

Juries in the 21st Century

Tonight I wish to speak to you about one of the most important institutions of the criminal justice system in a democracy with a common law tradition – the jury. I will be looking at the future of the jury, hence the title “Juries in the 21st Century”.

On 7 April 2008, the Attorney-General formally referred to the Queensland Law Reform Commission, of which I am the Chair, a review of the directions, warnings and summing up given by a judge to jurors in criminal trials in Queensland and asked the Commission to recommend any procedural, administrative and legislative changes that may simplify shorten or otherwise improve the current system.

He also referred to the Commission a review of the process of selection of jurors. The Terms of Reference for this enquiry direct the Commission to review ‘the operation and effectiveness of the provisions in the *Jury Act 1995* (Qld) relating to the selection (including empanelment), participation, qualification and excusal of jurors.’ The Commission is to have particular regard to the following issues:

- Whether the current provisions and systems relation to the qualification, ineligibility and excusal of jurors are appropriate. The Commission is to consider whether there are any classes of people currently ineligible for jury duty who should be eligible, or any classes of people currently liable for jury service who should be ineligible. The Terms of Reference specifically mention people engaged in the administration of the criminal justice system, local

government chief executive officers, and blind, deaf and disabled people

- Whether alternatives or variations to compulsory jury service, such as deferral, should be introduced.
- Whether juries in Queensland are representative of the community, and whether minority groups (including Indigenous Australians) are adequately represented on Queensland juries.
- Whether any reform is required to the current regime of penalties for breaches of the *Jury Act 1995* (Qld).

In England and Wales in 2003 virtually all categories of automatic exemption from jury service were abolished.

The Commission has published an Issues Paper on the first review and has received a number of submissions and will publish a second issues paper on selection of jurors in August. Our report on the first review will be published at the end of this year and the second by the end of next year.

Changes have already been made to the *Jury Act* in Queensland in September 2008 to allow for majority verdicts in certain circumstances, and to allow for judge-only trials, dispensing with juries, in exceptional cases.

The terms of reference of both reviews assume the critical role of juries in the Queensland criminal justice system. One might ask why do juries play such a critical role in the justice system here and elsewhere? In my view there is one paramount reason and it is simply because we live in a democracy.. Citizens in a democracy are expected to participate in civic

life but have few opportunities to do so and even fewer obligations to do so. One obligation that Australians now accept as critical to democracy is the obligation to vote, a reform pioneered in Queensland. In most other democracies that is a right but not an obligation.

In our democracy, there is also the obligation to be available to serve on a jury. In fact the effect of being on the electoral roll is to create the potential to be called up for jury service; for it is from the electoral roll that jury panels are chosen. Those entitled to vote in our community cover the complete range of adults of both sexes, all religious beliefs or lack of them, political opinions, education or lack of it, national or ethnic origins, race, age and the whole range of opinions within the community.

Their presence means that the criminal justice system is not a self-enclosed and self-justifying system but that all trials on indictment (with the exception of the very few now able to be tried without jury) are determined in a courtroom where members of the community make the determination of guilt or innocence within the framework of a fair trial conducted according to law by the judge.

This has a number of practical, as well as theoretical, benefits. It ensures that the criminal law must be comprehensible, that the evidence given must be comprehensible and that the law cannot stray too far from community opinion.

The following have been said by judges and researchers to be some of the advantages of the jury system

- It is a panel of ordinary and anonymous citizens assembled as representative of the general community;

- The powerful cannot expect special treatment;
 - The weak need not fear discriminatory treatment;
 - The administration of criminal justice is, and has the appearance, of being unbiased and detached;
 - The participating lawyers are constrained to present the evidence and issues in a manner that can be understood by lay people so that the defendant and the public can follow and understand the proceedings;
 - The administration, proceedings and judgments of the criminal law are comprehensible by both the defendant and the general public;
-
- If the defendant or a witness is being denied a “fair go” the fact that jurors tend to identify and side with a fellow citizen who is being denied a “fair go” tends to ensure observance of the consideration and respect to which ordinary notions of fair play entitle a defendant or a witness;
 - Because the jury is a body of ordinary citizens called from the community it offers some assurance that the community as a whole will be more likely to accept a jury’s verdict than it would be to accept the judgment of a judge or magistrate who might be, or portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people;
 - The jury allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters and to determine what evidence is truthful;
 - Research in Australia has demonstrated that people who have served on juries have significantly more confidence in juries and

the criminal justice system than other members of the population who are eligible for jury service but have not been called up to attend for jury service.

Even the popular media generally appears to have faith in juries, although a survey of recent headlines suggest that the media in Queensland is particularly impressed if the verdict is returned quickly. Ordinarily reports of juries' verdicts read something like this the first sentence in a report in the *Innisfail Advocate* of 21 February 2009:

“The fate of a 25-year-old accused of murder took just two hours for a jury to decide, with a life sentence being imposed on the young man for killing a 53-year-old during a drunken stoush at Belvedere more than two years ago.”

Or this report of 11 March 2009 in the *Cairns Post*

**“DAD CLEARED OF STAB CHARGE
JURY’S VERDICT TAKES 30 MINUTES”**

or the headline on page 1 of the *Toowoomba Chronicle* of 27 February 2009, of even more impressive speed:

JURY TAKES 10 MINUTES TO FREE YOUNG SOLDIER

In my experience, however, jurors usually think long and hard before reaching their verdict so perhaps quick verdicts are newsworthy because they are so unusual.

The *Jury Act* prohibits the soliciting or disclosure of jury information unless authorised by the Supreme Court. However, the Chief Justice has granted the Commission leave to conduct research involving former jurors. The Commission will use the results of that empirical research

which will be conducted by a team from the University of Queensland to determine how to assist juries better in performing their important task.

Given the central role ascribed by legal theorists, legal commentators, the judiciary and the popular media to the role of the jury in a criminal trial it is particularly important that commonsense and comprehensibility prevail in criminal trials and that jurors are truly representative of the community. At present there are many exemptions from jury service which reduces the representativeness of juries.

Judges sum up to juries before they retire to consider their verdict. Such summing up has to explain the relevant law as to the charges, any possible defences, directions and warnings about the use that can be made of certain types of evidence, remind the jury of relevant evidence and summarise the case for the prosecution and the defence.

The Issues Paper considers the growing list of specific directions that must be given in particular cases. These directions have proliferated and are often complex and may be given to avoid an obvious ground of appeal rather than because the trial judge really believes that it will assist the jury or is necessary to ensure a fair trial. There is some concern that jurors may not understand all of these increasingly complex directions.

The Commission is considering a number of technical legal issues with regard to the necessity or desirability of those directions.

The Commission is also considering a range of approaches that may assist juries in reaching their verdicts which, although not jury directions as such, may well go some way to providing juries with their information

needs. We are looking at means of improving jury directions and identifying other procedural, technological and documentary techniques which may assist juries during the course of trials and in their deliberations.

The tradition of the criminal trial is of an oral trial. Evidence is given orally in open court and traditionally few, if any, written or other means of communication have been used. But times are changing. Much evidence is now presented in form of audio or video tapes of interviews with an accused person or with an affected child witness or it may be tapes gathered as a result of covert surveillance or telephone intercepts. Not only are photographs common, there may be a video or even a computer programme created to show the alleged crime scene.

Counsel's address and the summing up by the judge are, however, normally delivered entirely orally and may take many hours in which complex legal concepts and evidentiary warnings may have to be given and explained.

It is my firm view that jurors should be assisted by as many written and visual materials as possible to assist them in their own onerous task of determining the guilt or innocence of a fellow citizen. Such assistance might be in the form of a PowerPoint presentation during the judge's summing up, the provision of factual questions to assist the jury in reaching a verdict in which the legal concepts are embedded rather than requiring a lengthy explanation of the law from the judge. I will give on the PowerPoint display an example provided by Chambers JA from the Court of Appeal in New Zealand at a Jury Direction Symposium held in Melbourne on 5-6 February 2009,

COUNT 1: AGGRAVATED ROBBERY

Note: On all issues, the burden of proof beyond reasonable doubt lies on the Crown

Not in dispute:

Mr Brown committed an aggravated robbery of the ANZ Bank on 3 February 2008.

1.1 Are you sure that Mr Smith was the driver of the car into which Messrs Brown and Menzies got after robbing the bank?

If “yes”, go to question 1.2.

If “no”, find Mr Smith “not guilty” on this count and go to count 2.

1.2 Are you sure that, prior to the robbery, Mr Smith knew that Mr Brown intended to rob the ANZ Bank and to threaten violence, if necessary, to ensure the success of the operation?

If “yes”, go to question 1.3.

If “no”, find Mr Smith “not guilty” on this count and go to count 2.

1.3 Are you sure that, prior to the robbery, Mr Smith had agreed to assist by driving the get-away car?

If “yes”, find Mr Smith “guilty” on this count and go to count 2.

If “no”, find Mr Smith “not guilty” on this count and go to count 2.

I will also give an example from a very recent trial, over which I presided. The defendant was charged with multiple counts of producing dangerous drugs and trafficking.

This was for example count 2. **COUNT 2: PRODUCING A DANGEROUS DRUG IN EXCESS OF 2 GRAMS**

On a date unknown between the first day of July, 1997 and the sixteenth day of February, 2001 at Ilbilbie in the State of Queensland, MICHAEL

PAUL BLOGGS unlawfully produced the dangerous drug methylamphetamine.

And the quantity of the dangerous drug methylamphetamine exceeded 2 grams.

Instead of just reading the charge to the jury, and explaining the onus and burden of proof, the elements of the offence, the reasons for what we refer to as the between dates, the occasion referred to as identified in the particulars and the evidence, the property where it was alleged the offence took place, the technical meaning of “produce” under the *Drugs Misuse Act*, the identification of what constitute dangerous drugs under that Act and its Schedules, which list drugs in different Schedules to reflect their perceived dangerousness relative to other drugs and which changes from time to time to reflect the prevalence and harmful effects, socially and physically of those drugs, the circumstances in which the production of the drug could be attended by a circumstance of aggravation leading to a higher penalty and the way in which they should consider the charge with or without the circumstance of aggravation, I posed factual questions which embedded all of those difficult legal concepts.

- 1.1 Are you satisfied beyond reasonable doubt that Mr Bloggs took part in the cooking of methylamphetamine in the chook pen at Mr Bloggs’ property on the occasion described by Ms Jones?

If yes, go to question 1.2;

If no, not guilty of count 2 and go to count 3.

- 1.2 Are you satisfied beyond reasonable doubt that the amount of methylamphetamine produced was in excess of 2 grams?

If yes, guilty of count 2 with a circumstance of aggravation and now go to count 3;

If no, guilty of count 2 without a circumstance of aggravation and now go to count 3.

And so on for each count.

Preparing and disclosing the PowerPoint presentation and the factual questions during the trial made the summing up in that trial a much more collaborative process between judge and counsel and is one way of making the process more comprehensible for jurors.

I urge you to read the Issues Papers produced by the Law Reform Commission at [www.qlrc.qld.gov.au](http://www qlrc.qld.gov.au) and send us your ideas, views, opinions and suggestions. Such a deeply democratic institution as the jury will benefit from ideas and submissions from as many informed members of our community as possible.