemn prosecution is carried out the Sheriff may give a maximum sentence of three years imprisonment. The Sheriff can remit the case to the High Court when his/her sentencing power is perceived to be inadequate.[1064] Lesser cases may be tried summarily by a Sheriff or Sheriff Principal sitting alone, including cases of robbery, assault with intent to rob, and uttering a forged document. The maximum sentence which can be given where summary prosecution is undertaken is six months imprisonment.[1065]

(3) The High Court of Justiciary also hears cases on indictment. The High Court has exclusive jurisdiction to try serious offences such as treason, murder and rape.

(4) The High Court of Justiciary sitting as the Court of Criminal Appeal consists of three or more judges, and hears appeals against conviction or sentence where the trial was on indictment. In criminal cases no appeal can be made to the House of Lords.

6.3 Within the civil jurisdiction in Scotland there are four tiers of courts, which in ascending order are as follows:

(1) The Sheriff Court, which can hear most civil actions and is itself an appeal court for cases relating to liquor, gaming or taxi licensing. The Sheriff Court has jurisdiction to hear actions for debt and damages where no pecuniary limit is set. A party can have the case remitted to the Court of Session if the action relates to either a heritable right or title or division of common property, where the amount is greater than £1,500 or £50 per

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1062 Criminal Procedure (Scotland) Act 1995, s. 7.

1063 Criminal Procedure (Scotland) Act 1995, s. 3.

1064 Criminal Procedure (Scotland) Act 1995, s. 195.

1065 Criminal Procedure (Scotland) Act 1995, s. 5.

annum, or the action deals with succession to moveables valued at over £1,000. Appeals can be made from the Sheriff Court directly to the Court of Session or to the Sheriff Principal and then to the Court of Session. Since the enactment of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 the Sheriff Court tries civil matters without a jury.

(2) The Outer House of the Court of Sessions tries civil cases, usually this is without a jury.

(3) The Inner House of the Court of Sessions hears appeals from both the Outer House and the Sheriff Court.

(4) The House of Lords hears appeals in civil matters from the Inner House of the Court of Sessions. In reaching a decision on these matters the laws of Scotland are applied.

The Incidence of Trial by Jury

Criminal Procedure

6.4 Pursuant to the Criminal Procedure (Scotland) Act 1975 there are two types of criminal jurisdiction exercised by the courts: the solemn and the summary jurisdiction. More serious offences are tried by indictment before a judge or sheriff sitting with a jury. The jury consists of 15 jurors and its verdict may be by bare majority.

6.5 Summary jurisdiction in relation to less serious offences is exercised by a sheriff or lay justice of the peace (or in Glasgow a magistrate) sitting alone. The Sheriff Court can try all offences except for those which are reserved to the High Court of Justiciary. For a statutory offence to be able to be dealt with by a lay justice of the peace the legislation must give him or her jurisdiction, either expressly or by implication.

6.6 The District Court tries minor summary offences, for example, breaches of the peace and certain petty charges under statute.

6.7 The mode of trial is determined by the Lord Advocate, who is the head of the public prosecution service. Where the offence is seen as being of sufficient seriousness the solemn procedure will be used, otherwise the offence will be prosecuted summarily.

6.8 In Scotland a judicial examination is held. The accused is brought before the sheriff for examination on the charge(s). The accused can make a declaration relating to the charge(s). Where no declaration is made, he or she may be committed for further examination or until liberated in due course of law.[1066] During the judicial examination, if the accused has given a confession to the constable, the prosecutor is able to question the accused to determine whether his/her account discloses a defence.

Civil Procedure

6.9 In the Outer House of the Court of Sessions trial is usually without a jury. However, where a statute provides for jury trial, as in cases involving personal injury or death, the jury will consist of twelve jurors. The jury's verdict may be by simple majority. A general verdict is usually given, although a special verdict, which gives specific answers to questions formulated by the trial judge, may be given. Where no verdict is reached after three hours of deliberation a judge may order that the jury be discharged and that there be a new trial.

Representativeness of the Jury System

General Concepts of Representativeness

6.10 There are no representative requirements which govern jury selection, other than that the jury be chosen at random from the electoral register.

6.11 The Scottish Office in its *Report on Improving the Delivery of Justice in Scotland: Juries and Verdicts* acknowledged the importance of obtaining a jury which is fully representative of the society as a whole:[1067]

> There is a need to ensure that the system gives due weight to the interests of the citizens who are being asked to serve as jurors, and that the courts do all they can to obtain juries which are both willing to serve and fully representative of society as a whole.

6.12 The need to increase the representativeness of the jury by improving the selection procedure was repeated in the Office's paper entitled *Firm and Fair,* which was written in 1994. The Office recommended that it be made

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1066 Criminal Procedure (Scotland) Act 1995, ss. 35–39.

1067 United Kingdom, The Scottish Office, *Report on Improving the Delivery of Justice in Scotland – Juries and Verdicts*, 1993 (hereafter '*Juries and Verdicts*'), p. 7.

more difficult to avoid jury service and that people be encouraged to serve by making it less inconvenient and less time consuming.[1068]

Community Attitudes to Jury Service

6.13 According to the Scottish Office, 'most citizens accept the importance of jury service and the justification for giving up some of their time to perform that duty'.[1069]

Jury District Formation

6.14 The six jury districts in Scotland are drawn up according to the boundaries of each sheriffdom. A List of Assize is then compiled for each jury district using the electoral roll.

6.15 Jurors for the Sheriff Court are selected from the List of Assize which contains persons who are draw from the city and surrounding areas. Jurors for trials in the High Court of Justiciary are summoned from the areas specified in the directions of the Lord Justice-General.[1070] Where the High Court is sitting in a town in which it does not normally sit, the jury is summoned from the general jury roll of the sheriff court district in the relevant town.[1071]

Juror Eligibility Criteria

6.16 The basic qualification for jury service is that a person be aged between 18 and 65 years of age, and ordinarily a resident in the United Kingdom.[1072]

6.17 Additionally, in order to qualify for jury service a person must be on the electoral roll.[1073] The Scottish Office has expressed concern about the extent to which the electoral roll may, at times during the year, be out of date or incomplete. The result of it being inaccurate is that around seven percent of

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1068 United Kingdom, The Scottish Office Home and Health Department, *Firm and Fair – Improving the Delivery of Justice in Scotland*, Cm 2600, 1994 (hereafter '*Firm and Fair*'), p. 15.

1069 *Juries and Verdicts*, p. 7.

1070 Criminal Procedure (Scotland) Act 1995, s. 84(2).

1071 Criminal Procedure (Scotland) Act 1995, s. 84(3).

1072 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1.

1073 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1.

persons who qualify for jury service are not listed.[1074] Certain groups of people are more likely than others to be unregistered: young people, those who are renting accommodation and new citizens.[1075] Accordingly, the Scottish Office has endorsed the recommendation of the Royal Commission on Criminal Justice which urged electoral registration officers to ensure that the rolls are comprehensive.[1076]

6.18 The desirability of the other basic eligibility requirements was not considered by the Scottish Office, which asserted that 'there appears to be no case for a general review of eligibility.'[1077]

Disqualification, Ineligibility and Excusal Criteria

Excusal as of Right

6.20 There are six groups of people who are within the category of persons who are excusable as of right. Generally, these groups comprise of: Parliament, European Parliament, the Forces, Medical and similar professions, Ministers of religion and others.[1078] Group A includes: peers and peeresses entitled to receive writs of summons to attend the House of Lords, members and officers of the House of Commons and officers of the House of Lords. Group B comprises of members of the European Parliament. Group C consists of full time serving members of the armed forces. Group D includes the following professionals if they are practising and registered: medical practitioners, dentists, nurses, midwives, pharmaceutical chemists and veterinary practitioners. Group E includes persons in holy orders, regular ministers and vowed members of any religious order living in a monastery, convent or religious community. In Group F are persons who have served or attended for service within the last five years and persons excused from service by the court for a period which has not yet passed.

6.21 The Criminal Justice (Scotland) Act 1995 inserted a Group DD into this list so that members of religious societies or orders whose tenets or beliefs are

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1074 *Juries and Verdicts*, p. 9.

1075 ibid.

1076 United Kingdom, The Royal Commission on Criminal Justice, *Report*, (Viscount Runciman, Chairman), HMSO, London, 1993, Cm 2263, recommendation 213. Referred to in *Juries and Verdicts*, p. 10.

1077 ibid.

1078 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1, Sch. 1, Pt. III.

incompatible with jury service can be excused as of right. This change was made following a recommendation by the United Kingdom Royal Commission on Criminal Justice and general support from those responding to the Scottish Office's 1993 Consultation Paper on Juries and Verdicts. The Faculty of Advocates, however, did not support this change and argued that no practical problem had arisen from this issue.[1079]

Disqualification

6.22 Persons who have been sentenced at any time to a term of five years or more or have been detained during Her Majesty's pleasure or during the pleasure of the Secretary of State or Governor of Northern Ireland are disqualified from jury service.[1080] Persons who have at any time served a sentence of three months or more of imprisonment, detention or youth custody or have been detained in a borstal institution and are not rehabilitated persons (that is, their conviction has not yet been spent for the purposes of the Rehabilitation of Offenders Act 1974)[1081] are also disqualified.

6.23 Furthermore, where jury service is to be for a criminal proceeding, persons on bail in connection to a criminal proceeding are also disqualified.[1082] The decision in 1995 to include persons on bail within the list of disqualified persons was made by the Government after many of the responses to its Consultation Paper, *Juries and Verdicts*, were supportive of this change. The argument in favour of this change was given in the Scottish Office's report entitled *Firm and Fair:*[1083]

> they have been accused of committing an offence and are still subject to criminal proceedings and...this might improperly affect their attitude to the proceedings in which they would be contributing to the verdict.

6.24 However, according to the Faculty of Advocates this was not a sound reason for supporting such a disqualification. They argue that an accused is presumed innocent until proven guilty and that there is no evidence that a person on bail would exert any 'undue influence on the jury process'.[1084] The

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1079 Faculty of Advocates, *Observations by the Faculty of Advocates on Scottish Office Consultation Paper on Jury Verdicts* (hereafter '*Observations*'), p. 2.

1080 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1, Sch., Pt. II.

1081 *Juries and Verdicts*, p. 11.

1082 Criminal Justice (Scotland) Act 1995, s. 7.

1083 *Firm and Fair*, pp. 15–16.

1084 Faculty of Advocates, *Observations*, p. 1.

Scottish Office also raised for discussion a number of additional reasons for not disqualifying persons on bail from jury service. Although this disqualification was recommended by the United Kingdom Royal Commission on Criminal Justice in 1993, there are substantial differences between the criminal justice systems in England and Wales and that in Scotland. First, in contrast to England, bail in Scotland is not widely granted. Secondly, verdicts may be by simply majority in Scotland, which means that there is little opportunity for a person on bail to 'play an improper role in the jury's deliberations'.[1085]

Ineligibility

6.25 There are three categories of persons who are ineligible to serve on juries in Scotland: the judiciary, others concerned with the administration of justice, and the mentally disordered, as defined in section 1 and Schedule 1, Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980. The Act also specifies those persons who are disqualified from serving on a jury, such as those who have been sentenced to imprisonment for five years or more.[1086]

6.26 The Victorian Law Reform Committee during its visit to Scotland in 1995 was informed that there is a strong desire to increase the numbers of people who are placed on the List of Assize to ensure a more even spread of the general population. However, support was also voiced for the existing categories of ineligibility on three grounds. First, the categories of ineligibility can be justified because:[1087]

> in certain circumstances, because of their background these individuals will have certain and better knowledge of the system and understanding of the court process which might put them in a position different from other jurors. And an example would be that they may understand some of the things that happened in the course of the trial, an objection or something like that, they may understand that means that the accused has got previous convictions.

6.27 Secondly, it is important that people involved in the administration of justice be ineligible to serve on a jury, because they may be perceived by the community as being biased, which would in turn lower confidence in the

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1085 *Juries and Verdicts*, p. 11.

1086 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1, Sch.1, Pt.. II.

1087 Dorian, L, QC, Faculty of Advocates, Meeting with the Victorian Law Reform Committee (VLRC) delegation, Edinburgh, 7 Jul. 1995, tape 38, pp. 20–21.

administration of justice.[1088] And thirdly, lawyers need to be ineligible from jury service in order to avoid the situation where the other members ask them to explain things.[1089]

6.28 The three categories of ineligibility include the judiciary, others concerned with the administration of justice and the mentally disordered.[1090] Persons in this first group are: the Lords of Appeal, Senators of the College of Justice, sheriffs, Justices of the Peace, stipendiary magistrates, a tribunal chairman or president or vice chairman/president or registrar or assistant registrar, and a person who within the last 10 years has held such a position.

6.29 Within the second group, other people who are or have been within the last 5 years involved in the administration of justice, are the following persons: advocates, solicitors (whether or not in practice), advocates' clerks, apprentices of solicitors, court staff if their work involves the day-to-day administration of the court, court shorthand writers, Clerks of the Peace and their deputies, Inspectors of Constabulary and their assistants, police constables and their assistants, other constables, police cadets, prison officers etc., prosecutors fiscal and their assistants, messengers in arms and sheriff officers, members of children's panels, reporters/ staff under section 36 of the Social Work (Scotland) Act 1968, directors of social work and those persons assisting them in relation to probation schemes, and members of the Parole Board.

6.30 The third group of ineligibility includes persons who are receiving medical treatment for a mental disorder and are therefore residing in hospital or attending more than one day each week for treatment. Persons are also ineligible if they are in guardianship or are incapable of adequately managing their property and affairs, because of a mental disorder.

Discretionary Excusal

6.31 The clerk of the court is able to excuse a person from jury service where good reason is shown.[1091] At the moment there is no set policy on excusals.[1092]

1088 ibid., p. 21.

1089 Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 38, p. 18.

1090 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1, Sch. 1, Pt.. I.

1091 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1(5).

1092 *Juries and Verdicts*, p. 15

6.32 In 1993 the Scottish Office studied the pattern of excusals from jury service and found that the reasons for excusal were as follows: 23 percent because of work; 21 percent for a medical reason, 19 percent because of holidays, 13 percent because the person had moved away from the area; 13 percent for other reasons; five percent because of family commitments; three percent because the person had already been cited; and two percent because of exams.[1093]

6.33 According to the Regional Sheriff Clerk in Edinburgh, John Anderson, where a trial is expected to last a long time jurors are warned of this on their summons, so that they have the opportunity to request an excusal.[1094] This practice means that juries tend to be under representative of the community particularly in cases where there is a long trial. The Scottish Office also observed that there is a danger that the use of excusals will lead to juries being unrepresentative of the community with the 'retired, the unemployed, manual workers and housewives' being better represented than 'the self-employed, professionals or senior managers'.[1095] Furthermore, it is undesirable for people to assume that it is easy to obtain an excusal. In order to remedy this situation, the Government recommended the statutory discretion to grant an excusal be narrowed so that it is only available in exceptional circumstances, rather than merely on the basis of inconvenience.[1096]

6.34 However, the Scottish Office when considering discretionary excusal emphasised that it is undesirable to insist that jurors serve on the days cited in all cases regardless of the person's circumstances.[1097] The reason for this is that there are circumstances where the cost or disruption to the individual which is caused by jury service could be out of proportion to its value to the community. For example, the person may be self-employed and it may be an important time for their business. Consequently, the sheriff needs a degree of flexibility when deciding whether or not to excuse jurors.

1093 ibid. See Figure 4: Reasons for excusal (whole sample) %.

1094 Anderson, J., Regional Sheriff Clerk, Scottish Courts Service/Administration, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 35, p. 10.

1095 ibid., p. 16.

1096 *Firm and Fair*, pp. 16–17.

1097 ibid.

6.35 This recommendation was not adopted in the Criminal Justice (Scotland) Act 1995, but the clerks power was amended in the following way:[1098]

> Where the clerk of the court has excused a person from jury service in any criminal proceeding he shall, unless he considers there to be exceptional circumstances which make it inappropriate to do so, within one year of the date of that excusal cite that person to attend for jury service in criminal proceedings.

6.36 The court may also excuse a person from jury service.[1099] The judge can remind jurors that they should inform the court immediately, that is, before the evidence is led, of any reason which they feel means that they should not sit on the jury.[1100] A person should not sit on a jury where, for example, he or she knows the accused.

Conscientious Objection to Jury Service

6.37 The clerk of the court has the power to excuse a person from jury service where he or she is satisfied that there is a good reason why that person should be excused.[1101] However, the person will be cited for jury service within one year of excusal, unless there are exceptional reasons.[1102] Excusal as of right is available to practising members of religious societies or orders whose tenets or beliefs are incompatible with jury service.[1103]

Gender Issues Affecting Jury Representativeness

6.38 In Scotland the judge until recently had a discretion to order that a single sex jury be used. This discretion could be exercised following an application by the prosecution or the defence or at the judge's own insistence.[1104] The judge could order an all-male or all-female jury at any stage before the empanelling of the jury. Before an order could be made there needed to be a sufficient number of persons of that gender and no existing application for a jury of the other sex.[1105] The procedure for compiling the list of assize reflected the possibility that a single sex jury would be used.

1098 Criminal Justice (Scotland) Act 1995, s. 7.

1099 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1(6)

1100 *Pullar v. Her Majesty's Advocate* [1993] S.C.C.R. 514.

1101 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s. 1(5).

1102 Criminal Justice (Scotland) Act 1995, s. 7.

1103 Criminal Justice (Scotland) Act 1995, s. 7.

1104 Criminal Procedure (Scotland) Act 1975, s. 100.

1105 Renton & Brown, *Criminal Procedure*, 5th Edition, 1994, p. 106.

Sufficient numbers of each sex were listed in order to permit the empanelling of both types of jury, and men and women were recorded in equal numbers.[1106]

6.39 Where an accused or prosecutor wished to make such an application it had to be made 15 days before the trial date. The judge dealt with the application is his/her chambers and his/her decision was final.

6.40 In those cases where the jury was of a single sex, the names of all prospective jurors who were summoned were placed in a box and the balloting proceeded by drawing out names, with names drawn of the other sex being passed over.[1107]

6.41 Furthermore, the judge could exempt a woman from jury service, after an application from her, 'on account of pregnancy or other feminine condition or ailment' or by reason of the 'nature of the evidence to be given or the issues to be tried'.[1108] These provisions were introduced to prevent women hearing evidence on subjects which were regarded as 'unseemly' for them.[1109] According to Professor J. Murray at the University of Edinburgh these provisions reflected the view that certain types of crime should not be heard by women because they would bring a 'blush to the maidens cheek'.[1110] He regarded this view as being the price that was paid for opening the jury service to women in 1920, which was perhaps earlier than many other jurisdictions. The Jurors (Enrolment of Women) (Scotland) Act 1920 provided for the disqualification and for the manner of enrolling women.

6.42 The above provisions have been repealed by the Criminal Procedure (Scotland) Act 1995, a consolidating Act in relation to certain criminal procedure enactments.[1111] The Act makes no mention of single sex juries or the prospective jurors' gender when describing the manner in which the lists

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1106 Criminal Procedure (Scotland) Act 1975, s. 100.

1107 Criminal Procedure (Scotland) Act 1975, s. 100, Sch. 3 & 7.

1108 Criminal Procedure (Scotland) Act 1975, ss. 10 & 100.

1109 *Juries and Verdicts*, p. 12.

1110 Murray, Prof. J, University of Edinburgh, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 37, pp. 3–4.

1111 *Osborn's Concise Law Dictionary* defines 'Consolidation Acts' to mean 'Acts which sweep up and collect and re-enact in one statute the existing enactments on a certain subject. The Consolidation of Enactments (Procedure) Act 1949 laid down a procedure for consolidation where at the same time incidental corrections and minor improvements ought to be made'. See Rutherford, L. & Bone, S. (Ed), *Osborn's Concise Law Dictionary*, 8th edn., Sweet & Maxwell, London, 1993.

are prepared and how jurors are summoned.[1112] It also states that 'a person shall not be exempted by sex or marriage from the liability to serve as a juror'.[1113] These changes were made following suggestions by the Faculty of Advocates and the Scottish Office Home and Health Department that the provisions should be abolished.[1114] The Scottish Office in 1994 received 'almost unanimous support for the abolition of these provisions'.[1115]

The Conditions of Jury Service and Representativeness

Early Notice and Length of Service

6.43 According to the Scottish Office Home and Health Department, the conditions of jury service could be improved and the inconvenience suffered by prospective jurors reduced if they were allowed greater flexibility in the dates of their service.[1116] This view was also voiced in the Scottish Office's consultation paper which proposed giving prospective jurors sufficient notice of the date of service so that they could organise their affairs:[1117]

> It seems eminently reasonable that as long as people are given sufficient notice of the dates to allow them to make arrangements to cover their other obligations, and the option of an alternative date if for exceptional reasons appropriate arrangements could not be made at the appropriate time, they should in all but exceptional circumstances be required to serve.

6.44 Potential jurors who are not empanelled are usually required to attend the court for three or four days.[1118] If jurors have not been balloted for jury service after a certain time, three days in the Sheriff Court and three to five days in the High Court of Justiciary, they are usually excused from further attendance.

6.45 Jurors in the Edinburgh Sheriff Court are advised that there is a recorded telephone service available. This service provides information the

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1112 Criminal Procedure (Scotland) Act 1995, s. 84 & 85.

1113 Criminal Procedure (Scotland) Act 1995, s. 85(8).

1114 Faculty of Advocates, *Observations*, p. 2; *Firm and Fair*, p. 16.

1115 ibid.

1116 ibid.

1117 *Juries and Verdicts*, p. 16.

1118 Anderson, J., Regional Sheriff Clerk, Scottish Courts Service/Administration, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 34, p. 8.

day before jurors are to attend court on whether they are still required to attend.[1119]

Payments to Persons Summonsed for Jury Service

6.46 Jurors after attendance can apply for payment for travel or subsistence expenses, as well as compensation for loss of earnings or the National Insurance Benefit, whether or not they are selected to serve on a jury.[1120] Where a person has attended for four hours or less on any one day he or she is entitled to receive the actual amount of loss or expenses up to a maximum of £22.40 per day. Attendance for more than four hours entitles a person to the actual amount of his/her loss or £44.80 per day. Where a person has served for more than ten days and the judge so directs he or she is entitled to the actual amount of the loss or expenses up to a maximum of £89.60 for each day after the tenth day.

6.47 Make-up payments are not provided by employers. However, Government employees normally receive paid leave during jury service.

Other Factors

6.48 In order to further improve services for jurors, as well as other court users, a Court Charter has been introduced. The *Statement of Charter Standards* details the standards which are to be expected from the Scottish Court Service. The Charter covers: the standard of accommodation in courthouses and the quality of service to be expected from staff.[1121] For example, jurors are entitled to expect comfortable jury rooms and clear signposting in the courthouse.

Jury Management Issues

Jury Roll Formation and the Summoning Process

6.49 The electoral roll is used to randomly select a list of potential jurors, these persons are sent a Revisal Notice (a notice which asks them about their eligibility). A List of Assize is then compiled and jurors are summoned from this list to attend the court.

1119 Form A, Edinburgh Sheriff Court Jurors.

1120 Form 109, Juror's Allowances, Leaflet.

1121 Scottish Court Service, Statement of Charter Standards, Citizen's Charter.

6.50 Jurors are selected from the Lists of Potential Jurors which are compiled by the Sheriff Principal. Under the Criminal Procedure (Scotland) Act 1975 one list was kept for men and another for women, the lists contained the names, addresses and occupations, and dates of birth. The order in which the names on the lists were recorded was based on the order in which the potential jurors returned the notice, with those ineligible etc. being excluded from the list.[1122] An equal number of men and women were included on the list of assize.[1123]

6.51 The jury roll formation and summoning processes changed in 1995. The Criminal Justice (Scotland) Act 1995 now provides that prospective jurors' occupations no longer be included on the list of potential jurors. Secondly, the provisions of the Criminal Procedure (Scotland) Act 1995, which deals with the process whereby the jury list is prepared and jurors are cited, does not make reference to a separate list for men and women.[1124] Section 84 (7) of the Act provides that 'only the lists returned in accordance with this section by the sheriffs principal to the clerks of court shall be used for the trials for which they are required'.

6.52 People on the List of Potential Jurors are sent a Revisal Notice. From the information which is returned persons who are dead or no longer qualified for jury service are passed over, with the date and reason being entered on the list.[1125] A List of Assize (which includes the names and addresses of prospective jurors) is then compiled and used to summon prospective jurors to attend the court.

6.53 Under the Criminal Procedure (Scotland) Act 1995 the Sheriff Principal can summon the number of jurors which he or she thinks fit, or the number which the Lord Justice-Clerk or any Lord Commissioner of the Justiciary direct.[1126] In the past, the Sheriff Principal was required to summon 45 jurors, unless otherwise directed.[1127] It was suggested by the Scottish Office Home and Health Department that this requirement should be abolished. The number is no longer appropriate as 'trials are normally grouped in sittings,

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1122 Criminal Procedure (Scotland) Act 1975, s. 90.

1123 Criminal Procedure (Scotland) Act 1975, s. 100.

1124 Criminal Procedure (Scotland) Act 1995, ss. 84 & 85.

1125 Criminal Procedure (Scotland) Act 1995, s. 84.

1126 Criminal Procedure (Scotland) Act 1995, s. 84.

1127 Criminal Procedure (Scotland) Act 1975, s. 85.

and clerks of court have to take into account a range of different factors which may vary from court to court.[1128] The Faculty of Advocates did not accept this argument. They asserted that it is essential to have a fixed minimum number of jurors who are to be summoned to ensure that there are enough jurors for balloting purposes.[1129]

6.54 Due to the large numbers of people who did not respond to the Revisal Notice in 1993 (23 percent according to a Scottish Office's study) it was suggested that a specific offence of failing to return the notice be introduced.[1130] This recommendation was adopted in the Criminal Justice (Scotland) Act 1995, which provides that it is an offence to fail to comply with a request for information by the Sheriff Principal.

6.55 Before this specific offence was created there was a general obligation to respond to a request for information by the court, and potential jurors were advised in the notice that they were 'required by Law to provide the Sheriff Principal with the information requested in sections 1–4 of the Schedule below.' This information related to the name, address, date of birth and occupation of prospective juror. They were also informed by the notice that it is an offence to serve on a jury knowing that they are not qualified or are ineligible or disqualified.

6.56 The Scottish Office conducted a study into the jury selection process in the Sheriff and High Courts in Glasgow and Edinburgh between February and August 1993. It found that:[1131]

> In summary, only 68% of those sent Revisal Notices were contacted; 27% were then excluded because of ineligibility or because they had a right to be excused; 10 % were excused by the clerk of court; 1% failed to turn up to court and 1% were objected to by the defence or prosecution. At the end of the process only 30% of those approached were available and eligible for jury service, and 8% actually served.

6.57 These findings were regarded as being disturbing by the Scottish Office, because they meant not only that the jury pool was reduced so that juries would be less representative, but also that the selection process may inconvenience large numbers of people unnecessarily.[1132]

1128 *Firm and Fair*, p. 16.

1129 Faculty of Advocates, *Observations*, p. 2.

1130 *Juries and Verdicts*, p. 10; *Firm and Fair*, p. 15.

1131 Scottish Office, op. cit., p. 8.

1132 ibid., p. 9.

6.58 The Schedule to the Notice to Potential Jurors asks potential jurors to give basic information such as: their full name, place of residence, date of birth, address, holiday or business dates and a daytime telephone number. The notice also asks potential jurors to indicate whether they are within any of the categories of persons not qualified for jury service, ineligible, disqualified or excused as of right.

The Jury Selection Process

The Balloting Process

6.59 The names of the potential jurors are written on small pieces of paper, the clerk of the court calls them out to make sure that potential jurors are present and places the folded pieces of paper into a glass bowl. The clerk then draws out each of the names in turn and calls out the corresponding number. The parties have a list of potential jurors, the list includes names and addresses. After each name is called out, and as the person walks towards the jury box, a challenge for cause or a joint application from the parties for that person to be excused may be made.

Peremptory Challenges

6.60 Before July 1995 three peremptory challenges were available to each of the accused persons and the prosecutor.[1133] Under the Criminal Justice (Scotland) Act 1995 peremptory challenges were abolished and persons are excused without a reason being given only after a joint application from the parties.[1134] The accused and the prosecution are able to challenge jurors for cause.[1135]

6.61 According to a 1993 study by the Scottish Office, peremptory challenges were used to remove three percent of people balloted for service.[1136] The decision to abolish peremptory challenges was based on the recommendation of the Scottish Office's paper entitled *Firm and Fair*. The Office saw these challenges as being unnecessary and open to abuse by the defence counsel.[1137] It was asserted that the challenges were being used to

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1133 Criminal Procedure (Scotland) Act 1975, s. 130(1).

1134 Criminal Justice (Scotland) Act 1995, s. 8.

1135 Criminal Procedure (Scotland) Act 1995, s. 86(3).

1136 *Juries and Verdicts*, p. 17.

1137 *Firm and Fair*, p. 17.

obtain a favourable jury, with people being challenged based on their gender, high level of education, occupation and appearance:[1138]

> It has been suggested that prospective jurors who are well educated, or in a professional occupation, or of a certain sex, or even those who wear a suit and tie, will be objected to by the defence in the belief that they will be less likely to acquit the accused. It is also suggested that in cases of fraud or financial crime, prospective jurors who are accountants or who otherwise seem well placed to understand the elements of the crime will be challenged in order to obstruct the jury's understanding of the case.

6.62 The Faculty of Advocates responded to this criticism by claiming that peremptory challenges provided the accused with an important safeguard against being judged by people whose experience tended to lead to their forming an opinion which was not based on the evidence.[1139] The example given of when this could happen was where a chemist sits on the jury in a drugs trial. During the Victorian Law Reform Committee's meeting with Professor Murray, the Dean of the Faculty of Law at the University of Edinburgh, support was voiced for the use of peremptory challenges even though it was acknowledged that they are 'not very scientific, you don't have a great deal of information...[the result is a] poor assessment and [it is] very irrational'.[1140]

6.63 The use of peremptory challenges by the prosecution has not been criticised in this way. The prosecutor's motive for challenging is usually restricted to situations where it is in the public interest and 'good cause' would otherwise have been shown, for example where the juror has a connection to the case.[1141]

6.64 Further criticisms of the use of peremptory challenges were based on the fact that they caused embarrassment to jurors who were challenged and considerable inconvenience, as additional jurors had to be summoned.[1142] But, according to a representative of the Faculty of Advocates, the real reason for the decision to abolish peremptory challenges was to increase the rate of conviction.[1143]

1138 Scottish Office, op. cit., p. 18.

1139 Faculty of Advocates, *Observations*, p. 3.

1140 Murray, Prof. J., Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 36, p. 11.

1141 ibid.

1142 ibid.

1143 Doherty, J. R., Clerk of Advocates, Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 38, p. 11.

6.65 The number of peremptory challenges was regarded as being excessive because it was unlikely that there would be a justifiable cause for removing all three jurors, such as bias, a connection to the case or insanity.[1144] Peremptory challenges were also seen as being unnecessary, because, where there are good reasons for challenging, a challenge for is usually available.[1145]

Challenges for Cause

6.66 The effect of abolishing peremptory challenges may be that greater use is made of challenges for cause. However, in England and Wales the abolition of peremptory challenges did not led to a 'significant rise' in the use of challenges for cause.[1146]

6.67 Where a challenge for cause is made on the basis that the juror is not qualified to serve as he or she lacks the basic qualification or is ineligible or disqualified the objection will be determined by the juror being put on oath.[1147]

The Voir Dire Process

6.68 There is no voir dire process in Scotland. The judge is able to ask the jurors whether there are any reasons which make it desirable for them not serve, such as a connection with the defendant or one of the witnesses.

Complex Litigation and the Jury System

Perceptions of Juror Competence in Scotland

6.69 According to the Faculty of Advocates jurors are able to understand complex litigation. The Faculty asserted that the difficulties experienced by jurors in following complex fraud cases have resulted from the way in which the case is presented:[1148]

> I would say that whilst I don't think that there are really cases that juries wouldn't understand, I think that the way in which the case is presented can sometimes inhibit

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1144 *Juries and Verdicts*, p. 19.

1145 ibid.

1146 *Firm and Fair*, p. 17.

1147 Criminal Procedure (Scotland) Act 1995, s. 86.

1148 Dorian, L., QC, Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 38, p. 6.

> their understanding and our rules of procedure, particularly in relation to cases of fraud, I think can make it very difficult for a jury to understand.

The Meaning and Extent of Complexity

6.70 Jurors in Scotland do not have the advantage of hearing preliminary speeches by the Crown or the accused, and therefore receive no introduction other than what is contained in the indictment, that is, the bare facts and the nature of the offence charged. This means that for the first couple of hours they will probably have difficulty understanding the relevance of the evidence given by the first witness.[1149] For this reason, witnesses need to be called in a logical order and their numbers need to be kept to a minimum:[1150]

> One issue which is very important for you is the running order of your witnesses...there is no point having a witness who's somewhere in the middle of the story as your first witness...I suppose that imposes a discipline on the prosecution to do that and to be selective about the witnesses that he chooses and the order in which he chooses to lead them...

6.71 According to representatives of the Faculty of Advocates, jurors tend to have particular difficulty in understanding the judge's directions relating to their ability to return a verdict on different parts of the charge.[1151] This difficulty arises despite the fact that the jury is informed of this power by the judge and by the prosecution and the defence. One way of addressing the problem would be to explain this power in a practical way; by perhaps saying, 'let's look at the indictment and we'll go over it line by line and if you are not happy with that [aspect of it] you can put a pencil [line through it]'.[1152]

6.72 Jurors may also have difficulty understanding the indictment itself. The Scottish Office considered this problem in 1993 in its Consultation Paper on Juries and Verdicts. They observed that the Crown has an obligation to draft indictments in a manner which would enable jurors to understand them. However, when drafting there are 'considerable constraints' placed on the

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1149 Prof. Murray, University of Edinburgh, Meeting with VLRC delegation, 7 Jul. 1995, tape 36, p. 21.

1150 Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 39, p. 7.

1151 Representatives from the Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 38, p. 4.

1152 ibid.

Crown which mean that plain English cannot always be used, for example, they must 'replicate exactly the wording of statutory offences'.[1153]

Alternatives to Jury Trial

6.73 Special juries were abolished by section 28 of the Juries Act 1949. Before this provision was enacted a landed person was entitled to the privilege of 'being tried by a jury comprising a majority of landed persons'.

6.74 The Faculty of Advocates suggested that it would not be desirable to reintroduce special juries. The purpose of trial by jury is to have 'the man in the street dealing with the facts for proceedings'.[1154] This argument was also made against the possibility of introducing lay assessors.[1155]

Case Management Issues

6.75 The importance of case management by judges was recognised by the Government in its report on Improving the Delivery of Justice in Scotland:[1156]

> The Government readily accepts that training in case management may be beneficial for sheriffs and justices of the peace who will be conducting intermediate diets.

6.76 Judges should be better able to manage trials, due to the introduction of a pre-trial procedures which mean that they are no longer in the position of having no knowledge of the case before them, except for the indictment and list of witnesses.

Pre-Trial Procedures

6.77 The first diet procedure for solemn and summary proceedings is outlined in the Criminal Procedure (Scotland) Act 1995, and involves the court ascertaining whether the case is likely to go to trial on the date assigned.[1157] This is determined by looking at the state of preparation of the cases of the accused and the prosecution and whether they have sought an agreement of evidence.

1153 *Juries and Verdicts*, p. 21.

1154 Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 39, p. 10.

1155 ibid., p. 11.

1156 ibid., p. 14.

1157 Criminal Procedure (Scotland) Act 1995, ss. 71 & 144.

6.78 A preliminary diet may be ordered by the judge where the case is to go before the High Court. For such an order to be made one of the parties must give written notice that they wish to raise one of the following matters.[1158]

- a matter relating to the competence or relevance of the indictment;
- that a party intends to submit a plea in bar at trial or the like;
- that there are documents which ought to be agreed upon or that a matter ought to be resolved before trial.

6.79 In relation to summary proceedings, there is also a pre-trial procedure designed to prevent delays in the trial, it is called the intermediate diet.[1159]

Sources of Information for Jurors

Preliminary Sources of Information

6.81 Information on the categories of people not qualified, ineligible, disqualified or excused as of right is provided to potential jurors in the Notice to Potential Jurors. They are informed that it is an offence to serve on a jury while knowing that they are not qualified to serve. Potential jurors are provided with information about allowances.

6.82 Further, information is provided to potential jurors in a brochure issued by the Scottish Courts Administration.[1160] They are informed about: why they have been called, whether they have to attend, what to wear, the likely length of jury service, compensation, the selection procedure, what to do if they know the accused, the oath or affirmation, jury secrecy and the role of the judge and jury.

6.83 Information is given about the complaint procedure and the Courts' Charter of Standards which applies to the services provided by court administration staff.[1161] There is also a recorded telephone service which provides information about whether a person should attend for jury duty the following day.

1158 Criminal Procedure (Scotland) Act 1995, s. 72.

1159 Criminal Procedure (Scotland) Act 1995, s. 148.

1160 Scottish Courts Administration (with the approval of the Lord Justice-General), *Jury Service in Scotland: Information for Potential Jurors*.

1161 Scottish Court Administration, Scottish Court Service, *Complaints*, Leaflet; Scottish Court Service, *Statement of Charter Standards, Citizen's Charter*.

6.84 The prospective jurors hear an introductory talk given by the clerk of the court before balloting. The talk by the Regional Sheriff Clerk in Edinburgh informs prospective jurors that if they have any problems they are to tell him or her, and that they must concentrate and follow the evidence and ultimately decide the guilt or innocence of the accused.[1162] The clerk of the court shows the prospective jurors the layout of the courtroom and informs them about the balloting procedure and where the parties will sit.

Information Provided to Jurors Concerning Disputed Issues

6.85 The Court in *Pullar v. H. M. Advocate* expressed approval of the practice whereby potential jurors are given limited information by the clerk of the court; including the identity of the accused and the complainer.[1163] The Court observed that the clerk should tell jurors when they arrive the name or names of the accused and the complainer (or anyone else who is important to the case) so that a potential juror may be excused if he or she posses knowledge which could give rise to a suspicion of prejudice. The names of persons actually named in the indictment may be read out, but not the names of all the witnesses, because this would be improper.[1164]

6.86 The practice of the clerk giving an introductory talk to prospective jurors was criticised by the Faculty of Advocates as being an inappropriate usurping of the trial judge's role and as going against the principle that the accused should be present during any part of the trial:[1165]

> It is a principle in our system, enshrined in section 145(1) of the 1975 Act, that no part of a trial shall take place outwith [sic] the presence of the accused, and it is contrary to this principle to allow clerks, unmonitored by representative for the accused, to make detailed addresses to potential jurors. There is a risk that off the cuff remarks may be made to the jurors during this process which, on reflection, may not have been appropriate in the circumstances.

6.87 In addition to the talk given by the clerk of the court, the judge may give a short explanatory talk. This, however, is not a universal practice. There would appear to be some support for extending its use. The Government has 'indicated that it would welcome any steps the judiciary can take to aid jury

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1162 Anderson, J., Regional Sheriff Clerk Edinburgh Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 35, pp. 9–10.

1163 [1993] S.C.C.R. 514 at 522.

1164 Murray, J., Prof., Faculty of Law, University of Edinburgh, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 36, p. 15.

1165 Faculty of Advocates, *Observations*, pp. 4–5.

comprehension, particularly where complex matters are before the court'.[1166] The Faculty of Advocates has suggested that explanatory talks by judges should be given and that there should be consistency in the content of these talks, with the content being settled by the Lord Justice-General in consultation with other judges.[1167]

Questioning of Witnesses by Jurors

6.88 Jurors are able to ask questions provided that they present their questions in writing to the judge or sheriff, when there is a suitable break in the proceedings.

6.89 The Faculty of Advocates has suggested that questioning by jurors should be encouraged during their deliberations, because 'the solemnity of the proceedings are such that jurors feel inhibited in explaining to the judge if they do not understand certain things'.[1168]

Note Taking by Jurors

6.90 Jurors are able to take notes during the trial. They are provided with pens and paper by the Court.

The Judge's Charge to the Jury

6.91 When deliberating jurors may experience difficulty in understanding specific matters explained in the judge's charge. If they seek clarification of these matters they often do not receive a great deal of assistance, because the judge may respond by merely rereading that section of the charge. The Chairperson of the Faculty of Advocates Criminal Law Group, Leona Dorian, QC, suggested using judicial education to address this issue.[1169] Moreover, it was thought that jurors would benefit from being given written basic directions relating to the law; for example, directions which explain what is meant by assault or murder.[1170]

1166 *Firm and Fair*, p. 18.

1167 Faculty of Advocates, *Observations*, p. 4.

1168 Representatives from the Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 38, p. 5.

1169 ibid., p. 5.

1170 ibid., p. 4.

Other Issues

General Conditions of Jury Service

6.92 Television cameras are allowed in the court where their presence would not place at risk the administration of justice. According to a Practice Notice given in August 1992, televising current proceedings in criminal cases during a trial will not be permitted under any circumstances.[1171]

6.93 The Sheriff Clerk is responsible for the jurors' domestic arrangements and their safety.[1172] Jurors are placed in the jury room by themselves to deliberate, and no one is allowed to communicate with them. Should the prosecutor or any other person intrude upon the seclusion of the jury, the accused is entitled to be acquitted of the crime.[1173] Jurors are not allowed to leave the jury room, unless it is to ask the judge a question or make a request relating to the case.

6.94 The judge may give instructions as to the provision of meals and refreshments for the jurors, overnight accommodation, their continued seclusion and medical treatment or other assistance which is immediately required. The judge may also direct that a personal or business message be passed to, or from, a juror, provided the message does not relate to the trial.[1174]

Debriefing and Counselling Jurors

6.95 There are no debriefing or counselling facilities for jurors in Scotland. Support for the introduction of a 'gentle, initial debriefing' was expressed by representatives of the Faculty of Advocates.[1175] In some cases jury service can be a distressing experience, given the nature of the evidence. According to the Leona Dorian, QC::[1176]

1171 Practice Notes, Notice: 6 Aug. 1992, 'Television in the Courts', C 2023.

1172 Anderson, J., Regional Sheriff Clerk, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 35, p. 2.

1173 Criminal Procedure (Scotland) Act 1995, s. 99.

1174 Criminal Procedure (Scotland) Act 1995, s. 99.

1175 Representatives from the Faculty of Advocates, Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 39, p. 1.

1176 ibid.

> We've all been in cases probably where we ourselves have been quite distressed by the photographs and the evidence about what has happened to a deceased, usually. And we are professionals dealing with it frequently, all the time, so if it can have that effect on us, then [on] somebody just brought in from the street [it] is bound to have a much more disturbing effect.

The 'Not Proven' Verdict

6.97 The 'not proven' verdict is available to the jury when there is a suspicion attached to the accused but there is insufficient lawful evidence to convict. A verdict of not guilty or of guilty may also be given in Scotland. Not guilty and not proven verdicts at law mean only that the Crown has not proved its case beyond reasonable doubt. Judges provide very little direction to jurors as to the difference between the not guilty and not proven verdicts; they merely state that 'there are two acquittal verdicts'.[1177]

6.98 This three verdict system is unique to Scotland and has existed there for around 300 years. The not proven verdict originated between 1660 and 1688 when juries refused to convict persons prosecuted under the religious Acts against the Covenants, and the judge responded by restricting the jury's function to determining whether the evidence proved the facts in the indictment or not.[1178] In the 1720s the verdicts of guilty and not guilty were also used.

6.99 The not proven verdict is now used by sheriffs or justices sitting alone (and represents 21 percent of their acquittals in summary cases) and by juries (representing 42 percent of acquittals in the High Court and 33 percent in the Sheriff's Court).[1179]

1177 *McDonald v. Her Majesty's Advocate* [1989] SLT 298. Cited in *Juries and Verdicts*, p. 30.

1178 ibid., p. 26.

1179 ibid., p. 27.

6.100 Support for the retention of the three verdict system was expressed by the Government in its 1994 command paper on Juries and Verdicts.[1180] The Faculty of Advocates has also supported the retention of the system.[1181] The arguments in favour of retaining the system are as follows:[1182]

(1) The not proven verdict allows the judge or jury to express their reasonable doubt where they perhaps think the accused is guilty but are not sure.

(2) The percentage of not proven verdicts, which are stated above, show that juries and judges choose to use this verdict.

(3) The verdict may be 'a more satisfactory verdict for the victim and others in such cases because it can reflect the absence of the necessary proof without casting doubt on the honesty and reliability of the victim'.

6.101 The abolition of the not proven verdict may be supported on a number of grounds. First, it is inconsistent with the presumption of innocence, because social stigma may result from the verdict.[1183] Secondly, the victim's family may mistakenly believe that the not proven verdict means that the accused was probably guilty and that the resulting acquittal is an injustice.[1184] And thirdly, there is a lack of clear directions as to the meaning of the phrase 'not proven', which may cause confusion for juries and judges. The Faculty of Advocates suggested that this last problem could be addressed by judges agreeing on a formula to be used when giving the judge's charge.[1185]

Majority Verdicts

6.102 The jury's verdict in criminal cases may be reached by a simple majority of eight out of the fifteen jurors. Where the number of jurors is reduced due to illness or death, a guilty verdict can be given but only by at least eight jurors, provided that there are not less than twelve jurors.[1186] In

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1180 *Firm and Fair*, p. 119.

1181 Faculty of Advocates, *Observations* by the Faculty of Advocates on Scottish Office Consultation Paper on Juries and Verdicts, p. 5.

1182 *Juries and Verdicts*, pp. 33–34.

1183 ibid., p. 35.

1184 ibid., pp. 3637.

1185 Faculty of Advocates, *Observations*, p. 6.

1186 Criminal Procedure (Scotland) Act 1995, s. 90.

these circumstances a verdict of not guilty or not proven may be given by the majority.

6.103 In civil matters a majority verdict may be reached by seven of the twelve jurors. Where the number of jurors is reduced to eleven or ten a majority verdict may be given by six jurors.

6.104 The Scottish Office Home and Health Department asserted that no change should be made to the ability of the jury of fifteen to return a verdict by simple majority.[1187] There were two main reasons for supporting the use of the simple majority verdict. First, it means that jury nobbling is very difficult, and secondly, jurors can reach a decision quickly, so that they very rarely need to deliberate overnight.[1188]

6.105 The Faculty of Advocates also expressed approval for the current system.[1189] However, in the meeting between representatives of the Faculty of Advocates and the Victorian Law Reform Committee, some members argued for an increase in the majority required before a verdict can be reached.[1190]

6.106 In Scotland if jurors return a majority verdict of guilty then they are not asked how many of them supported the verdict.[1191]

Judicial Education

6.107 Recently in Scotland there has been an increase in the use of judicial education. In 1994 a group was established to coordinate training programs for judges in the Sheriff courts.[1192] Furthermore, new sheriffs receive training in various areas, including sentencing.

Focus Groups and Shadow Juries

6.108 The Faculty of Advocates has suggested that consideration should be given to allowing shadow juries to be used. The use of shadow juries, which would sit on the public benches during selected trials, was proposed in order to provide information about whether changes to the jury system were

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1187 *Firm and Fair*, p. 20.

1188 *Juries and Verdicts*, p. 24.

1189 Faculty of Advocates, *Observations*, p. 6.

1190 Meeting with VLRC delegation, Edinburgh, 7 Jul. 1995, tape 39, p. 12.

1191 *Pullar v. Her Majesty's Advocate* [1993] S.C.C.R.514 at 524.

1192 *Firm and Fair*, p. 56.

necessary. Without the benefit of this research any changes to the system would be without a sufficient basis.[1193] The Scottish Office, in its command paper entitled Firm and Fair, said that consideration is being given to the use of shadow juries.[1194]

1193 Faculty of Advocates, *Observations*, pp. 6–7.

1194 *Firm and Fair*, p.18.

'Right' to Trial by Jury

History

7.1 The United States of America has inherited the fundamental characteristics of its legal system from England. Perhaps the single characteristic which gives shape to much of the rest of the legal system is the reception of the institution of the jury. The function of the jury has always been to ensure that the substantive law is thoroughly applied and that parties to any law suit receive a fair trial.

7.2 In 1215 in the Magna Carta, King John promised that 'No free man shall be taken or imprisoned or in any way destroyed except by the lawful judgment of his peers'.[1195] The jury has been especially important throughout English and American history as a bulwark of protection against abuses to human rights. The founders of the American Constitution were aware of and influenced by developments within England and the rest of Europe when they drafted the Constitution. For example, the experience of the Star Chamber which tried persons charged with political crimes in secret and passed judgment on them with little regard to fairness or due process of law, was regarded as an evil to be guarded against.

7.3 The Constitution enshrines trial by jury because the American ethos, even at that early stage, was not to trust judges acting along.[1196] Somewhat later in American history, the judges of the Supreme Court encapsulated this view saying:[1197]

> The jury trial provisions in the Federal and State Constitutions reflect a fundamental division about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges. Fear of

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1195 See Samaha, J., *Criminal Justice,* 2nd ed, West Publishing, New York, 1991, p. 329.

1196 Carrington, P.D., 'The Seventh Amendment: Some Bicentennial Reflections', 1990 *University of Chicago Law Forum*, p. 33.

1197 *Duncan v. Louisiana* 392 US 145 (1968).

> unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Constitutional Provisions

7.4 The United States Constitution is the foundation of the division of powers. It divides powers in the United States between those given to the central government, those that are reserved to the States and the balance which are reserved to the people. Secondly it provides a separation of powers into the legislature, the executive and the judiciary, introducing a system of checks and balances between each of those separate and autonomous bodies. Within the judicial branch, the institution of the jury is preserved. Article III Section 2 of the Constitution provides:

> The trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but were committed within any State, but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

7.5 The drafting of the Constitution of the United States of America originally provided only the separation of powers and the system of checks and balances. It did not explicitly extend fundamental human rights protections to the citizens and residents of the United States from actions by the central government. In order to provide such explicit guarantees a package of rights known as the Bill of Rights, and consisting of the first ten amendments to the United States Constitution were passed. Three of these constitutional amendments provide the framework for ensuring the right to a trial by jury in both criminal and civil cases and to further provide that participants in the legal system are entitled to a fair trial. The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ...; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall any person be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... 'The phrase 'due process of law' has been utilised by the United States Supreme Court in a series of cases which has fundamentally affected the criminal law system from the time of identification, apprehension or questioning of a suspect through the way in which the trial is conducted.

7.6 The Sixth Amendment further spells out rights of defendants in criminal trials. It provides:

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of Counsel for his defence.

7.7 The central concepts of an impartial jury together with the right of confrontation of witnesses against the accused have played a central role in judicial supervision of trial by jury and will be commented upon further in this report

7.8 The right to a jury trial was enshrined in the Constitution for non-criminal matters. The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury, shall be otherwise re-examined in any court of the United States than according to the rules of common law.

7.9 Despite changes in the value of money the $20 limit still applies and can only be changed by constitutional amendment. Note should be taken of the use of the term 'common law' as well. The right to trial by jury in Federal courts applies only to those cases which were originally within the jurisdiction of the Courts of Common Law and not those causes of action which were later developed through the intervention of the English Chancellor and through the courts of Equity.

Incorporation of Fundamental Rights

7.10 The first ten amendments, known as the Bill of Rights, were designed to protect citizens against infringements of their rights by the federal government. the scope of the protection did not extend to limit action by the government of the individual states. Since the passage of the Fourteenth Amendment, first adopted in 1868, the due process clause contained therein has been utilised to incorporate certain fundamental liberties contained within the Bill of Rights and to make those protections effective against state, as well as federal, action. In part the amendment provides 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'. In the area under consideration it is that part of the amendment which states that 'no state shall deprive any

person of life liberty or property without due process of law' that has extended fundamental protections of the trial by jury to trials held in State Courts.

7.11 The incorporation of the fundamental liberties of trial by jury has occurred through the United States Supreme Court, the first time in *Duncan v Louisiana*.[1198]

7.12 In addition to extending the guarantee of a trial by jury in criminal matters, the Supreme Court also utilised the Fourteenth Amendment to extend the right of civil jury trial, found within the Seventh Amendment, to the State courts. Incorporation, of course, is limited by the words of the Seventh Amendment and extends only to jury trial of common law (rather than equitable) actions.

The Legal Framework

Hierarchy of Courts

7.13 The United States has two quite separate hierarchies of courts though together they make up the entirety of the dispute resolution forums through adjudication within the United States. Pursuant to the United States Constitution, a system of federal courts has been set up and there is at least one federal trial court operating in each of the 51 jurisdiction of the United States. In addition to that there is a system of state courts operating with its own hierarchy.

7.14 Federal courts have been set up pursuant to Article III section 1 of the Constitution of the United States which reads, in part, 'The judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may, from time to time ordain and establish'. The courts which have been established pursuant to this include three levels: the District Courts, the Courts of Appeal, and the United States Supreme Court. Federal courts have exclusive jurisdiction insofar as the United States Constitution and statutes enacted thereto so provide.[1199] Insofar as Congress

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1198 The Court held: 'The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defence against arbitrary law enforcement qualifies for protection under the Due Process Clause. of the Fourteenth Amendment, and must therefore be respected by the States.' *Duncan v. Louisiana*, 392 US 145 at 156 per White, J.

1199 *Corpus Juris Secundum* volume 21 (Courts) para. 205, p. 236.

has not expressly or impliedly vested the federal courts with exclusive jurisdiction, state and federal courts may have concurrent jurisdiction.[1200] State courts may, for instance, try federal crimes.

7.15 Federal District Courts act as the trial courts for the federal judicial system. They have jurisdiction over all civil cases regardless of remedy requested or amount of damage sought. Courts of Appeal principally have an appellate jurisdiction. The Supreme Court of the United States has very limited original jurisdiction—cases and controversies between two or more states as well as over ambassadors and certain public officials.

7.16 A major source of jurisdiction for federal courts is its diversity jurisdiction. Citizens from different states are entitled to settle their controversies in the federal courts of the United States. 'Traditionally this jurisdiction is justified by the fear that state courts would be biased against the out-of-state party.'[1201] In order to utilise this diversity jurisdiction there must be a minimum of $10,000 in controversy.

State Courts

7.17 Each of the 50 states of the United States have their own courts which are imbued with both exclusive and concurrent jurisdiction. State courts have power over all matters which do not fall within the jurisdiction of the federal courts;[1202] in general there are three levels of court in each of the individual states. In the first instance there is generally a court of minor jurisdiction where cases of both civil and criminal matters may be commenced. Often the jurisdiction of these courts is limited to misdemeanours such as simple assaults or shoplifting, violations of municipal ordinances and civil suits involving amounts generally less than US$10,000.

7.18 In most states there are the general courts of unlimited first instance jurisdiction, often known as trial courts. These courts are courts of record, in that a transcript is made of the proceedings to provide a basis for appeal. The courts have authority to hear and determine all criminal cases from capital felonies to petty demeanours. They may also hear civil cases with an unlimited subject matter jurisdiction. With authority to entertain any and all criminal and civil suits, as well as appeals from minor courts, the work of

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1200 ibid., para. 206, p. 239.

1201 Sinclair, K., *Federal Civil Practice,* Practising Law Institute, 1980 p. 27.

1202 *Haydo v. Amerikohl Min. Inc.* 1987 CA 3, Pa. 830 F2d 494.

these courts stands as the main component of the administration of justice.[1203] In addition to these courts there are often intermediate level appellate courts and each state court hierarchy culminates in a state Supreme Court.

The Supreme Court

7.19 The United States Supreme Court is the highest appellate court for all cases tried in both federal and state courts. Appeals may be lodged with the court from the state courts as well as from the federal Circuit Courts of Appeal. The Supreme Court has a discretion in most instances, as to which cases it will consider. As there is only limited time to hear appeals, and that all nine justices sit together to hear appeals (other when exercising the Court's screening function) the court will hear only those cases which are deemed of most public importance. The decision of whether to hear a case is decided via a writ of *certiorari*.[1204]

Incidence of Trial by Jury

Jury Trials

7.20 In both the Federal Courts and State Courts the jury trial of a felony is governed by the various rights contained within the Sixth Amendment. The prosecution and defence counsel each may make an opening statement. The prosecution enters evidence that is subject to cross-examination by the defence. The defence may then introduce evidence that is subject to a prosecutor's cross-examination or they may rest without introducing evidence. The defendant has a constitutional right to be present at all phases of the trial. Confrontation is central to the common law trial.[1205] The State Constitutions equally enshrine the right to trial by jury. For example, in California pursuant to s 191 of the Trial Jury Selection and Management Act it is said 'The legislature recognises that trial by jury is a cherished

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1203 Grand, D. & Omdahl, L., *State and Local Government in America,* 5th ed, Allan & Bacon Inc., 1987, p. 307.

1204 There are a number of instances in which the Supreme Court does not operate by a writ of *certiorari* but rather receives cases that it will hear as of right. These include instances where an Act of Congress has been held by a federal court to be unconstitutional or where a state court has held a federal law to be invalid.

1205 Zalman, M. & Siegel, L., *Criminal Procedure: Constitution and Society* West Publishing, 1991, p. 673

constitutional right, and that jury service is an obligation of citizenship'.[1206]

Waiver of Jury Trial

7.21 There are two types of criminal trials in the United States: trials by jury and trials by a judge acting as sole decision-maker. The latter is also known as a bench trial or waiver trial (indicating that the defendant waived the right to a jury).[1207] The right of the defendant to choose whichever mode of trial was only made clear in Federal criminal law after the decision of the United States Supreme Court in *Patton v United States*.[1208] The issue before the court was whether the constitutionally ordained trial by jury was a privilege for the protection of the defendant or, on the other hand, whether it was merely the prescribed mode of trial. It was argued by some that jury trial was compulsory and could not be waived. The view that prevailed, however, was that the defendant could waive the privilege. The court found that since the defendant already had the power to plead guilty and in that way waive trial by jury, a defendant must have the lesser power to waive any particular mode of trial.

7.22 Although the method of trial by jury was found to be waivable, the Supreme Court suggested that such waiver must be knowing and informed:[1209]

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offences dealt with increase in gravity.

7.23 Under Federal law and the rules drafted thereunder, a trial by jury is still considered the standard mode of adjudication. Waiver requires both the agreement of the judge and prosecutor as well as that of the defendant.[1210] Defendants may have several strategic reasons for waiving a jury trial. They

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1206 State of California, Trial Jury Selection and Management Act, s. 191.

1207 Zalman & Siegel, op. cit.

1208 *Patton v. United States* 281 US 276 (1930).

1209 Ibid.

1210 Federal Rules of Criminal Procedure Rule 23A.

may believe for example that a jury is more likely to be prejudiced and unlikely to render a just decision or that a trained judge may be more sensitive to the beyond reasonable doubt standard than a jury of lay persons.[1211]

Trial by Jury in Minor Crimes

7.24 When the United States Supreme Court ruled that the due process of the Fourteenth amendment required the States to provide jury trial in criminal prosecutions it was left open whether that guarantee had to be extended to petty or minor crimes. The court suggested that juries would not be required in the prosecution of petty crimes but did not define that term.[1212] This was later followed by the ruling in *Baldwin v New York.*[1213] The court held that any offence where imprisonment for more than 6 months is authorised, cannot be deemed petty for the purpose of the right to trial by jury.

Criminal Trials in State Courts

7.25 The procedures adopted for trial by jury varies from state to state, with some state legislatures introducing modifications not present in the Federal system. For example, some States maintain a trial de novo system. This is a two stage process whereby a minor crime is first heard by a magistrate without any right to a jury. If the accused is found guilty, that defendant may then exercise an absolute right to have the case tried again as if it had never been adjudicated before. The subsequent trial will be held in a court where a jury trial is available. In *Ludwig v Massachusetts* (1987) the Supreme Court upheld a Massachusetts statute providing for a trial de novo.[1214]

7.26 Some States maintain that the government, as a litigant, has a legitimate interest in seeing that the cases in which it believes a conviction is warranted are tried before a tribunal which the Constitution regards as more likely to produce a fair result. They therefore maintain that the right to waive a jury trial is not that of the defendant alone. Other States, under their own Constitutions, visualise the jury primarily as a protection for the defendant. Under this view, the defendant has the last word as to whether the trial will be before a judge or before a jury. In such cases, the defendant has a tactical

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1211 Zalman & Siegel, op. cit.

1212 *Duncan v. Louisana,* op. cit.

1213 *Baldwin v. United States* (1970) 399 US 66.

1214 Zalman & Siegel op. cit., p. 642.

advantage in determining before which mode of forum the trial will proceed.[1215]

7.27 In those States which imposed a limit upon the right of the defendant to waive a trial by jury, the consent or agreement of the court and the prosecutor have often become a matter of routine due, undoubtedly, to the pressure of workload. There are instances, however, in which the court will insist that the public interest requires a jury trial. And in at least a few cases the prosecution has refused to consent to a waiver of the jury, perhaps as a tactical move intended to disadvantage the defendant. These are by way of exception rather than rule.

Civil Jury Trials

7.28 The guarantees contained within the Seventh Amendment to the United States Constitution, and its incorporation via Fourteenth Amendment 'due process' has meant that the standard method of trying civil matters in both Federal courts and in State courts is trial by jury. Civil cases often involve questions of judging community standards or the standards of a reasonable person in a particular situation. It has been said that the jury, as the voice of the community, is in the best position to offer that view.[1216] It is well to remember that in the State Courts of the United States the principal method by which judges are chosen is through popular election, though that mode of selection is slowly losing ground as other methods of selection and appointment gain the ascendancy. This has meant that the judicial position itself in the United States often lacks the majesty or the reverence which is attached to the judiciary in other countries of the common law. The guarantee of a trial by jury and the jury's collective wisdom is often to be preferred where there is a fear that an individual judge may be less than impartial or inevitably correct.

Representativeness of the Jury System

General Concepts of Representativeness

7.29 It is generally accepted that a jury should be composed of a representative cross-section of the people who live in the community in which

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1215 ibid., p. 671.

1216 Adler, S. J., *The Jury: Trial and Error in the American Courtroom* Random House New York 1994.

the trial is to be held. It has come to be recognised that the issue of whether juries are representative of their relevant communities is a critical aspect. One of the objectives of jury decision-making is to ensure that parties are judged by their peers who can bring values of the community to bear in deciding disputes.

7.30 In the United States today, it is common to describe the ideal jury as a 'body truly representative of the community'.[1217] This attitude towards juries has not been easily accomplished. A later chapter in this report explains the difficulty that Americans have had in ensuring that their juries are in fact representatives of the community both in terms of race and in terms of gender. Today, both Federal and State legislation requires that every citizen must have an equal opportunity to perform jury service.[1218] Jury service must not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other discriminatory factor. The lists from which juries are made up must be constantly reformed to ensure that they are representative and inclusive of the eligible adult population.

7.31 A working objective of a representative jury system would be one which minimises exclusion and promotes inclusion. Every person summoned should have an equal chance of serving on a jury, unless their exclusion is justified by some competing or overriding principle.

7.32 The concept of a representative jury is by no means self explanatory. Is the concept of representativeness to be defined in general terms, or does it appertain to each individual sitting jury? Are factors of race, education, age, sex, religion, economic status or philosophical standpoint relevant to the representativeness of the jury? Must all these matters be taken into consideration when composing the jury panel? What weight is to be given to any particular attribute? Is the notion of representativeness to be viewed from the perspective of, say, the accused, the victim or the whole community? It is generally agreed that the luck of the draw, as well as uneven patterns of excuses and challenges result in the fact that a particular jury in any given case may not, itself, form a cross-section of the community. But so long as

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1217 Abramson, J., *We, The Jury,* Basic Books, 1994 p. 99.

1218 For example, California Code of Civil Procedure, s. 191.

jurors are summoned randomly from an initially representative list, the democratic nature of jury membership is said to be preserved.[1219]

Impartiality

7.33 The only qualification for juries set forth in the Sixth Amendment of the Constitution is one that gives broad expression to the notion of the right to trial 'by an impartial jury of State and District'. Members of the jury panel must consist of impartial persons who are chosen from the judicial district in which the crime was committed. More than 50 years ago, the United States Supreme Court stated:[1220]

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.

7.34 The notions of impartiality and representativeness are not necessarily synonymous nor is one necessarily consistent with the other. Some have suggested that persons will reflect their own particular background and ideas and favour, as a result, one of the parties to an action without regard to the evidence:[1221]

> The notion ... that the composition of a particular jury is likely to have an important bearing on the verdict it returns, might be taken to represent a serious criticism of the institution. For if verdicts really are as strongly affected by the character of each jury as this implies, it is hard to defend a tribunal whose verdicts may be conditioned more by its membership than by the evidence given in trial.

7.35 The original concept for a jury stems from the provision in the Magna Carta which required that no free man shall be seized and imprisoned except by judgment of 'his peers'. This language is not specifically provided for in either Federal or State legislation. In one instance, the Supreme Court stated:[1222]

> The very idea of a jury as a body of men composed of *peers or equals* of the person whose rights it is selected or summoned to determine; that is, of his neighbours, fellows, associates, *persons having the same legal status in society as that which he holds.* [original emphasis]

1219 Abramson, op. cit., p. 99.

1220 *Glasser v. United States* 315 US 60 (1942).

1221 Baldwin J. & McConville, M., *Jury Trials* Clarendon Press, Oxford, 1979.

1222 *Strauder v. West Virginia,* 100 US 303 1880 (cited in Senner, J. & Segal, J., *Criminal Justice: An Introduction,* 6th ed, West Publishing Co., St Paul, Minn 1993.

7.36 The concepts of representativeness and impartiality do not necessarily sit together well. To take the definition of 'peers' too literally in composing a jury would imply that a medical doctor could only be tried by a jury composed of other doctors; a farmer by farmers and so on. If such a jury were possible, the likelihood of jury impartiality would be low. Necessarily the concept of an impartial jury does not mean a jury without any background or preconceptions. It is difficult to expect that jurors will appear in a case 'with a blank state, neutral and untainted by life experiences or pretrial publicity', or that 'those candidates for jury service who are irrevocably prejudiced will be detected and eliminated at some point during the selection process'.[1223]

7.37 The desire to reconcile concepts of impartiality and representativeness has perhaps troubled academics more than those who are actually attempting to strike a jury roll. The major task of the United States Supreme Court has been to strike down the obvious exclusionary tactics of disqualifying or excusing certain jurors on the basis of colour or gender. That process has taken place over a period of some 50 years through decisions of the United States Supreme Court and through legislation on both the Federal and State level.

Juror Eligibility Criteria

7.38 In the United States the eligibility criteria for serving on a jury has been laid down in Federal legislation which is mirrored by almost every individual State statute as well. A person shall be qualified for jury service if they: [1224]

(1) are a citizen of the United States, have reached the age of 18 years and who have resided in the district for at least 12 months;

(2) are able to speak, read, write and understand the English language sufficiently to fill out the juror questionnaire;

(3) are not incapable, by reason of mental or physical infirmity, of rendering satisfactory jury service; and

(4) do not have a charge pending against them for the commission of, or have been convicted in a State or Federal Court or have a record of, a crime punishable by

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1223 Kassin, S. & Wrightsman, L., *The American Jury on Trial: Psychological Perspectives,* Hemisphere Publishing Corp., New York, 1988, p. 6.

1224 Title 28 USC Chapter 121, Juries; Trial by Jury, s. 1865. See also for example in Illinois the Jury Act, s. 2. The State of California expresses its eligibility criteria as a negative 'All persons are eligible and qualified to be prospective trial jurors, except the following: (1) Persons who are not citizens of the United States (2) persons who are less than 18 years of age (3) persons who are not domiciliaries of the State of California as determined pursuant to Article 2 . . .' State of California: Trial Jury Selection and Management Act, s. 203(a).

> imprisonment for more than one year and it has not been ten years since the completion of the individual's entire sentence, including incarceration, probation and parole.

7.39 Despite the wide definition for eligibility of jury service, the Committee, wherever it went, received evidence which promoted widening the categories of eligibility for jury service in order to reinforce the importance of the civic duty in the minds of the community. It was thought to be important to emphasise the fact that jury service is the responsibility of all citizens and not just a few, and also to demonstrate the importance of representativeness. It is not so much the formal criteria for eligibility on the jury but rather the way in which the right to be excused is exercised which lessens the representativeness and inclusiveness of juries actually empanelled. Participation on a jury is an educational opportunity that currently touches a significant portion of the population, as a growing number of citizens are called for jury duty. Some 45% of Americans aged 18 and over say that they have been called up.[1225]

Exclusions, Exemptions and Excusal Criteria

Exclusions and Exemptions

7.40 The desirability of having the broadest possible base from which to choose potential jurors led Congress to pass a statute to narrow the discretionary authority from the jury commissioner, with regard to exclusions and exemptions. In addition to the general eligibility criteria scrutinised above, certain additional persons have been declared to be ineligible. A person who is incapacitated by a mental or physical infirmity so as to be unable to render jury service is exempted from service.[1226] The Chief Judge of the District Court:[1227]

> (a) …shall determine solely on the basis of information provided on the jury qualification form and other competent evidence whether a person is unqualified for, or exempt or to be excused from jury service.
>
> (b) In making such determination the chief judge of the district court shall deem any person qualified to serve on grand and petit juries in the district court unless he ...
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

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1225 Diamond, S., 'What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors', in Litan, R. (ed) *Verdict: Assessing the Civil Jury System*, The Brookings Institution, Washington DC, 1993.

1226 JA 117–118

1227 Title 28 USC, s. 1865.

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

7.41 There are further grounds for exemption generally based upon occupational criteria. For example:[1228]

> it may be specified that the following persons are barred from jury service on the ground that they are exempt:
>
> (a) members in active service in the armed forces of the United States;
>
> (b) members of the fire or police departments of any State, the District of Columbia, etc
>
> (c) public officials in the executive, legislative or judicial branches of the Government of the United States who are actively engaged in the performance of official duties.

7.42 In Los Angeles County the list of those ineligible or excluded from jury service includes:[1229]

> persons who have been convicted of malfeasance in office or a felony and whose civil rights have not been restored; persons who are serving as grand or trial jurors in any court of this State; and persons who are the subject of conservatorship.

7.43 In the District of Columbia persons who are excluded include: those who 'may be unable to render impartial jury service or [whose] service as a juror would be likely to disrupt the proceedings'.[1230]

7.44 Courts vary in the way, if any, they verify an assertion of infirmity. Many simply accept the juror's assertion. Others have a policy that specifies that an affirmation of infirmity requires the submission of evidence, such as a physician's certificate. Similarly a court may require verification when a person's employment appears inconsistent with the asserted medical problem.

1228 Title 28 USC, s. 1863(6).

1229 Persons Specially Invested with Powers of a Judicial Nature, s. 203.

1230 Title 28 USC Procedures–Juries; Chapter 121, s. 1866(c)(2). No person shall be excluded under this clause unless a judge, in open court, determines that such exclusion is warranted and that the exclusion of the person will not be inconsistent with other provisions of the Act. The number of persons excluded under the clause is not to exceed 1% of the number of persons who returned executed jury qualification forms between two consecutive fillings of the master jury wheel. The names of persons excluded under the clause together with detailed explanations for the exclusions shall be forwarded immediately to the judicial council of the circuit for review.

7.45 Some courts will go further in enabling a juror to serve even though they may appear to be prima facie within the allowed exemptions. For example if a deaf juror was empanelled, for whom a sign language interpreter had been appointed on a criminal trial jury did not violate s 28 where it was clear that her educational and work experience showed that she could read, write and understand the English language with proficiency. It was conceded that she had a little trouble in speaking English and while speaking English is often meant to mean speaking and understanding spoken English, the literal meaning of the statute would not be narrowed to create a per se rule against qualification of deaf jurors.[1231]

7.46 The ineligibility of certain persons based upon their occupational duties, and the related issue of excuse from service based upon occupational duties, has been an issue of some prominence. The exclusion of broad categories of occupation from jury service naturally has the consequence of limiting the level of community representativeness. Another clear consequence is the narrowing of the diversity of points of views expressed during deliberation with a narrowing of the heterogenous composition of a jury. The Committee regularly heard evidence that extensive exemptions or exclusions are one of the chief sources of public discontent about the jury.

7.47 The list of those who are disqualified or exempt from jury service has been expanded to include persons for whom there is no apparent reason for the exemption, other than political clout. Some categories of exemption appear to apply to more privileged members of the community with the consequence that the wrong message is sent to the community about the role and function of the jury.[1232]

7.48 Among those exempt from state to state and place to place include all clergy and members of minority religious sects. The reason for these

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1231 *United States v. Dempsey* (1987 CA 10 Colorado) 830 F2d 1084.

1232 Lists of disqualified and permanently exempt occupations are the source of the single greatest inequity regarding eligibility for jury service. 'Ordinary wage earners do not understand why they must disrupt their lives periodically to serve on juries, while highly paid professionals need not endure the same burden. Working people who must use vacation time to serve on juries are justifiably upset, that medical personnel and lawyers can be spared by their patients and clients for a month or more of vacations each year, yet don't have to sit on juries. If persons who work for hourly wages can be compelled to spend time on jury service, then sole proprietors of businesses can do so too—particularly when the sole proprietor employs others in his or her business establishment.' McMahon, C., *The Jury Project*: *Report to the Chief Judge of the State of New York*, Government Printer, New York, 1994, p. 33.

exemptions varies from the belief of the religious organisation itself that their members are forbidden to sit in judgment of others to the notion that a member of the clergy may be unable to apply temporal law or that its members are more likely to be lenient or otherwise partial in a fashion not shared by other citizens. Other occupational exemptions (notably those for doctors and law enforcement officials) are often justified on the ground that these individuals would not be appropriate jurors in particular cases (physicians in malpractice and some tort cases; police officers in criminal cases). Some witnesses disagreed with this proposition, indicating a large number of cases are available that do not impinge upon the training or views of doctors and police officers, on which they could sit without any problem at all.

7.49 A number of jurisdictions in the light of these complaints have moved to reduce or eliminate the automatic disqualification or exemption from jury service based upon occupation. The abolition of the automatic exemption rights for some occupational groupings is kept under constant review. For example, the abolition of the exemption for law enforcement officers on criminal trial juries may prove to have wide-ranging consequences in the conduct of the case and in the manner of jury deliberations. Evidence was forwarded to the Committee that those jurisdictions that permit lawyers, legal academics and judges to sit on juries may have adverse consequences.[1233] Some in their evidence presented the view that these occupational groupings could learn valuable lessons from 'being involved in the trial process from the other side of the fence'. Others feared the 'professional domination of the jury during deliberations'. It was suggested that other jurors could be deferential to the professional's opinions based on the belief that the professional's knowledge and understanding was greater than their own.

7.50 The State jurisdictions today still present an interesting contrast in their views with regard to exemptions. In Chicago there has been the elimination of almost all forms of automatic exemption. On the other hand New York State is well-known throughout the United States for its high number of exemptions from jury service. In New York State there are nine categories of exemption:[1234]

(1) Members of the clergy

1233 See for example, Colorado, Connecticut, Illinois and the District of Columbia.

1234 Juror qualification questionnaire, New York County, p. 2.

(2) Physicians, dentists, pharmacists, optometrists, psychologists, podiatrists, registered nurses, practical nurses, embalmers regularly engaged in the practice of their profession;

(3) Attorneys regularly engaged in the practise of law;

(4) Police officers, officials and correction officers in any correctional facilities, fire officers;

(5) Sole proprietors of a business employing fewer than three persons;

(6) Persons 70 years of age or older;

(7) A parent, guardian or other person who resides in the same household with a child or children under 16 years of age who is actively engaged in the daily care and supervision of such child or children;

(8) A person who is a prosthesitist or orthotist by profession or vocation; and

(9) A person who is a licensed physical therapist regularly engaged in the profession.

Excusal from Service

7.51 Closely allied to the above topic are those persons who are not either disqualified or exempted but rather, who are eligible for service on the jury but are allowed, upon request, to be excused or to have their jury service deferred to a later date. The division is shown very clearly in California.

(a) No eligible person shall be exempt from service as a trial juror by reason of occupation, race, color, religion, sex, national origin, or economic status or for any other reason. No person shall be excused from service from a jury except as specified in sub-division (b).

(b) An eligible person may be excused from jury service only for undue hardship upon themselves or upon the public, as defined by the Judicial Council.[1235]

7.52 Another approach is that of the Federal Court. The District Court's modified plan for random selection of jurors provides that the following persons may be excused from jury service on request:[1236]

1. Persons over 70 years of age
2. Nurses in active practice
3. Persons actively engaged as clergymen
4. Persons who have served as grand or petit jurors in the district within 4 years
5. Persons actively teaching or supervising in school or college
6. Persons required at home to care for children under 10 years of age or for disabled persons who cannot be left alone where no other person is available.

1235 State of California: Trial Jury Selection and Management Act, s. 204(a)

1236 Title 28 USC, s. 1863(b)(5).

7.53 Similarly, in the District of Columbia, grounds for requesting excuse from jury service are confined to:

1. One who is over the age of 70 years;
2. One who has served as a juror in the past two years in Federal Courts;
3. One who serves without compensation as a volunteer firefighter or a member of a rescue squad or ambulance crew for a Federal, State or local agency;
4. One actively engaged in operating a one person business;
5. One having active care and custody of a child under the age of 10 whose health and/or safety would be jeopardised by absence for jury trial or one who is essential to care for the aged or infirm;
6. One who is a Federal law enforcement officer such as a member of the Federal Bureau of Investigation, postal inspectors, customs agents, members of the United States Boarder Patrol and Deputy United States Marshalls; and
7. One who is a lawyer, doctor, dentist or minister of the gospel actively and regularly engaged in the practise of the professions.

7.54 The promulgation of such jury selection plans which includes certain classes of person based upon occupation to be excused from jury duty if they so desire was considered not to be improper by the United States Supreme Court.[1237] The basis that certain individuals, as a result of their occupation who were called up and could on an individual basis through request, be excused from jury service if the District Court found that such jury service would entail undue hardship or extreme inconvenience was legitimate. The Commission received evidence throughout the United States that this system of individual excusal led to problems both in the general perception of the public towards jury duty, and to questions of representativeness. Evidence was taken from members of the School of Law at the University of California, Los Angeles, which suggested that:[1238]

1237 *Donaldson v. O'Connor* (1974 CA5 Florida) 496 F2d 507.

1238 Meeting with delegates of the VLRC and Professors Bergman, Derrian and Moore from the School of Law U.C.L.A., 19 Jun. 1995. The same professors cited the attitude of medical professionals: 'Doctors probably get routine summons and do not return them. They say, 'it is ridiculous, I cannot serve', so you don't get a lot of doctors or veterinarians. You can figure it out for yourself how it works empirically'.

> There is certainly a disproportionate number of older people, perhaps retired persons who can serve, but a lot of people work for companies who are not willing to pay for jury service and those who do not work for companies find it appropriate to get out of jury service.

7.55 In Chicago and New York, the Committee heard various professionals within the field of criminal justice comment about the need to broaden either the eligibility criteria, or to tighten the excusal criteria in order that juries become truly representative of the community. To achieve this, these individuals stressed that many or all of the occupational categories that had in the past been exempt or excluded from jury service would have to contribute to the efficacy of jury service in these States:[1239]

> No longer can the responsibility—some call it a burden—of jury duty fall to a select few in the community. The professional classes must contribute to the community in ways other than in paying their taxes. Jury service is important to the standing of criminal justice in this country and must be shared equitably among the populace.

7.56 Some felt that the liberal excusal policy is a vestige of the past. A century ago, jurors had to make themselves available for service at a 'term of court' lasting four weeks. The rigours of travel compounded this inconvenience. In those circumstances it was imperative to exempt from jury service persons whose immediate presence was necessary to community health and safety. Today, those exemptions cannot be justified on the same ground. The Committee heard submissions repeatedly, particularly from court and jury administrators, that there should be no automatic occupational exemptions or rights to excuse from jury trial except in a few isolated cases. The Committee also noted that the courts have been urged to narrow the criteria for excuse and the court officials have become more selective in allowing persons to be excused.

7.57 Court practice now is generally characterised by individually handling each request for excusal on a case by case basis. All potential jurors must show the court 'just cause' or 'good reason' why they are unable to commit themselves to jury service. Excuses are granted only when authenticated and warranted. Courts increasingly demand that formal proof—either in the form of a written document or in the form of viva voce evidence offered by the person seeking to be excused—be required before an excusal is granted.

7.58 Evidence tendered to the Committee by Professors from the Law School at UCLA was in favour of limiting the excuse of lawyers. Lawyers

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1239 Professor Diamond, S., meeting with delegates of the VLRC, 22 Jun. 1995.

should not be excluded from participating in criminal juries purely on the ground that they *may* influence other jurors:[1240]

> I could have unduly influenced a jury in that a lot of jurors would have said, 'I am confused, he is a Professor of Law, a lawyer, he must know what is going on, so I will go with him'. Yes, that was a possibility. On the other hand in most criminal trials most issues are, in a sense, factual—not legal. The jurors do not have a problem with jury instruction. A juror says, 'He has an alibi and he was not there. I do not need to look to a lawyer to understand the situation'. I would not exclude attorneys from jury service on that basis.

7.59 Similar evidence was received in Chicago where the American Bar Foundation representative suggested that disqualification from jury service should not, in most cases, be based on occupation, more to do with the individual:[1241]

> So I think an automatic exclusion for an occupation is not the way you would want to go unless you don't have any other safeguards in the system and then I think you're going to lose some place.

7.60 The proposals to narrow ineligibility and exemptions should be viewed in the context of other jury reform recommendations. If courts take measures to make jury service less burdensome and more attractive—such as reducing the length of service—the number of persons seeking to be excused should diminish. Coupled with this, a tightening of exemption criteria across the jurisdictions would lessen the number opting out of jury service easily. Both the lessening of travel time by making the jury districts less geographically large as well as the addition of one trial/one day model of jury service will minimise the inconvenience that all citizens are asked to bear. Evidence was presented which facilitated sensible and predictable requests for deferral that would give jurors maximum input as to when they are actually able to serve. As an example, the exemption given to persons age 70 or older seems to have outlived its usefulness in light of the ameliorations explained above. Given the expanding role and growing number of senior citizens, many witnesses assisting the Committee recommended that the current exemption for individuals aged 70 or older should be eliminated. Instead, senior citizens who are physically or mentally unable to perform as jurors, or who would be seriously inconvenienced by jury service, should seek to be excused. Those requests should be readily granted.

1240 Meeting with delegates of the VLRC and Professors Bergman, Derian and Moore, School of Law, University of California, Los Angeles, 19 Jun. 1995.

1241 Professor Diamond, op. ci.

7.61 In a similar vein there has been repeated doubt expressed as to the wisdom of permitting members of groups such as teachers, attorneys, pharmacists, nurses, dentists and sole proprietors to be excused from jury duty. Case by case excusal, not simply because of the nature of their occupation but where, for example, an individual may have difficulty in finding adequate temporary substitutes when they leave their work or their practices, or may incur extra work or financial loss, even if substitutes were obtained, would instead be a sensible reason to grant excusal. This has been the approach taken within the Federal system.[1242]

Impact of Ineligibility/Excusal on Representativeness

7.62 Where the rules of any particular jurisdiction provide for wide ineligibility or disqualification, it may be very difficult to strike a representative jury. Even more importantly, the practice in any jurisdiction for granting exemptions or excusal for prospective jurors, either because of demonstrated hardship, or because it condones the apathy of a particular prospective juror, will affect adversely the achievement of a representative jury.

7.63 Exemptions from jury duty in the Federal Courts have been sharply restricted since 1978 when the Jury System Improvement Act was passed. In addition to the stick of toughened regulations, the Act also offered the carrot of increased compensation and travel allowances and forbade employers from firing jurors or causing them to lose seniority as a result of their service.[1243] The states are not necessarily as fortunate. One of the reasons for low jury yields within Los Angeles include population characteristics, law quality source lists, high juror demand and a shrinking pool of qualified jurors who are willing to serve.[1244]

7.64 According to many scholars, juries are composed of less than ordinary citizens. Particularly in those trials which are likely to be prolonged, the well educated professionals within the venire escape jury duty. They demonstrate that their positions of responsibility leave them unable to afford the burden of protracted jury duty. This is unfair to those who do serve for prolonged

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1242 See *United States v. Goodlow* (1979 CA9 Cal) 596 F2d 159.

1243 See Title 28 USC 1871 & 1875.

1244 The Citizens Economy and Efficiency Commission *The Management of Juries within Los Angeles County*, Los Angeles, 1994, (hereinafter LA Management), p. 13.

periods; those serving are rightly resentful which may lead to an inferior quality of decision making.

7.65 Suggestions for ameliorating this situation have been canvassed. In summary, they include a prima facie obligation to serve; excusal is based only upon particular hardship. No outright excusal is possible; only deferral to a time fixed at the prospective juror's convenience. One suggestion is to move to a county wide system of summonsing prospective jurors. Though this will have the benefit of increasing the size of the prospective jury pools, it is likely to result in a number of postponements (as opposed to exemptions) and requests to serve at a courthouse closer to the place of residence.

Deferral

7.66 A practice which may minimise the inference with the impartiality and representativeness of the jury, yet accommodate those for whom a particular moment is inconvenient, is deferring the time of service. Prospective jurors who indicate in their questionnaire that a particular time is inconvenient for either family or business matters, instead of being excused, are assigned an alternative time which serves both the court's needs and their own. Evidence from the jurisdictions visited was that a sensible and predictable uniform deferral procedure which includes the individual's input should be implemented. All persons claiming an inability, on the basis of hardship, to be part of the jury pool at a particular time, should be offered an alternate time as opposed to being excused from service. An alternate time, agreed upon at the time of excusal, should be fixed for service. The success of this flexible, discretionary excusal system depends upon the consistency and the ability of the jury commissioners, sheriffs or otherwise designated court officials, to distinguish between situations where a citizen can make alternate arrangements and serve at a later time, and those who are simply unwilling to be part of the jury process.

7.67 It has become routine in New York to grant deferrals as of right. It is now accepted that citizens are frequently summoned for jury service at a time inconvenient to them. Originally the system was intended to assist those who were going to be placed in a position of hardship if they were ask to serve at a particular time. The policy on deferrals currently varies from county to county within the State and some feel that the original raison d'être of deferrals has

now been subverted. It was suggested to the Committee that open slather deferrals do not foster public respect for the jury system.

7.68 Recent proposals presented to the Chief Judge of the State of New York recommended:[1245]

> Each summoned juror who is not entitled to an excusal should be able to obtain one deferral as of right. A deferral should be to a date certain, selected by the juror and with the proviso that the selected date be no more than six months in the future. Thereafter, no deferral should be permitted except for unavoidable emergencies. Allowing the juror to select a date for service will enable the juror to arrange for work or child care coverage well in advance or to use vacation time during the period of jury service. This provisions should be strictly enforced.

Ethnicity and Gender Issues Affecting Jury Representativeness

Ethnicity

7.69 The United States has sought to empanel juries who are representative of the community from which the jury is chosen as well as impartial, that is, they will be able to adjudge any case on the evidence presented to it. The achievement of those objectives has not been easy. At times the two objectives have been felt to be mutually exclusive, especially in the area of race plagued by suspicion of blacks by whites and whites by blacks. Episodes in the history of jury selection in the United States have shown that peremptory challenges are systematically used by lawyers for their parties to ensure a jury chosen is composed of members of the 'proper' race. Peremptory challenges in many of the states in the South of the United States have been used to eliminate blacks' participation in juries in which a white party was involved. In seeking a jury of one's peers, it is often said that trust will be engendered if persons from the same race and to a lesser extent, same gender, class, philosophy and the like are empanelled. On the other hand it is suggested that impartial deliberations are likely only when group differences are not eliminated but rather invited, embraced and fairly represented.[1246] It is said that the desired interaction between jurors can only take place in the jury room during deliberations.

7.70 The United States Supreme Court in the latter half of the 20th century has led a battle to ensure representativeness within the jury room. The objective has been to achieve a cross-sectional selection of jurors in order to ensure impartial deliberation. The cross-sectional mandate grew out of a

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1245 McMahon, op. cit., pp. 36–37.

1246 Abramson, op. cit., p. 101.

struggle to increase minority representation without abandoning principles of colour blind justice in favour of quotas and racial balancing. But it was not easy to move from accomplishing the negative tasks (no more discrimination) to achieving specific, representational goals.[1247] One conclusion that emerges from research on jury selection is that the more heterogeneous the jury's composition, the greater the likelihood of rich and unbiased performance.[1248] When jurors of different ethnic groups deliberate together they are better able to overcome their individual biases. The purpose of the cross-sectional selection has been to give voice or representation to competing group loyalties. It is almost as if a juror has been sent by constituents to vote their preferred verdict. Such a description of the representation we expect from jurors might explain why we call the jury a democratic institution. 'But it is a vision of democracy so tied to different groups voting their different interests that it cannot inspire confidence in the jury as an institution of justice.'[1249]

7.71 Abramson asked the question of whether through the goal of eliminating discrimination we have democratised jury selection. Or does the principle of cross-sectional jury go beyond traditional colour blind norms, to impose on jury commissioners the affirmative duty to achieve demographic balance on the jury rolls? He sees the difference between these two approaches as critical.

History

7.72 The last half decade century has seen a struggle in the United States to achieve representativeness and a non-racial striking of jury panels. In 1940 in the case of *Smith v Texas,* the Supreme Court for the first time referred to the need to make the jury a 'body truly representative of the community'.[1250] It was in this context that Justice Hugo Black, writing for the court, could note almost in passing that it was 'part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community'.[1251]

7.73 The United States Congress formalised the cross-sectional requirements for Federal juries in the Jury Selection and Service Act of 1968.

1247 ibid., p. 131.

1248 Guinther, op. cit, p. 58.

1249 Abramson, op. cit., p. 102.

1250 ibid., p. 115 see footnote 69; *Smith v. State of Texas* 311 US 128 (1940), p. 130.

1251 ibid., p. 115.

The next step for the representative ideal came in the 1975 case of *Taylor v Louisiana.* Here, the Supreme Court elevated the cross-sectional or representative requirement from a statutory matter, enshrining it within constitutional law by holding that the very meaning of the Sixth Amendment guarantee of trial by an 'impartial' jury required that the jury be drawn from a representative cross-section of the population.[1252] The court in *Taylor v Louisiana*[1253] indicated a properly selected jury might be more fair to defendants in the long term:[1254]

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.

7.74 Thus the court continued to refer to the contribution the cross-sectional requirement made to impartial deliberation. But this was no longer the chief rationale behind the idea. Instead it was claimed that the principal virtue of a representative jury was its contribution to the jury's political function. The justices were frank about the politics of justice. The jury's purpose was to legitimate the verdict to the population at large and to preserve public confidence in the justice of the verdict.[1255] Taylor was silent with regard to the use of racially inspired peremptory challenges.

7.75 In Los Angeles County, as a result of a 1978 ruling of the California Supreme Court, lawyers in criminal cases could no longer use peremptory challenges to remove prospective jurors, simply on the presumption that they were biased because of their race. Peremptory challenges suspected of being exercised for racial motivations could now be questioned by the opposing legal representatives. The attorney utilising the challenge must be able to justify his or her challenge to the judge at a bench conference.[1256] The judge, in turn, may either accept the explanation or dismiss the entire panel and start voir dire afresh.

1252 ibid., p. 118.

1253 419 US 522 (1975).

1254 *Taylor v. Louisiana* op. cit., p. 530, per White, J.

1255 Abramson, op. cit., p. 124.

1256 *California v. Wheeler* 148 Cal Rptr. 890 (1978).

7.76 A person seeking to overturn the jury selection must show that the jurors were selected in an intentionally discriminatory fashion. The burden, upon one who would show that the jury, as struck, under-represents a particular group, is to demonstrate:

1. The group in question is a recognisable class;
2. The selection and procedure resulted in substantial under-representation of the group; and
3. The original summonsing and selection procedure was susceptible to abuse or was not racially neutral.

For example in one case substantial under-representation was established when a statistical disparity of 40% existed between Mexican-Americans in the general population and the group summonsed to appear on the jury.[1257]

7.77 Prior to 1986 lawyers could peremptorily strike persons on the basis of race alone. 'In the years after *Swain*, some of the most highly publicised trials of black defendants, charged with violence against whites, showed the persistent use of **peremptory challenges** by prosecutors to eliminate prospective black jurors, on the assumption that blacks would obviously favour the defence in such cases.'[1258] In *Batson v Kentucky*,[1259] the court finally overruled the requirements in *Swain*, which required a showing long term racial exclusion, and held, for the first time, that using race as a reason for striking a juror was a violation of the equal protection clause.

7.78 The mere fact that the US Supreme Court has ruled as impermissible the use of **peremptory challenges** for achieving a 'racially cleansed' jury did not mean that, overnight, such use of **peremptory challenges** ceased. The courts have continued to monitor, at the behest of aggrieved parties, jury selection practices alleged to be racially motivated.[1260] Different views about the effectiveness of the enforcement process have been offered to the Committee by witnesses.

1257 See *Castenda v. Partida*, 430 US 482 (1977) For cases in which lesser percentages still established a prima facie case of under-representation see *Rose v. Mitchell,* 443 US 545 (1979); and *United States ex rel Barksdale v. Blackburn,* 1981 CA 5, Louisiana, 610 F.2d 253.

1258 Abramson, op. cit., p. 135.

1259 *Batson v. Kentucky* 47 US at 86–87 (1986).

1260 To establish a prima facie case of purposeful discrimination, the objecting party must demonstrate that other side used a peremptory challenge to remove from the venire a member of a cognisable racial group and that the facts and circumstances raise an inference that the opposing party used the peremptory challenge to exclude the prospective juror on the basis of that person's race. See *United States v. Cooper* 1994 7 CA Ill. 19 F3d 1154, p. 1159.

7.79 A charge of the abuse of the peremptory challenge during jury selection, even in the most uncelebrated case, is a political act and renders today's courtroom the centre of controversy. According to some commentators the present federal judicial enforcement of cross-section principles is rather weak.[1261] It became clear in the evidence presented to the Committee that in every jurisdiction, the methods used to select persons for jury trial have, to a greater or lesser extent, compromised the achievement of the theoretical ideal. Furthermore, a view commonly expressed to the Committee was that, owing to a variety of factors, jury pools, generally, are now so unrepresentative of the broader community that the system of trial by jury can only aspire to reasonable and random representativeness. The results from the inadequacy of the lists from which juror pools are comprised, together with the still lingering arbitrary use of peremptory challenges. In some jurisdictions steps are being taken to improve the situation, while in others there is a view that attempts to do so should be abandoned.

7.80 In Chicago, the Committee heard from an academic at the School of Law at Northwestern University about the specificity of representativeness and the difficulties involved in achieving such a notion. It was stated that the venire should be colour and gender blind, while at the same time promoting a process which stops exclusion and promotes inclusion.[1262] A senior fellow at the American Bar Foundation presented to the Committee the principle that juries, no matter their final composition, are regarded as being representative of the community if the original venire is not tainted or biased towards or against any particular group in society. The Committee met with representatives in Los Angeles shortly after the second Rodney King trial. The Committee was informed of arguments which had recently been put forward recommending that some kind of proactive framework be implemented so that, in actuality, there would be a 'specific representativeness'.[1263] This position borders on establishing certain circumstances which would tolerate outright jury manipulation. The Committee heard some evidence that the arbitrary use of the peremptory challenges by one side had virtually been eliminated; other witnesses said that it only works when all involved are honest and adhere to the spirit of the principle.

1261 Abramson, op. cit., p. 129.

1262 Professor Geraghty, T., Meeting with delegates of the VLRC, School of Law, Northwestern University, 22 Jun. 1995.

1263 Professor Diamond, op. cit.

7.81 The goal of the United States Supreme Court, in the short run, was to make it impossible for litigants to engineer all white jurors through the use of peremptory challenges. Ultimately, however, the court has embarked on a mission to eliminate racial basis in the selection of jurors.[1264] The leading question is whether jury selection has been democratised through the so-called negative goal of not discriminating. Or has the cross-sectional principle gone beyond traditional colour blind norms to impose on jury commissioners an affirmative duty to achieve demographic balance on the jury rolls?[1265] The answer is not yet clear.

Gender Issues

7.82 Discrimination on the basis of race has not been considered the only problem to plague jury selection in the United States. There has been an endemic attempt to manipulate the jury on the basis of gender. Two separate, but related, problems have affected women's participation on juries. In many jurisdictions women were (and are to a lesser extent) in a different position than men. Either women were ineligible or given a 'volunteer' only status. They were also granted either an automatic or semi-automatic excusal, if requested, for home duties. The second problem was the use of peremptory challenges to eliminate those women who were present on the venire. The United States Supreme Court was much slower in ruling upon the use of peremptory challenges, and eligibility or excuse criteria, to create a jury of predominantly men.

7.83 Early this century, witnessed a change in several jurisdictions from excluding women from jury service to seeking to have them take their place on the jury rolls. A rhyme captured the counter-reaction as women were called upon more frequently:[1266]

> Baby, baby, don't get in a fury;
> You're mama's gone to sit on the jury.

7.84 In many jurisdictions, women were still seriously under-represented on sitting juries. The situation was reviewed by the US Supreme Court in 1959. The held that an 'appropriately tailored' exemption for women was

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1264 Babcock, B. A. in Litan (ed), op. cit., p. 461.

1265 Abramson, op. cit., p. 102.

1266 ibid., p. 113.

permissible in order to safeguard 'the important role played by women in home and family life' but that the 'preclusive domestic responsibility of some women is insufficient justification for their disproportionate exclusion' from juries.[1267] As late as 1975 several states continued to run a two-track system of jury selection. Men were drafted but women had to volunteer.[1268]

7.85 The problem of the use of peremptory challenges to eliminate women from jury service was squarely faced by the Supreme Court in 1994. It extended the logic of *Batson,*[1269] and prohibited participants in state jury selection from using peremptory challenges to eliminate potential jurors simply because of their sex.[1270]

7.86 Commentators have spoken of the effect upon jurors of the systematic exclusion of persons by gender:[1271]

> I am certain that the women who spend their jury being struck from criminal cases and from big money civil cases too, suffered injury much like that of the black men who are most often the subject of the Batson line of cases. The court has identified such injury as 'a profound personal humiliation, heightened by its public character,' and held that citizens must not be called to served and then be abused in this way.

7.87 It would be naive to think that the constitutional prohibition will suddenly reverse the practice which has grown up. The use of peremptories on the basis of gender has grown up because of the perceptions by attorneys of members of the jury. 'The message was clear—on real juries men and women filter the evidence through different preconceptions, even different prejudices.'[1272] For example, in the trial of the Menendez brothers in California, both juries deadlocked but the jury for Erik Menendez apparently split along sexual lines, with six women holding out for voluntary manslaughter and five of the six men voting for first degree murder. The United States Supreme Court has held that discrimination based upon gender does not substantially further the State's interest in achieving a fair and impartial trial. It further held that the community is ultimately harmed by the perpetuation of invidious group stereotypes.[1273]

1267 *Duran v. Missouri* 439 US 357 (1959).

1268 Abramson, J, op. cit., p. 113. See footnote 63.

1269 *Batson v. Kentucky*, 476 US 79 (1986).

1270 Abramson, op. cit., p. 136.

1271 Babcock, op. cit., citing *Powers v. Ohio* 111 SC 1364 at 1372 (1991).

1272 Abramson, op. cit., p. 104.

1273 *United States v. Omoruyi* 1993, 9 CA Cal., 7 F.3d 880.

7.88 In recent times there has been some consideration given to a gender qualification in a certain type of cases (e.g. sexual assault and rape). In Chicago the Committee took evidence regarding gender balance of juries and heard that in one instance, involving a paternity matter, that the male in the case later complained about too many women on the jury. The case was remanded to another court because gender was the basis for excluding potential jurors. Some local research suggests that in sexual assault and child abuse cases, women are more likely to side with the prosecution: 'That's about the only area, when a male is being tried, in which we have studies of jurors that reveal that there is an impact of gender as opposed to other factors'.[1274]

7.89 The battle over gender has been the latest battle fought and won by those who believe that cross-sectional representation is a valid goal. The courts have so far refused to accept other examples of distinct under-representation. In face of attacks on the under-representation of blue-collar workers, less educated individuals, young adults, people from rural communities, people who chose not to register to vote, jurors with the surname beginning M to Z, and jurors with absolute scruples against imposing the death sentence, the courts have been unwilling to interfere with jury selection.[1275]

Jury Management Issues

Jury Role Formation and the Summoning Process

Jury Roll Formation

7.90 The first step in ensuring that there are a sufficient number of jurors to serve on trials in the various courts as well as to maximise representativeness and to maximise impartiality is have in place a proper procedure for producing a list of prospective jurors. In each jurisdiction the proper court personnel must assemble a roll from which jurors will be selected. For instance, in the Federal Courts 'the judicial conference of the United States may formulate a plan that shall establish a jury commission, or authorise the

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1274 Diamond, op. cit., p. 15.

1275 Cases collected in Georgetown Law Journal 'Project: Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeal 1986/87' 76 *Georgetown Law Journal* 521 at 951 note 2129 (1988).

Clerk of the Court to manage the jury selection process'.[1276] Those empowered must ensure that an adequate cross-section of potential jurors is ascertained. The legislation in California is typical of most State jurisdictions which share the objectives of the Federal Courts:[1277]

> It is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the State and an obligation to serve as jurors when summoned for that purpose; and that it is the responsibility of jury commissioners to manage all jury systems in an efficient, equitable and cost-effective manner, in accordance with this chapter.

7.91 Most jurisdictions also ensure that random sampling is utilised in creating master and qualified juror lists commencing with selection from various source lists.[1278] The most commonly used source list is the list of registered voters. It is estimated that only two-thirds of eligible Americans are registered to vote,[1279] and that taking the names from only a voting list excludes about one potential juror in three. Not only does using a voting list as a sole source mean that a number of persons do not get an opportunity to serve on a jury, it also means that persons with certain characteristics are likely to be heavily under-represented. Lists of voters or registered voters hardly constitute a fair cross-section of the community. Blacks, Hispanics, the young and the poor register to vote and vote at rates significantly lower than the rest of the population.[1280] Some have suggested that there is some advantage to utilising a voting list alone. For example, the Chair of the Committee of Federal Judges opined that the voting lists were sufficient saying:[1281]

> I call to your attention that the use of voter lists supplies an important built-in screening element. It automatically eliminates those individuals not interested enough in their government to vote or indeed not qualified to do so.

7.92 As the use of voting lists alone was generally considered to be infirm as a result of their systematic under-representation of certain groups of persons, the lists were later supplemented with names from other sources whenever

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1276 Title 28 USC, s. 1863(b).

1277 State of California: Trial Jury Selection and Management Act, s. 191.

1278 See, e.g. State of California: Trial Jury Selection and Management Act, s. 198(a).

1279 Bureau of the Census, *Statistical Abstracts of the United States,* US Department of Commerce, 1989.

1280 Abramson op. cit., p. 128.

1281 ibid p. 129.

the exclusive use of voter lists failed to serve the overall policy of achieving proportionate representation on the jury rolls for any particular distinct or cognisable group in the community.[1282] Over 30 States now supplement the voter lists with names taken from driver's licence lists, using some technology for avoiding duplication. Other source lists include telephone directories, city directories, tax rolls, town resident lists, and utility customer lists.[1283]

7.93 The American Bar Association recommended against the use of voter rolls alone. They urged the use of multiple source lists that collectively cover a much higher majority of eligible prospective jurors. In addition to those sources already listed, they urge that persons appearing in the local census, those receiving benefits from the Department of Social Services, newly naturalised citizens, parents of children enrolled in public schools, property or motor vehicle owners and even persons with hunting or fishing licences be included in lists from which jurors are selected. The State of California, one of the jurisdictions visited by the Commission, utilises the following sources:[1284]

> The list of registered voters and the Department of Motor Vehicles' lists of licensed drivers and identification cardholders resident within the area served by the court, are appropriate source lists for the selection of jurors. These two source lists, when substantially purged of duplicate names, shall be considered inclusive of a representative cross-section of the population...

7.94 Los Angeles County uses two source lists for jurors: the list of registered voters from the County Registrar of Voters, and the Department of Motor Vehicles list of licensed drivers and identification card holders resident within the area served by the Court.[1285]

7.95 In Chicago, the relevant Act outlines the preparation of jury lists as including legal voters and Illinois driver licence holders. The list shall be made by choosing every tenth name from the latest voter registration and driver's licence holder lists of the County.[1286]

7.96 In New York State, the Office of Court Administration uses three source lists to compile the State's master list of eligible jurors: voter registration rolls, driver's licences and State income tax rolls.[1287] It is

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1282 ibid p. 117.

1283 ibid pp. 129–130.

1284 State of California: Trial Jury Selection and Management Act, s. 197(b).

1285 California Code of Civil Procedure, s. 197.

1286 Juries Act 705 ILCS 305, s.1.

1287 New York Judicial Law, s. 506; Rules of the Chief Administrator, s. 128.3.

estimated that these three lists cover approximately 90% of eligible jurors. The State of New York recently announced that it will require that its pool of prospective jurors include people drawn from both welfare and unemployment rolls in addition to the rolls stated above. In addition, New York is one of the few jurisdictions in the country that allow individuals to volunteer as jurors. In this way, citizens whose names do not appear on any source list are not automatically excluded from jury service.

7.97 The size of the jury list will naturally vary depending upon the size of the district from which the names are selected. There are two types of districts speaking generally, a centralised jury district and a decentralised district. The Los Angeles County jury system is one of the largest of its kind conducting 6,000–7,000 jury trials annually. A 20 mile radius measures the extent of each jury district. This is, in fact, established by the Court as the distance which any single juror will be required to travel in order to serve, measuring from the centre of the census tract in which the juror resides to the centre of the census tract in which the court is located. This is the basis upon which jurors are drawn even though State law permits people to be called from any part of the County. It is also possible that some prospective jurors live in an area where there is more than one court. Those persons may be called to attend at any or all of the court houses for jury service.

7.98 In Chicago there is a decentralised court system based on geographic districts. Any individual who is summoned is designated to attend at a particular court. Similarly in the District of Columbia, all residents within the district are selected at random to serve at any designated court within that jurisdiction.

Summoning of Jurors

7.99 Each court or district must decide on the particular method by which it will select its names and inform its prospective jurors of their obligation to serve in a particular case or at a particular time. For example, in the Federal District Courts:[1288]

> from time to time as directed by the District Court, the Clerk or District Judge shall publicly draw at random from the master jury wheel the name of as many persons as may be required for jury service.

1288 Title 28 USC, s. 1864.

7.100 The Committee found that in various jurisdictions, jurors are summoned specifically for a particular case or are drawn from a jury pool or a combination of both. No more are summoned for appearance on any given day than can be prescreened. It is considered that daily overcalls create public relations resentment and are inefficient. There are two distinct types of jury summons used—the two part mailing system and the one part mail out. Los Angeles County uses a two part mailing system. The first mailing contains a juror affidavit which the recipient is to complete and return within ten days. The juror affidavit contains three sections: a qualification questionnaire, an exemption certificate and a request to be excused.

7.101 Returned juror affidavits are hand sorted and are examined to determine whether the prospective juror is qualified or not. The process eliminates those who are unqualified, exempt from service, or are excused. From the remaining list of qualified and available potential jurors, a computer randomly selects those are then notified by a second mailing of a reporting date for jury service. This date is a minimum of 2½ weeks from the time the summons is mailed. Jurors are directed to a court location, not more than 20 miles from their residence.

7.102 In a one part process, the summons directs jurors to report for jury duty on a specified date. It also provides additional jury system items including administrative information, a map showing where to report and a detachable juror badge.[1289] The United States District Courts also use a one part mailing. Included within their form is a juror information sheet, a parking permit and the summons for jury service.

7.103 Los Angeles County is considering implementing a one part mailing similar to that utilised in the Federal Court system. Although the development of a one part summons may require additional effort on the part of the court initially, it would ultimately reduce paperwork and possibly mailing costs. In addition to the information supplied by the Federal Court there would be a request to be excused or that service be deferred. The items would be required to be completed and returned within 5 days of receipt. Those requesting to be excused or requesting a deferral would also receive notification by return mail prior to the summons date.

1289 LA Management, p. 19.

7.104 The return rate of the juror summons depends upon both the method employed and the inclusiveness of the jury roll list. The Los Angeles County two part mailing system estimates that 48% of juror affidavits are never returned. Los Angeles County, in an attempt to ameliorate the situation recently signed an agreement with a major telephone service supplier to provide a menu-driven, interactive 24 hour a day telephone system with more lines for potential jurors summoned to report a wish to request a deferral, different location, or more information.[1290]

Questionnaires

7.105 The mail out mentioned above contains questionnaires which are destined to ascertain eligibility to serve. For example, in California:[1291]

> The jury commissioner or the court shall enquire as to the qualification of persons on the master list or source list who are or may be summoned for jury service. The commissioner or the court may require any person to answer, under oath, orally or in written form, all questions as may be addressed to that person, regarding the person's qualifications and ability to serve as a prospective trial juror. The commissioner and his or her assistants, shall have power to administer oaths and shall be allowed actual travelling expenses incurred in the performance of their duties.

7.106 In the Federal system, legislation governs the content of the questionnaire sent out to prospective jurors. The questionnaire is intended to elicit information that helps the court determine whether the person qualifies for jury service. Questions seek information including a person's name, address, age, race, occupation, education, length of residence within the judicial district, prior jury service, citizenship, and reasons for excuse or exemption from jury service.[1292] This may be supplemented by a later updated questionnaire.

7.107 In Los Angeles County the questionnaire asks questions related to juror identification, qualification and ability to serve as a prospective juror. Later, additional questionnaires may be required for the voir dire process. These *supplemental juror questionnaires* (known as SJQs) are given to jurors in addition to the brief questionnaires. These are generally given out after the person has been summoned and just before jury selection in an individual

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1290 ibid., pp. 26–27.

1291 State of California, Trial Jury Selection and Management Act, s. 196(a) (in part).

1292 Jury Selection and Service Act, s. 1869.

trial commences. SJQs focus on case specific topics rather than on general demographic information.

7.108 Illinois provides the respective County's jury commissioners with authority to submit questionnaires to prospective jurors to enquire as to their qualification for jury service and as to the hardship that jury service would pose to the respective juror.[1293]

7.109 In criminal cases in New York State, trial judges are given discretion to require prospective jurors to complete a questionnaire containing basic information. Many judges in criminal cases use the questionnaire to expedite their initial examination of the prospective jurors.

7.110 Other courts have designed their own juror information forms. One example, in the western district of Texas, enquires about the sexes and ages of the prospective jury members' children, the name of their current or last employer, the nature of their work, number of years and type of education, the nature and duration of the spouse's work, self or family employment in law enforcement, self or family employment by the Federal Government and self or family employment in the insurance industry.

7.111 In some districts, prospective jurors are sent questionnaires and are not called for service if they do not respond. A 1974 study in Chicago, for example, showed that 23% of those who were sent the questionnaire by the State courts did not return it, including 42% of those living in the predominantly black areas. In the same district only 2% of prospective jurors for Federal Court cases did not answer because the court followed up on those who did not reply to the first notice.[1294] Another reason for the greater success in the Federal system may have been the penalty enforcement for failure to answer:[1295]

> Any person summoned for jury service who fails to appear as directed shall be ordered by the District Court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for non-compliance with the summons may be fined not more than $100 or imprisoned not more than 3 days, or both.

1293 Juries Act 705 ILCS 305, s. 10.2.

1294 Kalven, H. & Zeisel, H., *The American Jury,* Little Brown and Co., Boston, 1971, pp. 74–75.

1295 Title 28 USC, s. 1866.

Jury Selection

Voir dire

7.112 The Voir dire in the United States is perhaps the central feature of the assembling of any jury, and the one that has created the most controversy. It is the method by which the persons who will finally adjudge guilt or innocence in a criminal trial, and issues of liability and quantum in a civil trial are selected. Lawyers for each side believe that getting the composition of the jury is the most important matter and will dictate all later events in the trial. The process of selection of jury through the voir dire may extend anywhere from less than an hour to, in the more protracted cases, anywhere up to several months. The process of voir dire refers to the examination of prospective jurors, by the court or by the attorneys of the parties involved, to determine their qualification for jury service. On the basis of the information that has been provided, it can be determined whether there is some reason why a particular person should not be allowed to serve on the jury, or whether despite the lack of any overt reason, the lawyers should exercise a discretion to determine that any particular person should not serve on this particular trial. The process of the voir dire has seen, in the opinion of some commentators, the most abuse by the parties, and has raised major questions about representativeness and impartiality. It has witnessed, within the unfolding of this century, a systematic process of eliminating persons on the basis of their race, and to a lesser extent, on the basis of their gender.

7.113 Voir dire is conducted in all jurisdictions on the basis of information that has previously been disclosed to the parties and to the court through the juror's questionnaire and other information that has been supplied by the jurors in the summonsing process. Voir dire examination will often open with a short statement about the case to be tried. The purpose is to inform the prospective jurors of what the case is about and to identify the parties and their lawyers. Questions are asked to find out whether any individuals on the panel have any personal interest in the case. The court also wants to know whether any member of the panel is related to or personally acquainted with the parties, their lawyers, or the witnesses that will appear during the trial. Then, either the judge or the lawyers or both will question the jurors for the purpose of determining whether they are free of bias, prejudice, or whether any matter might interfere with the ability of any single potential juror to act fairly and impartially.

7.114 Voir dire has been labelled as the single most important aspect of any trial. Voir dire elicited more comments than any other issue on which the witnesses contributed their views. Furthermore, many of the attorneys and academics who spoke to the Committee believe that most trials are won or lost at this preliminary stage. Legislation in Los Angeles County provides an indication of the way in which the voir dire process takes place:[1296]

(a) Except as provided in subdivision (b), when an action is called for trial by jury, the clerk, or the judge where there is no clerk, shall randomly select the name of the jurors for voir dire, until the jury is selected or the panel is exhausted;

(b) When the jury commissioner has provided the court with the listing of the trial jury panel in random order, the court shall seat prospective jurors for voir dire in the order provided by the panel list.

Conduct of Voir Dire: By Attorney or by Judge?

7.115 The persons with whom the Committee met attached a great deal of importance to the issue of whether voir dire is conducted by judges or whether it is conducted by attorneys. This, in turn, is influenced by what is perceived to be the function or functions of the process, as well as by issues such as available resources, costs, time constraints, and efficiency.

7.116 The State of California in its legislation provides one example of the way in which a judge conducted voir dire would take place:[1297]

> To select a fair and impartial jury in civil jury trials, the trial judge shall examine the prospective jurors. Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause.

7.117 In a criminal case the process in the State of California is carried on in much the same manner. The relevant section states that the court may permit the parties, upon a showing of good cause, to supplement the judge's examination by such further enquiry as the court deems proper and to allow additional questions by the parties.[1298]

1296 State of California, Trial Jury Selection and Management Act, s. 222

1297 State of California, Trial Jury Selection and Management Act, s. 222.5 (in part)

1298 State of California, Trial Jury Selection and Management Act, s. 223.

7.118 Those who favour judicially conducted voir dire argue that the central reason for the voir dire is to determine which jurors are fit to serve. As the judge has no stake in acting on behalf of either party, but rather on behalf of the system, it is argued that the judge is in a better position to exercise the function. In addition those who favour judge conducted voir dire have another argument. It will limit the opportunity of lawyers to woo the veniremen so those who are eventually selected have few preconceived notions about which side is in the right.[1299] They also state that less time, and consequently less money, is spent, as judge conducted voir dires are shorter in time. A Federal Court study revealed that judges require an average of half an hour to put a jury together when they conduct voir dire alone whereas, based on New York statistics, lawyer conducted voir dire averaged 12½ hours, some of them up to 6 weeks, and as long as the trial itself in 20% of the cases.

7.119 There are some who believe that there are disadvantages in having the judge conduct voir dire. As the prime purpose is to rout out prejudiced jurors some would suggest that lawyers are generally better qualified for the task than are judges. Judges do not know the issues of a case as well as its lawyers do and the judicial questioning, even when it's not limited to basic enquiry tends to be insufficient.[1300]

7.120 The method by which judges will conduct voir dire varies from jurisdiction to jurisdiction. Some judges have the prospective juror complete questionnaire forms; others (especially in areas where significant numbers of jurors do not know how to write) have jurors respond orally, without the need for the court to read the same questions out loud, over and over. The use of such questionnaires in criminal trials saves considerable time, and if done in writing, eliminates a good deal of tedious repetition about which jurors often complain. The Committee was informed that there was a desire expressed by many to have this practice extended to the civil voir dire. In New York criminal voir dire is governed by statute.[1301] It must be conducted in the presence of the trial judge who often conducts the questioning. Time limits and the use of questionnaires or other time saving devices are used in civil voir dire only when agreed to by the parties or imposed by the judge—a

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1299 Report of the Committee on Juries of the Judicial Council of the Second Circuit, New York, 1984, p. 20.

1300 Guinther, J., *The Jury in America*, Facts of File Publications, New York, 1988 p. 52.

1301 CPLR, s. 270.15–270.25.

rare occurrence. As a result in this jurisdiction, voir dire can take days or even weeks.

7.121 The process by which the questioning is done will vary from jurisdiction to jurisdiction. In some instances individual jurors are taken aside and questioned; more often they are questioned in groups. Even in those jurisdictions where the judge has the most power in conducting voir dire there is an opportunity for the lawyers of the parties to ask questions supplementary to those posed by the judge or to submit questions that they would like to have raised by the judge. The judge may then pose those questions if they are viewed as proper.[1302] Some commented that the conducting of voir dire on an individual basis in the robing room or the jury room appeared to offer the best yield of jurors prior to the exercise of challenges. In cases where there are several defendants, or where the defendants are in custody or may have to travel long distances it can expedite the proceedings if the presence of the defendants during the preliminary stage of the voir dire is waived by defence counsel with the agreement of the court. In those jurisdictions that utilise the questionnaires which have been examined by both the court and counsel for the respective parties it is usually only necessary for the prospective juror to appear briefly and to outline his or her background. A well designed questionnaire will provide sufficient information for the juror's qualifications to be well understood, and the retention or elimination of that juror to be based in great part upon verification of the information contained therein.

7.122 Those who support court supervision (or the prominent position of a judge) in voir dire suggest that judicial supervision of the process positively affects perceptions about the fairness of jury selection. Judges and some other witnesses claim that the benefit of judicial supervision lay in the reduced waiting time of prospective jurors. This, in turn, encourages them to be more attentive. A report on civil voir dire in New York State established that declining levels of judicial supervision are accompanied by corresponding declines in the perceived positive effects of judicial supervision on the fairness of the jury selection process.[1303]

1302 Federal Rules of Civil Procedure, Rule 47(a); Federal Rules of Criminal Procedure, Rule 24(a).

1303 Kaye, C. J. & Milonas, C. A. J., *New York State Unified Court System Report on the Civil Voir Dire Study*, New York, p. 66.

7.123 Many of the practitioners who spoke with the Committee expressed less favourable opinions about judicial management of voir dire, the imposition of time limits and other restraints on the conduct of the process. Some witnesses contended that judicial control of the process is inefficient and ineffective in providing fair and unbiased juries. The Committee was directed to the ruling of the United States Supreme Court which held, over 60 years ago, that 'the guiding hand of counsel' should be present at every critical stage of a criminal trial,[1304] which some witnesses argued should result in voir dire being placed within lawyer control. Those harbouring reservations about judicial questioning suggested that often judges, knowing less than the attorneys about the facts of the case, lack sufficient skills or incentive to dig deeply enough in their questioning to find out whether particular jurors harbour subtle biases relevant to their ability to decide the case. Those who believe that lawyers should conduct voir dire do so for the reasons indicated. The total commitment to the case, the greater underlying knowledge of the case, the skill of lawyers honed in cross-examination and eliciting information, all are destined to better serve the process by seeking information underlying the statement within the questionnaire. Furthermore, the experience of many of the judges who spoke to the Committee and who used time limits on questioning was that the attorneys are generally able to control themselves. Even in those circumstances where abuses do occur, the attorneys are subject to immediate rulings by a judge who has already been assigned to the case. Very few advocates for lawyer initiated voir dire take the position that it should be done in a totally unsupervised manner. In most cases they believe that it should replicate the trial itself, with the judge present and serving in a supervisory capacity but not actively questioning the prospective jurors. Court administrators, on the other hand, believe that the process can proceed in the absence of a judge, thus freeing up scarce judicial resources for more essential tasks.

7.124 There have been some suggestions by some commentators that lawyer-led voir dire is subject to abuse, or at least that it is used for purposes other than the principal purpose described above. Some witnesses saw the process as an opportunity for many lawyers, not only to commence their case presentation to the jury, but also to use it as an opportunity for persuasion. One study which surveyed a wide range of jury selection, estimated that lawyers spent only 20% of their time trying to identify and isolate jurors with

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1304 See *Powell v. Alabama* 287 US 45 (1932).

potential bias. It was found that they spent the majority of their time commenting on points of law, forewarning the panel about weaknesses in the case, and generally ingratiating themselves with the jurors.[1305]

7.125 The Committee also heard suggestions from witnesses that in order to increase chances of success at trial, it is necessary for lawyers to develop skills to competently select and bond with the jury. It was recognised that because hand picking a jury is impossible, the goal becomes determining which individuals to eliminate from the panel while trying to educate and bond with those who will serve. Some commentators questioned whether it was possible within the confines of voir dire based on the stereotypical perfunctory questions, to really ascertain which potential jurors should be allowed to serve. Many of those persons who spoke to the Committee agreed that trial lawyers must shed themselves of their present questioning techniques and explore new dynamic voir dire practices.

Effect upon Jurors

7.126 The process of jury selection is a potentially daunting experience for jurors. During voir dire, or jury selection process, they are called upon to describe themselves and their private beliefs before a courtroom of strangers so that the attorneys and the judge can decide if they can be seated on the jury. As a result, jurors may be reluctant to disclose attributes they believe are undesirable.[1306]

7.127 The American Bar Association Standard 7(c) requires the court, during voir dire, to ensure that the prospective juror's privacy is reasonably protected. Nevertheless jurors are understandably uncomfortable discussing where they live and work, and giving information about their families in front of a criminal defendant. Many fear potential retribution from the defendant's family and friends. There is an inevitable conflict between the juror's desire for privacy and the defendant's right to a public trial and to be present during jury selection.

7.128 The experience with voir dire in civil matters was, if anything, even less favourable for potential jurors. The primary jury complaint about the process is the amount of wasted time they must endure. They do not

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1305 Boeder, D., 'Voir Dire Examinations: An Empirical Study', 38 *Southern California Law Review* 503 (1965).

1306 Diamond op. cit., p. 288

understand why they must sit, often for days and occasionally even for weeks, while groups of 6 are asked the same boring questions over and over. They do not understand why they must wait until their names are called when it is apparent that they will be unable to sit on a particular case. The Committee was informed that jurors are often surprised that there is no judge present and that, in many court houses, civil jury selection does not take place in a courtroom. They do not like being asked what they regard as intrusive and irrelevant questions by lawyers. They resent what they perceive to be condescension from virtually everyone who is officially associated with the court system. Reports that unsupervised lawyers and court personnel fail to appear on time, take long lunches, disappear without explanation and end the day early, were by no means uncommon.

7.129 Well informed commentators also questioned whether the process could actually function in terms of the objectives set out. One commentator presented her own experience in attempting to select jurors:[1307]

> None of us doing the choosing in routine cases knew much about the people who were rejected. The wealthy or well connected litigants who could buy jury investigation services and other experts to assist them in looking beneath the stereotype knew more. But even they did not often have the kind of information necessary to reveal the individual behind the pigmentation and the gender.

Challenges for Cause

7.130 The overt function of voir dire is to eliminate potential jurors who are thought to be inappropriate to serve on a particular case. These jurors are eliminated in two ways: though challenges for cause, and though peremptory challenges. Challenges for cause did not appear to be a matter of much controversy among the witnesses heard by the Committee. The basis for a challenge for cause is generally prescribed by legislation. For example, in California:[1308]

> A challenge is an objection made to the trial jurors that may be taken by any party to the action and is of the following classes and types:
>
> …
>
> (b) A challenge to a prospective juror by either:
>
> (1) A challenge for cause for one of the following reasons:

1307 Babcock, B. A., 'Jury Service and Community Representation' in *Verdict* (Litan, ed) op. cit., p. 461.

1308 State of California, Trial Jury Selection and Management Act, s. 225.

A. General disqualification—that the juror is disqualified from serving in the action on trial.

B. Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.

C. Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party…

7.131 A challenge for implied bias might include, for example, a degree of blood relation to any officer of a corporation who is a party, or to any alleged witness or to the victim in a particular case.[1309]

7.132 The court is the sole arbiter of actual bias in challenges for cause.[1310] It is up to an attorney to raise a challenge for bias but in the end it resides in the court to determine.

7.133 There is no limit on the number of jurors the court may excuse through challenges for cause, nor is there any limit to the number of such challenges being exercised. In most cases, there are not a large number requested or granted.

Peremptory Challenges

7.134 In the process of selection of potential jurors, lawyers may exercise a number of challenges for which they need not give a reason. A juror, who has been peremptorily challenged, is excluded from the case without the person causing that juror's exclusion having to explain why. In criminal law historically, the prosecution did not have peremptory challenge rights at the time the constitution was adopted. It only became common by the mid 19th century as states gradually began to pass legislation granting such rights to the prosecution. On the other hand, defendants have been entitled to exercise peremptory challenges since Constitutional times. The peremptory challenge would seem to have been considered a device for the defendant rather than for either the prosecution or the plaintiff in a civil matter.

7.135 The legislation in California is illustrative of the method by which peremptory challenges may be employed:[1311]

1309 See State of California, Trial Jury Selection and Management Act, s. 229. This section states, inter alia, that the degree of consanguinity within the fourth degree of any party is challengeable.

1310 *Photostat Corp v. Ball* (1964 CA 10 Kansas), 338 Fed2d 783.

> A challenge to an individual juror may be taken orally or may be made in writing, but no reason need be given for a peremptory challenge, and the court shall exclude any juror challenged peremptorily.

The number may vary from place to place. In California in criminal cases if the offence charged is punishable with death or with imprisonment in the State prison for life, the defendant is entitled to 20 peremptory challenges and the people to an equal number.[1312] In civil cases, each party is entitled to three peremptory challenges. That number may be increased where there are several plaintiffs or several defendants depending upon the ruling.[1313] The information on which peremptory challenges are based will vary from jurisdiction to jurisdiction. In Los Angeles County, for example, the usual jury questionnaire is supplemented by a supplemental juror questionnaire. The SJQ is given to jurors just before jury selection commences. They generally focus on case specific topics rather than on general demographic information. These questionnaires entitle attorneys to question every prospective juror and to obtained detailed responses about case relevant experiences, attitudes and opinions. Generally, SJQs are 10 to 12 pages in length, but courts have certainly allowed longer questionnaires. Surprisingly the Federal Courts have been more likely than State courts to use SJQs. Initially they were used in high publicity criminal cases, but, as courts increasingly have become aware that some case relevant experiences are sensitive, they are gaining popularity in many State courts and in civil cases as well as criminal.

7.136 In addition to questionnaires, some lawyers do not rely entirely on their own ability to spot potentially biased jurors, rather, when they have clients who can afford to pay the tab—$5,000 to $20,000 and up, according to one trial attorney—they hire jury selection experts.[1314] More recently, 'scientific' jury selection has been associated with major civil litigation at the pre voir dire stage. The dry run trials organised by market research firms, not only tell the clients which arguments are most likely to impress jurors but they also presumably develop, based on the mock juror's response to the arguments, a profile of who should be sought and who avoided for the jury when the real trial comes.[1315]

1311 State of California, Trial Jury Selection and Management Act, s. 226(b).

1312 State of California, Trial Jury Selection and Management Act, s. 231(a).

1313 See Title 28 USC, s. 1870.

1314 Guinther, op. cit., p. 55.

1315 ibid.

7.137 A lawyer is the sole and exclusive arbiter of who may be peremptorily challenged for suspected bias or prejudice against a client's case.[1316] 'At the very least, peremptory challenges function to 'assure the parties' by giving them the right to veto those members of the jury panel whom they most distrust.'[1317]

7.138 Although no reasons need be given for them, peremptory challenges have themselves frequently been challenged by the loser in a case on the grounds that they were promoted by ethnic or gender bias. Indeed this has been the most controversial and closely fought battle in the use of peremptory challenges within the United States. The Committee was told by senior litigators at a prestigious law firm that issues of representativeness were directly connected to the selection process with particular emphasis on management of peremptory challenges.[1318] They argued that the manner in which counsel employ peremptory challenges has major ramifications for the potential representativeness of the jury. Similarly the Administrative Judge at the criminal branch of the New York State Supreme Court expressed concern about peremptory challenges and contended that the very nature of their utilisation is discriminatory, no matter the intentions (well meaning or otherwise) of their respective attorneys.[1319]

7.139 According to representatives of the Federal Judicial Centre in Washington DC, while everyone eligible for jury service is meant to have an equal chance of serving, the reality is otherwise.[1320] It was suggested that the issue of representativeness is constantly questioned and challenged in this jurisdiction, with the biggest impact on the ideal of a fair cross-section of the community arising from peremptory challenges.

7.140 In Washington DC, the law requires that no citizen shall be excluded from service as a grand or petit juror in the District Courts of the United States on account of race or gender. The issue of the voir dire and the exercise of

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1316 *Photostat Corp v. Ball* (1964 CA 10 Kansas) 338 Fed2d 783

1317 Abramson, op. cit., p. 131.

1318 Meeting with delegates of the VLRC and Warden, J. and Cooper, M., Sullivan & Cromwell, 26 Jun. 1995.

1319 Meeting with delegates of the VLRC and Judge Bing-Newton, J., McHugh, J., and Bussey, E., 27 Jun. 1995.

1320 Meeting with delegates of the VLRC and Judge Zobel, R., Johnson, M., Wiggins, E., Willging, T., Huebner, E., and Zizik, W., 28 Jun. 1995.

peremptory challenges was pinpointed as being critical in determining the racial and gender balance of selected juries.

7.141 A trial judge has no authority to prohibit a juror from being excused on a peremptory challenge, because while everyone has the right to be called for jury service, none have the constitutional right to be selected. However, the United States Supreme Court in two landmark decisions involving black Americans found that during jury selection the prosecuting attorney had excluded all black persons from the jury by use of peremptory challenges. The court ruled that an attorney may not use peremptory challenges to exclude persons from a jury solely on the basis of race. The use of peremptory challenges to secure a jury predominantly or exclusively based on a party's preference for a race or gender will be discussed later in this report.

Jury Size

7.142 The common law tradition received from England was that a person was entitled to be tried by a jury which consisted of 12 of his or her peers. The idea behind having a jury of 12 is that each individual juror will be able to contribute his or her perception of community standards, of the truth or falsity of the facts asserted and bring unique qualities into the deliberation which may influence other jurors unable to perceive the case in that way in the first instance. A jury of 12 comes at a cost, however. It has already been discussed that the empanelling of a jury of 12 through voir dire is a lengthy and involved process. There is, as well, the costs of each juror for each sitting day.

7.143 A number of jurisdictions have instituted reforms reducing the size of the jury. These jurisdictions believe that much of the same jury dynamic can be achieved when a lesser number of persons serve. During the course of the 1970s the United States Supreme Court in a series of cases recognised the permissibility of reducing the jury from 12 to a minimum of 6. For example, in California, the jury trial shall consist of 12 persons except that in civil actions and in cases of misdemeanour it may consist of any lesser number upon which the parties may agree.[1321] In the Federal Court system the position is that:[1322]

1321 State of California, Trial Jury Selection and Management Act, s. 220.

1322 Federal Rules of Civil Procedure, Rule 48.

> The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

7.144 The United States gave its imprimatur in 1970 to jurors of lesser size when it said that, in a criminal case, the essential feature of a jury lies in the interposition of the accused and his accuser in a common sense judgment of a group of laymen, and in the community participation and shared responsibility which results from this group's determination of guilt or innocence. The court went on to say that they found little reason to think that these goals are in any meaningful sense less likely to be achieved when jury numbers six rather than when it numbers twelve.[1323] Nevertheless the court firmly drew a line on the constitutionally permissible size of a felony jury when it struck down a five person jury.[1324] A jury in the Federal Courts when adjudicating upon a felony must consist of at least six members. It was felt that any lesser number would impede the necessary dynamics of deliberation.

7.145 It has never been thought possible that each individual jury would be proportionately representative of community ideas in a single panel. While both case and congressional law require that proportional representation be used for drawing up master jury lists, they are not composed in order to maintain a balance of disparate views on any given single jury. Therefore the reduction in the size of juries from 12 to some lesser size is not anticipated to have irreparable adverse effects for representativeness or for impartiality.

Sources of Information for Jurors

Preliminary Sources of Information

7.146 The process of being empanelled as a member of the jury can be a thoroughly confusing experience. The Committee heard from a range of practitioners and members of the judiciary about the need to improve juror preparation. Various suggestions were advanced regarding the content of information that should be given to jurors before they settle into their task of serving in a particular trial. These include information about the characteristics of the adversary system and about the role of juries as factfinders, as well as a description of what is expected of them once they

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1323 *Williams v. Florida* 399 US 78 (1970).

1324 *Ballew v. Georgia* 435 US 223 (1978).

begin their deliberations. The notion of presenting jurors with more information about the nature of the trial process and about their responsibility as jurors is fundamental. Research in cognitive psychology has shown that the more information a person has, the better able that person is to frame the information that he or she is about to receive which in turn enhances recall and aids in the interpretation of ambiguous material. It also engineers greater levels of juror satisfaction.[1325]

7.147 In addition to that information it has been suggested that it is important for members of the jury to have procedural suggestions about how to elect a foreperson, ideas for arranging a discussion format and voting procedures. It has been often commented upon that it is too late to embark upon the process of juror education at the final address. This information should be imparted fully at the initial orientation and again in summary form when the jury begins its deliberations.

Questioning of Witnesses or the Judge

7.148 Another obvious possibility for jurors to equip themselves with more information in order to fully understand the issues at trial, and to have better quality deliberations after trial, is that jurors should be permitted to ask questions of witnesses or of the judge. From the evidence presented it would seem that this practice is more controversial than note taking. In those jurisdictions that have legislated on the matter the trial judge is granted a discretion to allow juror questions. A Federal Circuit Court,[1326] which received the matter considered that the 'practice of juror questioning is fraught with dangers which can undermine the orderly progress of the trial'. The record, in fact, revealed no bias in the 95 questions asked over a three week long trial; moreover the court found that 'the vast majority of juror questions were technical in nature and reflected a commendable of degree of understanding and objectivity by the jury'.

7.149 It must be remembered that adherence to the adversary system is strongest during the trial itself. According to the adversary model it is the parties, through their legal representatives, who must decide which witnesses

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1325 Smith, V. L., *The Psychological and Legal Implications of Pretrial Instruction in the Law,* Stanford University Press, 1987. See also Smith, V. L., 'The Feasibility and Utility of Pretrial Instructions in Substantive Law: A Survey of the Judges' (1990) 14 *Law and Human Behaviour*, p. 235.

1326 See *DeBenedetto v. Good Year Tyre and Rubber Company* 1985 CA4, So.Car., 754 F.2d 512.

to present, in which order they are to appear, and what questions are to be directed to them. The judge in this model plays a passive role. To allow the jurors to question witnesses, even through the judge, might be to affect adversely the method of proof and the theory underlying a particular presentation of evidence. In some jurisdictions the judge's overt powers are quite considerable in controlling both the content of the trial and the role the jury is to play. Judges are permitted to ask questions of witnesses, and both the questions and the answers to them may strike the jurors as especially significant since it emanates from the neutral arbitrator rather than a partisan lawyer. In some places judges are permitted to comment on the evidence and can also, by the attitude they express towards one lawyer or the other, one witness or the other, indicate to the jury their opinion of the merits of the case. This judicial activism marks a departure from the passive umpire posited by the adversary model.

7.150 Such experiments as have been conducted are generally favourable to allowing jurors to ask questions. At the conclusion of an experiment allowing jurors to question witnesses, the judges voted by a two to one margin that they found juror questioning helpful in the conduct of a trial. Plaintiff lawyers and prosecutors approved the practice unanimously, with most criminal defence attorneys also in favour. Four out of every five jurors said they wished they could have questioned one or more witnesses. Only the majority of civil defence lawyers voiced disapproval.[1327]

7.151 Permission to ask questions added to the jurors' confidence in their verdicts as the evidence became more complex.[1328] Some suggest that the process of questioning could convert jurors from intelligent listeners to active participants. If there were repeated questions from the jury box that could disrupt the orderly examination of witnesses. Others expressed fear that jurors might ask prejudicial or irrelevant questions that could contaminate others on the jury; that counsel would begin to direct their questioning and their summations to those jurors who signal their prominence or leadership status by asking questions. Certain lawyers would be circumspect in objecting to improper juror questions for fear of causing resentment on the part of those who asked the improper question.[1329]

1327 Guinther, op. cit., p. 68.

1328 Lempert, R., 'Civil Juries and Complex Cases' in Litan (ed), op. cit., p. 183.

1329 Guinther, op. cit., p. 68.

7.152 Both the experimental and anecdotal evidence emanating from the United States suggested that jurors do not abuse question asking privileges. Questions may give judge and counsel an idea of how well jurors are following the evidence. The minimal empirical studies conducted in the United States confirms that the message being communicated by a witness is greatly enhanced through pertinent questioning. It has been 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.[1330]

Note Taking by Jurors

7.153 Jurisdictions throughout the United States are interested in improving the capacity of jurors to accomplish the tasks that are set for them during the unfolding of the trial itself. Trials present a combination of witnesses and documents, argument from lawyers, summations from judges and other information that may be difficult for inexperienced persons to receive, understand, recall at the relevant time, and bring to bear in their deliberations. One of the perennial suggestions is that jurors should be permitted to take notes. The present position in most jurisdictions, though by no means all, is that jurors 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. At the same time there is rarely any explicit injunction against taking notes and judges vary in their responses if asked by a particular juror or panel of jurors.

7.154 Traditionally jurors have been discouraged from taking notes, or even forbidden, during the course of a trial. Unlike judges who do take notes, the jurors are supposed to rely on their memories. Those who would uphold the tradition make several arguments: that jurors will be distracted from testimony trying to jot down highlights of it; that they will make more mistakes when they write; that in a jury room a special weight may be placed on what is written, perhaps wrongly written, or give the active notetaker undue weight in the deliberation.[1331]

1330 Heuer, L. & Penrock, S., 'Increasing Jurors' Participation in Trials', 20 (1982) *American Criminal Law Review* 1.

1331 CJG at 68.

7.155 On the other hand it seems to accord with common sense that jurors be allowed to assist themselves by whatever means they deem appropriate. In a Philadelphia Bar Association study, note taking was always optional and 70% of the jurors elected to do so.[1332] The note takers themselves overwhelmingly (89%) said they would do it again if permitted the next time they were jurors.[1333] In an experiment judges voted in favour of note taking by a 26 to nil margin, with 5 not sure. In that experiment as well, the jurors enthusiastically favoured note taking.

7.156 The United States Supreme Court has never directly addressed itself to this question. The Committee was able to establish that the State courts vary considerably in their opinions and practices. In some states, jurors are allowed to take notes; in others they are not. In some states, jurors are permitted to take their notes into the deliberation room; in other they are not. In some states, judges give jurors carefully constructed instructions on how to utilise their notes; in others they are left to their own devices.

7.157 One witness to the Committee stated that juror comprehension 'might be improved by encouraging them to take notes ... rather than them remaining passive 'receivers' of data'.[1334] Perhaps the consensus of the witnesses to the Committee ultimately felt that precluding jurors from taking notes was simply a vestige from the past. The custom derives from times of limited literacy and the concern that note takers would unduly influence the illiterates.

Technological Aids to Juror Comprehension

7.158 Another method of making more information available and consequently of easing the task of the juror is through access to technological aids. Computer generated information, displays, videotapes and other modern aids have been used to greater or less extent in many jurisdictions. Videotaped testimony of a witness who would not otherwise be available for trial has made a favourable impression on jurors. They found it easier to pay attention to the filmed deposition of absent witnesses than through a lawyer

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1332 Walter-Goldberg, B., 'Note Taking by Jurors in the Federal Courts', (1985) *Philadelphia Bar Association* Philadelphia, Pa, p. 2.

1333 ibid., p. 11.

1334 Professor Diamond, S., Senior Research Fellow, American Bar Foundation, meeting with delegates of the VLRC, 22 Jun. 1995.

reading a deposition into the court record.[1335] The videotaping of a trial permits the deposing of witnesses at their convenience rather than requiring them to sit outside a courtroom waiting to be called, sometimes for days on end. It is convenient to the lawyers as well who can tape their opening and closing speeches when they like just as a judge can his or her instructions.[1336]

7.159 The critics point out that videotaping violates, at least in spirit, the constitutional guarantee of the right to a public trial. If the party is facing a camera rather than facing his or her opponents they may say something other than that which they would say with direct confrontation. When speaking to a video camera from the comfort and security of their offices and homes, rather than in a public forum where the person about whom they are speaking is right in front of them, the fear is that the content or at least the subtleties and nuances, will be markedly different.

Right to Confrontation

7.160 The Sixth Amendment accords a right to a defendant in a criminal matter to confront his or her accuser. The components of the right to confrontation are:[1337]

> 1. That the witnesses testify under oath, to impress the witness of the seriousness of the procedure and to establish the perjury penalty for lying.
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> 2. Cross-examination, the greatest legal engine ever invented for the discovery truth; and
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> 3. That the jury observe the witness' demeanour so as to assess his or her credibility.

7.161 Cross-examination is one of the fundamental characteristics of the adversary system and underpins the confrontation clause.[1338] As long as an opportunity to cross examine is presented, the right is satisfied, regardless of whether the opportunity is utilised. In addition to cross-examination, a face to face meeting between the defendant and witnesses in the courtroom is required by the confrontation clause.

7.162 A further guarantee emanating from the Sixth Amendment is the defendant's right 'to have compulsory process for obtaining witnesses in his

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1335 Pearlman, P., 'Town v Country' 19 (1983) *Trial Magazine,* p. 71.

1336 Guinther, op. cit., p. 67.

1337 See Zalman & Seigel, op. cit, p. 663.

1338 See *Kentucky v. Stincer* (1987) 482 US 730.

favour'. In practice, this provision not only guarantees the process of the subpoena but also encompasses a broader right that eliminates barriers to relevant testimony that the defendant wishes to proffer in his or her defence. The confrontation process together with compulsory process, was incorporated into the due process clause of the Fourteenth Amendment in *Washington v Texas* (1967).[1339]

Provision of Transcripts of testimony to Jurors

7.163 In most trials, both civil and criminal, a transcript is prepared with an eye to eventual appeal. Should the transcript of the evidence be made available to the jurors during their deliberations? The balance is between the perceived gain to the jury in reaching a considered and proper verdict as against the danger that the jury will be overwhelmed, confused, or misled by the transcript.

7.164 Legislation in most state jurisdictions does not allow the juries to have access to the trial transcript, primarily on the basis that there is a danger that juries may receive inadmissible material in official documentary form. Permitting testimony to be examined with the aid of the transcript could entice jurors to spend a disproportionate amount of their time dissecting evidence which could, in turn, negate their intuitive grasp of the truth. Witnesses pointed out additional matters which militate against distribution of transcripts: first, the editing process would be complicated, expensive and often slow; and, secondly, the use of such transcripts would be too selective and would result in only a partial review of the evidence.

7.165 Not all those persons who met with the Committee were convinced or impressed with these objections. It was pointed out that the juror's recall of evidence would be greatly enhanced if they were permitted to refresh their memory from the transcript. 'Anyway, the official transcript would be, at least, as accurate and complete as the jurors' notes'.[1340] Other comments mentioned that 'no judge would be expected to work in a long case without a transcript and to expect a jury to do the same is nonsense'.[1341] The only

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1339 *Washington v. Texas*, (1967) 388 US 14.

1340 Judge Bing-Newton, J., New York State Supreme Court, meeting with delegates of the VLRC, 27 Jun. 1995.

1341 Professor Diamond, S., meeting with delegates of the VLRC, American Bar Foundation, 22 Jun. 1995.

reservation from the proponents of such an exercise 'is that care would have to be exercised in furnishing such documents'.[1342]

The Judges' Charge to the Jury

7.166 Traditionally, the division of labour between judge and juror is that the jurors are to find the facts; the judge is to find and explain the relevant law. The verdict, in the end, is read by the jurors applying the law to the facts. It is for the judge to explain to the jury the terms of their task and to give them enough information to perform that task; that is done through the judge's charge to the jury. The judge's instructions to a jury could 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, that the jurors' need to rely on their recollection of testimony, and the content of the law.[1343]

7.167 That jurors have trouble understanding the judge's instructions to the jury has long been recognised. Jurors themselves have frequently noted that they did not understand the law they were supposed to apply. Recent studies have placed juror comprehension of instructions around the 50% level.[1344] The majority of witnesses to the Committee confirmed that jurors cannot be expected to render an intelligent and considered verdict if the instructions they receive from the bench are unintelligible to them. The Committee was further informed that the importance of these instructions had been debated extensively in most jurisdictions throughout the United States. The jury instructions must satisfy two conflicting requirements: the need to state accurately the relevant law and the need to state the law so that the jury understands it. Some persons who spoke to the Committee went so far as to suggest that the most serious problems inherent in jury trials lie with the instructions presented to the jury rather than with the jurors themselves. The problem can be exacerbated since some judges draft their instructions to the jury with an eye on appeal rather than focussing on jury comprehension.

7.168 One response has been to take away the responsibility for individualised jury instructions from the judge and to issue standard or pattern jury instructions which simplify the process. It was stressed to the

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1342 Judge Brook, S., State Superior Court, meeting with delegates of the VLRC, 21 Jun. 1995.

1343 See Charrow, R. & Charrow, V., 'Making Legal Language Understandable: a psycholinguistic Study of Jury Instructions' 79 (1979) Columbia L.Rev. 1306, p. 1317.

1344 Guinther, op. cit., p. 71.

Committee that the pattern instructions which are adopted should 'not necessarily be regarded as magic formulae to be followed verbatim'[1345] but are intended to state the law accurately and to communicate the law in simple or plain English so as to remove much of the legal jargon. This reduces the likelihood of misdirections being made by the trial judge and/or misunderstanding on the part of the jury. Since the beginning of the 1980s roughly 40 States have adopted at least one set of pattern instructions promoting greater uniformity and consistency in the approaches taken by trial judges.

7.169 The Committee was encouraged by the evidence presented to it which supported the move to standard and uniform instructions to jurors. While recognising the difficulties of accurately translating some conceptually complex legal positions, many witnesses felt that the divergent forms in which such instructions were previously delivered made it difficult for juries to comprehend the actual issues judges were endeavouring to elucidate. In addition to instructions, many judges in civil cases provide jurors with an interrogatory sheet which lists the basis questions they are required to resolve.[1346]

7.170 Additional to the problem of the content of the judge's instructions is the issue of when to present the jurors with the instructions. It is felt that jurors are assisted by having the instructions at the beginning of the trial so as to direct their minds to the evidence which will be presented as well as after the trial and in the deliberation room. Mock jurors instructed both before and after the trial were better able to apply the law to the facts of the case than jurors instructed only after the trial.[1347] Many researchers and some judges believe it would be wise to permit jurors to take a written or videotaped copy of the instructions into the jury room with them:[1348]

> Consider the placement of instructions along the timeline of a trial. A judge's duty to direct the jury is continuous. It begins when the venir is empanelled, and it ends when the jury is discharged after its verdict. If there is a general principle, it is one of flexibility: the jury should be instructed as needed, when needed. Although the

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1345 Potas, I. & Rickwood, D., 'Do Juries Understand?', Australian Institute of Criminology, Canberra, 1984 p. 14. See also Elwork, A., Sales, B. & Alfini, J., *Making Jury Instructions Understandable,* Michie/Bobbs-Merrill, Indianapolis, 1982; Loftus, E., 'Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions', 17 (1982) *Law & Society Review*, p. 153.

1346 Guinther, op. cit., p. 73.

1347 Lempert, op. cit., p. 220.

1348 Kassin & Wrightsman, op. cit., p. 144.

> procedure is not regimented by law, most judges instruct the jury at the close of the trial, right before it retires to deliberate. The rationale for this custom is what psychologists call the 'recall readiness' hypothesis—that immediate past events are remembered better than remote ones, especially when the sequence of information unfolds over a long period of time. In order for an instruction to influence jurors, it should salient, available in memory and fresh in their minds when they deliberate.

7.171 The recent reforms to judges' instructions is expected to make the task of jurors easier. It should not overshadow the hitherto impressive performance by jurors. Most researchers who have studied decision-making by the civil jury have been impressed by the jury's performance.[1349]

Complex Litigation and the Jury

Definition of Complexity

7.172 There is a special range of trial in which many commentators have suggested that it would be inappropriate to use the jury. These generally come under the heading of Scientifically difficult as well as or in addition to complex:[1350]

> There are many dimensions to complexity, but one feature that stands out in the discussion of complex cases is protraction. Trial length is important to the argument against jury trial because lengthy trials raised serious problems of juror memory; are associated with massive amounts of information for the jury to comprehend; mean that large numbers of jurors, including a disproportionate number of those most likely to be especially capable, are excused from jury service; and can impose hardship on jurors who do serve, hardship that in theory might interfere with jury performance by causing resentment.

7.173 These trials are characterised by long duration, a large volume of information which create difficulty in comprehending the facts. Complex and difficult testimony taxes any decision maker, and it is not clear that juries face the unique challenge in deciding how to weigh expert testimony.[1351]

7.174 Among those types of cases which are often complex are corporate law violations, toxic torts, conspiracies, stock manipulations, sexual harassment allegations, claims under the antitrust laws, breaches of contract, and matters relating to trade secrets. All of these give rise to colourable claims of substantial complexity, and this is just a group of cases that happened to have

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1349 See, eg Diamond, op. cit.

1350 Lempert, op. cit, p. 183.

1351 Diamond, op. cit, in Litan (ed) op. cit., p. 294.

caught the eye of courtroom reporters.[1352] The right to jury in the United States in civil matters is guaranteed through the Seventh Amendment. In 1969, some of the justices of the United States Supreme Court questioned whether the practical abilities and limitations of juries might provide grounds for a complexity exception to that constitutionally enshrined right.[1353] The same court held that a jury unable to perform its responsibilities infringes due process which would justify the limitation placed upon the constitutional right.

7.175 The Committee heard wide-ranging discussion about ways of assisting juries to gain control of the materials presented through the course of a trial, especially in complex matters, so that they would come to accurate and reliable verdicts. The style by which a judge manages and presides over a trial can exert a measure of influence over the jury's competence. As complex issues in some trials cannot be avoided, some witnesses recommended that counsel and judge should be encouraged to seek on behalf of juries the use of technical aids wherever possible to assist in the presentation of evidence. Some suggested the streamlining of documents, particularly during the pretrial stage by means of computerisation; the use of models, diagrams and charts as a means of simplifying information; and the introduction of graphics and video portrayal on the basis that visual information is generally better remembered than verbal presentation.

7.176 The Committee heard some support for the argument that 'jurors are not competent to decide the complex legal and factual matters germane to many trials'.[1354] Many commentators point out that jurors routinely fail in their efforts to assess and comprehend detailed information.[1355]

Research into Performance

7.177 To what extent has experimentation on jurors revealed their competence or incompetence to try complex matters? The Committee heard a number of strongly expressed opinions from the academics, legal professionals and the judiciary with which it met. These expressions went from statements that indicated that on the whole the jurors performed very

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1352 Lempert, op. cit., p. 190.

1353 *Ross v. Bernhard,* (1970) 396 US 531 at 545.

1354 Hans, V. & Vidman, N., *Judging the Jury*, Plenum Press, New York, 1986 p. 121.

1355 See, for example, Osbor, C., *The Mind of the Juror;* Frank, J., *Courts on Trial: Myth and Reality in American Justice,* Princeton University Publishing, Princeton, 1949.

satisfactorily to the more cynical who held that jurors routinely failed in their efforts to assess and comprehend detailed information. The Committee was unable to come to a considered conclusion with regard to the competence of the jury in complex matters due to a lack of reliable empirical information.

7.178 A number of studies have been undertaken. In one study 103 Federal judges agreed to assign one or two cases on an experimental basis. Jurors were allowed to ask questions of witnesses or the judge. The judges came to the conclusion that the jurors, both through their verdicts and through the quality of the questions they were allowed to ask, performed well and worked hard and that they understood the law and reached sensible verdicts. There have been few regular scientific experiments, there has been no lack of experimentation in the more colloquial sense.

7.179 In one study, judges were asked to estimate the number of cases in which the task confronting the jury was difficult. In terms of percentage the judges found that 86% of cases were easy to comprehend, 12% were somewhat difficult and only 2% were very difficult. The number of cases in this experiment was 1,191.[1356]

7.180 Some studies show that the jury's problem in understanding is compounded by limited juror ability. Many of the juries have few or no members with a university education. Most of the jurors worked inside the household or at blue collar or clerical jobs. Since education and occupation are correlates of jury competence, some of these juries may have had few people capable of providing intelligent leadership.[1357] Such studies as there are suggest that jurors appear to work hard and take their job seriously, sometimes to the point of reading important documents in the case word by word.[1358]

7.181 A number of strategies have been suggested to assist juries in difficult or complex cases. Complex cases could be simplified through pretrial agreements, severance of joint claims, partial summary judgment when facts are indisputable and other methods of limiting the issues in dispute. In addition to the prior suggestion of rewriting jury instructions to make them more comprehensible there is also furnishing jurors with written copies of the

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1356 Kalven & Zeisel, op. cit, p. 154.

1357 Strodtbeck, J. & Hawkins, 'Social Status in Jury Deliberations' 22 (1957) *American Sociological Review,* pp. 713–718.

1358 Lempert, op. cit., p. 204.

court's instructions, giving jurors instructions, allowing jurors to deliberate on various issues as the case progressed, furnishing jurors with daily transcripts (or alternatively allowing jury notetaking), dividing issues for decision, refusing party joinder, providing appointed experts to help the jury understand the testimony of the parties' expert witnesses, removing factual controversies by encouraging agreement, using Masters to clarify particularly difficult ideas, sitting blue ribbon juries, and allowing juries to ask questions.[1359] The recent issued *Manual for Complex Litigation* endorses some of the above reforms.

7.182 The general message overall appears to be that the jurors get it right. Even in protracted civil trials in which the instructions are likely to be most taxing, 70% of jurors rated the instructions they received as easy to understand. At the same time, when the jury were asked (in this particular survey) about the understanding of their *fellow* jurors, some 45% indicated that they thought fellow jurors did not understand the instructions. Of course it is the collective recall of the jury rather than any individual juror that in the end should supply guidance. The commentators seem to sum it up favourably:[1360]

> ... the jury's decision by and large moves with the write and direction of the evidence. The jury does in great part understand the facts and gets the case straight.

Lempert provides the following insight:[1361]

> Overall, the sample of cases I have examined provides no empirical support for the claim that there is a denial of the due process right to a rational decision on the evidence when juries are seated in complex civil cases.

Special Juries

7.183 At one stage within American history in cases of complexity, importance or publicity, special juries or 'blue ribbon' panels were in place. The jurors, in order to be qualified to sit on such juries, were first subjected to interviews, tests of intelligence and tests of their understanding of English. The juries were characterised by persons of professional or administrative occupation and usually higher socio-economic groupings. The theory in those

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1359 ibid., pp. 219–220.

1360 Kalven & Zeisel, op. cit, p. 149.

1361 Lempert, op. cit., p. 205.

days was that justice required above average levels of intelligence, morality and integrity.[1362]

7.184 Underneath this approach lay a slippery and subjective standard for jury eligibility labelled elite. It provided a convenient cover for the systematic exclusion of certain persons, Afro-Americans in particular; it allowed for the perpetuation of an all white jury in the South nearly a century after the Supreme Court outlawed, in theory, such juries. The introduction of the Jury Selection and Service Act 1968 abolished the elite jury and again mandated random selection procedures.

7.185 It has been suggested that it is possible to reach a better functioning jury within the present existing system. One commentator has suggested that without changing the conditions of jury duty, highly capable juries may be seated if lawyers, perhaps urged on by the judge, cooperated and did not routinely exercise their peremptory challenges, on those jurors most likely to understand the case. In the *De Lorean* trial, for example, seven university educated individuals were on the jury. None of them missed a trial day or arrived late, and they performed at the highest level.[1363]

7.186 The Committee heard some support for the reintroduction per se of blue ribbon juries. Much of this support was based on the increasing incidence and sophisticated nature of modern offences of white colour crime and commercial fraud, which some argue are unfamiliar and beyond the comprehension of even most well-educated lay persons. It has been urged that '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 legislation'.[1364] It was further offered to the Committee that counsel would need to spend less time cross-examining expert witnesses and addressing the jury where the jury is composed of those who are better able to follow and understand the arguments. One final suggestion was trial by jury should remain in the usual run of cases 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

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1362 Abramson, op. cit., p. 99.

1363 Beroule, S., 'Inside the De Lorean Jury Room' 6 (1984) *American Lawyer* 94.

1364 Note, 'The Case for Special Juries in Complex Civil Litigation' (1989) *Yale Law Journal* 1155, p. 1159.

could be used; in cases under securities legislation, the jury could consist of sharebrokers or merchant bankers.

7.187 Most persons who spoke to the Committee were of the view that blue ribbon juries no longer have any place in America. It flies in the face of notions of community representativeness and impartiality. The educational attainments of today's community members are superior to what they were previous to the 1960s.

Bench Trials

7.188 The final option promoted by some commentators in the area of complex litigation is that it should be reserved to trials before a judge alone—bench trials. However, there should be no room for the replacement of a jury. The theory behind this view is that judges are much more competent in these matters than are jurors. There is little systematic empirical evidence that relates to the competence of the jury in civil litigation; virtually none bears on the competence of the judge. According to Lempert, 'the evidence on how judges handle complexity is…fragmentary. What we can say is that there is no guarantee that a judge can do better than a jury'.[1365]

7.189 The choice to waive a jury trial is of course ever present. Some witnesses, particularly practising lawyers, told the Committee that there are times when they have chosen to have a bench trial. They have suggested that this is on the basis that, depending upon their own view of which party the complexity of the litigation would favour, they have been influenced by the greater ability for the judge to understand, and of the jury to become confused. Others have stated that if a judge is known as a lenient sentencer this will encourage their client to opt for a bench trial. Obviously, on the other hand, if the judge has a reputation as being particularly pro-prosecution or is a stern sentencer, then they will encourage their client to opt for a jury trial. Others have suggested in the criminal area that the courts themselves, sometimes have reasons for keeping jury trials to a minimum because of the time and cost factors involved. In doing so, it was speculated that 'courts make it attractive for defence lawyers not to ask for juries by assigning judges with reputations of leniency'. Courts with separate lists will sometimes have a time factor which will induce parties to choose or not choose a jury trial. Most

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1365 Lempert, R in Litan, R (ed), op. cit.

of the reasons advanced were not supported by the commentators on the basis of reason or logic.

Other Issues

General Conditions of Jury Service

7.190 The ideal of jury service and what should happen apparently is at considerable odds with the reality of the situation. Those who have been called for jury duty often complain that their time is wasted, that the time chosen or that the location is inconvenient, and that the facilities are run-down, inadequate or unsuitable for jury service. All too often jury service in Los Angeles county, as elsewhere, is described by those participating, as an exercise in frustration, waste of time, with uncomfortable and unattractive facilities, a lack of information to understand adequately the process, and the failure to recognise the sacrifices involved in the performance of jury duties.[1366] The complaints from those who have served on jury duty in Los Angeles county and those reported in the media include cold and crowded jury assembly rooms, particularly in downtown locations, lack of amenities, such as adequate or comfortable seating, reading materials, television sets, facilities to use portable computers, or capacity to use pagers to allow waiting jurors to leave the assembly room while remaining in the vicinity. The drinking water available to jurors is also reported to be highly undesirable in some locations.[1367]

7.191 The deficiencies are of course are not limited to Los Angeles. The deficiencies have been noted elsewhere as well. These include dilapidated, cramped, dirty, undermaintained and unsafe facilities. Jurors have a right to decent surroundings, human working conditions, considerate treatment and helpful and informative instructions at all phases of their visit to the courtroom.[1368] The Committee also heard that in Washington DC the conditions vary greatly depending upon the location of the courthouse.

7.192 Perhaps the single most frequently voiced complaint from the evidence in each of the jurisdictions was that the system is regarded as inefficient:[1369]

1366 LA Management, op. cit., p. 2.

1367 ibid., p. 22.

1368 McMahon op. cit., p. 12.

1369 Meeting with delegates of the VLRC and representatives of the Jury Commission and the LA Superior Court, 16 Jun. 1995.

> A lot of people go down there and find nothing happens ... A lot of people constantly talk about these experiences. A lot of people say, 'I would be willing to serve if I could come down here and something happened, but I have heard from people that it's a waste of time, nothing happens, they gave jobs to other people'. They say 'we fell behind in our work'. Nobody talked to them. They say 'We were put in the room for three hours and then told to go home'.

7.193 The situation changes if the persons summoned actually sit on a jury panel. The analysis of juror satisfaction surveys conducted by the Los Angeles Jury Commission found that 'once people get down here (to the courthouse) and actually sit on a jury, 75% to 80% of them have positive experiences, they go away and they're advocates of the jury system'.[1370]

7.194 Throughout the jurisdictions the Committee visited, there were a number of projects and broad recommendations for improving the conditions which prospective jurors have to endure. It was recommended that there be some standard which addressed the physical conditions: a television room; a reading or quiet area; kitchen area (food service/vending machines); games area; adequate restrooms, including handicapped facilities; suitably sized, lit, heated, cooled and ventilated jury assembly rooms; sufficient comfortable seating; and installation of child care facilities.

7.195 Other representatives the Committee met with considered having such items as playing cards, games and books in the assembly room. There was also mention made of courts being prepared to identify and consult with public interest groups, architectural firms and contractors, who specialise in the improvement of public spaces, so that the amenities prospective jurors have to deal with are suitable.

7.196 The reforms proposed were not limited to the physical conditions which have to be endured by jurors. In Arizona it has been recommended that new and innovative programs be undertaken by the Bench, Bar and schools 'to better acquaint the adult and youth populations with the institution of the jury, with jury service, and with jury trial so that the public attitudes towards all three will improve'.[1371] Recommendations included an annual 'jury appreciation week'; use of media articles and programs; live presentations by judges; publication and distribution of brochures and guides; multimedia displays in jury assembly rooms, schools and libraries; outreach programs by

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1370 ibid.

1371 Dan, B. & Ors, *Jurors: The Power of Twelve,* The Supreme Court Committee on More Efficient Use of the Jury, Sept. 1994, p. 12.

lawyers and judges; and a comprehensive public education program to reach children and teachers beginning in the elementary grades.

7.197 In New York, a recent review of jury service in that State recommended the implementation of a comprehensive education and outreach program to promote the value and civic duty of jury service.[1372] It was suggested that such a program would involve State and local Bar Associations, schools, churches, community associations and similar forums.

7.198 In certain jurisdictions legislation is already in place which sets minimum standard of accommodation for jurors with handicaps. In California, a juror selected who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communications, is allowed a service provider (a person who is a sign reader, interpreter, oral interpreter, deaf/blind interpreter, reader or speech interpreter) during jury deliberations. Also required is the preparation and delivery of the court proposed jury instructions to that service provider.[1373] Facilities should be included not only for the jurors but for such service providers.

Length of Service

7.199 Throughout the United States there have been recent reforms in the length of time that any single prospective juror should be made to serve. The American Bar Association, Standard 5, recommends 'The time that persons are called upon to perform jury service and be available should be the shortest period consistent with the needs of justice'. In the Federal system except when necessary to complete service in a particular case, no person shall attend court or serve as a juror for more than 30 days in a two year period.[1374] The most common system now in use in the United States is the one trial/one day system. In 1987 about 20% of US jurisdictions, including both metropolitan and rural areas, used a term of service of one trial/one day. By 1994 that percentage had increased to an estimated 33%.[1375] As the name implies, a person has to come to the jury room for one day. Unless that person is emplaced in a jury, the one day service completes the obligation of the

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1372 McMahon, op. cit., p. 12.

1373 State of California, Trial Jury Selection and Management Act, s. 224.

1374 Title 28 USC, s. 1866(e).

1375 LA Management, op. cit, p. 27.

prospective juror. If selected on a jury, the juror serves the entire length of the trial.

7.200 As a result of the introduction of this system, the average term of jury service in Los Angeles has reduced to 6.2 days.[1376] This has been assisted by innovations in summoning jurors:[1377]

> Unless excused by reason of undue hardship, all or any portion of the summoned prospective jurors shall be available on one-hour notice by telephone to appear for service, when the jury commissioner determines that it will efficiently serve the operational requirements of the court.

7.201 In Washington DC the length of service for jurors is determined by the Master Jury Plan. Jurors summoned for service in the Superior Court are subject to the one trial/one day term of service.

7.202 In the Federal Court system, legislation puts a maximum limit on a juror's actual service but says nothing with regard to the term of potential service:[1378]

> In any two year period no person shall be required to
>
> (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or
>
> (2) serve on more than one grand jury, or
>
> (3) serve as both a grand and petit juror.

7.203 In Chicago the introduction of the one trial/one day has been considered a success. No longer are the people who are summoned complaining that their time is being wasted. Evidence before the Committee from a Senior Research Fellow at the American Bar Foundation was to the effect that:[1379]

> The one day/one trial system has caught on in most of the large areas where you can get a very good computer system going and you can turn over jurors quickly enough and bring in new pools. And we have found it to be a very wonderful way to get more people willing to serve, because they don't feel that their time is being wasted when they come down to court.

1376 ibid., p. 26.

1377 State of California, Trial Jury Selection and Management Act, s. 213.

1378 Title 28 USC, s. 1866(e).

1379 Professor Diamond, S., meeting with delegates of the VLRC, 22 Jun. 1995.

Compensation

7.204 There is a gathering trend within the United States to compensate jurors for the time that they spend away from their normal duties rendering service to the administration of justice. A contrary view suggests that payment should be no more than nominal and that jury service, in common with voting and other civic duties, is one of the obligations of citizenship and requires no separate pay.

7.205 The California legislation is perhaps typical:[1380]

> Unless a higher fee is provided for each day's attendance by county or city and county ordinance, the fee for jurors in the superior, municipal and justice courts, in civil and criminal cases, is five dollars ($5) a day for each day's attendance as a juror. Unless a higher rate of mileage is otherwise provided by statute or by county or city and county ordinance, jurors in the superior, municipal, and justice courts shall be reimbursed for mileage at the rate of fifteen cents ($0.15) per mile for each mile actually travelled in attending court as juror in going only.

7.206 The American Bar Association's Standard 15 'juror compensation' states:

> A. Persons called for jury service shall receive:
>
> 1. A nominal amount in recognition of out of pocket expenses for the first day they report to the courthouse.
>
> 2. A reasonable fee for each succeeding day they report.

7.207 In recognition of the competing interests in this area, different jurisdictions pay a greater or lesser amount to their jurors. For example, in the District Courts of the Federal Court system, jurors are paid an attendance fee of $40 per day for actual attendance as well as a travelling allowance.[1381] The State of Massachusetts which has implemented a one day/one trial system initiated an innovative program in which jurors receive no compensation for the first three days of service and thereafter receive $50 per day. The court can pay unemployed persons $50 per day for the first three days of service. In addition, Massachusetts employers are required by law to pay employee jurors a normal salary for the first three days of jury service.[1382]

1380 State of California, Trial Jury Selection and Management Act, s. 215.

1381 USC Title 28, s. 1871.

1382 See LA Management op. cit., p. 37.

7.208 Jury service was sometimes thought by some employers to be inconsistent with the duties that their employees undertook towards their employers and often resulted in the worker being fired or otherwise suffering some disadvantage. By legislation today employers cannot interfere with the employment of their employees who are called out on jury duty. More importantly it is a general expectation now that employers will pay a make-up pay or compensate their employees while on jury duty. While it is not compulsory under the law in Los Angeles County, a list of employers who pay their employees is maintained.

Conditions of Deliberation

7.209 The jury deliberates in private, that is, in the absence of the presiding judge or of any other court official. Its deliberations cannot be recorded and remain secret; there can be no outside influence nor any review of the process of the jury's deliberation. As deliberations often take some time, it is important that the State provides adequate facilities in order to allow the jury to carry out its task.

7.210 The provisions of the California legislation are perhaps typical of most other jurisdictions:[1383]

> At each court facility where jury cases are heard, the board of supervisors shall provide a deliberation room or rooms for use of jurors when they have retired for deliberation. Such deliberation rooms shall be designed to minimise unwarranted intrusion by other persons in the court facility, shall have suitable furnishings, equipment, and supplies, and shall also have restroom accommodations for male and female jurors.

When the jury is kept together, either during the progress of the trial or after their retirement for deliberation, the court may direct the Sheriff or other court official to provide the jury with suitable and sufficient food and lodging and any other reasonable necessities.[1384]

7.211 Judges sometimes use jury sequestration in order to ensure fairness. When judges order sequestration, they place jurors in isolation so that they cannot receive news about the trial from outside the courtroom. Generally, juries are sequestered in hotels where they cannot read newspapers or watch television or otherwise receive news about the trial. Naturally, the conditions

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1383 State of California, Trial Jury Selection and Management Act, s. 216(a).

1384 See State of California, Trial Jury Selection and Management Act, s. 217.

must be suitable during the period of sequestration, especially in lengthy trials.[1385]

Majority Verdicts

7.212 The tradition of the common law was to require that a jury of twelve persons reach a unanimous verdict. There has been some movement within the United States, as mentioned earlier, to reduce the size of the jury. Several States have also opted, in certain circumstances, for verdicts based on a majority rather than on unanimity. There has been considerable debate in recent times in the United States regarding the appropriateness of a majority verdict.

7.213 The pattern varies from jurisdiction to jurisdiction; there are some juries of twelve persons who much reach a unanimous verdict, others of twelve that do not have to; some of six, some of eight, some of ten; some of the smaller size requiring unanimous verdicts, some three-quarters agreements, some five-sixths, with the choice in civil cases sometimes left to the agreement of the opposing counsel.[1386]

7.214 The Federal trial jury retains the twelve person and unanimity requirements in criminal cases.[1387] The Supreme Court has upheld states which authorised verdicts based on less than unanimous votes if they require a 'super majority' for a guilty verdict. In *Apodaca v Oregon,*[1388] felony verdicts of guilt by votes of 11 to 1 and 10 to 2 were upheld as being within the Sixth Amendment. Strong misgivings as to the way the jury functions under the *Apodaca* rules were expressed by Justice Douglas in dissent:[1389]

> The diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is obtained, further consideration is not required ... even though the dissentient jurors might, if given the chance, be able to convince the majority.

Douglas, J went on to note that since, in most deadlocked cases, the majority favours the prosecution, the majority vote rule upsets a traditional common law protection. It had previously been thought that the defendant has the

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1385 See Samaha, op. cit., p. 336.

1386 See Guinther, op. cit, p. 75.

1387 Federal Rules of Criminal Procedure, Rule 23(b) and Rule 31(a).

1388 *Apodaca v. Oregon* (1972) 406 US 404.

1389 *Johnson v. Louisiana, Apodaca v. Oregon*, (1972) 406 US 356, p. 388.

protection that guilt will be found only when all the jurors are convinced after deliberation, even those that held strong reservations about guilt at the outset. The United States Supreme Court has had serious reservations about majority verdicts. Time after time it has confirmed its commitment to the process of deliberation and not just the final outcome. It is felt that the commitment to such a process is seriously compromised by decision-making which does not require unanimity. Furthermore, it has been established that juries which do not require unanimous verdicts spend less time discussing the facts of the case and more time voting on the verdict. Research has also found that after reaching their required quorum, the majority jurors usually reject the minority opinions, terminate further discussion and return a verdict far more quickly than juries striving for unanimous verdicts. The Supreme Court has invalidated State statutes which allow less than unanimous verdicts in juries consisting of fewer than twelve persons. In those jurisdictions which require unanimous verdicts, jurors, in general, have been able to reach unanimity. 'Just because jurors start from different places does not mean that they are doomed to deadlock; in fact, only about one in twenty fails to reach a unanimous verdict.'[1390]

Reserve or Alternate Jurors

7.215 Reserve or alternate jurors are often chosen in cases which are likely to be prolonged. Having an alternate jury allows the trial to continue if one of the original jurors becomes ill, cannot continue to serve or is dismissed from service. Generally, in short trials, there is no need for alternates. Some jurisdictions allow party agreements that they will continue the trial with fewer than the original number of jurors. Typically , such an agreement states that if one of the jurors must be excused after the trial begins, the parties agree to continue and to be bound by the remaining juror's verdict. It is possible that judges could also seek such agreements in criminal cases, but most find it inappropriate to do so. This accords with the presumptions and legal protections afforded to defendants.

7.216 The position in the State of California, reflected in Los Angeles County, designates the position of reserve or alternate jurors:[1391]

> Whenever, in the opinion of a judge of the superior court, municipal, or justice court about to try a civil or criminal action or proceeding, the trial is likely to be a

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1390 Abramson, op. cit., p. 104.

1391 State of California, Trial Jury Selection and Management Act, s. 234.

> protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as 'alternate jurors'.

7.217 If before the jury has returned its verdict a juror becomes sick or otherwise unable to perform his or her duty that juror may be discharged and of the alternate jurors, one of them shall be designated by the court to take the place of the juror so discharged.[1392]

7.218 In the State of New York, alternate jurors, as in the State of California, are selected separately from the principal jurors and are designated as alternates. Witnesses offered evidence to the Committee endorsing the use of non-designated alternates so that no distinction was made between the alternates and the regular jurors during the selection process and during the trial. Designation would only take place after the completion of the summations and the jury's charge. Those witnesses commented that it would encourage all jurors to pay close attention to the evidence and to the charge. This, it is argued, would improve the quality of the verdict if one or more of the alternates eventually were to be involved in the deliberations. It would give all the alternate jurors a better experience even if they eventually were excused. Some have commented that some jurors feel they are 'second class citizens' as alternate jurors throughout the trial.

7.219 Legislation governing the Federal Courts is similar to that of the States. The court may direct that no more than 6 jurors in addition to the regular jury be called and empanelled to sit as alternate jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.[1393]

Special and General Verdicts

7.220 It is up to the judge to decide the type of verdict that the jury is to render. By tradition, the jury delivers a general verdict, that is, guilty or not guilty; liable or not liable. The jury is not expected to either give reasons or an explanation for its decision. In criminal cases, if guilt is found, the jury os often expected to impose the sentence or penalty; if the plaintiff succeeds in a

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1392 See State of California, Trial Jury Selection and Management Act, s. 233.

1393 Federal Rules of Civil Procedure, Rule 47(b); Federal Rules of Criminal Procedure, Rule 23(c).

civil case, the jury is expected to quantify the amount or the remedy which is to be awarded to the plaintiff.

7.221 More recently, the judge, either on his or her own motion, or as a result of the request by one or both of the counsel, can ask that the jury render a special verdict. In that case the juror's role is limited to supplying answers to a series of specific questions about the case which are posed by the judge. When the judge receives the answers from the jury, the law is applied to those answers. The jury's choice of verdict may be further limited by the judge directing it to return a particular verdict. In such cases the judge may come to the conclusion that the evidence allows a reasonable jury to reach only one decision. In that case the judge directs the jury to reach that verdict and the jury has no choice in the matter. A further matter is to leave the verdict to the jury, but if the jury comes to what the judge considers to be a perverse verdict, the judge may issue a judgment notwithstanding the verdict.

Jury Nullification

7.222 It has been said that the jury is in charge of finding the facts and apply the relevant law as explained by the judge. When a jury deliberately does not apply the law which the judge has said is governing, it is often described as having engaged in the act of 'jury nullification'.[1394] The jury's right to apply a law has been perceived as one of its main reasons for its existence. The jury's role includes the right to be merciful. As the United States 9th Circuit Court of Appeal put it in a 1979 case:[1395]

> ... the jury has always exercised the pardoning power, *notwithstanding the law,* which is their actual prerogative (italics added).

7.223 If a law is unjust or will create injustice when applied to a particular case then the jury's right to reach a conscience verdict can protect the particular defendant or the populace from it. Juries have the unreviewable power to acquit, even when the government proves that the defendant is

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1394 Becker, B., 'Jury Nullification' 16 (1980) *Trial Magazine*. How to reconcile this with the judge's right to direct a verdict is left unexplained. Usually jury nullification is associated with criminal trials; directed verdicts with civil trials.

1395 *Local 36 of International Fishermen* and *Allied Workers of America v. United States*, 1949, 9 CA, Cal., 177 Fed2d 320 p. 339.

guilty beyond reasonable doubt. Jury nullification, therefore, earns its name from the power of the jury to literally nullify the law.[1396]

Focus Groups and Shadow Juries

7.224 Focus groups and shadow juries are often used in aiding trial preparation, especially in high profile cases. Focus groups comprise a number of individuals who are brought together by the attorneys for one of the parties to listen to testimony or cross-examination and to make comments upon their reaction to it. With shadow juries the shadow jurors sit in an audience at real trials and then, as if they were the jury, they deliberate and return a verdict. Such a technique permits feedback. Mock trials are also held to assist parties in future selection of jurors. In a mock trial, the would-be jurors observe films or videos of trials that have already been conducted. The results and comments of the jurors viewing the mock trial are used to assist in understanding the way in which juries deliberate and reach their decisions. This, in turn, is said to be useful for selecting and planning trial strategy. It assists in determining the characteristics of desirable jurors as well as determining the appropriate choice for opening statements, the type of experts to call, the way to present evidence and to tackle summation arguments. Other uses for these devices are to determine the effectiveness of a lawyer, to gauge the credibility of the accused or a witness, to determine what kind of people are desirable or undesirable jurors and to provide insights into jury deliberation.

1396 See Samaha, op. cit, p. 333.

APPENDIX LIST OF OVERSEAS MEETINGS

Delegation Members:

Hon James Guest, MLC (Chairman), Hon Bill Forwood, MLC, Mr Peter Loney, MP, Mr Peter Ryan, MP, Dr Gerard Vaughan, MP, Mr Douglas Trapnell and Mr Mark Cowie.

Legend:

* Meetings attended by whole delegation
\# Meetings attended by Forwood, Loney and Cowie
† Meetings attended by Guest, Ryan, Vaughan and Trapnell
‡ Meetings attended by Guest, Ryan, Loney and Trapnell
§ Meetings attended by Forwood, Vaughan and Cowie
¶ Meetings Attended by Forwood, Trapnell and Cowie

No.	*Date of Meeting*	*Representative*	*Affiliation*
1	16 June 1995 Los Angeles, California, USA *	Hon. Judge Judith C Chirlin } Hon Judge Aurelio Munoz } Hon Judge Robert W Parkin } Mr John A Clarke } Ms Gloria M Gomez } Mr John W Sleeter }	The Supreme Court, Los Angeles County
2	16 June 1995 Los Angeles, California, USA *	Mr Gerald Chaleff } Mr David J Pasternak } Mr Richard Walch }	Los Angeles, County Bar Association
3	19 June 1995 Los Angeles, California, USA #	Mr John P McNicholas	American Board of Trial Advocates
4	19 June 1995 Los Angeles, California, USA #	Prof Paul Bergman } Prof Steve Derian } Prof Albert Moore }	University of California, Los Angeles, Law School

No.	*Date of Meeting*	*Representative*	*Affiliation*
5	19 June 1995 Vancouver, British Columbia, Canada †	Hon Mr Justice W A Esson Hon Judge E Dennis Schmidt Ms Kari D Boyle Prof Peter Burns, QC Mr Arthur L Close, QC } Mr Thomas Anderson } Mr Chris Erickson } Mr John Northup } Mr Gene Walsh } George K Macintosh, QC Richard C C Peck, QC Terrence L Robertson, QC	Chief Justice, Supreme Court of British Columbia Provincial Court, Pacific Centre Insurance Corporation of British Columbia The University of British Columbia Law Reform Commission of British Columbia Sheriff Services, The Law Courts, Vancouver Farris, Vaughan, Wills & Murphy Peck, Tammen and Bennett Harper Grey Easton
6	20 June 1995 Ottawa, Ontario Canada †	Mr Franz Ingruber } Mr Patrich Hardy }	Australian High Commission, Ottawa
7	21 June 1995 Ottawa, Ontario Canada †	Ms Heather Holmes } Mr Donald K Piragoff }	Criminal Law Policy Section, Department of Justice
8	21 June 1995 South Bend, Indiana, USA #	Hon Stanford Brook	Judge, St Joseph Superior Court
9	22 June 1995 Ottawa, Ontario Canada †	Mr Gaston St–Jean	Canadian Criminal Justice Association
10	22 June 1995 Ottawa, Ontario Canada †	Hon Udge Orville Frenette Hon. Mr Justice Hugh Poulin Mr Andrejs Berzins }	Superior Court of Quebec Superior Court of Ontario Crown Attorney's

		Ms Donna Eastman } Mr Wayne R Lora	Office, Ontario Advocate, Hull, Quebec

No.	*Date of Meeting*	*Representative*	*Affiliation*
11	22 June 1995 Chicago, Illinois, USA #	Prof Shari S Diamond	American Bar Foundation
12	22 June 1995 Chicago, Illinois, USA #	Prof Thomas Geraghty } Ms Ruth A Scholossberg }	Northwestern University, School of Law
13	23 June 1995 Toronto, Ontario, Canada †	Hon. Mr Justice R A Blair } Hon. Mr Justice A Campbell} Hon. Mr. Justice D Coo } Mr John McMahon, }	Superior Court of Ontario
14	23 June 1995 Toronto, Ontario, Canada †	Hon. Mr Justice P LeSage,	Superior Court of Ontario
15	23 June 1995 Toronto, Ontario, Canada †	Ms Alexandra M Chyczij Mr Thomas Clemenhagen Mr Frank K Gomberg Mr Paul Iacono Mr Peter Robinson	The Advocates' Society
16	23 June 1995 Toronto, Ontario, Canada †	Mr John Twohig	Policy Development Division, Ministry of the Attorney General
17	23 June 1995 Toronto, Ontario, Canada †	Ms Louise Botham Mr Bruce Durno Mr William M Trudell	Criminal Lawyers Association in Ontario
18	26 June 1995 Montreal Quebec Canada †	Prof Patrick Healy Prof Pierre Robert Prof Louise Viau M. Andre Vincent } Me Lori Renee Weitzman } Ms Christine Robertson	McGill University University of Montreal University of Quebec at Montreal Chief Crown Prosecutor's Office Canadian Institute for the Administration of Justice
19	26 June 1995 Montreal Quebec	Hon Mr Justice Frazer Martin	Superior Court of Quebec

	Canada†		

No.	*Date of Meeting*	*Representative*	*Affiliation*
20	26 June 1995 New York, USA#	Mr Michael A Cooper } Mr John Warden }	Sullivan and Cromwell
21	27 June 1995 New York, USA#	Hon. Juanita Bing Newton Mr Ed Bussey } Mr John McHugh }	Administrative Judge, First Judicial District, Supreme Court of New York Supreme Court of New York, Criminal Branch
22	28 June 1995 Washington DC, USA *	Hon Judge Rya W Zobel } Ms Emily Z Huebner } Ms Molly T Johnson } Ms Elizabeth C Wiggins } Mr Thomas E Willging } Ms Wendy Zizik }	Federal Judicial Center, Court Education Division
23	28 June 1995 Washington DC, USA *	Mr Thomas C Smith	Criminal Justice Section, American Bar Association
24	29 June 1995 Washington DC, USA *	Ms Madelyn R Appelbaum } Mr Thomas H Henderson } Ms Margie A S Lehrman } Mr Jim Rooks } Mr Jeff White }	Association of Trial Lawyers of America
25	29 June 1995 Washington DC, USA *	Mr Daniel J Bernstein } Mr Eric H Holder, Jr } Mr Terry Keeney } Mr Brian M Murtagh } Mr Monty Wilkinson } Mr Thomas E Zeno }	United States Attorney's Office, District of Columbia
26	30 June 1995 Washington DC, USA *	Mr Ulysses B Hammond } Mr Steve Ramirez } Mr Roy S Wynn Jr }	Superior Court, District of Columbia
27	30 June 1995 Washington DC, USA *	Ms Dixie Amoro } Mr Lou De Falaise } Ms Eileen Gleason } Mr Ed Hagen } Mr Monte Stiles }	Attorney-General's Advocacy Institute

		Mr Ron Walutes }	

No.	*Date of Meeting*	*Representative*	*Affiliation*
28	3 July 1995 London, UK *	Mr Chris W Dickson	Serious Fraud Office
29	3 July 1995 London, UK *	Mr Lloyd Jeans } Mr John Ringguth }	Crown Prosecution Service
30	4 July 1995 London, UK *	Hon. Mr Justice Sir Nicholas } Phillips } Mr Julian Owen }	Central Criminal Court
31	4 July 1995 London, UK ‡	Prof Michael Zander	London School of Economics and Political Science
32	4 July 1995 London, UK ‡	Mr Michael Hill, QC } Mr Ed Lawson, QC } Mr Simon Davis }	Barristers-at-Law practising in criminal law
33	5 July 1995 London, UK ‡	Miss Christine Stewart } Mr Richard Deakin } Ms Diana Latchford }	C4 Division, Home Office
34	5 July 1995 Cambridge, UK §	Prof John Spencer	Selwyn College, University of Cambridge
35	5 July 1995 Cambridge, UK §	Dr David A Thomas	Institute of Criminology, University of Cambridge
36	6 July 1995 Coventry, UK ‡	Mr Lee Bridges } Mr Roger Lam }	Legal Research Institute, School of Law, University of Warwick
37	7 July 1995 Oxford, UK ‡	Dr Sally Lloyd-Bostock	Centre for Socio–Legal Studies, Wolfson College, Oxford
38	7 July 1995 Edinburgh, Scotland §	Mr John L Anderson	Edinburgh Sheriff Court
39	7 July 1995 Edinburgh, Scotland §	Prof Robert Black } Prof John Murray } Mr David Sheldon }	Faculty of Law, University of Edinburgh

No.	*Date of Meeting*	*Representative*	*Affiliation*
40	7 July 1995 Edinburgh, Scotland §	Ms Leeona Dorrian, QC } Mr Colin J Sutherland, QC } Mr John Beckett } Mr Alan Turnbull }	Faculty of Advocates
41	11 July 1995 Dublin, Ireland *	Justice Michael Moriarty } Mr Michael Quinlan }	Circuit Court, Dublin
42	11 July 1995 Dublin, Ireland *	Mr Patrick A Glynn } Mr Gerard Lambe } Mr James MacGuill } Mr Gregory Murphy, SC }	Law Society of Ireland King's Inn, Dublin
43	12 July 1995 Dublin, Ireland *	Prof Paul A O'Connor Mr Kevin Costello Mr John O'Dowd Mr Gregory Mayley, SC	Faculty of law, University College Dublin Bar Council of Ireland
44	12 July 1995 Dublin, Ireland *	Hon Anthony J Hederman } Mr Simon O'Leary }	The Law Reform Commission
45	14 July 1995 Hong Kong	Prof Edward L G Tyler } Associate Prof Anthony R Upham } Mr Derry H M Wong }	Department of Professional Legal Education, City University of Hong Kong