Jury research in New South Wales

By Peter Hennessy

Over the past five years, there has been a significant increase in the amount of jury research being undertaken in Australia, both within academia and within government.

The role, function and selection of juries have become issues of political interest, and this is reflected in the work that has been undertaken within the NSW Law Reform Commission (NSWLRC) since 2003. Since that time, the Commission has been asked to consider the following questions:

- Whether majority verdicts by juries in criminal trials should be introduced in New South Wales?
- Whether people who are blind or deaf should be able to serve on juries?
- Whether juries should have a role in the sentencing of an offender?
- Whether the current eligibility provisions for jury service are inhibiting the representativeness of juries?
- Whether the warnings and directions that a judge is required to give to a jury in a criminal trial have become overly complex?

Majority Verdicts (Report 111)

A report on majority verdicts was completed by the NSWLRC in August 2005. The Commission recommended that the system of unanimity should be retained, primarily on the basis that there was a relatively low incidence of hung juries, and that developing other strategies to reduce the rate of hung juries may be more effective. The Commission, therefore, recommended that 'empirical studies should be conducted into the adequacy, and possible improvement, of strategies designed to assist the process of jury comprehension and deliberation'.[1]

This recommendation was not accepted by the Government, and majority verdicts (11-1) have now been introduced in New South Wales.

Blind or Deaf Jurors (Report 114)

Report 114 was completed in the second half of 2006, and released in May this year.

The *Jury Act 1977* (NSW) does not specifically exclude people who are blind or deaf from serving on a jury. However, it excludes a person who is unable to read or understand English, as well as 'a person who is unable because of sickness, infirmity or disability, to discharge the duties of a juror'.[2] In accordance with this provision, the Sheriff of NSW has determined that people who are blind or deaf are ineligible to serve as jurors. The competing policy issues which arose in this review involve, on the one hand, the question of whether it is discriminatory to exclude people who are blind or deaf from serving on juries and, on the other hand, whether a person who is blind or deaf suffers a disability which will compromise his or her understanding of the evidence, or prevent him or her in some other way from fulfilling the responsibilities of a juror. Would it prejudice an accused's right to a fair trial? The report recommended that the *Jury Act* be amended to reflect that people who are blind or deaf should be qualified to serve on juries, and should not be prevented from doing so on the basis of that physical disability alone.

The NSWLRC recommended the development of guidelines by the Sheriff, for the provision of reasonable adjustments, including sign language interpreters and other aids for use by deaf or blind jurors during trial and deliberations.

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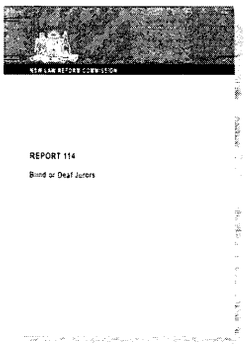

Blind and Deaf Jurors

The New South Wales Law Reform Commission report, *Blind and Deaf Jurors* (Report 114) is available free online at: <www.lawlink.nsw.gov.au/lrc>.

Hard copies of the report can be purchased by contacting the NSWLRC on (02) 9228 8230 or via email at: nsw_lrc@agd.nsw.gov.au.

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However, the report recommended that the court should have the power to stand aside a blind or deaf person summoned for jury duty if it appears to the court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge his or her duties effectively, in the circumstances of the case.

Aspects of the work involved in this review are set out in another article in this journal.[3]

Juries and sentencing

In June 2006, the NSWLRC published Issues Paper 27, *Sentencing and Juries*, which sets out the arguments for and against the jury having a role in the sentencing of an offender. The issue of whether juries should have some role in sentencing was raised by the Chief Justice of the Supreme Court of NSW, His Honour James Spigelman AC, in a speech he made in January 2005 entitled 'A New Way to Sentence for Serious Crime'. The NSWLRC was subsequently asked by the Attorney General to consider whether a judge in a criminal trial should consult with the jury on aspects of sentencing, having regard to the secrecy and protection of jury deliberations, as well as public confidence in the administration of justice.

The current practice in Australia is that juries play no direct role in the sentencing of an offender. Determining the appropriate penalty is a matter for the magistrate or judge. It is worth noting that the vast majority of criminal cases heard in New South Wales are finalised in Local Courts before magistrates. In 2004, 3,623 matters were finalised in the District and Supreme Courts of NSW. Only 622 of these involved trials before either a judge and jury or a judge sitting alone. Thus, in terms of the overall number of criminal justice matters heard in the District and Supreme Courts, approximately 16% involve a jury. It is only. therefore, in these matters where the jury could have any role in sentencing at all.

Under the present system, jurors can play only an indirect role in the sentencing process. It is possible, for example, for a jury to return a verdict recommending leniency with respect to a sentence. How this is taken into account is entirely a matter for the judge. Juries may also have an indirect involvement if they deliver a verdict of guilty on an alternative count (eg, manslaughter instead of murder) or they deliver a special verdict.[4]

In contrast to the position in Australia, juries in the United States have a long history of involvement in sentencing. This has predominantly been in determining whether the death penalty should be imposed. However, in non-capital cases, only six states in the United States (Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia) still provide for juries to have direct involvement in sentencing. In its Issues Paper, the Law Reform Commission considered the following key issues:

- public perceptions concerning the current sentencing process, and how these impact on public confidence;
- likely effect that introducing a role for juries in sentencing would have on public confidence levels, sentencing decisions and the jurors themselves;
- the type of input that jurors should have, for example, being asked by the judge to explain why they found the defendant guilty, or giving their views on questions that relate directly to sentencing;
- the practical and procedural questions that would need to be resolved before

any proposal for involving the jury in the sentencing process could be implemented; and

- whether there are any constitutional constraints in relation to any such proposals.[5]

There is no doubt that there are both philosophical and practical issues to be considered in any proposal to involve juries directly in the sentencing process. A primary concern is potential impact on public confidence in the criminal justice system. Groups in favour of greater involvement by juries argue that there would be greater public confidence in sentencing decisions made by judges if the community's expectations could be conveyed to the judge via the jury members. The result of this process, it is argued, is that sentencing decisions would be more consistent with public opinion on crime and the appropriate punishment. On the other hand, members of the legal profession have argued that the practical difficulties involved in providing mechanisms for jurors to have their say on sentences could have a negative impact on public confidence. This would be particularly the case if the jury's consultations on sentence with the judge were conducted in secret. Added to this is a growing body of research which suggests that jurors are more inclined to agree with sentences handed down by a judge when they have heard all the evidence in a case.[6]

Another issue that has arisen for consideration is the potential impact of the opinions of jury members on the sentencing decision itself. On one view, juries may assist the judge in determining an appropriate sentence by offering a broader range of opinions on the gravity of a crime, and perhaps even the chance of the offender re-offending. On the other hand, concerns have been expressed that jurors may take into account irrelevant considerations. It might also lead to a lack of consistency in sentencing, with a consequential loss of public confidence in the criminal justice system. It might also prove difficult to get 12 jurors to agree on what an appropriate sentence should be. This would not be a major hurdle if the role of the jury were limited to providing advice to the judge, with the judge having ultimate responsibility for determining sentence.

A further issue is the potential impact on the jurors themselves if they are required to determine sentences. Not all jurors may feel comfortable in taking on this new responsibility, as they may have had little, if any, experience with the criminal justice system previously, nor have any idea of what an appropriate sentence might be in a particular case. Determining an appropriate sentence is a complex task. Maximum sentences for particular offences are, in most cases, specified in legislation, and other relevant principles have been determined by the courts over periods of time. Jurors may need additional briefings, including written materials, to be made available in order for them to make informed decisions about sentencing.

The NSWLRC has received submissions on the issues set out in Issues Paper 27. It is currently preparing a final Report to the Attorney General, which is expected to be released in mid-2007.

Jury service

In August 2006, the NSWLRC commenced a review of the system for selecting jurors under the *Jury Act*. The Commission was requested to have special regard to the current statutory qualifications for jury service, other options for excusing a person from jury service, and to consider Australian and international developments in relation to the selection of jurors. The Commission published Issues Paper 28 in November 2006, and will be reporting in mid-2007.

The background to the project was an increasing concern that juries had become, or were becoming, less representative of the community, because of the number of people who were automatically disqualified, or were ineligible, or otherwise exercised their right to be excused. For example, judges, lawyers, members of parliament and staff who work in parliament are ineligible for jury service. Clergy, dentists, medical practitioners, pharmacists, mine managers, persons who work for emergency services, persons over 70 years, pregnant women, or persons caring for children under 18 years may seek exemption from jury service. The effect of this is that large sections of the community are never summoned for jury duty, whereas others are summoned more regularly than they should be.

It was an appropriate time for a review in New South Wales as a number of other Australian and overseas jurisdictions had reviewed and made changes to their jury selection system

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in recent years. In most instances, these reviews resulted in a significant reduction in the categories of persons who were exempt from jury duty.

Jury duty is an important civic duty, and one in which all citizens should, as far as possible, participate. Limiting the number of people who are able to serve as jurors has the effect of increasing the burden on those who remain eligible. As the High Court noted in *Cheatle v The Queen* in 1993, 'the relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community'.[7]

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While there is a formal requirement that jurors are randomly selected, the automatic exclusions of certain professions and occupations, or the right to seek exemption, has had impact on the representativeness of a jury. The NSWLRC has received many submissions supporting the simplification of the system for selecting jurors and a reduction in the number of exempt professions.

Jury directions

The final jury project being undertaken by the NSWLRC, which commenced in February 2007, is an examination of the directions and warnings that are required to be given by a judge to a jury in a criminal trial. The Commission is required to have particular regard to:

- the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;
- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
- the ability of jurors to comprehend and apply the instructions given to them by a judge; and
- whether other assistance should be provided to jurors to supplement the oral summing up.

There has been growing concern, particularly by trial judges, that the directions, warnings and comments that are required to be given by a judge to a jury have increased in number and become more complex. For example, there are directions that are required to be given in relation to offences that may have occurred many years previously (Longman direction), in sexual assault cases where the victim has not made a complaint or a timely complaint (Crofts direction), in cases where there is only one witness asserting the commission of a crime (Murray direction), and other directions that arise in particular cases, for example, tendency or coincidence evidence, similar fact evidence, relationship evidence, or evidence in rebuttal of good character. Most of these directions are complex, and the capacity of jurors to comprehend and apply the instructions is difficult to ascertain.

To gain a better understanding of the capacity of jurors to understand and apply instructions given to them, the NSWLRC has examined empirical research that has already been published in this area, but in addition will be undertaking a survey of jurors in New South Wales, with the assistance of the Bureau of Crime Statistics and Research. This empirical research will be conducted in the second half of 2007. The Commission's review will consider not only whether it is possible to simplify the instructions that are given to juries, but also whether the scope for preparing material in plain English or in simplified diagrammatic forms may be appropriate in some jury trials.

The Commission is due to report on this review in mid-2008.

Conclusion

In addition to the jury projects being undertaken by the NSWLRC, a number of empirical studies of juries have been conducted or have been commenced, both in New South Wales and in a number of other states.[8]

The results of these studies will provide significant insights into the way juries operate and will assist in improving both the system for selecting jurors, the resources that jurors need to properly perform their task, as well as improving the quality of the decision-making process.

Endnotes

1. New South Wales Law Reform Commission, *Majority Verdicts*, Report 111, [4.59]–[4.64].
2. *Jury Act 1977* (NSW), sch 2.
3. See the article by Jemina Napier and David Spencer, immediately following this article.
4. See New South Wales Law Reform Commission, *Sentencing and Juries*, Issues Paper 27, Ch 2.

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Five present members of the Court conducted criminal trials when they were formerly members of State Supreme Courts, one was a member of a Court of Appeal with extensive criminal work and another was the Commonwealth Director of Public Prosecutions. Many of the judges hold secondary commissions as members of courts with trial and appellate criminal jurisdiction: the Supreme Court of the Australian Capital Territory, the Supreme Court of Norfolk Island, and the Supreme Courts of Vanuatu, Tonga and Fiji. This depth and mix of experience has informed the work of the Criminal Practice Committee as the Federal Court moves towards another chapter in its history as a court created under Chapter III of the Constitution.

Endnotes

1. *Brown v R* (1986) 160 CLR 171.
2. J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 806. The statement is attributed to Bernhard Ringrose Wise speaking at the Constitutional Convention in Melbourne in 1898.
3. For a description of the development of criminal jury trials in Australia see M Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62 *Law and Contemporary Problems* 69.
4. *The King v Porter* (1936) 55 CLR 182.
5. *The King v Brewer* (1942) 66 CLR 535.
6. Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, ALRC 103 (2006).
7. *Cheatle v R* (1993) 177 CLR 541.
8. *Brown v R* (1986) 160 CLR 171.
9. *Brownlee v The Queen* (2001) 207 CLR 278.
10. See New South Wales Law Reform Commission, *Jury Service*, Issues Paper 28 (2006), at 57–58. See also New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004); New Zealand Law Commission: *Report 69: Juries in Criminal Trials*, Report 69 (2001).

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7. *Cheatle v The Queen* (1993) 177 CLR 541, 560.
8. For example, Australian Institute of Criminology, *Jury Satisfaction and Confidence Survey* (2007) (forthcoming); D Boniface et al, *Jury Comprehension and Obedience to Judicial Directions: The Accused's Criminal History and Extra-curial Juror Investigations* (2007) (forthcoming); Bureau of Crime Statistics and Research, *Child Sexual Assault Trials: A Survey of Juror Perceptions* (2006); J Napier, D Spencer and J Sabolcec, *Guilty or Not Guilty? An Investigation of Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting* (2007) (forthcoming).

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Endnotes

4. J Barber, 'Account of a Deaf Juror' (2005) July *Sign Matters*, 25–32.
5. S Travaglia, 'Deaf Person to Serve on Jury' (2005) *Resource: The Official Newsletter of the Disability Resource Centre Auckland*, 5.
6. S Mather and R Mather, (2003), 'Court Interpreting for Signing Jurors: Just Transmitting or Interpreting?' in C Lucas (ed), *Language and the Law in Deaf Communities* (2003), 60–81.
7. T Dick, 'Nine Angry Jurors... and a Few Left Confused', *The Sydney Morning Herald* (Sydney) 6–7 January 2007, 16.
8. For example, V Charrow & R Charrow, 'Characteristics of the Language of Jury Instruction' in J Alatis & G Tucker (eds), *Language in Public Life* (1979), 163–185; J Levi, 'Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions' (1993) 68(1) *American Speech*, 20–49.
9. NAATI is the National Accreditation Authority for Translators & Interpreters—the body that establishes and regulates the Australian industry standard for all languages. Any interpreter that works in a NSW court is required to have NAATI Interpreter level accreditation (formerly known as Level 3).
10. The judge's summation was taken from the case of *R v Rodney Ivan Kerr*, which was tried in the Supreme Court of NSW Criminal Division between 27 October–6 November 2003. Kerr was charged with the manslaughter of William Christopher Harris at Redfern station in Sydney. He was also charged with affray and endangering the safety of a person on the railway. Two excerpts, which incorporated sufficient legal terminology and important facts of the case, were selected by the NSWLRC.