ADVOCACY
Jury Selection

"The jury has the power to bring in a verdict in the teeth of both law and facts."

Oliver Wendell Holmes

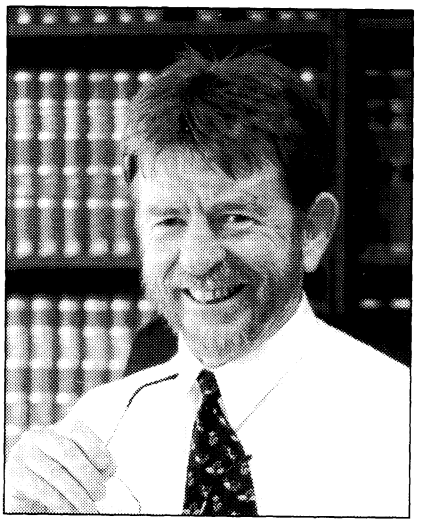
Anyone who has experienced the process of jury selection will have been reminded of a down market Tattslotto draw. The barrel spins, the number is drawn, and 50 or more people sweat upon whether their number will come up this time. A juror is selected and the process is repeated. Once the name of a potential juror has been identified comes the decision to be made on behalf of both the Crown and defence whether to challenge that particular potential juror. A decision has to be made then and there. The time available is limited to the time it takes for the selected person to move from his or her position in the court room to the front of the jury box where he or she will be sworn or affirmed. It is a very small period of time indeed.

In some trials it is an intriguing exercise for those not directly involved to try to determine whether the challenges that are made follow some pre-determined plan or are simply made because counsel wishes to be seen to be doing something. An investigation conducted on behalf of the AIJA in 1994 found that the use of the peremptory challenge was "often arbitrary, used in a partisan manner to manufacture a jury favourable to the interests of the challenging party, based upon crude stereotyping, and did not afford the accused much input into the selection process".[1] Elsewhere it has been suggested that the whole process is of dubious utility.[2]

If the right to challenge is to be exercised the task that confronts the advocate is a difficult one. Generally all that is known of the potential juror is the name and a general description of his or her employment. The description of the employment can be as broad as "public servant", "manager", "home duties" and "unemployed". In many cases the description is quite unhelpful. However something can be learned of the potential juror by a quick physical assessment. The sex, approximate age and the style of dress may be matters that will assist in determining whether or not to challenge a juror. Other signs may be more compelling. The wearing of a T-shirt emblazoned "Legalise Marihuana" or "Bring Back the Death Penalty" may give some guide to whether or not you would want that person on your jury. Of course the exercise remains one of "crude stereotyping".

In determining whether to challenge, and if so on what basis, much will depend upon the nature of the case you are to present. Before you enter upon the jury selection process you will have considered the question of the desirable composition of the jury, the type of person you would like on the panel and, more importantly, the nature of those whom you would wish to challenge. The nature of the case to be presented and the nature of your client will inform your decision. The decision will always be a difficult one. The impact upon the outcome of the trial of your decision to challenge or not challenge a particular person is unlikely to ever be known. You are to a large extent required to work in the dark.

In the Northern Territory the selection of the jury is governed by the *Juries Act*. The jury will normally consist of twelve jurors with up to three reserve jurors. The Crown and the person arraigned (or "his counsel"), may each challenge peremptorily six jurors in a normal case and twelve jurors in the case of a capital offence. Further challenges are allowed but they must be for cause shown. A challenge for cause may be made at any time. In addition the court may, at the request of the Crown, order a juror to stand aside but the number of jurors so ordered shall not exceed six.



Hon Justice Riley

In relation to a challenge for cause the following is said in Bishop: *Criminal Procedure (second edition)*:

> There is no limit to the number of potential jurors who may be challenged for cause. A challenge for cause is generally made orally. Where a potential juror is challenged the person issuing the challenge must lay a foundation of fact to support the challenge before any right to cross-examine the juror arises. A trial judge is under no duty to allow potential jurors to be "paraded for cross-examination" in the hope that grounds for challenge might emerge.

<u>If a prima facie case can be established then the issue is tried on the voire dire.</u>

In addition to a challenge to individual jurors there is a right contained in the *Juries Act* to challenge the array. A challenge to the array may occur where the Sheriff has proceeded in disregard of the provisions of a statute or of the law to summon the panel which, because of that failure, is not made up in the manner required by the law. There are other bases upon which a challenge can be made.

An example of a successful challenge to the array in the Northern Territory is found in *R v Diack* (1983) 19 NTR 13. In that case counsel for the applicant was surprised to find a disproportionate number of females on the jury panel and he therefore challenged the array. Evidence was called and it appeared that a system had been developed by the Sheriff

Continued page 18

Advocacy

Continued from page 17

that involved identifying many more potential jurors than the Chief Justice's precept required. The Sheriff's officers then went out and served summonses until the number necessary to fulfill the precept had been served. The officers did not bother to serve the rest. It was thought that this led to the imbalance in the number of females because, at the time of service, there were more females at home and available for service than males. Nader J allowed the challenge noting that "there is to be no loose practice in the summoning of persons whose names are drawn in the ballot". He held that there need be substantial, if not strict, compliance with the provisions of the *Juries Act* for the selection of a jury.

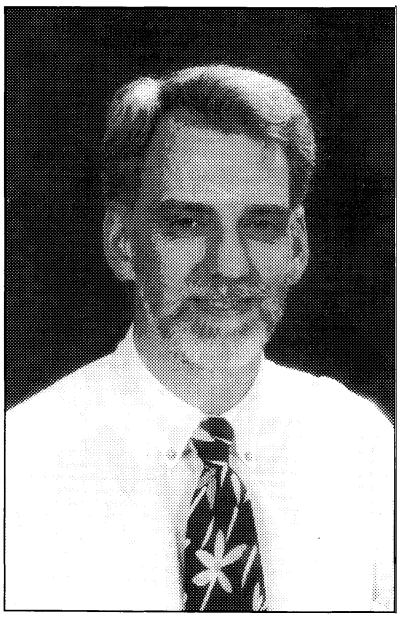
It will be the members of the jury who make the final decision in the case. The composition of the jury is a matter largely beyond the control of counsel. With care and acute observation you may be able to have some small influence upon that matter.

1 *Challenging a Potential Juror for Cause.* McCrimmon 23 UNSW Law Journal 127

2 NSWLRC Report 48

AROUND THE NT BAR

Tony Young is a barrister at William Forster Chambers in Darwin, Northern Territory.



Tony joined the bar in 1994 after working as a solicitor for the NT Legal Aid Commission and its predecessor; the Australian Legal Aid Office, the Northern Land Council and in private practice.

He practices principally in civil and common law. The largest part of his civil work has been personal injuries – common law and under the *Work Health Act* – and commercial law in the Supreme Court and Local Court but has extended to immigration work in the Federal Court and Aboriginal land claims. His commercial work has been diverse – ranging from leases to Romalpa clauses.

He has appeared in residence and property trials in the Family Court and at most levels of the criminal justice system including jury trials and before the Court of Criminal Appeal.

He has appeared for clients or acted as counsel assisting before various tribunals including the Coroner, Industrial Relations Commission, Legal Practitioners Complaints Committee, Liquor Commission, Anti-Discrimination Commission and the Aboriginal Land Rights Commissioner.

Tony has chaired the Northern Territory University Disciplinary Board and sat as Hearing Commissioner for the Anti-Discrimination Commission. He has lectured at the Northern Territory University in property law on Aboriginal land rights and native title and in employment law.

Around the Bar is the regular contribution supplied by the NT Bar Association