12 ANGRY PERSONS STILL NEEDED

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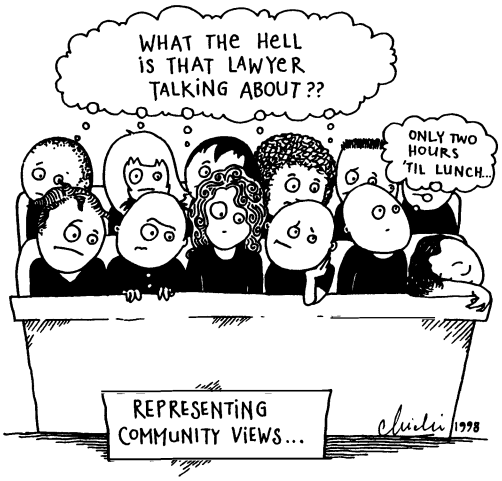
Time to review juries as community representatives. Should we have more juries instead of continuing along the path of having fewer?



Juries have not had good press lately. As a result of American 'media' trials, the images of incompetence, racism, greed and stupidity are just a few of the negatives associated with those who have served in the US branch of this ancient office.[1] In Australia things have not been much better. Recently, juries have been depicted as too often releasing individuals who, on face value at least, seem to have committed serious crimes,[2] and the media has had a field day with each allegedly 'anomalous' verdict. But none of the problems are new. In 1988 Findley and Duff published *The Jury Under Attack*, which canvassed a list of apparently on-going issues associated with the jury system. The problems raised then are still current and seemingly as far from resolution as ever.

Apart from the media, the main voices of discontent in Australia include academics and disgruntled lawyers who usually focus on issues of competence and representativeness rather than corruption or prejudice, the latter evils being more commonplace in the recent US trials reported in Australia.[3] These voices are in part balanced by those who argue that juries represent, for good or ill, the public's viewpoint, and their right to reach conclusions that are not immediately logical in the light of the evidence should be respected as being the community's considered response to the facts.[4]

How good are juries?

Even the notion that juries might err is not settled. Vincent J says 'I have never known a jury to convict an innocent person when they have been properly charged by the judge'.[5] The implications of this claim (and others like it) are significant beyond being a qualified vote of confidence in juries. Vincent J is, in effect, establishing himself as able to know which verdicts are right and which are wrong. This implies that the jury is from a practical standpoint redundant and of value, if at all, only as a token or symbol of participatory democracy in the legal system. Moreover, it implies that unless a judge tells the jury how to go about their deliberations, they may well make mistakes. This appears to be a criticism of the jury's ability to make correct decisions on its own account as much as it is a questionable claim for special knowledge on the part of judiciary.

In support of the claim that juries may sometimes get it 'wrong', it has been argued that jurors are only amateurs whose passing contribution to the legal process, though important, can be guided only so far.[6] As conditionally autonomous observers, what they see and hear is necessarily 'managed' by the judiciary (professionals) in step with the requirements of the common law system, and — as an unfortunate but largely inevitable consequence — the occasional error is virtually unavoidable.

It seems that this model usually contains the unstated but clear assumption of necessity associated with preserving common law procedures as they relate to juries. Despite the jury's function as a connection between the community and the legal system and the socio-political

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issues that emerge from it, attempts to challenge this aspect of the legal enterprise will be likely to encounter strong opposition from the profession and those who believe that the system is inherently better than any of the options available — a traditionally fixed position which characterises any questioning of the court structure as a threat to its stability and prone to cause grave damage to public confidence in the entire legal system. The proponents of this position further argue that while the constraints of a court contest run under the present 'settled' body of rules still permits what are perceived to be occasional 'erroneous outcomes' on the part of juries, the hierarchical nature of the courts usually allows the professionals to clean-up any really serious blunders on appeal.[7] Again the justification is usually that preserving the community's link to the system via the jury warrants acceptance of the odd blunder. Questions about the quality and effectiveness of that link remain unaddressed.

The concern about public confidence might be a little late. In Australia the media/public impression of lawyers and their system is not a flattering one and the media's mainly negative fascination with things judicial has already created a climate which permits governments of all persuasions to intervene in law's traditional 'closed shop' with relative impunity. Despite the regular reassurances, doubts remain about the reliability and effectiveness of juries in the modern world; a world which is given increasingly to specialisation and technical complexity and which (if the media is to be believed) sees the behaviour of juries as a problem for the legal system in general. It is often argued that the modern jury system which was largely devised in the 17th and 18th centuries and 'transported' ready-made to Australia in the 19th century has reached the end of its usefulness; that the idea of 12 good persons and true coming to grips with the intricacies of forensic evidence or the nuances of complex argument in a way which guarantees reasonable outcomes is wishful thinking.[8]

Of parallel concern to the notion of competence has been the question of jury representativeness and whether the still routinely made claim that juries somehow represent the views, values and sensibilities of the community in microcosm is accurate.[9] Commonly, the matter of exemptions from jury service is raised as a significant cause of distortion, which permits the production of juries that not only lack the talents of various exempt professional groups but have become effectively unrepresentative in the process. The Law Reform Committee of the Parliament of Victoria[10] (LRC) recently concluded an inquiry into the State's jury system and, among other things, investigated the question of community representation. It included a recommendation which seeks to limit the number of exempt persons as a means of improving community participation in the jury process.

The final report of the Committee was released in December 1996, and contained a large number of recommendations, many of which seek to address the above question (pp.19–25). Although there are 81 recommendations in the report, the LRC did not call for any substantive change to the system, but concentrated on tidying up the procedures while leaving the structure virtually unchanged. This may not be enough to assuage those critics whose agendas for reform are more far-reaching than the Committee was prepared to go.

Everyone should be a juror

It is not my intention to examine the report in detail; rather my analysis will concentrate on the issues of competence and representativeness. This approach is predicated on the belief that the two concepts are logically connected, and that a failure to consider them as defining moments in the wider issue of democratic participation in the legal system leads to the kinds of problems which regularly provide the media with the raw material for scaremongering and create uncertainty about the value of the jury to the community.

The LRC, in an attempt to clarify how it saw representativeness, said:

> The Committee intends representativeness to be understood in the sense of a representative selection or sample of a larger population. Such a proposition does not imply that efforts should be made to ensure that individual jurors are representative of the whole community. [p.19]

The unanswered question then becomes: precisely who are the individual jurors intended to represent? It emerges that the LRC's somewhat unusual view of representativeness is that it can be achieved by random selection from the list of eligible persons — in other words a lottery. Anything else — such as selection from representative groups or from special areas of interest — 'would be logically and administratively impossible to achieve in practice'.

Thus representation based on gender, race, ethnicity or (for complex cases)'special educational qualification or level of expertise' would be too complicated and lead, among other things, to 'unlimited questioning of jurors prior to empanelment, and to prolonged "challenge for cause" proceedings' (p.21). Given that it is within government's power to eliminate both tactics, this objection seems to be based on the belief that these are untouchable rights, beyond change or modification.

The LRC further argues:

> Such an approach also illogically assumes that a person's attitudes will be dependent upon characteristics such as *gender, race, age and socio-economic factors.* [p.21, my emphasis]

It is surprising to see a government report make claims of this sort given that social scientists would argue that it is far from illogical to believe that the factors mentioned would play a part in the deliberations of jurors. The idea that individuals somehow shed their socialising just because they are in a law court is demonstrably naive.

More importantly, the idea implicit in this is that individuals might not be affected by a large range of cultural variables (including their own concepts of right and wrong, appropriate evidence and credibility). In particular this view ignores the sweep, pervasiveness and impact of mass media in people's lives. It is especially odd to see the notion of education generally discounted when it may well assist jurors to deal with the complexities and pressures of a trial — ironically, their alleged failings in these areas are the reasons often given for dispensing with juries altogether.[11]

The overarching emphasis in the LRC's report lies in the need to 'fit' juries to the existing system, rather than entertaining the possibility that the system itself may need some modification before juries can function effectively. This suggests that the LRC may have accepted traditionalist claims about the efficacy of the present arrangements without carefully examining them to see if they correspond to community perspectives or indeed any other than those held by the legal establishment.

As to the idea of computer randomised juror selection, it is unclear what the LRC hopes to achieve with this recommendation. Randomising does not ensure that the commu-

nity and its values are accurately reflected in the outcome. All it does is to ensure that every eligible individual has an equal chance of being chosen in what I have described as a 'lottery'. It is by definition discriminatory insofar as minorities are less likely to be chosen than members of the 'majority'. Even so, does this mean that community values will be reflected in jury selection in a way proportionate to their significance in the wider community? There is no such guarantee available, as, like all lotteries, there are simply lesser or greater chances of selection.

Jurors versus lawyers

From a non-lawyer's perspective the problematic nature of jury selection is compounded by the rigidly controlled way in which jurors are allowed to participate in proceedings. They are allowed to hear only what the court and the rules of procedure and evidence think fit; they are not permitted to challenge this process; they are meant to be largely ignorant of legal rules and practices; they have no formal understanding of barrister's tactics and the rhetoric of their oral discourse; and they are not allowed to examine witnesses or to clarify matters using material other than that given in evidence. They exist in largely mute ignorance of the system's tactics. No one is interested in their neuroses, short attention spans, pre-conceived ideas and the possibly bullying or coercive manner of individual jurors so long as they appear normal to the legal actors in the court.

All or any of these personality foibles could well become apparent in the jury-room and significantly alter the social dynamics of the deliberative process. No one outside the jury room will know with any degree of certainty, because a jury does not have to justify its actions or record its deliberations. If the verdict is one which goes against media expectations then speculation can arise as to why the jury got it 'wrong'. Despite their highly stage-managed situation it will be the jurors (both the incompetent and the competent) who will be collectively judged on their performance, not the stage-managers who have constructed the context. It is little wonder that in the relatively small number of matters in which they now appear, juries are often seen as problematic and in need of close examination and reform.

The idea of community values remains a source of confusion. At one level of legal discourse it seems to refer to a set of agreed values about the moral and practical base on which society is supposedly founded and which juries are supposed to bring to legal proceedings. On another level the generality seems to specify the typical thought processes of the notional 'average' person, particularly their ability to decide what is a fact from an array of claims about an event in the world and its proper understanding in a specific legal context. Above all they are supposedly capable of working out the truth from two or more competing accounts of an event (and its cause/s) on something called the balance of probabilities. In this way they will be conducting a form of peer review, the result of which tells the community and the participants in the event that justice has been done.

But there is no guarantee that these ideals correspond to reality. First, there is no mechanism by which anyone can be sure that the result in a jury trial is not just the outcome of a set of powerfully articulated prejudices which one group or individual was able to use to 'talk down' any dissenters (always assuming there were some). Second, the mix of viewpoints (knowledges) randomly selected do not necessarily combine to produce a neat synthesis of something called the community view (values). Even if there are shared norms within the group there is no certainty that they will routinely translate into the same understanding of the facts and their implications.

Moreover, the notion prevailing in most common law jurisdictions that the jury should be allowed (or compelled) to remain silent about the reasons for their decision is more likely to promote slipshod reasoning and dubious levels of analysis than it is to promote free and frank discussion. Assertions about the rightness or wrongness of a verdict are no guide to the actual process of decision making. If a lawyer feels vindicated by a verdict, or a judge claims to be able to tell if the jury has 'got it wrong' all that is happening is a process of second-guessing, which may or may not correspond to the deliberative activity in the jury room and may or may not be right anyway.

The widened form of selection proposed by the LRC encompasses some previously exempt categories of persons but this new pool of potential jurors will not change the problems discussed above. The curious belief that formal knowledge (education) is, for jurors, either useless or an impediment to the process is dubious in the extreme. While the age of the expert may well create excessive specialisation and a narrow perspective on some issues, it is hard to see how, in a legal system which allows expert evidence, a jury reliant on lawyers' explanations of meaning and interpretation can be described as independent. Perhaps it has some traditional basis in that it enshrines notions of 'commonsense' and 'community values' as general attributes which overcome detailed ignorance. It is still rather odd to suggest that a representative selection from the community should not take into account skills that the rest of the community might well value, even though they may not be evenly distributed. Their lack of training in even a rudimentary understanding of legal process permits juries to be depicted as anachronisms in an age of specialists and experts.[12]

Career jurors

Despite clear concerns over the matter of competency, there has been little discussion about the possibility of providing potential jurors with a grounding in the basics of court procedure and the behavioural norms of lawyers and judges. More importantly there has been no attempt to introduce the subject of jury service, as an area where skilling is important, into the present school legal studies program. The LRC suggests that some form of activity be undertaken at school level to acquaint students with the importance of the jury system, but it is not clear given the LRC's lack of interest in educated jurors that it extends beyond a public relations exercise. There seems to be no compelling reason why students should not come to grips with the practical problems associated with an experience which demands engagement at the onlooker level, and requires a decision on who wins a very serious contest, based only on the information provided in a rigidly controlled context.

Juries have no permanency: each juror gains experience like a visitor in a strange land. There is no formal pool of jurors which might permit a continuing voice within the legal system — one which shows the benefit of accumulated experience and is able to apply it. Arguably the concept of continuity of service strikes at the norm of representativeness traditionally espoused by common law theorists. Lawyers steeped in the notion of the necessity of the system's present structural form might, with some justification, be unhappy with changes that raise the prospect of legally informed juries. The existence of such juries would

oblige lawyers to rethink long-established techniques of argument and interrogation. This might become necessary to deal with a new reality that involved being observed by a group who had become wise to many, if not all, of the devices and tricks of their trade.

With this in mind, it is perhaps not surprising that neither the judiciary nor lawyers' professional organisations are at the forefront of any fundamental reappraisal of the methods of law-giving and adjudication in Australia or the possibility of an altered or extended role for juries in the 21st century court system, certainly not to the extent of raising any questions which might threaten the present allocation of judicial authority or the mechanisms which underpin it.

Yet some of the media-driven pressures for reform may compel a re-evaluation of significant aspects of the justice system, and in so doing it will be necessary to reappraise some of the criticism levelled at juries. Such a reappraisal should not be drawn from the standpoint of the traditional legalist, whose position is largely founded on a body of assumptions and claims about the general efficacy, if not efficiency, of the prevailing legal order, and as a predictable consequence tends to be routinely defensive of 'the-way--things-are'. Instead, community-supported reform could come from a non-partisan review which was not encumbered by a set of doctrinal beliefs and vested interests and which was prepared to conduct a comparative examination of the available options including those emanating from non-common law countries. If that examination does consider options drawn from non-common law traditions, there is of course a risk the debate could deteriorate into knee-jerk responses, which reduce the issues to an assortment of cliches about the alleged merits of a system that in reality increasingly excludes all but the wealthy from its remedies, and whose present engagement with the community — at the level of participation — is largely patronising and far from democratic. The perspective taken in any review of juries should be one that presupposes that juries are, or should be, an essential part of the law-giving apparatus of a representative democracy, and that any procedural changes which enhance a constructive engagement with the community should be welcomed.

Looking at the options from this standpoint, debates about court procedures can be refocused onto questions of what can be done to increase and improve competence, credibility and representativeness in Australian courts. Such a refocusing implies an examination of the prevailing distribution of powers between the judiciary and juries in law-giving. For the legalist, any suggestion of a change to the present order of authority is usually perceived as an assault on the powers and prerogatives of the judiciary, and, by implication, the entire hierarchy of legal 'officials', and is predictably dismissed on traditional grounds such as: 'our system has evolved over the centuries and is the best we can realistically expect and any threat to judicial practices and authority threatens the entire system'. Or the thematic variant: 'the present arrangement has worked well for over 100 years; to question it now will undermine public confidence and damage the standing of one of our main democratic safeguards', etc.

A way ahead

Talking about change may admit it as a possibility, but the *possibility* of change is hardly a justification for not conducting a reappraisal of any institution or its constituent elements. Without such re-appraisals, analysis of the administration of justice in Australia may well remain dogged by myths and untested propositions about jury competence and representativeness, delivered by a hierarchy of power that ultimately relies for support on public confidence at a time when a ready acceptance of legalist myths is waning.

Historically, juries have been seen as both cornerstones of the British system of justice and a necessary form of communal participation in the sanctioning of criminal behaviour and the resolution of civil matters. During the early days of Settlement, military and civilian administrators thought them of dubious value to the maintenance and enforcement of justice in a penal colony. Nevertheless they became part of the legal system as the colonies moved from a convict to a 'free' settler population.[13] The conditions of colonial Australia no longer exist, but the jury is still tolerated and patronised as a necessary evil rather than a fully integrated and evolving part of the system.

The idea that other legal systems might provide useful and usable ideas for our own jury structure does not seem to have attracted much attention either at the popular level of debate, nor it seems within academic discourse. Perhaps the apparent inevitability of our present system has helped to limit discussion to matters that simply preserve the belief that ours is the best legal edifice in the world and that tinkering with it is dangerous. As I suggested at the start of this paper, the jury system continues to be the subject of disquiet and dissatisfaction. The solutions proposed by the LRC seem to be predicated on the notion that treating juries in isolation from their context will produce outcomes which will satisfy the community and persuade them that the system is all it claims to be. I very much doubt that band-aid solutions will ever mask the serious problems discussed here effectively or for very long. The reconstruction of the jury system deserves better.

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