reform

a regular bulletin of law reform news, views and information
Australian Law Reform Commission, Box 3708, GPO, Sydney, 2001, Australia

january 1985 no 41

in this issue

juries – the continuing controversy

> As soon as questions of will or decision or reason or choice of action arise, human science is at a loss.
>
> Naom Chomsky
> *The Listener*, 6 April 1978

Revelations concerning the decision-making process in the jury room have continued in recent months. An *Age* poll conducted in September found that only 59% of Australians were confident that the jury system works well and that 39% had little or no confidence in it at all.

Undoubtedly, some people's responses were influenced by the publication by the media of accounts given by jurors in the Murphy and Gallagher cases on the way their juries reached 'unanimous decisions'. Most recently, a juror from the trial of Brian Maher and John Patrick Donnelly, who had been charged on matters relating to 'bottom of the harbour' tax schemes, approached the *National Times* to reveal what had happened in a jury room. He claimed that after four days of argument, the jury was deadlocked 9–3 and that when the judge then refused to discharge them, two of the three changed sides, leaving him alone in arguing for an acquittal. Finally, he claimed that a compromise was reached by his agreeing to convict on two counts if the remainder of the jury agreed to acquit on the other two.

Reaction to the revelations in the Gallagher, Maher and Donnelly cases has been varied. Some have commented that such 'horse-trading' in juries arriving at their verdicts is not exceptionable and that there is no particular public interest in the community being made aware of the internal discussions of juries in such instances. At the other extreme, however, Tim Colebatch in the *Age* (1 November 1985) asked:

> What sort of justice is this, where verdicts are negotiated between jurors so they can escape from the jury room? Is this the unanimous verdict that lawyers – and, God help us, law reformers – keep telling us is the best form of justice invented by man?

The rash of juror revelations prompted a quick response from the Victorian Parliament with the passing of the Juries (Amendment) Act 1985. This Act makes it an offence for a person to publish to the public any statements made, opinions expressed, arguments advanced or votes cast in the course of jury deliberations. In addition, it makes it an offence for a person to solicit or obtain the disclosure by a person who is or has been a member of a jury of such information. The Act also provides that a present or past jury member must not disclose any statements made, opinions expressed, arguments advanced or votes cast in the course of jury deliberations if that person has reason to believe that any of that information is likely to be or will be published to the public. This allows the juror to make such revelations to a judge, a court, a board or commission appointed by the Governor in Council, the Attorney-General or the Director of Public Prosecutions so that concerns about, for example, the behaviour of a jury could be followed up by the police and prosecuting authorities. Mr Kennan, the Victorian Attorney-General, had rejected calls for a moratorium until the ALRC's report on the law of contempt saying, 'We cannot really have the timetable of the Australian Law Reform Commission dictate the interests of justice'. He said that the Bill, as it then was, would be monitored and could be amended later to ensure uniformity with laws in other States. 'There has been increasing evidence in recent years of pressure on witnessses and jurors in a number of ways', Mr Kennan said — 'Jurors want to do their job in confidence and leave the court without any repercussions'. (*Canberra Times,* November, 1985.)

By contrast, in Western Australia the Attorney-General in August said that after an investigation, he had decided that such legislation was not at that stage necessary (*West Australian,* 14 August, 1985). In New South Wales, the Law Reform Commission in its Discussion Paper, *The Jury in a Criminal Trial,* completed in September, 1985, suggested that there should be 'some restriction on disclosure by jurors'. It has tentatively proposed that the publication of jurors' disclosures which identify the trial in question should be an offence, saying that publicity given to disclosures by jurors may give cause for concern that fear of public exposure will have the effect of inhibiting frank discussion and expression of views in a jury room – 'there is also a danger that people will be unwilling to serve as jurors' (194–5). The Commission has also commented that:

> It may be that publication in certain circumstances should be permitted, for example, when neither the accused nor any other juror is identified. Again it may be necessary only to prohibit paying or offering to pay a juror for his or her 'story'. In this way the disclosure is likely to be made and solicited in good faith. (195)

The Commission has invited submissions as to whether, and if so, in what circumstances, jurors' evidence as to the jury's deliberations should be admissible in appellate proceedings.

The ALRC has also been required to address the question whether it should be a contempt of court for a juror to disclose details of jury deliberations or for the press to solicit and/or publish them. A Discussion Paper on *Contempt and the Media,* which still deals with these issues, together with those relating to sub judice and scandalising contempt will be available in February. The Commission expects to begin public hearings on all matters relating to contempt law in April, 1986. This process should further stimulate debate on the alleged crisis of confidence in the jury system, the accountability of jurors and the right of jury members to reveal their versions of what occurred within the precincts of the juryroom. It will also provide a forum for the media to give their views on the importance of their present ability to report jury revelations and the relationship that the media perceive between this ability and public confidence in the administration of justice.

the jury in a criminal trial. The NSWLRC in its Discussion Paper, *The Jury in a Criminal Trial,* has made a number of tentative proposals on issues related to the constitution of, instructions to and behaviour of jurors. One of the themes of the Discussion Paper is an attempt to ensure that jurors are less alienated by criminal trial procedures and made more aware of the nature of the trial process and their role in it. Accordingly, the Commission suggests that procedures should be formulated to ensure that the trial judge addresses jurors at the commencement of the trial on:

- the course the trial will take;
- the role of the jury; and
- the law on matters such as the standard and burden of proof and the presumption of innocence.

As well, it is proposed that each juror, at the discretion of the trial judge, should be provided with a file containing copies of the indictment, the documentary exhibits and a document setting out the alternative verdicts available to the jury. The Commission moots a number of possibilities to combat the problem of the prejudiced juror. It tentatively proposes that judges should request Crown Counsel to outline for the jury panel the nature of the case and the identity of the accused and likely witnesses. The judge should then request people who feel they would be unable to give impartial consideration to the case to come forward. The use of pre-trial hearings to resolve disputes as to the admissibility of evidence, so as to avoid the incidence of *voir dires,* should also be encouraged according to the NSWLRC. The Commission suggests that when there has been substantial pre-trial publicity, the judge should invite people who feel they have been prejudiced by this to apply to be excused. As well, in discussing the difficulties that are experienced where there has been extensive pre-trial publicity, such as in the Chamberlain and Trimbole cases, the Commission suggests that 'there may be an argument for giving the accused the option to elect a trial by a judge sitting without a jury'.(7.23) The Commission solicits submissions on the issue, at this stage refraining from making any proposals on it.

The NSWLRC goes on to suggest that it should be a universal practice for the jury to be advised of its right both to ask questions of the judge and to have any part of the evidence read from the transcript. Significantly, though, no proposal is as yet formulated on whether jurors should be permitted during their deliberations to have access to transcripts of proceedings. While this was recommended in 1975 by the Criminal Law and

Penal Methods Committee of South Australia, it was rejected by the Canadian LRC five years later. The standard concern was expressed by Gibbs J (as he then was) with whom Mason and Jacobs JJ agreed) in *Driscoll v R* (1977) 137 CLR 517, 541–2 in the context of the record of interview – 'by its very availability [it] may have an influence upon their deliberations which is out of all proportion to its real weight'. Selective availability of transcripts allows the possibility of misestimation by reason of selectivity while general accessibility of transcripts carries with it the danger that jurors will become preoccupied with the written versions of evidence. On the other hand, it is arguable that from a psychological point of view many of the same problems exist when a judge reads out only those parts of a transcript requested by the jury, leaving full rein for distortion and the operation of mistaken memory in the long and/or complex case. The NSWLRC invites submissions on the different policy issues.

The Commission goes on to propose that instead of the foreman simply delivering the verdict of the jury, each member of a jury in a criminal trial should be polled to ensure that the verdict is unanimous and the responsibility for the verdict a personal one for each juror. This would depart from the formalistic presentation of verdicts that is the practice in many States and could even be conducted by the trial judge, rather than his or her associate. The Commission suggests that where alternative factual bases for a conviction are left for the jury, the judge should direct the jury to consider on which ground its verdict is based when the verdict is rendered in such a way that the ground accepted is not clear, and the judge should first ask the foreman whether the jury reached a unanimous view as to which ground it accepted. Only if the jury's view is unanimous should the judge ask which ground was accepted. The jury's answer should be binding on the judge when sentencing. It is also proposed by the Commission that where both first and second juries have been unable to arrive at a verdict, there should be a statutory provision preventing further trials. The NSWLRC invites submissions on issues raised in its Discussion Paper by the end of 1985 and appends to its Paper an extensive comment sheet.

unsworn statements

> One of the Seven was wont to say: 'That laws were like cobwebs; where the small flies were caught and the great break through'.
>
> Francis Bacon, Apothegms, 181

three reports. The right of an accused person to make an unsworn statement in the course of his or her trial is the subject of three recent reports. These are the Interim Report on *Evidence* published by the Australian Law Reform Commission, the Law Reform Commission of Victoria Report, *Unsworn Statements in Criminal Trials* and the Report of the New South Wales Law Reform Commission, *Unsworn Statements of Accused Persons.* All three reports recommend that the right of an accused to make an unsworn statement be retained although the VLRC proposes certain procedural changes in the case of a defendant who is legally represented. At the same time, all three reports attempt to address specific criticisms that have been levelled at the right to make an unsworn statement. In particular, the ALRC and the NSWLRC recommend that the rules of evidence should apply to the unsworn statement; the VLRC recommends that they should apply when the accused is represented.

alrc interim report on evidence. As part of its Reference on Evidence, the ALRC examined the question of unsworn statements and, in its Interim Report on *Evidence,* proposed that they be retained together with certain reforms to the current law and practice. The draft Evidence Act s21 provides that, in a criminal proceeding, a defendant may give unsworn evidence. This evidence will be subject to the rules of evidence. It may be read from a written statement, spoken with the aid of notes, or, where a defendant is unable to read from a statement, with the leave of the court, read by his or her legal representative. After such unsworn evidence has been given,