Juries—a central pillar or an obstacle to a fair and timely criminal justice system?

A very personal view

By Valerie French

Judge Valerie French is a graduate of the University of Western Australia and has practised law as a solicitor and barrister since 1973. A Judge of the District Court since 1994 and President of the Children's Court from 1999 to 2001. Judge French was formerly a Stipendiary Magistrate and Children's Court Magistrate. She is currently the Chairperson of the Prisoners Review Board, and retains her appointment as a District Court Judge.

To suggest that the system of trial by jury could bear critical scrutiny is seen by some as akin to questioning motherhood.

Accusations of elitism are invited if the suggested alternative is trial by judge alone—an alternative that would exclude community involvement at a time when the justice system is often portrayed as being 'out of touch'. When a jury conviction is overturned on appeal and a defendant's imprisonment is found to have been a miscarriage of justice it is a defect in the trial judge's direction or a dereliction of duty in the part of the prosecution that is the subject of trenchant criticism. There is rarely any suggestion that the jury and the system of trial by jury may be at fault.

I have spent many years presiding over jury trials as a District Court judge and conducting trials as a 'judge alone' while a magistrate and a Children's Court judge. I know what system I would choose if I were charged with a serious offence that put my liberty at risk. Simply put, if I were guilty I would take my chances with a jury as I would have nothing to lose. If I were innocent, I would not put my fate in the hands of a committee of 12 people who do not have to give any reasons for their decision or be in any way accountable for what has happened in the jury room.

I am not suggesting that members of the community serving on a jury are not capable of reaching fair and just decisions based on the evidence presented to them—even in lengthy and complicated cases. Clearly they do. Indeed most judges think they do in most cases. I also agree with the view that if jury decisions are in error they tend to err in favour of acquittal rather than conviction. It is often said that it is preferable for many guilty people to go free than for one innocent person to be wrongly convicted. That may be right, but it is poor comfort for the victims of crime. However, I consider that the role of trial by jury as it presently operates can be a significant impediment to a timely, efficient and effective criminal justice system.

Delay

It is not uncommon for criminal trials to be conducted many years after the offence was alleged to occur and a long time after a person has been charged. This delay affects the quality of evidence and impacts on the both the accused, who may be denied bail, and the victims, who can not attempt to achieve some closure and try to get on with their lives. While some delays are caused by the requirement to gather evidence and prepare a case, the time consuming nature of jury trials and the lengthy court lists that they produce is a significant contributor.

Attempts to 'speed up' the process of a jury trial are hampered by the formalities of the process, the lengthy arguments over the admissibility of evidence and the fragility of the system. A trial can be aborted by an unwise or inadvertent comment in court or some exposure of a sensitive matter through the media. When evidence is completed, there is a prospect that the jury may not be able to reach a verdict. There is then a retrial and the whole process begins again, usually months later when a further listing date has been made available.

Personal experiences as judge alone

As a Children's Court judge and a magistrate I have had the satisfying experience of conducting trials for serious offences that were able to be finalised within a few months of the date of the offence or alleged offence. In one particular case involving a very serious home invasion and sexual assault of an elderly woman, the trial was able to be concluded and the two young offenders sentenced within four months. To answer the question of whether the outcome was just, I can only comment that the matter did not go on appeal. That kind of outcome has advantages not only for the individuals involved, the victims and the victims' families, but also the broader community who are able to see that the criminal justice system can work quickly and effectively. I reflected at the time that if the matter had been referred to trial by jury the delays in obtaining a listing and the time taken to conduct the trial would not have seen a conclusion within a period of 18 months to two years—even with the best efforts being made to expedite the matter.

I have also had the experience of presiding over jury retrials that have produced a second or third hung jury. The stress that causes to the people involved is incalculable. The financial burden to the courts, prisons and prosecution authorities is borne by the community.

While it may be argued that this is the price that has to be paid for a 'Rolls-Royce System' I question that *logic* in the light of the reality and the exigencies of the 21st century.

A jury of whose peers?

It has been said that the combined wisdom of a jury of one's peers is the best method of reaching a fair decision. But if you have taken part in or watched a jury empanelment process that sometimes seems questionable. With generous rights to challenge without cause enjoyed by both prosecution and defence, the end result can be disappointing. Prospective jurors with management experience, small business operators, accountants and teachers are routinely excluded. The perceived wisdom appears to be that they may know too much, be too conservative or too protective of property rights. This can leave a pool of people who appear to be the unemployed, the disinterested or—more dangerously—the very resentful at being press ganged into service.

While most jury members take their roles very seriously and in accordance with their oath, it is becoming more common—in my opinion—that some members of the jury do not seem to want to be there. Although it is not possible to say what goes on behind the closed doors of the jury room, I suspect that in some cases that attitude is reflected in their behaviour and possibly in their approach to the trial and the outcome. Lengthy trials produce particular problems and although jury members are protected from loss of employment, a lengthy absence from a job is never advantageous and, of course, the self-employed are left to their own devices.

Some of these problems could be reduced by curtailing the right to challenge without cause. I understand that this has occurred in the United Kingdom where lawyers and even serving judges are now required to report for jury duty and have their numbers drawn out of the hat without fear of exclusion on the grounds of their occupation and experience.

The length and the nature of jury trials have also changed in the past few decades. Although I am not aware of any research to support this, my own experience and a few forays into older transcripts and appeal court decisions indicates that the length of jury trials has blown out. Trials lasting one or two days are becoming less frequent while criminal trials lasting weeks and even months are no longer rare. There are any number of possible explanations for this. The most obvious are the increased complexity of the judges' directions or charges to the jury, the lengthy arguments about admissibility of evidence and the introduction of scientific and technological evidence through expert witnesses.

It has also been suggested that the modern jury member, informed by ready access to the world wide web, endless television crime scene dramas and the political and media focus on law and order issues may find it difficult to bring an objective mind as well as a willing body to the jury room.

The alternatives

So what is the alternative and would that be any better? I am well aware that many members of the judiciary and the criminal Bar are very sceptical about the prospect of criminal trials by judge alone. However, I consider that that is fuelled by early

experiences with crusty old pro-prosecution magistrates and little experience in the advantages of trial without jury. A criminal trial by judge alone is not only shorter and quicker but is also more amenable to proper appellate scrutiny. An appeal after conviction by a jury is generally confined to trawling over the judge's direction to see if there is some error or omission or some construction that could be said to have possibly had an adverse influence on or misled a jury in some way. If the appellant's arguments are upheld it can only be on the basis that whatever error has been exposed may have affected the jury's determination. This has to be a somewhat unsatisfactory state of affairs. It means that a case can go on appeal, sometimes on a number of occasions, then to a retrial years later, all because some defect in the original trial process *might* have impacted on the original verdict.

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A trial by judge alone can be subject to appeal by both prosecution and defence. The conviction will be accompanied by reasons for decision including reference to the evidence that was taken into account, the evidence that was considered not to be satisfactory and an explanation of the application of the relevant legal principles to that evidence resulting in the decision. An appeal can focus on what *did* go wrong rather than what might have happened.

I have sometimes heard it said that a judge is not in a good position to make decisions about the credibility of witnesses in a criminal trial. However, the fact finding in a criminal trial is in most cases no different to the decision that has to be made about the credibility of witnesses in civil trials. Our system of civil trials has changed from trial by jury to the almost uniform practice of trial by judge alone since the 19th century, with no suggestion that this has affected its operation.

There are also a number of alternatives that are available. Trial by jury could be retained in certain classes of cases, for example offences at the upper range of seriousness or involving matters that lend themselves more naturally to community adjudication through trial by jury. With the balance of criminal trials conducted by judge alone this would free up the system to be able to conduct those criminal trials by jury in a more timely manner.

Examples of other alternatives to trial by judge alone are seen in some European and other international jurisdictions. I believe that Scandinavian countries have a system of trial with a judicial officer assisted by an appropriate expert and a small number of community representatives.

Courts and the justice system are very slow to accept change. That is an advantage when the subject of change is something as important as our system of trial for criminal offences that affects the rights of accused and the rights of our community to a fair, just and effective system. But that conservative approach should not prevent a rational examination of the obvious problems with the present system and the need to look for solutions. It may also be that, like the abolition of wigs and gowns and the other irrelevant paraphernalia of the legal system, trial by jury can be re-fashioned to suit present day needs.