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INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL

Proceedings of a Seminar on

THE JURY IN CRIMINAL TRIALS

Convenor: B. A. McKillop, Senior Lecturer in Criminal Law

CHAIRMAN:
The Honourable Sir Laurence Street, Chief Justice

25th June 1986
State Office Block, Sydney

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FOREWORD

Bron McKillop,
Senior Lecturer, Faculty of Law,
University of Sydney,
Convenor of Seminar.

This was a timely seminar, following as it did upon some recent controversial trials (Chamberlain, Murphy, Gallagher), and upon the Report of the New South Wales Law Reform Commission on *The Jury in a Criminal Trial* in March, 1986.

The first paper was presented by Mr Paul Byrne, the New South Wales Law Reform Commissioner in charge of the criminal procedure reference to the Commission, which reference includes juries in criminal trials. Mr Byrne noted at the outset of his paper that the first of the 95 recommendations in the Report was that:

> A person who is charged with a serious criminal offence should continue to have the right to trial before a judge and a jury of 12 people randomly selected from the community.

There was no opposition to this proposition at the seminar. The recommendation, by majority, of the United Kingdom Fraud Trials Committee (the Roskill Committee) that complex fraud trials be heard by a tribunal consisting of a judge and two specialist lay members was noted by Mr Byrne as having been considered by the Commission and rejected. The rejection was on the basis that the traditional role of the jury in the criminal justice system, involving community participation, the determination of guilt by reference to the standards of the general community, accountability and public acceptance, should be preserved in these cases, and the problem of jury comprehension in such cases should be attacked through adequate preparation and effective presentation of evidence. No voices were raised at the seminar in support of the Roskill Committee recommendation.

The two recommendations of the Law Reform Commission that were most debated at the seminar were that the requirement of unanimous verdicts be retained and that peremptory challenges be reduced to three. There was some support for majority verdicts, either to overcome the problem of the odd intransigent juror (Kinchington, Q.C.) or for reasons of cost (Roach), but there was one spirited rejection of such verdicts on the ground that they would necessarily result sometimes in the conviction of the innocent (Molomby). There was some opposition to the recommendation to reduce peremptory challenges (from 20 on murder charges and 8 on other charges to 3 on all charges) on the grounds that this would too greatly reduce participation by the accused in his trial and his ultimate acceptance of the verdict (Woods Q.C., Milne), but some scepticism was expressed about the reality of that participation by an accused who is represented (Sutherland).

The second paper was presented by Mr Ivan Potas, a criminologist with the Australian Institute of Criminology. Mr Potas' primary concern was with the extent to which juries understand the instructions given them by the judge and the evidence presented before them, particularly by expert witnesses. His main suggestion for improving jury understanding was to have judges and expert witnesses use language sufficiently clear and simple as to be readily comprehensible to laymen. Judges could move towards achieving this by adopting standard instructions on the matters of law involved in a trial and by giving written copies of

those instructions to the jurors. Flow charts simplifying the process of answering the questions left to juries by judges in some types of cases were suggested and an example was proferred by Mr Potas based on the *McManus* formulation of the *Viro* instructions on excessive self-defence.

Mr Justice Roden spoke at some length during the general discussion on the matters that concerned Mr Potas. His Honour saw it as the obligation of the judge to use language that the jury would understand rather than requiring the jury to learn the judge's language. His Honour was not in favour of standard directions for the reason that they would inevitably be in lawyers' language and not tailored to the circumstances of the particular case. In His Honour's view complex rules, particularly of "Viroesque proportions", could not be the subject of simple directions, rather the rules themselves should be simplified. This would allow the jury to discharge its proper function in a criminal trial — to assess the moral culpability of the accused.

Mr Tom Molomby, producer of "Law Report" on A.B.C. radio, sought in the third paper, to place the criminal jury in its social and political context. He saw the power of the jury to acquit whatever the evidence as a good thing, as a protection against oppressive laws, and as allowing the jury to function as the conscience of the community. To those who criticize the jury as liable to error, Mr Molomby would ask for an error-free alternative and would not, on the evidence of two recent English appeal decisions referred to, accept that judges are less prone to error than juries. Ultimately for Mr Molomby the credibility and stability of the criminal justice system in a democracy requires the continuance of trial by jury.

The Chairman of the seminar, the Chief Justice, Sir Laurence Street, sought any views during the general discussion on the power of the jury, seen by Mr Molomby as a good thing, to acquit against the evidence as an expression of community conscience. There was some express further support for the power (Woods, Q.C.) and some opposition (Parnell, Magistrate). As to the related "merciful verdict of manslaughter", Mr Justice Roden pointed to the illogicality of the jury having the power so to return but not being able to be told about it, except if they ask.

The view of the seminar was clearly that the jury should be retained for serious criminal charges. Indeed there was no general agreement even to the limited changes recommended by the Law Reform Commission. There were however pleas for more to be done to allow the jury to participate more fully in the trial process.

THE JURY SYSTEM: SOME SUGGESTIONS FOR REFORM

Paul Byrne, B.A., LL.B., Dip. Crim., LL.M. (Hons).
Commisioner, N.S.W. Law
Reform Commission

Introduction

As participants in this seminar may be aware, the New South Wales Law Reform Commission has a reference to examine various aspects of the law and practice relating to criminal procedure. Whilst the terms of that reference are broad, they expressly direct the Commission to inquire into "practices and procedures relating to juries in criminal proceedings".

The Commission commenced its research on the role of the jury in a criminal trial in November 1984. In September 1985 a Discussion Paper was published for the purpose of gathering community responses to various issues related to the jury system. The Commission's Report was completed in March 1986 and tabled in Parliament by the Attorney-General, the Honourable Terry Sheahan, in April. The Report covers a wide range of topics related to jury trials.

I propose to concentrate in this paper on those aspects of the Report which created the greatest level of interest among members of the Commission. Not surprisingly these issues have been prominent in discussion and criticism of the Report following its publication. Before embarking upon an examination of those issues, some brief remarks should be made by way of background information.

Some Basic Principles and Objectives

In the Commission's view, the general features which the jury system should possess are:

1. fairness and justice;
2. public acceptability and accountability; and
3. efficiency and effectiveness.

The Commission divided its work on the jury system into separate categories which were linked to the objectives which we considered to be desirable. These objectives are themselves more specific means of achieving those general features which have been set out above. The specific objectives were:

1. to ensure a representative jury;
2. to protect the jury and its individual members from interference;
3. to make the jury's task easier;
4. to reduce the existence and influence of actual and perceived bias and prejudice;
5. to promote satisfactory verdicts;
6. to save time and money; and
7. to clarify the law in those areas where its operation was uncertain.

A Summary of the Commission's Major Recommendations

The Report makes a total of 95 specific recommendations, 60 of which would require legislation to be implemented. The principal recommendations may be summarised as:

- ★ The trial of serious criminal offences should continue to be heard before a judge and jury of twelve people randomly selected from the community.
- ★ The representative character of juries should be enhanced by increasing the number of people who are eligible.

- ★ The anonymity of jurors should be strictly preserved.
- ★ People called for jury service should be given more information in advance about their task.
- ★ The presentation of a criminal case to the jury should be improved by more effective communication including greater use of written materials.
- ★ There should be special procedures to reduce the risk of bias and prejudice among jurors including restrictions on the material published by the media before a jury trial.
- ★ A system of pre-trial hearings should be instituted to determine in advance of the trial issues which do not concern the jury.
- ★ A system of appointing additional jurors should be used to ensure that very long criminal trials are not abandoned for want of sufficient jurors.
- ★ Soliciting information from jurors for the purpose of publication and the sale by jurors of information regarding their deliberations in the jury room should be prohibited.
- ★ There should be no immediate steps taken to control or limit disclosures made in good faith by former jurors about their deliberations in the jury room.

Avoiding the Impact of Prejudicial Publicity: The Right to Trial by Judge alone

This is one of the means suggested to meet the problem of prejudicial publicity:

Recommendation 56: The *Crimes Act* 1900 should be amended to provide that, in all criminal cases which are to be tried on indictment, the accused person should have the right to make an application that the trial be conducted by a judge sitting without a jury. Applications of this kind should be determined in the following manner.

(a) The application should not be entertained unless the judge hearing it is satisfied that the accused person has either obtained legal advice on the matter or understands the nature and consequences of the application.
(b) The onus should be on the accused person to show that there are legitimate grounds for dispensing with the jury.
(c) The decision as to whether the trial should be conducted without a jury should be made by a judge at a pre-trial hearing.
(d) The Crown should be represented at such a hearing and entitled to be heard on the merits of the application.
(e) The accused person should have the right, with the leave of the court, to withdraw the election to be tried by judge alone.

In the Discussion Paper we suggested that the problem caused by extensive pre-trial publicity of a prejudicial kind could be overcome by giving accused people the option of trial by judge alone. Whilst there was considerable support for this proposal, it was also frequently objected to, chiefly on the ground that it is the "thin end of the wedge" which could lead ultimately to the abolition of the use of juries in serious criminal cases. The proposal has been criticised as a measure which contributes to the further erosion of the right to trial by jury in serious criminal cases. It has also been argued that it is unnecessary because the problem which it is designed to solve can be met by more acceptable changes to the current law and practice. In particular, it is argued that the enforcement of strict rules limiting the publication of prejudicial material before trial would eliminate the problem of pre-trial publicity rendering it impossible to empanel an impartial jury. The existence of such strict rules would of course be no guarantee that they will not be

broken. Even if offenders were prosecuted, this would not remove the influence of the prejudicial material published. On the contrary, the publicity given to these prosecutions serves only to aggravate the already existing prejudice.

Procedure on Applications for Trial by Judge Alone

Safeguarding the Rights of the Accused Person

The right to trial by jury is a fundamental right available to people charged with a serious criminal offence. The Commission has suggested that there should be safeguards provided to ensure that an accused person does not, whether through ignorance or under the influence of undue pressure, surrender the right to trial by jury without good cause. It recommends that an application to be tried by judge alone should not be granted unless the judge determining the application is satisfied that the accused person has either obtained legal advice on the matter or understands the nature and practical consequences of the application. There is a similar provision in equivalent South Australian legislation.[1] The principle of "informed waiver" which is embodied in this part of our recommendation can also be found in the procedures to be followed when an accused person accepts a "paper committal" in place of traditional committal proceedings. It should be borne in mind by those who would regard the very existence of the power to waive such fundamental rights as dangerous that an accused person who pleads guilty is waiving the same right without this safeguard.

Onus on the Accused Person

The primary conclusion of the Report is that serious criminal cases should as a general rule be tried before a judge and a jury of twelve citizens selected at random from the general community. In the light of this it is proposed that trial by judge alone should not be available to an accused person as a matter of right. The concept of jury trial incorporates both the right of the accused person and the right of the community to have serious criminal cases dealt with in a manner which ensures that the standards of the community have been applied in the determination of guilt. Neither of these rights should be removed without justification. Other circumstances however, may render trial by jury unsuitable in particular cases. The normal mode of trial for serious criminal offences should be employed unless it can be shown that it is, in the circumstances of the particular case, unsuitable because of overwhelmingly prejudicial publicity before trial. The onus of establishing that there are legitimate grounds for conducting the trial without a jury should be borne by the accused person.

In some cases the publicity given to a criminal case may be localised. For example, an offence occurring in a country region may be publicised in that region alone. The investigation of the crime, the arrest of the accused person and the conduct of preliminary proceedings in court may have all been given publicity. Where the publication of prejudicial material is localised, the more appropriate means of overcoming the problem would appear to be to change the venue of the trial. However, the proliferation of the electronic media means that where an offence or investigation has created statewide or even national interest. changing the venue of the trial will not help to reduce the influence of prejudicial publicity.

1. *Juries Act* 1927 (SA) s7.

Pre-Trial Determination

An application to be tried by judge alone must, for the sake of efficient management of the court lists and to avoid unnecessary inconvenience to jurors, be made well before the start of the trial. There is an argument in favour of an application based on the existence of prejudicial material being heard by another judge on the ground that it is undesirable for the trial ajudge to be directly exposed to it.

The Rights of the Crown

Since the community has an interest in ensuring that the mode of trial is appropriate to the case, the Crown should have the right to be heard on the merits of an application by an accused person to be tried by judge alone. The representation of the Crown's interest should not, however, amount to a right of veto. The ultimate decision should be made in the exercise of a judicial discretion.

Withdrawing the Election

The accused person should generally be able to withdraw the election to be tried by judge alone. Whilst this might be seen to create an opportunity to delay the proceedings, it is unlikely that this will be a problem in reality. Applications of this kind can be expected to be infrequent. In any event, the prospect of causing some delay does not outweigh the importance of retaining the right to trial by jury for those accused people who change their minds about the desirability of being tried by judge alone.

The question has been raised whether the accused person should be entitled to know the identify of the trial judge before making an election. It is argued by some that this is a crucial factor in deciding whether to make such an election. On the other hand, "forum shopping" would be encouraged by providing the name of the trial judge in advance. The apparent problem may be met by the proposal that the accused person should be able to change his or her election to be tried by judge alone with the leave of the court. An accused person who changes his or her mind about giving up the right to trial by jury should not be compelled to abide by his election unless the judge considers the change to be prompted by an improper motive. There are many circumstances when such a change may be legitimate, for example, where an accused person changes legal representation after making such an election.

The High Court has recently held in *Brown's* case[2] that, in proceedings for Federal offences, a provision which gives the accused the right to elect for trial by judge alone is in breach of s80 of the Constitution. That decision was by a majority of 3:2. In a paper recently delivered to the Australian Institute of Criminology[3], Mr Justice Murphy, who did not sit on the case, gave a strong indication that he would have supported the minority view, saying that *"Brown's* case may not be the last word on this issue", he cited the colourful statement of Justice Felix Frankfurter in *Adams* case to the effect that to deny the constitutional validity of a provision allowing waiver of the right to trial by jury "is to imprison a man in his privileges and call it the Constitution".[4]

2. *Brown v The Queen* (1986) 60 ALJR 257.
3. Justice Lionel Murphy: "Section 80: Trial by Jury", address to the Australian Institute of Criminology, Canberra 20 May 1986.
4. *Adams v United States ex rel McCann* 312 US 269, 280 (1942).

The Size of the Jury in Long Trials

Recommendation 85: The consent of all parties should continue to be required before the judge is entitled to allow a trial to continue with fewer than ten jurors. It should be provided by legislation, however, that in a trial which has lasted more than six months, the judge has a discretion to allow the trial to continue with a minimum of eight jurors irrespective of the consent of the parties.

In order to increase the probability that twelve jurors would be available to consider their verdict at the completion of a long trial, the Commission recommended the introduction of a system of appointing additional jurors at the outset of the trial. Depending on the expected length of the case, up to three additional jurors may be appointed. Similar procedures have been introduced in various parts of America and in other States of Australia although they are rarely used. This proposal has not proved to be particularly controversial. The more pressing issue was whether there should be a minimum number of jurors and, if so, what the minimum should be.

The current law is that up to two jurors may be discharged at the discretion of the trial judge. Where there are more jurors discharged, the trial cannot continue unless the consent of both, or all, parties is obtained. The current law appears to acknowledge that at least in some circumstances a jury of fewer than 10 is an acceptable tribunal to determine the guilt of an accused person. The question at issue was whether the consent of both parties should be required before this is allowed.

A majority of the Commission concluded that, with one exception, there should be no change to the present law. The need for change has not been demonstrated with respect to the vast majority of criminal trials. The recommendation to implement a system of additional jurors will ensure that, in trials expected to last more than three months, once a jury is empanelled there will be only a minimum risk that its numbers will diminish to the point where the trial cannot be continued without the consent of the parties. However minimal this risk may be, we think it should be guarded against. If a very long trial had to be abandoned because the jury was reduced to nine or eight members it would be little short of catastrophic. The criminal justice system and the participants in the case should not be expected to bear the burden of having to start the proceedings again. Having suggested that the jury might be reduced below ten in exceptional circumstances without the consent of the parties, it must be acknowledged that there is a level beneath which a jury has insufficient members to have the essential characteristics of a conventional jury.

The combination of proposals for additional jurors and minimum jury size is designed in the first place to guarantee that long criminal trials will not need to be abandoned for want of jury members. If the trial is estimated to last more than three months the judge would have a discretion to empanel additional jurors. If the trial lasts longer than six months, the judge would have a discretion to allow the trial to continue so long as there were at least eight people remaining on the jury. Where three additional jurors are empanelled and the trial lasts more than six months, then up to seven people could be discharged from the jury without requiring the proceedings to be abandoned. The current law allows for only two such discharges. The prospect of long trials being abandoned for want of sufficient jurors would be virtually eliminated if this scheme were implemented.

It would also have certain consequential advantages. In the first place the

likelihood of the verdict in a trial being that of twelve members of the community would be substantially increased. In addition, where an individual juror suffers personal hardship during the course of a long trial, the judge would be more likely to grant a discharge on such grounds simply because he or she will have greater latitude to do so before the risk of discharging the whole jury becomes real.

The Trial of Complex Technical Cases

In the United Kingdom the Fraud Trials Committee was established under the chairmanship of Lord Roskill to consider whether changes should be made to the existing law and procedure in cases where the accused person is charged with offences of fraud. That Committee recommended in its report that, in complex fraud cases which fall within certain published guidelines, trial by judge and jury should be abolished.[5] The decision would be made by a High Court judge. The trial would take place before the Fraud Trials Tribunal. This body, it was suggested, should consist of a judge and two lay members selected from a panel of people who have experience of business dealings and the capacity to understand the kind of complex issues which arise in difficult fraud cases. It was proposed that the determination of guilt should be made by a simple majority of the tribunal. If there is a dissenting opinion it should not be disclosed. It was expressly noted that the two lay members would have power to override the opinion of the judge on the question of guilt. The judge alone, however, would be responsible for determining sentence.

The reasons why this recommendation was made may be stated shortly. The Committee concluded that the overwhelming weight of evidence presented to it established that the legal system in England and Wales is incapable of prosecuting the perpetrators of serious frauds expeditiously and effectively. The randomly selected jury was considered to be an inappropriate tribunal for the trial of complex fraud cases as:

> . . . in almost every area of law, society has accepted that just verdicts are best delivered by persons qualified by training, knowledge, experience, integrity or by a combination of these four qualifications. Only in a minority of cases is the delivery of a verdict left in the hands of jurors deliberately selected at random without any regard for their qualifications. Thus, those who advocate that complex fraud trials should be conducted before a select, as opposed to a random, tribunal are arguing not that such cases should be treated in any special or unique fashion, but that they should be treated in a manner more akin to the way the vast majority of all other legal cases are treated today.
>
> In our opinion the absence from the jury box in a complex fraud case, except by chance, of persons with the qualities described in the preceding paragraph seriously impairs the prospect of a fair trial.[6]

The reasoning in this passage is, in my view, flawed by the failure to distinguised between civil and criminal cases. The issue to be determined in a fraud trial, namely the criminal guilt of the accused person, is quite different to issues which may need to be determined in the resolution of civil litigation. The point is not that a "minority of cases" is left to be decided by randomly selected and unqualified jurors but that all serious criminal matters are so decided. Furthermore, every case decided by a judge is decided by a person who is, as a rule,

5. *Report of the Fraud Trials Committee* (Chairman: Lord Roskill) HMSO London January 1986.
6. *ibid* paras 8.23-8.24.

"unqualified" with respect to the discipline from which technical, scientific or complex evidence originates.

The Fraud Trials Committee was unable to conduct any direct research on jurors' comprehension of actual fraud cases. Witnesses who gave evidence to the Committee asserted that many jurors are almost certainly out of their depth in trying to comprehend the evidence presented in complex fraud cases. It was noted that the verdict of a jury may rest not upon a firm grasp of the evidence but upon an "overall impression of guilt or innocence in the minds of jurors".

There was one dissentient in the eight member committee. Mr Walter Merricks, a practising solicitor, felt that the majority of the Committee based its conclusions on inadequate evidence. In his view the evidence available did not point unambiguously to the conclusion that jurors cannot and do not understand fraud cases. Mr Merricks pointed to the important consequences which flow from the use of a jury in a criminal trial.

> The jury not only represents the public at the trial, its presence ensures a publicly comprehensible exposition of the case. There is the danger in trial by experts that the public dimension will be lost . . . I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible.[7]

The same point has been made by Mr Justice Deane in the High Court of Australia:

> [a] system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings.[8]

Mr Merricks then raised the issue that concerned many of the organisations and individuals who made submissions to the Committee, namely the appropriate tribunal to determine whether the conduct complained of is dishonest, the essential element of all serious fraud charges. The National Council for Civil Liberties crystallised the issue in its submission.

> The decision to be made in fraud trials is in common sense and common honesty "was it a swindle?" Twelve ordinary citizens using their experience and common sense with guidance on the law are best equipped to answer that question.

In his dissenting opinion Mr Merricks concluded that entrusting the assessment of dishonesty to experts is dangerous. The standards to be applied in assessing honesty should be those of ordinary people.

The recommendation to abolish the jury system in complex fraud cases made by the Fraud Trials Committee is by no means novel. In November 1978 a major report tabled in the New South Wales Parliament recommended that trial by jury

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7. *ibid* para C20 at 196.
8. *Kingswell v The Queen* (1986) 60 ALJR 17 at 31.

no longer be mandatory in relation to certain corporate and "white collar" offences.[9] It was proposed that the Attorney-General, or a person nominated by him, might order that the trial of a person charged with such offences be held before a Supreme Court judge sitting without a jury. This proposal was not adopted. However, legislation was passed enabling the summary trial of corporate offences with the consent of the accused person.[10]

The argument which is usually put forward in support of the abolition of trial by jury in complex cases, particularly commercial and "white collar" crimes, is not compelling. It is invariably based on the assertion that jurors are incapable of understanding the evidence upon which prosecutions of this kind depend. The validity of that assertion must be questioned. There is in fact very little evidence to show that jurors, or more accurately juries, do not have an adequate grasp of the relevant material on which their verdicts should be based. There is a strong body of opinion which holds that juries generally reach acceptable verdicts in these cases. This was recognised in the minority opinion of Mr Merricks.

> Most judges and lawyers who made submissions to us thought that juries mostly reached the right result, or at least an understandable result.[11]

The majority of the Fraud Trials Committee expressed the orthodox argument about the inability of jurors to understand long and complex cases.

> We have no doubt that most ordinary jurors experience grave difficulties in following the arguments and retaining in their minds all the essential points at issue, particularly in a long hearing of a complex character. This creates the serious risk either that the jury will acquit a defendant because they have not understood the evidence or will convict him because they mistakenly think they have understood it when they have in fact done little more than applied the maxim 'there's no smoke without fire'.[12]

This statement was immediately followed by an acknowledgment that such evidence as is available does not support this proposition.

> There is no accurate evidence which we have been able to obtain to suggest that there has been a higher proportion of acquittals in complex fraud cases than in fraud cases or other criminal cases generally. Nevertheless, we do not find trial by a random jury a satisfactory way of achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth.[13]

The Fraud Trial Committee's conclusion was partly based on the results of research intended to discover the comprehension of individual jurors. Research into the effectiveness of juries, however, is unlikely to be of much value unless that research is carried out by questioning the jury as a collective group. It is not good enough to interview twelve jurors independently and accumulate their individual knowledge and understanding of the case. They should be interviewed as a group so that their combined knowledge and understanding can be put to work in responding to each issue put to them. Research which finds that twelve individual jurors do not retain a thorough understanding of the case is not of itself conclusive of the fact that the same twelve people acting in unison will collectively lack a thorough understanding of the case.

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9. Department of the Attorney-General, Criminal Law Review Division *Report on Summary Prosecution in the Supreme Court of Corporate and "White Collar" Offences of an Economic Nature.*
10. *Crimes Act* 1900 s457A.
11. See note 5 above para C18 at 195.
12. *ibid* para 8.34.
13. *ibid* para 8.35.

The lack of understanding of jurors has not been adequately demonstrated. On the contrary, it would appear that the collective wisdom and experience of juries has enabled the jury system to adapt and meet the demands placed on it by trials involving complicated evidence.

The arguments in favour of retaining trial by jury in these cases are based on preserving the traditional role of the jury in the criminal justice system. The fundamental principles of criminal justice are best served by the jury system. Community participation, the determination of guilt by reference to the standards of the general community, accountability and public acceptance of the criminal justice system are all features which would be lost if the jury were to be abandoned.

The Presentation of Complex Information

Some of the arguments made in the debate over the suitability of the jury for the trial of complex cases do reveal the need for change. Far from amounting to a case for abolition, they make out a case to vary existing procedures.

The Commission recommended that evidence of a scientific and technical nature should be presented to juries in a manner which maximises the prospect that the evidence will be understood by the jury. There are various means available to improve juror comprehension. In the first place, a greater use of written materials should be considered including making the transcript of evidence available and giving directions of law in writing. Secondly, there is probably scope for the use of more imaginative but not necessarily more complicated, means of presentation such as diagrams, charts, projectors and other visual aids.

The problems which are believed to render trial by jury unsuitable in cases where scientific evidence is prominent can best be met by improving the manner of presenting that evidence. The responsibility is one which must be shared between the witness giving the evidence and the lawyer who is asking the questions. The prosecution case at the trial of Edward Splatt was based on various items of forensic evidence. In the course of his report the Royal Commissioner who inquired into the reliability of Mr Splatt's conviction made the following remark:

> The vital obligation which lies upon the testifying scientists is that they spell out to the jury, in non-ambiguous and precisely clear terms, the degree of weight and substance and significance which is or ought properly to be attached to the scientific tests and analyses and examinations as to which they depose; and specifically the nature and degree of any limitations or provisos which are properly appended thereto.[14]

He went on to say that:

> . . . the critical responsiblity which rests upon legal persons is to ask such detailed and probing questions of the scientists as are most likely to elicit the type of evidence just mentioned.

The emphasis in jury trials should be on clarity and on simplification of the evidence presented. Adequate preparation and effective presentation are the most fruitful means of securing the comprehension of the jury in complex cases.

The Use of Specially Qualified Jurors

It has been suggested from time to time that the jury in a complex case should be drawn from a group of people who have particular qualifications which will

14. *Report of the Royal Commission of Inquiry into the Conviction of Edward Charles Splatt* (Commissioner: Carl Shannon Esq, QC South Australia 1984) at 52.

enable them to understand the case. A jury which understands the evidence, so the argument runs, is more likely to bring in a just verdict based on the merits of the case than a jury which cannot follow the evidence. Arguments based on the level of comprehension of jurors are ultimately speculative because there is no reliable information available regarding the "competence" of the jury system either generally or in particular cases. Since juries are not required to give reasons for their verdicts, and since the grounds on which they are reached are not usually divulged, there is no reliable way of knowing whether a verdict is based on a sound understanding of the case. Moreover, in most cases the capability or qualifications of the jury to cope with the evidence in the case will never be known.

For the trial of complex commercial cases, it is argued that the sole criterion for qualification as a juror should be a standard of intelligence or education which demonstrates that the person has the ability to cope with complex evidence. One author in the United States has suggested that special juries should be used in civil trials. The reasons advanced are equally relevant to criminal cases.

> A jury composed of particularly qualified individuals could understand sophisticated concepts that might be beyond the ability of either a judge or a traditional jury. Jury confusion would be less of a problem than it is with jurors who are unfamiliar with the technical, financial and legal issues involved in much of today's complicated litigation. There also would be less likelihood of an irrational verdict because the special jurors would be able to make a reasoned decision based on their understanding of the facts and the law[15].

The notion of a specially qualified jury is, however, inconsistent with the principle that the jury should be representative of the whole community. There are obvious dangers in creating different classes of juors. There are also practical difficulties. Which cases are to be tried by a "special jury"? What are the precise qualifications for the jurors? Would "special jurors" be available in sufficient numbers? Should they receive a higher rate of payment? It should be said again that the most effective way of increasing juror comprehension is to improve the means by which difficult evidence is presented. The responsibility for that lies with counsel and the judge. If the case is not capable of being presented in a manner which can be understood by ordinary people, then it is probable that there is something seriously wrong with the case in the first place.

The System of Peremptory Challenges

As a general rule, jury service should be available to all adult members of the community and be shared equally by them. In this way, the representative character of juries is preserved. There may be, however, certain groups who should be excluded or excused from jury service either generally or on a particular occasion. The grounds on which this may be done can be broadly stated as being, firstly, personal hardship and, secondly, public necessity.

The jury selection process in New South Wales appears to work reasonably effectively in the sense that jury panels, and indeed juries, are reasonably representative of the general community. This was the intention of legislation, passed in 1977, restructuring the manner in which jury rolls are established and the process of selection of potential jurors from the rolls.

Once the jury selection procedure reaches the court room, however, the parties to the litigation have, I suggest, the power to make a significant impact upon

15. "The Case for Special Juries in Complex Civil Litigation" (1980) 89 *Yale Law Journal* 1155 at 1159.

the constitution of the jury. This is made possible by the current system of peremptory challenges. In New South Wales an accused person has the right to make a maximum of twenty peremptory challenges in a murder trial and eight in any other case. Where there are a number of accused people jointly tried, each of them has the same number of challenges and the number of challenges available to the Crown in any case is equal to the sum of those available to the individual accused.

A majority of the Commission felt that the relevant legislation should be amended to provide that the maximum number of peremptory challenges available to an accused person should be reduced to three irrespective of the offence being tried. A further recommendation is that the maximum number of peremptory challenges available to the Crown should be reduced to three for each accused person irrespective of the offence being tried. Two of the Commission's six members dissented from these recommendations. One was of the view that the maximum number of challenges available should be six; another considered that it should be four but only if the occupation and residential address of the potential juror was disclosed.

In order to place this issue in some perspective, it should be noted that at common law an individual accused had the right to make 35 peremptory challenges. This was, of course, in the days when it was much more likely than an accused person would know and perhaps have reason to object to the people called to serve as jurors from the local community in which the accused person usually lived. This common law rule has been gradually altered as the representative character of juries has been enhanced. Because of a massive increase in population and now that jury service has become more widely available, the likelihood of persons known to the accused being called to serve as jurors has diminished.

These recommendations are designed to preserve an essential feature of the jury system, that it should be representative of the general community. While the accused person and the Crown each has the right to trial by an impartial jury of twelve people selected randomly from the community, neither party has the right to trial by a jury of its choice. If this argument is taken to its logical extension, it would of course lead to the complete abolition of peremptory challenges, leaving only the right to challenge for cause as a means of eliminating jurors who are or who may be seen to be biased. Abolition of the right of peremptory challenge would also mean, however, that the accused person would be denied any role in the jury selection process.

The accused should be permitted a degree of participation in the selection of the jury but this level of participation should not be extended to enable the accused to eliminate particular groups in the community from the jury. There should not be a right to trial by jury of choice. Another reason for preserving the right of both parties to make peremptory challenges is that this procedure is a means of avoiding the potentially embarrassing spectacle of the reasons for challenge for cause having to be given in open court.

The right of the Crown to make peremptory challenges was the subject of much discussion. The conclusion the Commission has finally reached is based on a number of practical considerations. One of those has just been referred to. Another is that the Crown may see the need to use its right of peremptory challenge to make the jury more representative of the general community.

The empirical surveys which the Commission conducted revealed that the practice of Crown Prosecutors in exercising the right to make peremptory

challenges varied considerably. In one-third of trials there were no challenges by the Crown. In the others the Crown averaged three challenges. In some cases the Crown challenged more people than the accused. According to some practitioners, the reasons for Crown challenges depend very much on the approach taken by the prosecutor concerned. In order to overcome this apparently inconsistent approach and to ensure that challenges are based on legitimate grounds, the Commission has recommended that the Attorney-General, in consultation with the Crown Prosecutors, should establish guidelines to govern the Crown's exercise of the right of peremptory challenges and that these guidelines should be published. The publication of guidelines of this kind would avoid, for example, what occurred in the *Georgia Hill* case. In that trial of a woman charged with murder, the Crown Prosecutor challenged twenty women balloted as jurors with the result that the jury was eventually constituted by eleven men and only one woman.

In order to appreciate the impact of the changes proposed for the system of peremptory challenges, it is necessary to bear in mind that a number of further recommendations made by the Commission relate directly to the process of jury selection. There are a number of alternative and preferable procedures which could be adopted to achieve one of the few legitimate objectives of the peremptory challenge system, namely the elimination of jurors who are not impartial or who may not be seen to be impartial.

The first of these is a procedure which envisages that the Crown Prosecutor make a short address to the jury panel before the selection process commences. This would contain a broad outline of the facts and circumstances of the case and advise the panel of the names of the prosecution witnesses. The judge would then be obliged to invite any member of the jury panel who felt that they would be unable to give impartial consideration to the case to apply to be excused. The direction given by the judge would be expected to emphasise the fact that potential jurors should only apply to be excused where the nature of their previous association with the case or the witnesses is such as to give rise to a real risk of bias or prejudice or a real risk that bias or prejudice may be seen to exist.

The specific recommendation is in these terms:

> **Recommendation 59:** The *Jury Act* 1977 should be amended to provide that, before empanelling a jury, the Crown Prosecutor shall be required, if requested by the judge, to inform the jury panel of the nature of the charge, the identity of the accused person and the principal witnesses who are to be called for the prosecution. After this information has been given, the judge should request members of the jury panel who feel that they would be unable to give impartial consideration to the case to apply to be excused.

There is, in addition, a recommendation that:

> **Recommendation 60:** The *Jury Act* 1977 should be amended to provide that where the judge is, on application by a party, satisfied that the nature of the issues to be tried is such that people of a nominated occupation, or who live in a nominated area, may be unsuitable as jurors, the judge should ask the jury panel whether any of their number is a member of that group. Any potential juror who answers this question in the affirmative, should be liable to challenge for cause without further proof being required of the grounds for the challenge.

The combined effect of these two procedures should be to eliminate sources of prejudice or potential prejudice in a more effective manner than the peremptory challenge prodecure currently permits.

Unanimous or Majority Verdicts

A further issue is whether the jury's verdict should be unanimous. Unanimity has long been considered an essential and fundamental feature of trial by jury. The existing rule, which appears to have been settled midway through the fourteenth century, is of ancient origin. There are, in my view, two major arguments in favour of preserving it.

Allowing a majority verdict diminishes the important protection afforded by the high standard of proof required in criminal cases. Where there is only a majority verdict of guilty it can clearly be said that (in the absence of corruption) there exists in the mind of at least one member of the jury a reasonable doubt about the guilt of the accused person. It is simply not valid to say that if a doubt is entertained by only one among twelve, then it cannot be a reasonable doubt. It is inescapable that the existence of a dissenting voice casts a shadow over the validity of the verdict. The acceptability of the verdict may be called into question by the participants in the trial and the general public alike. William Forsyth, a nineteenth century historian who was acclaimed for his work on trial by jury, was a staunch supporter of the rule requiring unanimity. He expressed his view in vivid terms:

> And how must it paralyse the arm of justice, when from the very tribunal appointed by law to try the accused, a voice is heard telling her that she ought not to strike?[16]

The second major argument in favour of retaining the rule requiring the verdict of the jury to be unanimous is that the incidence of juries failing to agree is, and always has been in New South Wales, relatively low. The figure has apparently remained reasonably constant over time at approximately 3 per cent of criminal trials. It should also be noted that there have been few, perhaps only two in New South Wales, cases in which the jury has failed to agree on a verdict after a long trial.

"Majority" verdicts, as have been introduced in various parts of Australia, do not, of course, eliminate the problem of jury disagreements. They merely provide a means of reaching a final verdict in those cases where there is only one or two dissentients from the majority view.

The experience in England following the introduction of majority verdicts in 1967 is revealing. At that time the rate of jury disagreements was in the region of 4 to 5 per cent. Over the following years, the incidence of juries reaching verdicts by majority gradually increased. In 1968 there were majority verdicts in 7.7 per cent of cases, in 1969 this increased to 8.3 per cent and in 1970 to 9.1 per cent. It appears that the rate at which majority verdicts are given in criminal trials in England has now levelled out at approximately 13 per cent. The important fact that should not be overlooked in all of this is that there are still jury disagreements in England — in those cases where less than ten members of the jury agree on a verdict.

In order to reduce a small number of unsatisfactory verdicts (in the form of jury disagreements) there has been a massive increase in the number of verdicts which are unsatisfactory in another way, that is because they are not unanimous. The 4 to 5 per cent rate of disagreements has been reduced but not eliminated. At the same time a 13 per cent rate of majority verdicts is tolerated. It would appear that the proposed solution to the problem of jury disagreements created a monster of greater proportions than the problem it was designed to solve.

There is an additional matter of relevance to this issue. In both England and

16. Forsyth *History of Trial by Jury* (1850) at 254-5, noted in H. V. Evatt "The Jury System in Australia" (1936) 10 (Supp) *Australian Law Journal* 40.

Australia, the trial judge is not bound to tell the jury that their verdict must be unanimous. Whilst this is the strict law, in practice judges and counsel, particularly defence counsel, do advise juries that their verdict must be unanimous.

Verdicts which are less than unanimous are permitted in criminal cases in South Australia, Western Australia and Tasmania. Majority verdicts are permitted in civil cases in New South Wales. Quite apart from those who may come from other States, there are many people resident in New South Wales who are qualified to serve on a jury who come from countries where there is no jury system at all. It cannot be presumed that jurors in New South Wales are so well acquainted with the unanimity rule that it is not necessary to inform them of this feature of the jury system in criminal trials.

Accordingly, the Commission has recommended that the trial judge be required to direct the jury in a criminal trial that their verdict must be unanimous. This is consistent with the principle that juries should be informed of the law they are required to apply. The requirement of unanimity is a fundamental feature of trial by jury. The deliberations of the jury must be guided by knowledge of its existence.

Disclosure of Jury Deliberations: A Question of Balance

The arguments in favour of jury secrecy have been summarised by Mr Justice McHugh of the New South Wales Court of Appeal:[17]

- ★ Without the exclusionary rule there would be serious inroads into the freedom of speech of jurors in the jury room and their candid discussion of the issues would be discouraged.
- ★ Secrecy facilitates decision making because it protects jurors from outside influences and avoids the strain imposed by public scrutiny.
- ★ The exposure of juror's deliberations would undermine public confidence in the jury system and bring about the end of trial by jury.
- ★ Unless jurors are shielded from unwanted scrutiny, people will be reluctant to serve on juries.
- ★ The secrecy rule is necessary to ensure the finality of the verdict, whether that be a verdict of guilty or not guilty.
- ★ The secrecy rule protects the community satisfaction which flows from a unanimous verdict. Jurors would hesitate to reach unanimity if their compromises may be publicly exposed.
- ★ Secrecy enables juries to bring in verdicts without fear of community reaction against an unpopular verdict. Where the reasons for a decision are not known, unpopular verdicts cannot be effectively challenged.
- ★ Disclosure by jurors may be unreliable and lead to a misunderstanding of the verdict. Human recollection of what was said or discussed in situations of drama, conflict or emotion is always suspect.

On the other hand, there are arguments against the secrecy rule:

- ★ Disclosure may allow a greater understanding of the way in which the system of criminal justice works, and, more importantly, reveal its strengths and weaknesses. For example, the Commission's survey of jurors who had actually participated in criminal trials enabled it to identify certain areas appropriate for reform and to formulate our recommendations accordingly.

17. Mr Justice M. H. McHugh "Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt", paper delivered to a seminar conducted by the Media Law Association of Australia Sydney 12 February 1986.

Conversely the strict laws prohibiting disclosure in England hampered the work of the Roskill Committee.

- ★ Disclosure may bring specific injustices to light. Whilst evidence from this source may be inadmissible in an appellate court asked to overturn a conviction, it may be relevant to the question of executive clemency with regard to sentence or to a governmental decision whether or not to initiate an inquiry. In the same way, disclosures of this kind may generate such public pressure as to induce otherwise reluctant governments to take steps to reconsider verdicts.
- ★ A juror who speaks out about his or her experiences is simply exercising his or her right to freedom of speech.
- ★ Disclosure will make juries more accountable by making the jury system subject to reasonable scrutiny. The public is entitled to have the jury know that the public is watching its performance.
- ★ The publication of a juror's experience through disclosure may have a valuable educative effect on the general public.

The arguments for and against disclosure must be weighed in the balance. The juror who speaks out will disclose information which, whether accurate or not, may be embarrassing to other jurors. In this sense the exercise by one juror of the right to speak will involve the infringement of the right to privacy of another juror. One can infer from the silence of the majority of jurors, at least at the public level, that they wish to keep details of this experience private.

In the immediate aftermath of the publicity given to statements made about the jury in the *Murphy* trial and statements made by the jurors themselves, applications to be excused made by prospective jurors trebled. For many jurors, the fear of others publicly discussing what might be said and done would be a disincentive to jury service. More significantly, it could be a disincentive to speak with frankness and candour in the jury room. This factor is important but must not be exaggerated, because the very threat of publicity may itself be an incentive to act responsibly.

The Commission made five specific recommendations regarding the right of jurors to make public disclosures. Three of these place restrictions on the manner of disclosure. They are:

Soliciting Information and Harassement of Jurors

Recommendation 91: The *Jury Act* 1977 should be amended to provide that it is an offence to solicit or harass a juror or former juror for the purpose of obtaining for publication information regarding statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of a jury.

The Sale of Jury Secrets

Recommendation 93: The *Jury Act* 1977 should be amended to provide that it is an offence for a person who is serving or has served on a jury to seek or obtain a financial advantage by disclosing information regarding the jury's deliberations in a manner which identifies the particular trial.

Jury Disclosures During Trial

Recommendation 94: The *Jury Act* 1977 should be amended to provide that it is an offence for a person who is a member of a jury in a criminal trial to disclose during the trial any information regarding the deliberations of the

jury unless that disclosure is made for the purpose of reporting to the judge an irregularity affecting that particular jury or in answer to a question asked by the judge.

A fourth recognises the value of continuing research:

Research on the Jury System

Recommendation 92: Any amendments to the *Jury Act* 1977 which have the effect of placing any restriction upon former jurors disclosing information should expressly reserve to the Attorney-General the power to authorise the conduct of research projects involving the questioning of former jurors about their jury room experiences.

One issue which our recommendations on jurors' disclosures have not addressed is that of post-trial disclosures made voluntarily by jurors where there is no question of financial advantage. Should this type of disclosure be prohibited, either totally or in certain circumstances? The Commission recommended that apart from the changes to the law proposed above there should be no immediate action taken relating to the disclosure by jurors of information about their deliberations. Most people seem to agree the *Contempt of Court Act* (UK) is an overreaction. Recent changes to the law in Victoria are not quite as restrictive.

Before rushing to a firm conclusion on the subject of bona fide disclosure, it may be prudent to wait and see whether the apparent relaxation of the conventions as to secrecy has any significant repercussions. The impact of the Victorian legislation should now be closely watched.

My personal view is that the jury system is sufficiently sound and strong to withstand the greater scrutiny which might follow more frequent disclosure about its operation. If it is not strong enough to pass critical examination, then it should not be given artificial protection. If it fails that test, then the search for a suitable alternative should be commenced.

Projects for the Future

In the course of its work on the jury system, the Commission encountered a number of problems which are more directly related to other parts of the Criminal Procedure reference. There were, in addition, some projects which we considered worthwhile but which were simply too big to be tackled as a part of a more general treatment of the jury system. These remain as future projects.

1. The Use of Standardised Instructions

In the United States it is common, indeed almost universal, for judges to refer to "pattern jury instructions" when directing juries on matters of law. There are standing committees of judges, practitioners and law teachers in most States whose task it is to keep these standard directions up-to-date and to develop new instructions where the need arises. This form of jury direction has developed in the hope that it may bring a consistent approach by trial judges to the task of directing juries and at the same time limit the number of cases in which errors justifying the interference of the appellate courts are made.

In our survey of judges, we questioned them about their attitudes towards the use of standard instructions. Among both Supreme Court and District Court judges there was a very strong body of support for developing a series of standard instructions. Curiously judges were of the view that this would prove to be of great benefit to juries, but of even greater benefit to judges. There was a deal of opposition to the proposal based on the fact that it was virtually impossible to draft

a direction of law without seeking to relate that direction to the facts of the particular case. Several judges expressed the view that standard instructions should be used only as a guide and not be regarded as a foolproof means of informing the jury about the law which they had to apply.

The Australian Institute of Criminology, in conjunction with a panel of judges appointed by the Chief Justice and the Chief Judge of the District Court, had conducted some preliminary research about the effectiveness of jury instructions. Experiments were designed to test how much jurors understood of the instructions they were given. This experimental project reached the stage where it was concluded that the development of standard instructions would be worthwhile.

2. The Role of the Jury in the Sentencing of Convicted Persons

The questions of fact at issue between the parties in a criminal trial often, if not usually, involve matters which are of relevance to the determination of sentence. In some cases the verdict of the jury will not reveal the factual basis on which it reached that verdict. Where the verdict is guilty, the judge is required to determine the appropriate penalty on the basis of his or her own conclusions as to the relevant facts of the case.

In our Discussion Paper we tentatively suggested that, where alternative bases for a conviction which have different consequences for sentencing are left to a jury, the judge should endeavour to determine which basis the jury accepted. This would be a departure from the common law principle reaffirmed in *Kingswell v The Queen* where it was said:

> If there is a trial by jury the ordinary incidents of such a trial will apply; the judge will continue to exercise his traditional functions, and, for the purpose of imposing a sentence within the limits fixed by the law, will form his own view of the facts, provided that that view is not in conflict with the verdict of the jury.[18]

The responses received by the Commission on this question generally favoured the implementation of the procedure set out in the Discussion Paper.

Whilst the Commission considers that there is merit in the proposition that, since it is the jury's role to determine the facts, its findings should be accurately reflected in the determination of sentence, we are not at present agreed upon the means by which the factual finding of the jury should be ascertained. It may be done by asking specific questions of the jury or by framing the terms of the indictment with sufficient precision to avoid ambiguity in the verdict.

The Commission will examine this topic when it comes to deal with that part of the Criminal Procedure reference concerned with sentencing. At the same time it will be necessary, in the light of the practice in some jurisdictions in the United States, to consider the more general question of what role, if any, the jury should have in the sentencing function of the criminal courts.

3. The Admissibility in Appeal Proceedings of Evidence Relating to the Jury's Deliberations.

It appears to be reasonably settled law that an appellate court will not receive evidence from jurors as to irregularities taking place in the jury room where such evidence is advanced as a basis for disturbing the jury's verdict. The justification advanced by the courts for the rule is that:

> . . . the interest of the community in ensuring freedom of debate in the jury

18. *Kingswell v The Queen* (1986) 60 ALJR 17 at 20, per Gibbs C J, Wilson and Dawson JJ.

> room and finality of verdicts outweighs [the interests of the community and of litigants] in seeing that the accepted rules and formalities of a fair trial are maintained and enforced.

Notwithstanding the decisive reaffirmation of the rule in cases such as *Re Mathews and Ford* and *Gallagher,* the validity of the rule has continued to be questioned. The editor of the Australian Law Journal queried the merits of the general exclusionary rule some years ago. More recently, in a leading article on the subject, Professor Enid Campbell has suggested that the current law "merits attention by our law reform commissions".[19] Her suggestion has been supported by Mr Justice McHugh of the New South Wales Court of Appeal.

The question of whether there should be any change to this exclusionary rule and the effect which it has upon the appellate level of the criminal justice process will be examined later in the course of the Criminal Procedure reference when the Commission deals with the subject of appeals in criminal matters.

4. Prohibitions Against the Publication of Prejudicial Material Before a Jury Trial.

It has been noted that there were strong objections to the proposal that an accused person should have the right to trial by judge alone. The strict enforcement of rules prohibiting the publication of prejudicial material was suggested as a more suitable means of controlling the influence of such material.

In Canada, for example, the publication before trial of a confessional statement alleged to have been made by an accused person is prohibited. In Scotland there is a blanket prohibition on the publication of information disclosed at proceedings which are preliminary to a trial before a judge and jury.

The Commission has made two specific recommendations relating to pre-trial publicity, namely:

> **Recommendation 57:** Legislation should expressly prohibit the publication before trial of material which simultaneously identifies a person as being charged with an offence and as having a prior criminal history if the hearing of the offence charged is likely to be before a jury.

> **Recommendation 58:** Legislation should expressly prohibit the publication of the criminal history of a person known to be suspected of an offence which is likely, if a charge is laid, to be dealt with by a jury, unless the publication of the information is to assist in the investigation of the suspected offence or is made in the interests of public safety.

We do not consider it appropriate for us to make any other specific recommendations at this stage. This topic will be examined by the Commission in greater detail in its Discussion Paper *Procedures Before Trial in Criminal Cases* which will be published later this year.

19. E. Campbell "Jury Secrecy and Impeachment of Jury Verdicts" (1985) 9 *Criminal Law Journal* 132 and 187 at 201.

PRESENTATION OF PAPER

Paul Byrne

The New South Wales Law Reform Commission commenced research on the role of the jury in criminal trials in November 1984. In September of 1985 we published a Discussion Paper for the purpose of attracting contributions from the community and in March 1986 the Commission's final Report was completed. The period of that research coincided, and I say coincided because it was more by accident than design, with a very high level of public interest in the jury system. In some ways that made the Commission's task easier because there was no shortage of people wanting to express their views about the system.

I should stress one feature of the research carried out by the Commission, and that is that after preliminary research had been completed, it was never a realistic possibility that the Commission would recommend that the jury system should be abolished. The arguments against it are, in my view, not compelling. Their most notable deficiency is the failure to suggest an acceptable alternative to the jury system in the trial of serious criminal cases. Once that point had been reached it was a case of identifying problem areas both real and potential and then seeking to design changes to remedy those problems. I will concentrate, as does the paper, on areas which seemed to be of the greatest interest.

The first of those is the suggestion by the Commission, that there should be an optional right to trial by judge alone. The specific terms of the recommendation are:

> In all criminal cases which are to be tried on indictment the accused person should have the right to make an application that the trial be conducted by a judge sitting without a jury.

We canvassed that particular proposition in the Discussion Paper and it received considerable support but at the same time it was frequently objected to on the ground that it was the "thin edge of the wedge" which could ultimately lead to the abolition of use of juries in criminal cases. The actual recommendation itself has also created some controversy. It is suggested that the terms of the recommendation acknowlege the inability of the jury system to cope with some cases. That I think misses the point of the proposal. By saying that there should be a right to trial by judge alone the Commission is recognizing that in some cases the accused person may not feel that the jury system can cope. If there are legitimate grounds for that view it should be acknowledged and steps should be taken to satisfy at least the accused person that the trial will be a fair one. If I can use a practical example: if, for instance, the Chamberlain appeal had been successful and a re-trial had been ordered. It may have been that those two accused people would not have wanted to be tried again by a jury. They may have claimed that it was impossible to bring together a jury who did not have a preconceived opinion about the case.

In my opinion the system should be able to accommodate concerns of that kind where they are shown to be legitimate, that is by the waiver of the right to trial by jury. It has been approved in the United States of America although not in Australia. The recent decision of the High Court in *Brown's* case was based on a literal reading of s.80 of the Constitution. The argument in favour of permitting the right to waive trial by jury was most concisely put by Justice Felix Frankfurter of the Supreme Court of the United States when he said this: "To deny the

constitutional validity of the provision allowing waiver of the right to trial by jury is to imprison a man in his privileges and call it The Constitution".

I have made some comments in the paper about the *size of the jury*. I will proceed directly to the question of *complex trials*. There are two major points to be made here. The first is that the presence of a jury ensures that the case is presented in terms which are commonly comprehensible. The presence of the jury secondly ensures that the concept of dishonesty, which is the matter which is at the root of most cases, at least of complex commercial crimes, will be assessed by reference to the standards of ordinary people.

The subject of complex trials is dealt with in some detail in the paper. I can summarise it fairly simply by saying that there are no special rules recommended. The Commission's report places its emphasis on more effective presentation of these kinds of cases to the jury. More effective presentation can only be achieved by more thorough preparation. One American approach to the so called problem of complex cases that we came across was to suggest that there is indeed no such thing as a complex trial. A complex case is simply one which has not been effectively presented. Prior to that ineffective presentation, there was usually very inadequate preparation. It has been put another way. If the prosecution's case cannot be reduced to simple terms so that it is clear and convincing it is likely there is something seriously wrong with it. I might deal with one matter that is not mentioned in the paper but it is given some prominence in the Report of the Fraud Trials Committee in the United Kingdom otherwise known as the Roskill Report. In the report of the majority it is said:

> A factor to which we attach great importance is that the prosecuting authorities refrain from prosecuting in some cases because of the difficulty of presenting them in a way in which juries will be able to comprehend.

In other words it is suggested that prosecutors abandon cases because they consider them to be too complex. The suggestion is that the problem of juror comprehension is much greater than is revealed by an examination of the cases that go to court.

The dissenting member of the Roskill Committee revealed in his short comments what would appear to be the true facts of the situation and I think that they, with respect, expose the misleading argument put by the majority.

Material was put before the Committee by the Director of Public prosecutions in the United Kingdom. For 1983, there were 179 cases referred to the Fraud Division and in 71 of them the decision was not to prosecute. Of those, 32 were because of insufficient evidence to justify a trial, 9 were referred to the Department of Trade and Industry for alternative action, in 10 there were difficulties with extradition, in 9 other offences were revealed but not fraud, 6 were regarded as being too stale to prosecute, in 5 the amount of the deficiency was considered too small to justify a prosecution and only 1 was not prosecuted because of the complexity of the case. That is 1 out of 179 cases referred to the Fraud Division of the D.P.P. in the United Kingdom.

I went on in the paper to deal with the subject of *specialist jurors*. That is one of the solutions that is put forward to the problem of jurors who cannot follow or understand the evidence. That suggestion has problems of its own; the most important being the qualifications needed to qualify as a juror in these difficult cases. There have been various suggestions put forward ranging from requiring that jurors have a university degree, or requiring them to sit a special examination for potential jurors. Each of those particular suggestions has its own problems. One

American commentator, noting the wide range of exemptions available to excuse people from jury service, suggested that if you want a jury of intelligent people the first group to get rid of would be those people who were not smart enough to get themselves excused from jury service!

On the question of juror qualifications, I should give you some information that was discovered in the surveys that we conducted as part of our research on the jury system. They revealed some interesting information about the education standard of in the first place, potential jurors, and secondly, jurors. Of prospective jurors 5.7% of them had been educated only to primary school standard. Of people who actually served as jurors only 2.7% had been educated to primary standard. On the other hand, of prospective jurors some 6.1% had a university degree, and of people who actually served on a jury 8% had a university degree. Those results relating to juror qualifications tend to discredit claims that have been made that defence counsel challenge people who look intelligent. Alternatively, I suppose it could be argued those figures which show that if such a policy is in fact followed, it is poorly executed.

The question of *peremptory challenges* is one which has created probably the most debate of all the recommendations in the Commission's Report. It is suggested that for both the Crown and the accused the right of peremptory challenge should be reduced to three, irrespective of the charge being tried, and I would remind you that at the moment there are 20 challenges available in a murder and 8 in any other charge. I should also say there was great debate even with the Commission about this particular proposal, and that it was only by a majority of 4-2 that the actual recommendation was passed. The reason that that particular recommendation has been put forward is essentially to preserve the representative nature of juries. I appreciate that if that argument were taken to its logical conclusion, the recommendation we should make is to abolish the right of peremptory challenges altogether, but if that were to be done it would mean that both the accused and the Crown would have no input into the process of jury selection at the trial stage other than by the use of challenges for cause.

On the question of *majority verdicts* there were really two important issues to be dealt with. The first was whether majority verdicts were acceptable as a matter of principle and again only a majority of the Commission found that they were not. The main reason that they were objected to as a matter of principle was that the concept of majority verdicts diminishes the strength of the protection afforded by the high standard of proof in criminal cases and that majority verdicts breed uncertainty and disquiet about verdicts in criminal cases.

The second issue was whether or not majority verdicts were in fact required and when one looked at the statistics that were available, dating back some 50 years, it was apparent that the figure of disagreements was apparently consistent over the years — at about 3% — which is not a particularly disturbing statistic. It should also be mentioned that there were not a large number of cases where juries had failed to agree on a verdict in a case which had lasted a considerably long time.

One of the issues that is not dealt with in the Report, nor indeed in the paper, is the question of whether the rule requiring unanimity should be applied equally to convictions and acquittals. The issue at stake is whether an acquittal by a majority is an acceptable procedure. If only a majority of jurors say that an accused person is guilty there does exist a reasonable doubt about that person's guilt, enough to preclude a conviction but not enough to justify an acquittal. If on the other hand, a majority of jurors says that an accused person is not guilty there exists a reasonable

doubt about guilt and sufficient doubt to justify an acquittal. Therefore, the argument runs, majority acquittals might be acceptable but majority convictions would not be acceptable. That is, in fact, the approach that has been recently adopted in South Australia for the trial of murder charges.

On the question of *jury disclosures* the Commission has made recommendations for limited restrictions but generally proposed that post trial disclosures made voluntarily and in good faith without the prospect of payment should not be prohibited. The reasons why that particular recommendation is made are set out in the paper and I will not go into those in any detail.

If I might conclude by saying that the Commission's research on the jury system, one aspect of it, involved questioning almost 2,000 people immediately after they had completed their service as jurors. More than 93% of those people felt that the jury system should be preserved. It is fair to say also that from amongst those practitioners experienced in the use of juries in criminal trials, the submissions made to us were overwhelmingly that the jury system should be preserved. Those statistics alone I think are sufficient testimony to the value of the jury system.

INSTRUCTING THE JURY AND HUMPTY DUMPTY JUSTICE

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'When I use a word' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean — neither more or less.'

'The questions is', said Alice, 'whether you *can* make words mean so many different things.'

'The question is', said Humpty Dumpty, 'which is to be the master — that's all'.

Lewis Carroll
Through the Looking Glass, Ch. 6.

In the wake of a number of highly publicised trials, coined by some commentators of the jury as 'show' trials[1] the whole issue of whether juries are functioning properly has been raised and debated in the community. The New South Wales Law Reform Commission has recently reviewed the law relating to juries and has produced a report containing 95 reform recommendations covering a very broad spectrum indeed.[2] Perhaps the most significant aspects of the Commission's Report are, its recommendation to preserve the right of an accused who is to be charged with a serious criminal offence to be tried before a judge and jury of 12 people randomly selected from the community, and its recommendation that the verdict should continue to be a unanimous decision of the individual members of the jury.[3]

The division of labour between judge and jury is well defined by law and practice. Lord Diplock in *Courtie* said:[4]

> the function of the jury as triers of fact to the exclusion of the judge in a trial on indictment is limited to finding facts that are brought to their attention by admissible evidence, all questions as to the credibility and weight to be attached to such admissible evidence being for the jury alone. What evidence is admissible, however, is a question of law and accordingly the function of determining it is vested in the judge to the exclusion of the jury, even though this may involve, as in the cases of dispute as to the voluntary character of confessions, determination by the judge and not the jury of questions of credidibility and weight to be attached to evidence of fact directed to the collateral issue of admissibility.[5]

The NSW Law Reform Commission concluded that no fundamental changes are required to the jury system because it complies with, and serves ideals and values set out in seven principles.[6] One of these principles relates to effective

1. Brown, D. and Neal, D., 'The Gang of Twelve', February 1986, *American Society*, 13.
2. New South Wales Law Reform Commission (1986), *The Jury in a Criminal Trial*, LRC 48, 1986, (hereafter cited NSWLRC).
3. *ibid* Recommendations 1 and 78.
4.]1984] 1 A11 ER 740.
5. *ibid.* 742.
6. NSWLRC *op. cit.* 10 at paragraph 1.28.

communication[7], and the Commission cites with approval the following passage from the judgment of Mr Justice Deane in *Kingswell*:[8]

> [a] system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner than can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings.[9]

If the jury system is to retain the public confidence it deserves, it is essential that jurors should fully appreciate their part in the trial process and be capable of understanding what is presented to them.

Given however, that jurors deliberate in secret and are not called upon to give reasons for their verdict, but simply present their determination upon the guilt or non-guilt of the accused, it is not known whether they fully understand the issues that they are called upon to consider.

Glanville Williams, an outspoken critic of the jury system, has argued that there may be great difficulty in reducing complex legal issues into terms that the jury may understand.[10] Thus, he says:

> there is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrow-minded, biased or temperamental. The danger of this happening is not one that can be removed by some minor procedural adjustment; it is inherent in the English notion of a jury as a body chosen from the general population at random.[11]

He later asserts that jurors, drawn from ordinary occupations of humble character, are seldom qualified to be regarded as 'first-rate intellectual machines'.[12]

It is, of course, not necessary to be a critic of the jury system to point out that there is a need to keep the jury's task simple. This then avoids the requirement that the jury be constituted with persons of above average abilities or intellect. It may be recalled that Mr Justice Roden, some five years ago addressed a seminar at this Institute at which he expressed his great respect for the capacity of juries, through their application of common sense and experience to counter the excesses of legalism.[13] In the course of his paper His Honor repeated some quotes from his judgment in *Petroff*[14] in which he drew from the Eleventh Report of the Criminal Law Revision Committee (Eng) and the House of Lords debate upon it. First he quoted Lord Hailsham, then Lord Chancellor, concerning the artificiality, complexity and in some cases unintelligibility of the rules of criminal law and procedure. His Lordship had stated that some convictions were quashed because of the failure of the judge to accurately state the law and this in turn was partly

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7. The other six principles concern: the pursuit of truth, minimising the risk of convicting the innocent; public confidence; acceptance and accountability; fairness and justice; efficiency; openness and the publicity of criminal proceedings.
8. (1986) 60 ALJR 17.
9 *ibid.* at 31. Cited by NSWLRC *op. cit.* at 9.
10. Williams, Glanville, 1958, *The Proof of Guilt,* 2nd ed., Stevens and Sons, London, 1958, 273.
11. *ibid.* 236, 237.
12. *ibid.* 237.
13. Roden, A., 'Criminal Evidence — the Law and the Gobbledegook', Syd. Inst. Crim. Proc. No. 48 *Criminal Evidence Law Reform,* NSW Govt. Printer, 1981, 11.
14. [1980] 2 A Crim R 101.

attributable to the unnecessary complexity of the law itself.[15] Then Roden J. cited the following quotation from the Criminal Law Revision Committee's Report:

> The present law requires judges to direct juries to achieve certain mental feats which some judges think impossible for any lawyers to achieve; and it is no answer to criticisms of this kind to say, as is sometimes said, that there is no difficulty in directing the jury in the way in which the courts have said they should be directed. There may be no difficulty in saying the right words; the question is what the jury make of them, and nobody can be sure of that.[16]

In His Honour's view then, many of the rules are practically incomprehensible to all but trained lawyers and the criminal law may have reached such heights of technicality and artificiality, that the meaning of words rather than the application of principles has become the central focus of the criminal trial.

Simplifying the Law

There is no question that it is possible to make the jury's task easier by simplifying the law itself. One recent example of this emanates from New Zealand where s.2 of the *Crimes Amendment Act* 1980 repealed a number of provisions relating to self defence as set out in the *Crimes Act* of New Zealand. It is sufficient to quote just one of the repealed sections of the Act:

> s.49 self-defence against provoked assault — everyone who has assaulted another without justification, or has provoked an assault from that other, may nevertheless justify force used after the assault if:
> (a) he used the force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked and in the belief, on reasonable grounds, that it was necessary for his own preservation from death or grievous bodily harm; and
> (b) he did not begin the assault with intent to kill or do grievous bodily harm and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm; and
> (c) before the force was used, he declined further conflict and acquitted or retreated from it as far as was practicable.

The new section, headed self-defence and defence of another, reads simply as follows:

> s.48 Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

The new section is not a guideline instruction, but it is clear that both the judge and the jury would have less difficulty with this than the earlier formulation.

While there is tremendous scope for simplifying the law in this way, there are attendant dangers. Consider for example, in the law of homicide, the special defence of insanity, and the partial defences of diminished responsibility, provocation and excessive self-defence. Misdirections in such cases are rife and they must present varying degrees of difficulty for jurors. Yet they are necessary or at least desirable provisions for they do have an important part to play in the

15. *Hansard*, House of Lords, No. 40, Vol number 338, Col. 1583.
16. Roden A., *op. cit. 13.*

administration of justice. These defences allow the jury to fine tune their verdict to the perceived moral culpability of the offender. And who better to make this decision than the jury, the representative of the community? It is a mark of the sophistication of our society that we are able to make such fine distinctions, and it would seem a retrograde step to remove these from the law, merely for the sake of simplicity. If, of course, the line is so fine that jurors cannot comprehend and apply the concepts, then changes must be wrought. If the concept is worth preserving however, refinement, not wholesale abolition, is the answer.

Standard Jury Instructions

One approach, itself not free from difficulties, is the provision of 'pattern' or standard jury instructions. Such instructions have existed in other jurisdictions, particularly in the United States, for many years. They are precedents which judges may use or adapt when addressing the jury upon the law. They are intended to provide the jury with the proper legal standards for reaching a verdict. They are drafted, first to state the law accurately, and second, to state the law in simple or plain English. This reduces the likelihood of misdirections being made by the trial judge and/or misunderstanding on the part of the jury. It is interesting to observe that about two-thirds (27 out of 41) of the responding judges surveyed by the New South Wales Law Reform Commission considered that the availability of standard form instructions would assist jurors, and some three quarters of the respondents considered that standard forms would assist the judges themselves.[17] At this stage only preliminary work in the development of standard form instructions has been undertaken in New South Wales.[18]

Appellate Court Guidelines for Trial Judges

The present situation is that individual judges must do their best in framing their instructions. They usually retain their own set of precedents, which have been tried and proved, and they also look for assistance in the decisions of appeal courts. In this regard a recent English decision has some cautionary remarks to make conccerning the utility of 'model' directions.

In *Hancock and another* [19] the Criminal Division of the English Court of Appeal substituted in the case of each of two appellants who had been convicted of murder, a verdict of manslaughter, on the ground that the guideline directions followed in that case amounted to a material misdirection. The guidelines that had been followed were formulated by the House of Lords on the basis that it was an appropriate direction to be given by the judge to the jury in a murder trial where the issue of intent involved reference to foresight of consequences.

The particular direction was derived from the speech of Lord Bridge in *Moloney* [20] and was in the following terms:

> In the rare cases in which it is necessary to direct a jury by reference to foresight of consequences, I do not believe it is necessary for the judge to do more than invite the jury to consider two questions. First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural

17. New South Wales Law Reform Commission, *op.cit.*88.
18. Some 20 standard jury instructions have been drafted by a Committee of NSW judges but they have not been published or officially sanctioned. See Potas, I. and Rickwood, D. *Do Juries Understand?* Australian Institute of Criminology, Canberra 1984.
19. [1986] 1 All ER 641.
20. [1985] 1 All ER 1025.

> consequence of the defendant's voluntary act? Second, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer Yes to both questions it is a proper inference for them to draw that he intended that consequence.[21]

The case then went to the House of Lords which considered the sole question as to whether that model direction required amplification.

Lord Scarman, with whose judgment Lord Keith of Kinkel, Lord Roskill, Lord Brightman and Lord Griffiths agreed, noted that the 'guidance was offered as an attempt in a practical way to clarify and simplify the task of the jury'.[22] This, his Lordship observed, was not intended to prevent judges from using other language designed to assist jurors in reaching their conclusions upon the facts of evidence. There was always the danger:

> that the inevitable generality of guidelines intended to cover a case may be such as to be inapplicable or misleading in some cases, usually through an error of omission.[23]

In the result, his Lordship commented that the best guidance that can be given to a trial judge is to stick to his traditional function, which is

> to limit his direction to the applicable rule (or rules) of law, to emphasise the incidence and burden of proof, to remind the jury that they are the judges of fact and against that background of law to discuss the particular questions of fact which the jury have to decide, indicating the inference which they may draw if they think it proper from the facts which they find established.[24]

In the particular circumstances of this case the trial judge was unwittingly led into error by applying the guidelines and therefore failing to resolve a particular difficulty which the jury had expressed, namely, an explanation of how to relate *foreseeable consequences* to *intention* in the definitions of murder and manslaughter.[25] The House of Lords agreed with the Court of Criminal Appeal that the *probability of a consequence* was a factor that was sufficiently important to warrant it being drawn to the attention of the jury in the present case. The failure to do so may have led the jury to disregard this aspect and thus focus exclusiveley upon the casual link between the act and its consequence. Without reference to probability, Lord Scarman concluded that the Moloney guidelines were unsafe and misleading.[26]

The case is of interest here because of Lord Scarman's strong objection to the desirability or wisdom of having guidelines of general application. His Lordship said:

> I fear that their elaborate structure may well create difficulty. Juries are not chosen for their understanding of a logical and phased process leading by question and answer to a conclusion but are expected to exercise practical common sense. They want help on the practical problems encountered in evaluating the evidence of a particular case and reaching a conslusion. It is

21. *ibid. at.* 1039.
22. [1986] 1 All ER 7 641 at 647.
23. *ibid.*
24. *ibid.*
25. The jury had retired for some five hours before returning to say they had failed to reach a verdict. They were then given an opportunity to reach a majority verdict, and during their subsequent deliberations they sent a note to the trial judge expressing difficulty with the precise legal definitions of murder and manslaughter, particularly with regard to the elements of intent and foreseeable consequences. The trial judge then proceeded to given them a further direction but failed to go beyond what he had already put to them in the summing up.
26. [1986] 1 All ER at 651.

> better, I suggest, notwithstanding my respect for the comprehensive formulation of the Court of Appeal's guidelines, that the trial judge should follow the traditional course of a summing up. He must explain the nature of the offence charged, give directions as to the law applicable to the particular facts of the case, explain the incidence and burden of proof, put both sides of the cases making especially sure that the defence is put; he should offer help in understanding and weighing up all the evidence and should make certain that the jury understand that whereas the law is for him the facts are for them to decide. Guidelines, if given, are not to be treated as rules of law but as a guide indicating the sort of approach the jury may properly adopt to the evidence when coming to their decision on the facts.[27]

In conclusion, Lord Scarman said that the laying down of guidelines for use in directing juries in complex cases was a function which could be usefully exercised by the Court of Appeal, but that function should be limited to difficult cases. Such guidelines should avoid generalisations and encourage the jury to exercise common sense in reaching their decision on the facts. Guidelines were not rules of law and judges were not obliged to use them. 'A judge's duty is to direct the jury in law and help them on the particular facts of the case'.

So much for the English decision. Now consider a recent Australian one. *McManus,* an unreported decision of the New South Wales Court of Criminal Appeal, 21 June 1985, is a good illustration of that Court's attitude toward guidelines. It demonstrates the awareness and concern of that Court of the need to simplify instructions and so make the respective tasks of judge and jury a little less perplexing.

McManus was one of three offenders who had been charged with wounding with intent to murder. The victim of the offence had been playing pool in an hotel when a dispute arose. In the course of the altercation two girls caused a disruption to the game with the result that one of them was pushed away with some violence. Apparently McManus had then wanted to fight the victim, but the latter had hit him so hard that he fell to the floor. McManus then left the hotel but returned some half hour later armed with a .38 revolver given to him by one of his two co-accused. McManus approached the pool table, the victim walked towards him, the weapon was produced and the victim was shot.

In his unsworn statement at the trial McManus said that he had no intention of killing anyone, that he had no intention of using the gun and that he had panicked and was scared when the victim had approached him. In his record of interview McManus had admitted that he intended to shoot the victim 'if he had another go at' him and that he thought that the victim 'was going to have another go' at him. The defence argued that the shooting was done in self defence.

In the course of his summing up to the jury the trial judge had pointed out that the onus of proving self defence did not lie on the accused, but that the Crown had to negative it. It was for them, the jury, to decide whether or not the conduct amounted to a threat of violence that gave rise to a situation in which McManus 'might reasonably have apprehended assault' and so 'justified him in acting in self defence'.

If the jury were satisfied that there was such a threatening situation (a matter for the jury to determine) and if McManus's response to the situation was not excessive (again a matter for the jury to determine), then he had committed no crime. On the other hand, if the accused's response was held to be excessive, then

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27. *ibid.*

the jury was instructed that the defence of self-defence would fail. His Honour then proceeded to address the jury in terms of the six point formulation of the defence of excessive self-defence as set out in the judgment of Mason J. in *Viro*.[28]

However, with regard to this defence, the Court of Criminal Appeal found that the trial judge's summing up in the instant case 'failed to make it plain to the jury that they must consider the appellant's own belief regarding the proportionality of his response to the threat that he believed he faced' (per Street C.J.).

In accordance with *Bozikis*,[29] where the application of the six point formulation in *Viro* to a charge of wounding with intent to murder was discussed, the Crown had to establish beyond reasonable doubt that the appellant did not believe that the force which he used was reasonable proportionate to the danger which he believed he faced. It was for the jury to decide whether, (i) the accused's belief regarding the danger threatening him, and (ii) the accused's belief in the proportionality of his response, had been negatived by the Crown beyond reasonable doubt. Unfortunately, in the present case the Court of Criminal Appeal held that the summing up had emphasised an objective rather than a subjective assessment of the proportionality of his response and therefore the conviction of wounding with intent to murder could not be sustained.

In the course of his judgment Street C.J. observed that the six point formulation of principle in *Viro* was intended for lawyers rather than jurors. His Honour noted that the excessive use of double negatives could present difficulties for jurors and that some trial judges had experienced 'understandable diffidence' in attempting their own version of the formulation. Accordingly the Chief Justice composed a substitute form of words which he regarded as 'perhaps' constituting a more readily intelligible form of direction to a jury.

For ease of comparison the *Viro* formulation is placed alongside the proposed guidelines of the Chief Justice. It should be noted that the new version is necessary lengthier on account of its intended application to a broader range of offences.

VIRO INSTRUCTION	McMANUS INSTRUCTION
1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.	Where an accused person is charged with murder or attempted murder, or with an offence involving an intent to murder or to cause grievious bodily harm, a question may arise whether he was acting in self defence. If that claim is made, or that possibility arises, the Crown must prove beyond reasonable doubt that the accused was not acting in self defence, the following questions define the approach you must take:

28. (1976-78) 141 C.L.R. 88 at 146-147.
29. [1981] VR 587. For a decision which provides that the directions given in *Viro* are not limited to circumstances where the accused is threatened with 'death or serious bodily harm' see *Walden*, unreported NSWCCA, 13 March 1986.

1. *Are you satisfied beyond reasonable doubt that the accused did not reasonably believe that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made on him?*

(b) By the expression 'reasonably believed' is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

In answering this question you must consider what the accused himself might reasonably believe in all the circumstances in which he found himself. You do not answer this question by considering what some imaginary reasonable man would have believed — it is the *accused's own* belief that you must consider.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.

If the answer to this question is 'Yes', the question of self defence disappears from the trial.

If the answer to this question is 'No', then you must consider question 2:

3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.

2. *Are you satisfied beyond reasonable doubt that the force in fact used by the accused was more than reasonably proportionate to the danger which he believed, or may have believed, he faced?*

In answering this question you must consider:

(i) the *accused's own* belief as to the danger, and (ii) then apply to that *your own* (not the accused's) assessment of whether the force was more than reasonably proportionate to the danger the accused believed, or may have believed, he faced.

4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.

If the answer to this question is 'No', then the Crown has failed to prove its case against the accused and your verdict should be NOT Guilty.

(In cases other than murder, wound with intent to murder or attempted murder): If the answer to this question is 'Yes', the question of self defence disappears from the trial.

(In cases of murder, wound with intent to murder or attempted murder): If the answer to this question is 'Yes', then you must consider question 3:

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending on the answer to the final question for the jury — did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?

3. *Are you satisfied beyond reasonable doubt that the accused did not believe that the force which he used was reasonably proportionate to the danger which he believed, or may have believed, he faced?*

If the answer to this question is 'Yes', then, if the Crown has otherwise provided its case against the accused, your verdict should be Guilty of Murder, Guilty of Wounding with Intent to Murder or Guilty of Attempted Murder, as the case may be.

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

(In cases in which the charge is murder): If the answer to this question is 'No', then, if the Crown has otherwise proved its case against the accused, your verdict should be Not Guilty of Murder but Guilty of Manslaughter.

(In cases in which the charge is wound with intent to murder or attempted murder): If the answer to this question is 'No', your verdict should be Not Guilty.

It is worth recording the cautionary approach to this guideline instruction for it parallels the cautionary approach outlined by the House of Lords in *Hancock* (supra). Chief Justice Street points out that it is drafted in order to assist trial judges only. It is a 'suggested' paraphrase, and adjustments would be needed for the case in hand. Thus,

> whether or not to use it, whether or not to amplify it, how it is to be used, how it is related to, and explained in the context of, the evidence, are essentially matters for the trial judge (per Street CJ).

Understanding the Evidence

It is not to be assumed that it is only the trial judge's summing up that can be misunderstood by the jury. After all the jury listen to the evidence and it is on the basis of the evidence that they are directed to determine the relevant issues of fact. They may be asked to evaluate conflicting psychiatric opinion, or the intricacies of fraudulent transactions, or the views of forensic scientists.

In a recent psychological journal, one researcher argues quite convincingly that jurors place too much faith in eyewitness testimony and have no notion as to how many factors influence the accuracy of such evidence.[30] She goes on to observe that sometimes judges give jurors a list of instructions upon the pitfalls of relying upon eyewitness evidence (as indeed they do where the evidence is wholly circumstantial) yet, she argues, jurors do not listen or do not understand the instructions.[31] In the same magazine, another commentator states that:

> Far from being a straightforward fact-finding mission, a trial is a labryinth of language, with the words of the judge, lawyers and witnesses creating numerous obstacles that prevent juries from making accurate decisions.[32]

The 'leading question' is perhaps a prime offender. It is a form of 'coercive questioning', that allows the lawyer interrogating the witness to elicit the version of the facts that best suits his or her case. For may jurors this often proves to be the version of the facts that is remembered. In a study conducted by Loftus and her colleagues at the University of Washington, mock jurors were asked to read transcripts of a murder trial.[33] Two styles of questioning on the part of the prosecutor were substituted, although the witnesses' responses were not alerted. The first style of questions were words associated with violence and intended to evoke emotional responses. The second style of questions were intended to invoke a 'neutral' response. For example, a question under the aggressive, emotive style, this was 'How much of the *fight* did you see?' Under the neutral style, this question became 'How much of the *incident* did you see?' It was found that jurors were more likely to find the accused guilty if the former style of questioning was used rather than the latter. Similarly an aggressive, noisier manner was likely to elicit a more positive (favourable) response than under neutral questioning.[34]

Research reveals other interesting findings. The choice between an indefinite and definite article can influence a witness's response. For example, 'Did you see *the* broken headlight?' rather than 'Did you see *a* broken headlight?' People who speak rapidly or in a standard accent are perceived as more competent than slow talkers or persons with thick non-English accents.[35] Similarly it has been found that

30. Loftus, Elizabeth F., February 1984, 'Eyewitnesses: Essential but Unreliable', *Psychology Today*, 22.
31. *ibid*, 24.
32. Andrews, Lori B., February, 1984, 'Exhibit A: Language', *Psychology Today*, 28.
33. *ibid*, 30.
34. *ibid.*
35. *ibid.*

differences in phraseology, tempo and length of answers can influence jurors quite markedly. In other studies researchers have identified 'hedges' (eg, 'I think . . .', 'It seems . . .', 'Perhaps . . .') intensifiers, ('very close friends' instead of 'close friends' or even 'friends') and the tone of voice as influencing outcomes.[36]

When various versions of testimony are compared, it is found that the more direct approach is more convincing than the style incorporating hedges and intensifiers. Similarly, 'hypercorrect' language (where the witness attempts to speak in an unnaturally 'correct' way) is less convincing than the witness who does not employ a grandiose style.[37] All these techniques, whether used deliberately or unintentionally make a difference to the jury's response.

The literature in this area is vast and cannot adequately be reviewed here. The whole field of courtroom communication presents a fascinating and rewarding study with important implications for the justice system. Suffice to say that despite the importance of this topic, there is a paucity of Australian research in this area.[38]

Speaking the Same Language

A good example of the problems of communication involving expert witnesses is given in the Splatt Royal Commission,[39] and it concerns the scientific connotations of the expression 'absence of dissimilarities' as used by a forensic scientist.[40] The jury had been told that a comparison of foam spicules from the bedsheet and the prisoner's car coat indicated that there was 'an absence of dissimilarities'. The jury had been directed that the heart of the scientific evidence related to the finding of similarities between the trace materials on the prisoner and the trace materials at the crime scene. The jury was told that there were no dissimilarities between the two sets of spicules and accordingly were likely to conclude 'that they were similar in every respect and therefore identical as to source of origin'.[41] However, it transpired that 'no dissimilarities' merely meant that both were polyurethane.

Commissioner Shannon writes:

> How could the jury possibly have guessed that any such vital limitation existed, without being so told? And it seems to me that this very ambiguous situation is accentuated by the fact that the scientific witness gave merely the answer 'No' to the question: 'Did the tests that you performed indicate any dissimilarities *at all* in the respect of the two sources of material?' The intrusion of the words 'at all' was an unfortunate addition if all that was intended to be conveyed to the jury was that both materials fell into the common broad classification of polyurethane . . . In the Crown's closing address the jury was told 'she found them to be, *in all respects, similar*'. Obviously, the Crown did not understand the answer to be limited to a finding merely that they were both polyurethane; 'similar in all respects' goes practically the whole way to *suggesting* that they are identical coming from the same origin. In those cicumstances the scientific witness can say (and this has been said in the present Inquiry): 'the answers which I gave

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36. ibid, 31.
37. *ibid.*
38. But see an interesting series of articles entitled 'Psychological Communication in the Courtroom' by psychologist Graham Andrewartha in the December 1983, February 1983 and March 1983 editions of *Australian Law News.* See also a paper presented by Peter Sheehan 'Some Psychological Aspects Relevant to the Jury', presented at a seminar on 'The Jury' held at the Australian Institute of Criminology, Canberra, May 1986.
39. South Australia, *Royal Commission Report Concerning the Conviction of Edward Charles Splatt,* Royal Commissioner C.R. Shannon QC, Government Printer, South Australia, 1984.
40. *ibid.* 58.
41. *ibid.* at 58, 59.

were accurate within the framework of the questions put to me'. The Counsel examining or cross-examining could, I suppose, equally say: 'How could I be expected to know that further questions were required if the limitations understood by the scientist as being implicit in his answer were never categorically stated by him'.[42]

The lesson here is that forensic scientists, as indeed all expert witnesses, need to define their terms clearly and precisely, be conscious of possible ambiguities, openly state the limits of their findings and in short, tailor their remarks to terms that can be understood by members of the jury. If this is done and it is submitted it can be done, calls for panels of experts to replace lay jurors will diminish and confidence in the jury system will be restored.

Do Juries Understand?

Some time ago the Chief Justice of New South Wales became concerned about the incidence of appeals involving misdirections of the law by trial judges in their summing up to juries. As a result of this a small committee of very experienced judges from the Supreme and District Courts of New South Wales was set up to consider the question of whether standard jury instructions should be drafted and made available for use by the courts and possibly also for use by the legal profession. The Australian Institute of Criminology was also involved in this project and after several meetings some twenty standard instructions which were regarded as being both legally accurate and expressed in simple English were produced. Instructions on such matters as self-defence, good character, common purpose, statement from the dock, onus of proof, identification, alibi and provocation were drafted.

During the drafting process it became quite clear that it would not always be possible to express complex concepts in simple terms. There were boundaries beyond which it was not possible to go, given that the instructions had to be legally accurate, and the judges were there to ensure that the instructions did conform to the law.

Once the instructions had been drafted the Committee agreed that it would be desirable to test the instructions and so discover the extent to which ordinary people would be likely to understand and apply them. Accordingly the Australian Institute of Criminology set about designing and implementing a study, the results of which are now published under the title *Do Juries Understand.*[43]

The study was undertaken in the tradition of 'mock jury' research. A fictitious case concerning three accused charged with armed robbery and murder was devised and a large selection of the drafted instructions was included. The case was presented to groups of young people in the form of a judge's summing up. The subjects were asked to place themselves into the position of jurors and subsequently were asked to complete a series of multiple choice questions so that the level of their understanding of the concepts employed could be evaluated.

The experimental groups consisted of a total of 128 Stirling College students. These consisted of 17 and 18 year old boys and girls. In addition a group of 15 adults from the Canberra College of Advanced Education were also tested. The control group, which consisted of 24 Stirling College students were read the facts of the case but were not presented with the jury instructions at all.

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42. *ibid.*

43. Potas, I. and Rickwood, D. (1984), *Do Juries Understand?* Australian Institute of Crimonology, Canberra.

On analysis it was found that the subjects from the Canberra College of Advanced Education understood the instructions better than the younger, less experienced Stirling College students. However, the majority of Stirling College students also understood the instructions reasonably well, although it was also found that a minority exhibited very poor understanding indeed.[44]

An unexpected finding was that the control group, that is, the group which did not hear the instructions, did not differ significantly on any of the measures of understanding, comprehension or applicability from those subjects who had received the instructions. The control group did differ in one respect — they were less severe in their individual verdicts — that is they were less likely to find the offenders in the hypothetical case guilty of the principal charge for which each was tried.

An anticipated finding was that some instructions were less well understood than others. Thus, the draft instructions relating to common purpose and self-defence as presented in the hypothetical case were significantly less well understood than directions relating to good character, identification, provocation and alibi.[45]

Admittedly, there were some weaknesses in the study. The majority of subjects were young, and thus were not a truly representative sample of jurors. The subjects from the Canberra College of Advanced Education were closer in age to a typical sample of jurors but were probably better educated. Women were also probably over-represented in the sample.

A further criticism, and one which applies to all mock jury trials, is that the testing environment was artificial. The study did not attempt to replicate witness testimony, and so the subjects did not have the advantage of hearing and seeing the witnesses. The availability of body language cues, an essential part of normal communication processes were therefore lacking, except insofar as those cues could have been picked up from the presenter of the summing up.

There was some difficulty in explaining why it was that the control group, which did not hear the instructions, seemed to score as well as the experimental groups, which did hear the instructions. It was suggested that most people have an intuitive knowledge of the law, that a great deal is learned through the press, particularly the electronic news media, and by courtroom dramas, whether real or fictional. Thus, most people have a baseline understanding of legal terms and concepts. A further possible explanation for the degree of concordance between the two groups may be that the legal concepts themselves are attuned to ordinary notions of fairness and morality. Thus, whether instructions are given or not, similar responses are invoked once the factual circumstances of the offence have been presented. This may reflect the presence of the 'good' or 'common sense' of the jury that is so often referred to by advocates of the jury system.

There was also the possibility that the methodology used was to blame for this surprising outcome, but interestingly other studies have encountered similar problems. Thus, one group of researchers, in the course of reviewing empirical studies of linguistic difficulties experienced by jurors noted as follows:

> Recent social science research suggests that juror's difficulties in understanding instructions on the law are considerable and widespread. Strawn and Buchanan assessed juror comprehension of oral criminal pattern instructions used in Florida by comparing the understanding of subject-

44. *ibid.* 44.
45. *ibid.* 50.

> jurors who received instructions to that of a comparable group of subjects that did not receive instructions. They found that although the instructions helped to some extent, the instructed jurors still missed 27 per cent of the test items and failed to show any improved comprehension for four of nine crucial content areas addressed by the instructions.[46]

The Australian Institute's study does suggest that written copies of instructions would make the task of jurors a lot simpler particularly where they are given a lot of information to absorb and process. When reading *Petroff* [47] it is difficult to envisage how a jury could make a competent fist of the task that faced them without written directions. Similarly even the simplified instructions as set out in the judgment of Street C. J. in *McManus*[48] could best be understood if the jury had the written questions before them. There is no question that reducing complicated issues into an algorithmic format, that is breaking down complex question into a series of simpler ones, is a sensible way of solving the problem. As for the language itself, it is difficult to surpass the words of Mr Justice Roden when he said:

> one of the keys to effective communication is to use the language of the person to receive the message, rather than that of the person delivering it.[49]

Simple language describing simple concepts will be the least likely to be misunderstood, regardless of the intellectual capacity of jurors. Certainly the law cannot afford to retain a private language, play the part of Humpty Dumpty and yet expect the jury to understand and apply its precepts. The development of guideline instructions and a more concerted effort to assist the jury along the lines set out in the New South Wales Law Reform Commission's report[50] will ensure that the system of jury trials will be with us for a long time to come.

46. Severence, L. J., Greene, E. and Loftus, E. F., 'Toward Criminal Jury Instructions the Jurors Can Understand', 1984, *The Journal of Criminal Law and Criminology*, 198-231.
47. Supra.
48. Unreported, NSWCCA, 21 June 1985.
49. Roden, A. *op. cit.* 28-29.
50. *The Jury in a Criminal Trial, op. cit.* See particularly Chapter 6, 71-98.

PRESENTATION OF PAPER

Ivan Potas.

You will note the title of my paper is "Instructing the Jury and Humpty Dumpty justice", and I begin it with a quote that all of you have seen before. It is a little hackneyed but I make no excuse about the use of that quotation because I believe that the words used in trials tend to confuse juries and one of the unfortunate aspects of the whole problem of juries is that we can never be sure whether they really understand what they are asked to do. Well as Humpty Dumpty seemed to be very clever with words Alice decided to ask him to explain the first verse of Jabberwocky. You may recall the verse.

'Twas brillig, and the slithy toves
Did gyre and gimble in the wabe;
All mimsy were the borogoves,
And the mome raths outgrabe.

In order to unlock the secret of this verse Alice engaged in dialogue with Humpty Dumpty. Humpty Dumpty explained that "brillig" meant 4 o'clock in the afternoon, the time when you begin broiling things for dinner. Alice asked what "toves" were and Humpty Dumpty replied that these were something like lizards and corkscrews, they made their nests under sundials and they also lived on cheese.

This kind of interrogation, questions followed by answers continued until each word that Alice did not understand was explained to her. Now the law itself can be just as incomprehensible as the verse just quoted, at least to ordinary mortals. This is particularly so where technical terms and concepts are used. Thus the law can be seen as a private language where terms of art are used and where only lawyers can understand what is happening.

Another aspect is that the jury are not able to interrupt proceedings in the way, for example, that Alice was able to ask Humpty Dumpty what the various words meant in a logical sequence. Most of the time members of the jury remain silent and rely almost entirely upon what they hear and what they see and their own thinking on the matter.

I think the whole issue of communication is a little akin to a guided missile which relies on information about the target. It is O.K. when you have dialogue and you can question the person providing the information to determine whether or not you are on course, but in a criminal trial the jury sit patiently, they listen in the wings until they are called upon to consider their verdict. If they do not fully understand the relevant issues, or if they think they understand the issues but they misinterpret them, then of course this can lead to a miscarriage of justice. The trial judge may not know whether they are on the right track or not and so may not be in a position to correct mis-understanding. So the information given must be fully comprehended without a feed-back relationship of which I have spoken. Further, as jurors deliberate in secret and as they are not called upon to give reasons for their verdict we can never really be sure whether they have understood precisely what they have been asked to do.

I do not advocate that jurors or juries should be required to give reasons, nor do I wish that their deliberations should be conducted other than in private. What we need to do, and this is the underlying theme of my paper, is to ensure that the material presented for consideration by the jury is as clear and concise as possible, free from technical jargon so far as that is possible so that the risk of the jury going wrong is minimised.

In the course of my paper I refer to Glanville Williams' critique of the jury system where he points out that jurors are seldom first rate intellectual machines. He observes that jurors are drawn from the ranks of persons from ordinary occupations of humble character. He states that jurors may be unusually ignorant, slow witted, biased or temperamental and therefore that they may have considerable difficulty in reducing complex legal issues into terms that they can understand.

I note Paul Byrne's comment where he pointed out that up to 8% of jurors surveyed had university degrees. Glanville Williams wrote in he late '50s and wrote in reference to England, and it is not unlikely that things have changed since then. It is not unlikely that the level of education has increased and this argument that it is only the lower, uneducated members of the public that get on juries, I believe needs to be questioned.

Furthermore, one of the Law Reform Commission's recommendations is that the class of persons eligible for jury service should be extended. If this should eventuate then this will lead to a greater cross representation of all classes in the community and reduce the force of Glanville Williams' criticism.

Mr Justice Roden has also criticised the complexity of the law and His Honour has observed both at this, and in a previous seminar and in a case called *Petroff* (a judgment of the New South Wales Court of Criminal Appeal) that sometimes the rules which jurors have to consider are practically incomprehensible to all but trained lawyers. For him the solution lies not with doing away with the jury, His Honour is in fact a staunch supporter of the jury, but rather he suggests that what you do is simplify the law itself. Now there is scope I believe in simplifying some of the law and in my paper I provide one example from the *Crimes Act* (New Zealand) where the New Zealanders repealed quite elaborate provisions relating to the defence of self defence and replaced these with a very short statement of the law, encapsulating in simple terms both the subjective and the objective criteria that are part of that defence. But I caution the approach of merely saying that the law is becoming too complex. It is complex, but one of the problems is that some of the fine distinctions that we like to make and we believe are important are very difficult to express in simple terms. All homicides, for example, are not the same so we are justified in retaining the various defences or special defences or partial defences, call them what you will. The defence of insanity, for example, is very complicated. Excessive self-defence is a very complicated defence, the other two that come to mind are 'diminished responsibility' and 'provocation' and these present fairly complex questions that jurors are faced with. But to say that we should get rid of these in order to simplify the law may mean that we get rid of some very important distinctions that we should uphold rather than abandon.

Now, if we cannot simplify the law because *we believe* that these fine distinctions *should* be made and they cannot be stated in more simple language because the concepts themselves are complex, we must look for other ways of ensuring that the jury understand what they are asked to do. One approach here is to provide the courts with 'standard jury instructions', or 'standard directions', 'standard charges' or 'pattern' jury instructions, (they all mean the same thing). These instructions are drafted with an eye to state the law accurately. This reduces the likelihood of a misdirection. They also aim to state the law in simple or plain English. This reduces the likelihood that the jury will misunderstand the issues that are given to them to consider. Now, the New South Wales Law Reform Commission recently surveyed judges on this issue and about two-thirds of those

who responded considered that standard form instructions would assist jurors. Three quarters of the judges who responded also felt that standard form instructions would assist the judges themselves. So it seems clear that judges would welcome such an innovation in this jurisdiction. I point out that in the United States most jurisdictions do have standard or uniform or pattern jury instructions.

Only last month our sister Institute held a seminar on juries (the proceedings of which should be published about the same time as these proceedings). At that seminar Professor Wayne Westling from the University of Oregon was present and he discussed some of the strengths and weaknesses of standard jury instructions. He listed uniformity as one of the advantages. In other words, if there are standard or uniform instructions then courts will apply the same instructions in similar types of cases. Secondly, he argued that uniform directions decrease the chance of reversal for misdirection because the instructions themselves are required to state the law accurately. Thirdly, the instructions are the product of group deliberations and therefore are likely to be better than the product of individual judges. Another point, Professor Westling did not make directly, but I think is an important one, is that it also saves time. There is less need to do legal research because the instructions are available not only to the judges but the legal community as well.

One weakness of the system is that words used in standard directions must comply with the law. This means that if the statute is phrased in technical terms it may be very difficult to re-phrase the law in plain English and as I have said, it is not always possible to state complex legal concepts in simple language.

Some jurisdictions in the United States go to extremes. In some jurisdictions they have standard form instructions which they virtually stick and paste. In other words they are so standard that every case is almost identical even though the circumstances of the cases may differ quite substantially and I certainly would not commend such an approach here. I would rather see standard instructions as forming a kind of guideline direction for the trial judge — the judge being able to depart from these guidelines as the circumstances of the case make it appear appropriate.

In my paper I discuss a couple of decisions. One from the House of Lords, *Hancock,* which talks about judicial guidelines and the other *McManus,* which is a judgment of the Chief Justice which restates the *Viro* formulation in terms which a jury is more likely to comprehend. His Honour points out that the *Viro* instructions were really directed at lawyers rather than to members of the jury. I have designed a flow chart which looks at those directions and I think even further simplifies the verbal and written instructions. *(See* Figure 1.)

I would think that wherever there are complicated instructions it is desirable that they should be given in writing to the jury. It may be that with the use of flow charts this will even further assist the jury in understanding the steps that they should go through in order to reach a conclusion upon the issues that fall before them for consideration.

A portion of my paper looks at the language and the influence of language on the jury including language of expert witnesses as well as that of the trial judge. The question of body language i.e. non-verbal language, is another line of research that has been going on in the United States in particular; (there is an excellent article by Blank, Rosenthal and Cordell, called "The Appearance of Justice: Judges Verbal and Non-Verbal Behaviour in Criminal Jury Trials" in (1985) volume 38 of the *Stanford Law Review,* p, 89). My view is that perhaps there may be excessive emphasis on non-verbal aspects of a trial and some of the claims by psychologists

may be extreme. The authors claim for example that judges give away their inner feelings by the tone of their voice, or their attitudes and so on and that this influences juries quite significantly in their deliberations. Perhaps this is so. I do not know what one can do about it and it raises some interesting questions e.g. whether one can appeal against an expression on the face of a trial judge and that kind of thing. The mind boggles as to what this could lead to in practice but I think that it is important to keep in mind that it is not just the language that is heard that communicates information. It is also the appearance of the witnesses and the trial judges' body language and so on.

In the concluding pages of my paper I refer to a study which was undertaken by myself and a psychologist, Debra Rickwood, in which we set out to test whether ordinary people are capable of understanding some of the draft standard jury instructions that have been developed by a Committee of New South Wales judges. I am pleased to report that in general the instructions that we tested were understood by the majority of subjects. Some instructions were not as well understood as others. For example, we have some difficulty with the instruction relating to 'common purpose'. Whether that was a function of our experiment or whether they could have been assisted by or might have had a different result in an actual trial we cannot say. We did conclude our report however with the recommendation that further research and development in this area should take place. I am now more than ever convinced that research is essential in order to evaluate the efficiency of the jury system and also to find ways of streamlining court procedures. If we are complacent and fail to meet this challenge the community will lose faith in the jury trial and replace it with cheaper, and in my view less democratic and less satisfactory forms of decision-making.

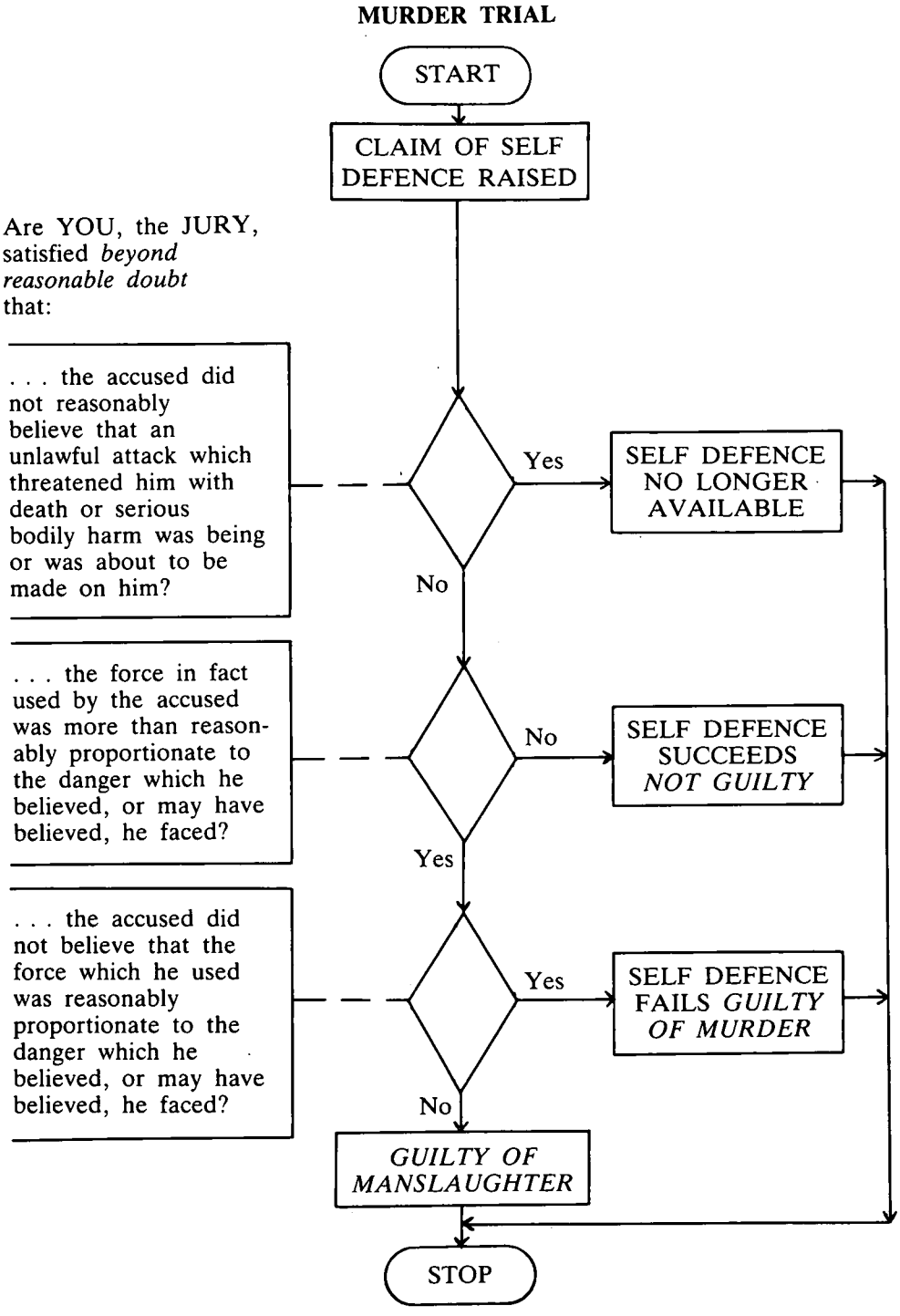
MURDER TRIAL
START
CLAIM OF SELF DEFENCE RAISED
Are YOU, the JURY, satisfied *beyond reasonable doubt* that:
. . . the accused did not reasonably believe that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made on him?
Yes
SELF DEFENCE NO LONGER AVAILABLE
No
. . . the force in fact used by the accused was more than reasonably proportionate to the danger which he believed, or may have believed, he faced?
No
SELF DEFENCE SUCCEEDS *NOT GUILTY*
Yes
. . . the accused did not believe that the force which he used was reasonably proportionate to the danger which he believed, or may have believed, he faced?
Yes
SELF DEFENCE FAILS *GUILTY OF MURDER*
No
GUILTY OF MANSLAUGHTER
STOP

Figure 1

JURIES AND SOCIETY: THE POLITICAL IMPLICATIONS OF CHANGING THE SYSTEM

Tom Molomby
Australian Broadcasting Corporation

As a convenient text, let me begin with a quotation from the greater American advocate Louis Nizer:

> The civilised procedure of trial by jury is slow, painful, and expensive, but it takes man one more step away from the jungle. It is as essential to democracy as voting, because the judgment of the jury is but another way of obtaining the consent of the governed. *My Life in Court* Doubleday 1961 (page 66)

May I suggest that in all discussions of our law and legal system it is salutory to bear in mind that, substantial achievement as it is, it has not for all that very long been, to adopt Mr. Nizer's term, out of the jungle. In the context of this seminar I remind you simply that it was only just beyond living memory that no accused people were allowed to give evidence in their own defence, and only within living memory that the Court of Criminal Appeal was established. More generally, one does not have to look very far in our world to find substantial support for the proposition that civilisation is only skin deep.

Those are important background considerations, I believe, for any discussion of the fundamental institutions in our society, particularly in relation to their stability, in which one major factor is their credibility.

The Jury and Conscience

One feature of the jury system often remarked on in the literature is the power to acquit whatever the evidence, or, to put it more directly, the power to express disapproval of the law by refusing to convict despite the strength of the prosecution case, that is, to deliver what one writer has called an 'equity' verdict. While several writers remark on this as a feature of the system, some of them stand back from either commending or condemning it. For example, Baldwin and McConville, authors of one of the more frequently quoted recent English books, (*Jury Trials,* Oxford U.P. 1979) examine a number of cases in which strong doubts were expressed about the justification for acquittal, and they express the view that in some of them sympathy for the defendant was the cause of a verdict against the weight of the evidence. But they don't examine at all whether that was a good thing. I'll be bold enough to say that I believe that it is a good thing, and indeed an important part of protection against oppressive laws. The jury in this role has been called, I believe rightly, the conscience of the community. While there are well known examples of phenomenon — probably the most recent being the acquittal of Clive Ponting in England last year on charges under the *Official Secrets Act* — I suspect that there may be more than is recognised.

Let me give as an example an Australian case which you'll all know, in which the verdict was certainly completely contrary to the evidence, but in which that fact as far as I know was not remarked upon at all, despite enormous publicity directed to the case otherwise — that's the so-called Adelaide axe murder of 1981. You'll recall that after 27 years of horrific ill treatment both of herself and her daughters, the accused in that case killed her husband with an axe while he slept. The killing and the intent to kill were admitted from the start. The defence tried to plead provocation on the basis that though there was no incident of the traditional heat of

the monent type, the accumulated history of oppressive circumstance should be considered as provocation. The trial judges refused to invite the jury to consider that defence, and the woman was convicted of murder. On appeal, it was determined that provocation should have been left to the jury — only by 2 to 1 incidentally — and a new trial was ordered. At the second trial, with exactly the same case, there were only two possible verdicts — manslaughter, if the jury accepted that there'd been provocation, and murder if they didn't. Yet they acquitted, and who's to say they were wrong? In my submission, that's an important and undervalued aspect of the jury system.

The Jury and Error — What is the Alternative and what are its Consequences?

There have been several studies of the jury system — that by Baldwin and McConville which I mentioned earlier is one such — which have attempted to assess the possible rate of error in verdicts, both acquittals and convictions. Some of these provoke considerable concern. Baldwin and McConville, for example, cite data from surveys which indicate that at least 10% of acquittals and 4½% of convictions are most probably wrong. On their own, such conclusions are not only barren, because they suggest no remedy, but potentially misleading, because any reasonable assessment of the worth or efficiency of the system must be based on factors which include the comparative rates of error in alternative systems. Indeed the broad questions 'what is the alternative?' must be examined. The alternatives most often mentioned are trial by judge alone, or, as in the recent recommendations of the Roskill Committee — to which I'll be referring again later — trial by judge and two assessors.

There is an assumption implicit in many such discussions that other forms of trial would not suffer the same error rate as the jury. That, I submit, is questionable, and overlooks the fact there there will always be difficult cases which will be found formidable by any tribunal, and that there will always be perverse decisions even by judges. The latter is a proposition of which, with all deference to the judiciary, I suggest we may need to be reminded from time to time, and I propose to take a case from another jurisdiction to illustrate it.

On a Saturday evening in England, in October 1974, a bomb went off in a hotel in Guildford. It killed 5 people and wounded about 50. Another bomb went off in another Guildford hotel half an hour later, but luckily that had been cleared, so no one was injured. Those bombs were presumed to have been set by the IRA, and as you'd expect they had a devastating effect on the local community. There was heavy pressure on the police to find the criminals, and of course, they were eager to do so.

Within a month, four people had been arrested and charged. The only evidence against them were confessions which the police said they'd made. At their trial, all four said the confessions were untrue, and had been extracted from them by threats or violence. Certainly the confessions couldn't all have been true, because there were remarkable differences in the details of something the four people were meant to have done together. Nevertheless, all four people were convicted.

Now the style of bombing with which they'd been charged continued after they were in custody, and indeed after they'd been convicted, for over a year. It stopped stopped only after an IRA Active Service Unit was captured in what became known as the Balcombe Street seige.

When the members of this unit were put on trial they did, for the IRA, a rather

unusual thing — they recognised the court, and their leader made a statement from the dock that they, and not the four people who had been convicted, had done the Guildford bombings. Well, the convicted four were straight off to the Court of Appeal, of course, to have their convictions quashed, and they must have become even more optimistic as the hearing proceeded, because members of the IRA unit gave very convincing evidence of how the Guildford Bombings had been planned and carried out, with details which only the people who'd done them could have known. The Court of Appeal accepted that some at least of the IRA unit had been involved in the Guildford bombings, but nevertheless refused to quash the original four convictions; their reason was elegant in its simplicity — both groups, they said, had done the bombings, even though there was no evidence whatever that they'd known each other and the full and complete confessions relied on in the first trial made no mention of the second group.

In this summary I've had to simplify a case which in some respects is of considerable complexity, but the general point I make I believe is sound and the judgment in that case is thoroughly perverse.

To show that lightning can indeed strike the same place twice, I refer you to a book called *Wicked Beyond Belief* by Ludovic Kennedy (Granada 1980) about another decision of the same court at the same period, in which the cause and the criticisms of the judgment was supported by no less a person than Lord Devlin.

I mention those cases simply to illustrate the point, which really should not need illustrating, that all tribunals will make mistakes, even to the point of perversity, and that the only rate of error in the jury system which has any meaning is one made on a comparative basis.

The Credibility and Stability of the System of Justice

Another aspect which appears to be often ignored is the broader political consequences of replacing the jury system. Such a radical change to the role of the judiciary in the criminal process seems to me to raise many of the problems which currently lead many judges to be reluctant to undertake Royal Commissions and other similar enquiries. This issue seems to be given little if any acknowledgement, let alone consideration. In my view, one would have to contemplate a fundamental shift in the credibility of the system and attitudes to the judiciary if the jury system were abandoned.

The most recent example of a proposal for this sort of change is the report of the English Fraud Trials Committee, otherwise known as the Roskill Committee. They recommend that complex fraud cases should be heard by a tribunal of a judge and two lay assessors, but they give no consideration at all to the possible effect of this on the credibility of the system as a whole and on attitudes to the judiciary.

This recommendation of the Roskill Committee is based on the belief that complex fraud cases are beyond the comprehension of juries. But what the Committee has not done is to look at that rationale from the point of view of what it means for public confidence in the system; for it concedes that the criminal justice system has gone beyond public comprehension. One member of the Roskill Committee dissented from the recommendation for a special tribunal, and on the issue I have just outlined, he said:

> The jury not only represents the public at the trial, its presence ensures a publicly comprehensible exposition of the case . . . I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials

> where the state admits that it cannot explain its evidence in terms commonly comprehensible. (Mr. Walter Merricks, page 196, para. C20.)

I endorse that opinion thoroughly, and I suggest that the course recommended by the majority of that Committee is unjustified and dangerous.

The Roskill Committee made a large number of other recommendations for procedural improvements in the trial system, many of which I'm sure would be accepted readily here. The dissenting member of the committee thought that these would mostly remedy the problems which the enquiry had revealed. It's a remarkable and disturbing feature of a certain type of discussion of law reform that it attempts to define problems out of existence by changing the system around them, rather than address them directly. This, as it seems to me, is what the majority of the Roskill Committee has done.

I have referred to the need to consider the stability and therefore the credibility of the system of justice, in proposing any changes. Any radical change to fundamental institutions such as the system of criminal justice, I suggest, must be made with an eye to the long view. The history of the last twenty years, let alone the last hundred, shows that the best of civilisation and its institutions are far from secure. Despite the hopes of the period of growth after the Second World War, the gap between the haves and the have nots, both as between nations and within them is increasing. The gap between the individual and the institutions of society is in many respects also increasing, resulting in frustration and alienation. In such an environment a system of criminal justice which is, or can be perceived to be, administered by agents of one or other section of society contains an inherent instability. The best system of justice is that which offers not only the best chance now of justice in the individual case, but the best chance of surviving for justice in the future. That, I believe, is the jury system.

PRESENTATION OF PAPER

Tom Molomby.

I'm not entirely sure why I've been asked to give this paper in the face of so many better qualified than I to address the operation of the jury system. I had thought originally when I was asked it might have had something to do with the fact that I've been involved in one way or another in a relatively small number of cases involving disputed or, I would say, wrong jury verdicts. I think juries do make mistakes, and I think that is a matter of great concern, and that in some cases fairly simple things could be done to minimise those chances of mistake but I would like to state clearly at the outset that I stand here as a supporter of the jury system and despite things I might have said about the results of particular cases, however deplorable, none of that should be taken to imply a general lack of confidence in the system.

I will outline what I have included in my paper fairly briefly.

The general theme that I have addressed is the social and political role of the jury and its place in the scheme of things interposed, if you like, between the formal continuing apparatus of the administration of justice and the citizen. And I have made three major points about that for which by the way I don't claim any originality or novelty, but they do sometimes seem to be allowed to slip into the background in consideration of these matters.

First, I have remarked on the jury's power to say 'not guilty' when the facts and the law very clearly say 'guilty' and I have mentioned two relatively recent cases, one the *Ponting* case in England, and the other the axe murder case in Adelaide in 1981 in which that clearly occurred. I've expressed the opinion that it probably happens more than is generally recognised. I don't mean recognised by the participants in the trials, though I don't suggest that it occurs all that often for all that, but I do make bold enough to say that I believe it is a good thing and that it is an important part of our protection against oppressive laws. I would have to concede, I think, that these days they are more likely to be laws whose application in particular circumstances might be oppressive rather than laws which are in their substance oppressive. Historically there might have been more of that one.

Second, I draw attention to what seems to me to be a methodological defect in a lot of criticism of the jury, which is that it seems to proceed on the assumption, false assumption I submit, that other forms of trial would not suffer similar defects or similar mistakes. I've given a summary in the paper of a case in the Court of Appeal in England (I thought I might take a case in which three people have been involved rather than one), a case that I find quite astonishing and which I think does indicate a perverse judgment. I've also mentioned a book which documents another such case which to my mind involves a judgment similarly perverse. That book is called *Wicked Beyond Belief* and, in response to a remark made to me, I should make it clear that that is not intended as a description of the Court of Appeal, but is a phrase used by the trial judge in the case in his summing up. That book, I understand, is a bit difficult to find these days even though it was only published in 1980 so I might just take the liberty of outlining its facts very briefly. I think that you will see that they're very much the sort of facts that juries have to confront every day.

Four people had set out in a van to rob a post office and they apprehended the postmaster in the car park and in a struggle he was shot and killed and they all jumped in the van in which they had driven there and sped off. Some days later one

of them was apprehended, I think he was dobbed in by somebody, and he in turn and in return for special treatment for himself which always, of course, creates special problems, gave the police the names of three other people, all of whom protested very vehemently and said they had not been there. Indeed they provided alibis of sorts but unfortunately for them the alibis involved only their family and friends and therefore were able to be discredited, and despite their protestations they were convicted. After the trial an impeccable and independent witness came forward who supported wholly the alibi which one of those people had given, and as a result his case was referred back to the Court of Appeal and his conviction was quashed. The cases of the other two were then also referred to the Court of Appeal, but the court refused to accept that because the informer's evidence against one of the three had been shown to be unreliable, his evidence against the other two was necessarily also unreliable. They even went so far as to rationalize that by saying that the informer did not have to be lying about the involvement of the first person, he could have been mistaken, that is in a case where four people drove in a van to the site and drove away in some excitement from the site.

I should add on this methodological point of criticism of juries an issue that I left out of the paper. In a number of discussions that I've attended of this issue juries are rather unfairly blamed for the results of celebrated and acknowledged miscarraiges of justice which are not necessarily the faults of the juries at all. I need only to instance the rather remarkable *Thomas* case in New Zealand in recent years in which the man was in fact convicted twice (because his conviction was quashed after some new evidence came up the first time) and yet finally it was established quite clearly that that conviction was wrong, but, of course, the fault was not the jury's — the fault was the false and fabricated evidence that was put before the jury — and I would suggest that any other tribunal would have come to the same erroneous result on the two occasions that the juries did.

The third major point that I make about the jury system is that any abandonment of it in cases of serious crime would cause a fundamental shift in the political disposition of our system of criminal justice. As a relatively minor point there would be scope, for example, for far less pleasant comments than those I've made about the English Court of Appeal directed perhaps at members of the judiciary on a somewhat wider basis. But the major point is that there would be a very real shift in power in the system of criminal justice and perhaps, most importantly, in some circumstances a very real change in the interests it was perceived to serve by the community at large.

I conclude by acknowledging in all frankness an authority which perhaps goes somewhat in the other direction from the position of general support for the jury system which I have adopted, but which, of course, I would claim to be able to distinguish if necessary. The famous English advocate, Norman Birkett, when he first became a High Court Judge did not like it terribly much, and he confided to his private diary:

> There is no satisfaction in work on the Bench at all comparable with the work one used to do at the Bar. There is no scope for fine speaking or for playing on the emotions. I still have the power of dominating juries however. They do whatever I wish.[1]

1. H. Montgomery Hyde, *Norman Birkett*, Hamish Hamilton (1964) p.540.

DISCUSSION PAPER

JURY TRIALS AND TRIAL BY MEDIA, AND FORENSIC EVIDENCE

E. R. Dalziel, Barrister-at-Law

For any efficient decision-making process the decision-makers should obviously:

(a) be given all the basic facts in a digestible form.
(b) be given any expert evidence in an understandable form.
(c) be allowed to examine and dialogue with the presenters of basic facts and the experts.
(d) be allowed to examine anything they, as the decision-makers, think relevant.

Finally, any higher level of review of decision-making should go to at least a partial re-hearing, as does any review in politics or business.

The usual jury trial only too obviously falls short of this. The jury are not given transcripts of evidence, no dialogue is available with the chief actors, the counsel on either side. In reality, the latter control proceedings, with little input by the judge, who should in theory be the best lawyer present, and certainly must be the most unbiased. The situation fairly bristles with contradictions. The much-criticised rules of evidence prevent what most people would think is vital evidence from reaching the jury, in some cases. Yet the jury are supposed to import into the system an input from everyday experience!

It has been asserted that 90% of the evidence on which everyday decisions are made comprises hearsay. The media fill a vital role here, if one confusing to the jury. Calculated leaks while at investigative stages can colour people's thoughts. It is hard to stop media sensationalism for its own sake, and periodically media leaks are useful to inform the public who then demand action from reluctant government. But the jury cannot test all this in court, as it is artificially excluded, as they see things.

At the other end of the scale, is scientific forensic evidence. This can be dredged up from the ends of the earth and admitted in court, as gospel, despite it lacking the one essential in science, INDEPENDENT VERIFIABILITY. A forensic scientist, by the very nature of the adversary system, is NOT impartial, nor is he allowed to give all the evidence he would like to give, e.g. shades of negative or affirmative. There is only one solution to this situation, a consensus position for forensic evidence.

So why not a consensus position for ALL other probative facts?

While this cannot happen in the adversary system, it can happen in an inquisitorial one. It is the type of process ethnic people are used to; it is used in arbitrational proceedings; in all forms of conciliation everywhere; and in business decision-making. It lends itself readily to the four criteria mentioned above.

The legal establishment in Australia perceives this process as more costly than the present adversarial one. If this is so why does not cost-conscious business adopt the adversary system? Lord Devlin and Lord Scarman criticise the adversary system on the score of cost and suitability in modern times. To paraphrase Jerome Frank, juries are placed in an unfamiliar situation as regards presentation of facts, and then badgered for a quick decision. Specialised evidence and trial by media are two things we now have to live with, and juries should be given better opportunities to deal with it.

Finally, is it not time we decided that jury persons be qualified in some way? An inquisitorial system has no need for any legal training for the jury, the distortions of the adversary system which need compensating for, would have gone, but ignorance still does not make a good decision-maker. There is a number of 'young-old' people about who have experience of decision-making at executive level. Why not create a pool of people offering their services on juries, and reward them more appropriately? Empanelling juries for long trials has shown such a need. If advocates were paid less, as would be possible with an inquistitorial system, there would be no place for the expensive lawyer of last resort whom the public often perceives as a perverter of justice.

DISCUSSION PAPER

A COMMITTED ADVOCATE'S RESPONSE

David Nelson, Barrister-at-Law.

It is surprising to note that the initial papers do not include any response by a currently practising experienced jury advocate.

To the jury advocate the jury always seems to possess one characteristic which is not necessarily present, or present all the time, in the other components of the trial. That is shorthand for saying that in many trials or in many sections of trials people get irrascible, things are said which would otherwise be better left unsaid, people conceive hatreds for particular persons, prosecutors become over zealous, judges get extremely irate with lazy or incompetent or, indeed with competent counsel, precisely because he is competent. The trial is a human situation.

Juries have an insatiable and unrelating and ever-fresh desire to do justice according to law which they expect will conform to their own notions of fair play. A jury is not only a tribunal fact but a special part or mechanism of the body politic without whose assent the justice system/government may not imprison any person for any considerable length of time, or so it ought to be. It renders tyranny difficult. It is capable, not often, but in he odd case of judging not only the accused but on occasion it judges the judges, the advocates and the permanent prosecutorial staff in recent times an interest to be considered quite distinctly from the prosecuting counsel. There have been mention of difficulties in prosecutors dealing adequately with cases because complex briefs are delivered 24 hours before the trial and therefore you have another antagonism or dialetic in the trial process.

As to Byrne's paper (see pp. 11-28) instead of the jury's verdict being acceptable it should be indifferent as to whether its verdict is accepted or not. It is not its accountability which is precious but its independence. It cannot be efficient in any mechanical sense and its verdicts of guilty and not guilty are completely effective and unambiguous. It can only be representative in a statistical sense by accident as anyone who has tried a factory accident case before four housewives would know. It is representative because it is the historically trusted delegate of the wider community.

Ideas such as protecting it, making its task easier and protecting it from bias and prejudice can easily cloak measures for managing the results it produces. That kind of absence of good taste and presence of crassness which manages to attach to a bill of rights measures designed to coerce the thought processes of citizens should be kept out of the way of making the jury's task easier. I do not like loose talk of satisfactory verdicts. We could save a lot of time and money if we had an administrative system of justice and no jury at all.

I take exception to a lot of Byrne's language, but probably not justifiably, in the sense that he really intended all the implications that I draw out of his language. But he should take thought before saying things like "the jury's verdict should be acceptable". But I do not think that we necessarily disagreed. Words like "satisfactory verdicts" are very difficult. A German jurist once said there is no such thing as the truth in a trial: there is only judgment. We should be humble because no trial will ever comprehend all of the facts.

I have had experience of criminal pre-trial proceedings under the *Supreme Court (Summary Jurisdiction) Act* 1967. One judge once told me that if the accused did not make admissions then that situation might be reflected in the sentence on

conviction. What did I do about it? I saved it up and used it in a way which ensured a minimum sentence. Or so I thought. It is often not understood that the Supreme Court Summary Jurisdiction can be, in the hands of certain counsel and judges, full throated criminal pre-trial. Full-throated criminal pre-trial does induce in a human way judges to comment on the evidence. You will get: "Why are you being so obstructive?" We do not need, "Mr. X, your client has made a full written confession and on the written evidence at the commital the trial would be a waste of public money as well as an improper burden upon the time of twelve honest citizens." Nothing like that has ever happened but there are refusals of adjournment sought for more complete preparation.

There can be subtle reasons for the strict preservation of ancient ceremonies. Let there be beneficial alterations but let such alterations be attended to in a spirit of trepidation and humility. One matter which possibly should receive attention is joinder of counts in an indictment. I would suggest that the judges have power to sever indictments, to order counts to lie on the file until further order and to make stay orders against tacked on omnibus conspiracy counts. They may have that formal power but in New South Wales they do not use it. The general principle is that the prosecution is not to be hindered. There is need for stronger direction from the legislature. In England severance of counts and orders for omnibus conspiracy counts to lie on the file are not uncommon. I have not researched the basis of this difference but have noticed it in the English reports.

I believe that Byrne's paper contains a serious error in analysis in relation to complex fraud cases. There are not two categories of law, civil and criminal. There are three categories: civil, criminal and disciplinary, e.g. proceedings for professional misconduct. The disciplinary category is marked by the Briginshaw level of proof, specially skilled tribunals, serious punishment up to heavy fines and including restriction on economic activities but not the deprivation of liberty.

If there is a category of fraud which is so complex that ordinary men cannot follow it then it is likely to concern money, paperwork and computers. It seems to me likely that few judges could follow it either. On the other hand a special tribunal possibly could and there could be attached to such jurisdictions the pendant remedies of granting an inquiry into unjust enrichment and the making of recovery orders. However, if the fraud warrants a serious gaol sentence then it is hard to see why it should be so obscure.

As to Potas's paper (see pp. 33-46) and with great respect the McManus instruction is only a shade easier than the Viro instruction. The best style of instruction to a jury, in my view, is what I call the contrapuntal style. In which, whether a full abstract description of the law has been given, the judge traces the conceptions one by one and illustrates conception by reference to alternative views of the instant facts of the particular case or, where such illustrations are not apt, by reference to contrasting examples.

To assist the judges there are in circulation, but to what extent I do not know, quite a number of model summings up. One often sees springbound volumes on the bench which the judge appears to be making reference while summing up. I think it is a matter for the judges to refine and organise what exists rather than for non-judges to interfere. Would it really do any good to have a court of criminal appeal directing what should go in such springbound volumes. The right appeal case may not turn up for decades. The slow development of the law by judges, which is the mark of common law, might well be hindered. Doubtless the use of model summing ups and the like should be encouraged but it should be an

intracurial matter for the judges themselves.

Also the trial is inevitably a labrynth of language. Just about everything of any complexity or importance is a labrynth of language. The point is that the trial should be a sufficient school for the jury but it should not matter much if they do not remember it all when they get out.

As to Molomby's paper (see pp. 52-55) I find that the attitudes he expresses have my general support. There should in any consideration of changes to the jury system be the widest consultation with insightful persons from every walk of life. Clemenceau said that war was too important a matter to be left to the generals. I suggest juries are too important to be left to lawyers and their ilk. Molomby refers to Nizer's view that a jury is but another way of obtaining consent of the governed. I should like to add for myself that it is a way of obtaining some acceptance from the incarcerated.

How important that may be can be judged by those who have extensive experience in the inside of prisons. In every prison I have visited there is an atmosphere of resentment and barely suppressed violence. Sullen lolling prisoners repeat interminably the macho signs of physical fitness. Add a few stupidities and we could have another Bathurst. Have you ever gone down a narrow yard where prisoners are lolling in the sun and have to step and wend your way between each one of them whilst they are all flexing their muscle? You get some idea of how resentful they can be. Now any mechanism of a psychological importance such as challenge whereby the prisoner can himself be part of the process of the judgment rendered on him should not lightly be given up. The paradox is that by challenging the prisoner participates in the selection of those who determine his fate. It seems to me that you would give up all hope of such acceptance if you significantly cut his challenges.

I am too busy to follow the academic and reform discourse on juries in any detail but I find more appreciation of the subtlety of humanity in Molomby's paper than in any other.

DISCUSSION PAPER 3

J. Parnell
Stipendiary Magistrate

The late W. J. Knight Q.C. always said that the jury verdict was the only way the public would be satisfied. Now, 30 years on, with —

1. 98% of all criminal cases in New South Wales being dealt with without a jury verdict, most in summary trials before magistrates with sentences up to three years.
2. Neither the death penalty nor the mandatory life sentence remaining.
3. Merciful verdicts outlawed by *Gammage*.
4. Summary trials by consent in New South Wales of serious frauds, and in South Australia of any crime.
5. Abolition of jury trial for prescribed offences (including murder) in Northern Ireland (when popular prejudice was judged by the Executive as having got a bit out of hand).
6. The failure of the system to contain the length of trials rendering the actual jury available to be enpanelled not representative of the community.
7. An apparent increasing intervention by enquiries and Appeals Courts with jury findings on matters of fact.
8. Arbitrary guidelines to hinder the exercise of judgment of fact by jurors. viz: accomplice corroboration — methods of treating adopted but unsigned confessions.
   doubts have arisen as to how an *informed* public would react.

However well it has served in the past, the retention of the criminal jury is now merely a sop to academia, both in the media and elsewhere, and one needs look no further for confirmation than the New South Wales Law Reform Commission report.

Nevertheless, the jury system offers the only real prospect for a public, absent from the body of vacant seats confronting the Bench every day, to join in the administration of justice and observe at first hand its operation. It should survive in some form if only for this purpose. Notwithstanding, a number of problem areas are quite evident.

In today's documentary age the major fraud trial is beyond the scope of any jury — how can twelve persons of unknown reading skills cope with a pantechnicon load of documents? — and no judge can cover the insuperable task of explanation. The modern fraud trial is a bit more than looking up and saying, was it a swindle or wasn't it?

Then indeed why should Company Directors be entitled to a jury with its consequent option of presenting their cases by evidence or unsworn statements, while those without the mental capacity to steal more than the summary limit are left without any option? And why in our egalitarian society should the thief who steals the Managing Director's holiday Mercedes be given an advantage over the thief who steals the secondhand Commodore from the husband relying upon it to take his wife to hospital? Jury trials should be abolished for all property offences.

Whilst the jury trial appeals as an appropriate vehicle for offences against the person where self-defence and drunkenness, etc. intervene — a global verdict after a lengthy and tedious hearing accompanied by a complicated summing up (compare the guidelines on self-defence from *Viro*) smacks as dangerous. Just how do twelve ordinary citizens cope with hearing that once at a speaking speed, perhaps half a

day before the summing up finishes? The big problem in any trial is applying the law to the facts or vice versa. This I suggest is an impossible task for twelve ordinary citizens who only hear the law once and who are not trained in obtaining or assembling factual material.

The global verdict should go and rather the jury should answer specific questions — preferably as such arise in the trial — and then the chairing judge should bring in the verdict himself. With some thought along these lines and with the reduction from twelve to four it might be possible to extend the system and thereby involve the public to a greater extent.

DISCUSSION

Paul Byrne

To comment on some of the issues that have been raised in the paper presented by Mr. Nelson. He said that he did not approve of the language that I used. I would put to you Mr. Nelson, with respect, that you have confused what I, in fact, said. You said that I suggested that the *verdict* of the jury should be publicly acceptable, that the *verdict* should be efficient, and that the *verdict* should be effective. I think the point I was making, and as it reads in print, is that the *system* should have those features, not a specific verdict that any individual theory might give (page 11).

In relation to another point on page 13 you have suggested that my paper contains a serious error in its analysis in relation to complex fraud cases in that there are not two categories of law, civil and criminal, but that there are three categories, civil, criminal and disciplinary. The point that I was seeking to make there was that the Roskill Report fails to put the issue before the public fairly. The argument that they make is that almost all legal cases are decided by people who are qualified by training, knowledge, experience, and integrity, so that the recommendations that they make, i.e. that serious fraud cases should be decided the same way, is consistent with that general principle. What my argument was and is, is that the Roskill Report should have said that, in fact, all serious criminal cases are tried by a jury and the recommendations that they are making are inconsistent with that principle, rather than being consistent with a completely different principle. They have unfairly, I think, avoided the distinction between civil and criminal cases. I really cannot see that *Briginshaw's* case, simply another standard of proof that might be applied in a particular kind of case, in that case I think a divorce case, I cannot see what that has to do with the distinction that Roskill avoided and I think they should have made.

The third aspect of Mr. Nelson's paper that I should comment on is his suggestion that there should be power in judges to sever counts in the indictment. I would sugggest to him with respect that Section 365 of the *Crimes Act* already is in extremely broad terms and gives those powers in very clear terms to judges.

B. R. Kinchington, Q.C., Chairman, Commercial Tribunal (N.S.W.)., former Deputy Senior Crown Prosecutor

I was the Deputy Senior Crown Prosecutor until December 1984 involved in the prosecution of white collar crime and corporate crime. I do not recollect being approached by the N.S.W. Law Reform Commission for my views in regard to any of the matters raised by Mr. Byrne. I do remember getting a Discussion Paper to which I certainly did not have the time to reply but I was not sought out. I do not know if anybody else was sought out to discuss the problems that we have faced in New South Wales in regard to the prosecution of corporate crime and white collar crime of a complex nature. I would have thought that to do so might be a starting point.

Having made those comments I really want to speak on the question of unanimous or majority verdicts. I do not think it is very productive in papers such as Mr. Byrne's to rely upon propositions based upon the fact that a concept of unanimous verdicts has an ancient origin. I think Mr. Byrne referred to the fact that he went back to the 14th century. That seems to me to not be very helpful. We are

now in the 20th century approaching the 21st century and I think we should be more objective in our approach.

Mr. Byrne in his paper states that there are two major arguments in favouring unanimous jury verdicts. As I understand the first of these arguments deals with the following proposition: majority verdicts will diminish the important protection afforded by the high standard of proof required in criminal cases. Might I just make this comment on that statement. I do not think he would get much sympathy from any person who faced two criminal trials after a jury had disagreed on the first trial whereby the jury was eleven:one in favour of an acquittal, and where he was convicted on the second trial by the unanimous verdict. We there have a situation of 13 to 11. Later in his paper Mr. Byrne argues that one person who has a reasonable doubt must throw some doubt on whether there is not a reasonable doubt in the whole of the verdict.

The second point that he raises is that where there is a majority verdict of guilt, it can clearly be said, in the absence of corruption, that there exists in the minds of at least one member of the jury a reasonable doubt about the guilt of an accused person. I do not think that it can clearly be said that that follows from the fact that you get a majority verdict of say eleven:one. If I might just recount an episode that happened in my family recently. My youngest daughter attended on a jury. The jury disagreed. The reason that they disagreed was because there was one member on the jury panel who would not discuss any aspect of the case with the rest of the jury. That is one practical instance that has come to my notice. I have also in my long career as a Crown Prosecutor been told on a number of occasions that the verdict has been a eleven for and one against: sometimes eleven for a conviction, one against a conviction, sometimes eleven for an acquittal and one for a conviction. In the three instances that I was informed of that, the people that were for or against in the minority were people who were not going to be convinced at all. One did not like policemen and would never convict anyone, so I was informed, if a policeman is involved in a case. Another one was the exact opposite because the police said he was guilty, then the accused must have been guilty although the other eleven were prepared to hold that he was not guilty. I do not think you can make statements such as "It can clearly be said". Of course, you would opt out of that by taking umbrage at the words "in the absence of corruption". I do not think that it is corruption for a person on the jury to have tunnel vision in regard to a particular aspect of a case. I do not think you can say that because of a majority verdict and there is one person holding out, that that person has a reasonable doubt. He might have other reasons for not wanting to convict or not wanting to acquit. That is the point I want to make.

The third point that Mr. Byrne makes is he says the acceptability of the verdict may be called into question by the participants in the trial and the general public alike. We have had two very prominent trials in recent years. One involving Mr. Justice Murphy of the High Court and one involving the Chamberlains in Darwin. In the first trial of Mr. Justice Murphy there was a unanimous verdict but that caused a lot of discussion, a lot of criticism of that verdict. It was not acceptable to a section of the community according to what you read in the papers. In regard to the Chamberlains we had the same thing. Whether it be right or wrong, we have instances of unanimous verdicts not acceptable not only to the participants but to large portions of the public. You will never get over that whether you have majority verdicts or unanimous verdicts. Participants in the trial themselves will not be happy. In murder trials where you have no complainant but you have the relatives

of the deceased, if there is an acquittal or a conviction for manslaughter they are very often very critical of the jury for bringing in that verdict. Sometimes that even goes to the wider public at large. So I do not think that is a valid reason for not bringing in majority verdicts.

Mr. Byrne then raises two other arguments. Firstly he says that it is simply not valid to say that if a doubt is entertained by only one among twelve then it cannot be a reasonable doubt. Now that does not seem to me to be a valid argument. It is saying that because one person out of twelve has a reasonable doubt in regard to a verdict, whether it be for 'guilty' or 'not guilty', that the other eleven on the jury because they have made up their minds they are not entitled to be convinced beyond reasonable doubt or have a reasonable doubt. I do not really see what that sentence means. It reads well but it does not seem to support the argument of opposition to majority verdicts.

Secondly, he says it is inescapable that the existence of a dissenting voice casts a shadow over the validity of the verdict. All I can say about that is "Nonsense!"

In his argument Mr. Byrne relies upon a number of statistical matters, and states that the incidence of disagreements of juries in New South Wales is relatively low. When we are concerned with the administration of justice and when we are concerned that ensuring that justice is done between an accused person and the community of which that accused person is a member, does it really matter if the juries disagree in a high or low proportion of cases? If they are disagreeing in a large proportion of cases there is something wrong with our system of justice. If it is low what flows from it? It may well be they are disagreeing in that eleven want to acquit and one wants to convict. We do not know except sometimes we do hear from hearsay.

I think we mainly should be concerned with the justice of the situation. Mr. Byrne goes on to say there has been a massive increase in the number of verdicts which are unsatisfactory verdicts, but brings no evidence before us to support this assertion.

Finally, he says it would appear that the proposed solution to the problem of jury disagreements creates a monster of greater proportion than the problem it was designed to solve. I join issue with the use of the words "monster" and "problem".

Daryl Melham, Solicitor-in-Charge, Criminal Indictable Section, Legal Aid Commission (NSW)

There are a few points that I would like to make in relation to jury trials and also in relation to the Law Reform Commission Report that has just recently been handed down. I have disclosed my bias already and that is from a defence point of view as distinct from a prosecution point of view.

One of the recommendations that does concern me from the New South Wales Law Reform Commission is the reduction of challenges from 20 in murder trials and 8 in others down to 3. I am strongly against that recommendation and would like to see those challenges retained at their present number no matter what the cost, and I think that is the primary concern. The present system has served us well and, in my view, a really substantial case must be established before you start taking away further rights of the accused. Some people might think that a peremptory challenge means nothing. To many accused and to many defence counsel it means a lot. It is the first opportunity for an accused person to participate in his trial. Often the accused remains silent at the committal stage, and silent until the latter part of the trial. In a number of cases that I have been involved in it has played a major role in the accused person settling down in the early part of his trial,

and in accepting the result as being a judgment of his peers. I think to reduce it by any number questions whether it is a judgment of his or her peers.

In my view the jury system has served us well and it should be strengthened rather than weakened. They say that bad cases make bad law — you can always pick an isolated case to condemn a jury verdict or the jury system, but if you look at the overwhelming number of cases juries have served us well and the jury system should be strengthened and retained. I take issue with Barrie Kinchington when he talks about recent prominent cases and their relevance to how the jury system works. My view is that on a close look at each of the recent prominent cases where jury verdicts have been brought into question the conduct of the jury in each case was impeccable. The trials were at fault as a result of other failures in that trial, and in two of the instances it was the result of the way the jury was charged by the trial judge. That is where the trial fell into error and disrepute and not by anything that the jury had done.

I know that the New South Wales Law Reform Commission addressed this issue but I would like to see it made mandatory that juries are discharged after verdict. I perceive it as a humiliating part of the trial where the jury returns a verdict of guilty, that they are kept around to hear the rest of the case. In many instances some of those jurors will come back and serve another time. My view is that to protect the jury they should be discharged and allowed to leave the court immediately, so that when they do come back another time to serve on another jury they do not have the doubts about does he have a criminal conviction, etc. I would like to see the jury trial strengthened from that point of view. I think there should not be discretion there, and I do not agree with the argument that as members of the public they are entitled to come back and look at the sentencing process. In my view while they are members of the public their role in the trial is to judge the facts and having completed that they should be discharged.

Dr. G. D. Woods, Q.C.

My first point is that the Report of the N.S.W. Law Reform Commission is the product of very intense and thoughtful law reform work. It is really a very admirable document. I know how difficult analysis of the issues but a degree of unanimity about conclusions and recommendations. That is what the Commission has done with great effectiveness and I think this document will probably be the basis for the future directions of the jury as an institution in criminal trials for some years to come in this state.

Having said that I take opportunity to comment critically upon a couple of matters. First of all I must endorse what David Nelson said with respect to the question of consent. This is a point also made by Tom Molomby. Some time ago the Law Reform Commission had a meeting in this hall in respect to the proposed abolition of the dock statement. I said then, and a number of other people said, that it should not be abolished for the principal reason that it represents an opportunity for an accused to participate in the trial and by participating, to consent to the outcome. In my opinion the process of empanelling a jury, the right to challenge persons who come before one as an accused person, reflects this same consideration. It is a situation where the accused is put 'on his country' in terms of the classic common law formula — he can say "I don't like him, don't like catholics, don't like blackfellows, or don't like women", and exercise his whatever particular prejudice or combination of prejudices he chooses.

From the viewpoint of an advocate of some little experience with juries, I really do not believe that you can make any predictions as an advocate advising people whether they should eliminate this person or that person. You get to know what their prejudices are and you take it from there, but really I do not know of any way of predicting accurately whether a person is going to acquit or a person is going to convict. Frequently, people who have been involved in jury trials would have had the experience of having knocked somebody off a panel and discovered subsequently that this is a person who would never convict anybody. He is sitting up there and has got the statutory RSL badge, short back and sides, and you think this fellow will 'slot' my client in ten seconds, and it turns out he has got a son who was convicted and he hates coppers. Conversely prosecutors no doubt have challenged people for some reason looking as if they might give the reverse result. I do not think in practice that challenges make much difference. Strictly as an advocate, I would not care whether they did away with all challenges completely, just have a random jury panel.

Now, if that were the only consideration, that is whether the jury panel is random, then the present situation is more or less as good as you can get. We have jury rolls and most people are on the jury rolls. There is a computer selection and it is representative. However, the point about being entitled quite peremptorily to challenge is that the person who is there as an accused person becomes, in terms of social control, 'locked into' the system. He participates. He believes that these are people whom he has to some extent participated in choosing. I believe that that is a very important consideration.

We live in a community which does not have much violence. There is a bit of a drug problem and there are a few burglaries, but when you think of other jurisdictions around the world (not only the English speaking world) we are comparatively a peaceful society without a grave crime problem. In my view all communities, especially in times of rapid social changes such as we are in now, live to some extent on a knife edge. It would not take much for this country to develop what Britain has developed over a period of 10 to 15 years, that is a serious problem of escalating unemployment, social breakdown, and difficulties of the kind which, incipiently, we have got here. It seems to me that there is a very major concern of the criminal justice system to be seen as legitimate, to be seen as accepted by all parts of the community. We have all races here, we have had an influx of migrants ever since the Second World War: Italians, Lebanese, Vietnamese and Turkish people and so on. They have only an incipient acceptance of the Anglo-Saxon legal tradition. In some areas of law we see that it is very difficult for people from certain cultural backgrounds to accept what we regard as basic legal norms. Some clients who are acquitted cannot be persuaded other than that somehow I or the solicitor or somebody has 'slipped the judge a quid'. That is not a view isolated to particular ethnic groups, but it is a view that many people have — in some particular cultures it is a view that comes more readily to mind than others. What we regard as unthinkable, a lot of people do regard as thinkable: that juries are rigged, that judges can be fixed, that prosecutors can be got at, and that when the prosecutor is being a bastard it is not because he regards doing his duty vigorously as being a proper attitude towards his job but because he is being paid by the other side.

Given the necessity for our community to have a system of law which is regarded with respect by everybody, we have to regard the acceptance of our norms by those who participate in the system whether voluntarily or involuntarily as vital, and it seems to me that jury selection is par excellence a part of the criminal process

in which people participate. They generally do not appear for themselves, they generally do not get up and make a speech at the end of the trial, they generally do not ask questions, but they do either give evidence themselves or make a statement from the dock, and they do very frequently have a strong input into the question of jury selection. There is a long tradition in the Attorney-General's Department, as in other areas of public service (despite the criticisms that are sometimes made about lavish expenditure) to want to cut down on expenditure. Frequently over the last 10 years proposals have been put forward to cut down the jury challenges because it is very expensive. It means that in order to get a jury trial going you have got to have enough people at court who can be challenged or who are available to be challenged. These people are paid a day's pay and it is expensive, but in my respectful view if there are two areas of expenditure which no politician will regard as amendable to cuts, one is children's hospitals and the other is juries. No politician is going to be seen as attempting to cut down on the jury system for reasons of cost cutting. I would urge the Law Reform Commission to reconsider their views about that particular matter and to regard the question of acceptance by the community of the criminal process as being directly affected by this issue of jury challenges. Otherwise, in my view, the Report of Paul Byrne and the other members of the Law Reform Commission reflects a great deal of careful thought and ought to be endorsed.

R. Sutherland, Barrister-at-Law

I would like to touch on one or two things that Dr. Woods raised in relation to the peremptory challenges. I hold no brief for the Attorney-General or anybody else to attack the cost, but one gets the distinct impression having worked in the area that, at the end of the day, it is a game of chance and not a game of skill. I think Dr. Woods acknowledges that, and to say that "Of course, the accused really participate by the challenge" is, in my respectful view, to ignore the reality of the vast majority of trials presently conducted where the increasing and almost invariable practice is that under the guise of assisting the accused the challenges are not in fact made by the accused, they are made by counsel for the accused. I myself, of course, when I hold brief for the defendants have been party to attempt that skill. I acknowledge Dr. Woods' observation, but really, of course, one more often than not misjudges it — you get the feed back later. I think to fly under the banner of "participation of an accused" the justification of 8 challenges, which in trials of five accused on "omnibus" conspiracy trials where there can be 40 challenges, and where more often than not the judges have to send the bus down from Hospital Road up to Taylor Square to get down another 60 jurors, really ignores the reality of the situation. I do not think that it would be proper, of course, to totally abolish it, but as Paul Byrne acknowledges in his paper perhaps a reduction to three. I note that the criticism that Mr. Byrne made, and that the Commission made, was in relation to that particular murder trial where there were an inordinate number of challenges made by the Crown in order to get a particularly typed sexual majority on the jury. If that be the type of criticism that is to flow, then what is good for the Crown is good for the accused.

In relation to the question of discharging the jury immediately upon verdict, it always seems to me to be peculiar that one invites the public into the criminal system by forming part of the jury, and then tells them: "You deliberate and put out of your mind questions of prejudice either for or against. You put out of your mind emotion, you decide it on the issues of fact, you decide it on the directions of law that the trial judge gives to you", and then at the end say "Thanks for your

participation but you are not entitled to know what is now to happen. You are not entitled to know if perhaps you have had some lingering but not reasonable doubts before you reached your decision to convict, but perhaps your conscience will be bolstered when you discover this man has 16 convictions for the same offence, or alternatively perhaps your consicence might be tickled next time you come on a jury and discover, having acquitted him, that indeed he also had 15 for the same type of offence". That is not meant to be that outside the bounds of similar fact one would go to the jury with somebody's criminal record, but it is an acknowledgement that a jury is entitled to know what happens, they are entitled to know what the next step is. In my experience they are left there as members of the public because the almost invariable direction is given: "Ladies and gentlemen of the jury, thank you for your service, go with the Sheriff's officer who will give you a small token of the community's appreciation. You are now free to leave. If you wish to remain you are entitled to do so".

A third point that I would like to raise in relation to jury trials is this: that having been involved over the past couple of years in a number of inordinately long trials, for example a three month trial in the Supreme Court last year, it is absolutely remarkable that we now let members of the jury have a piece of paper and a pen and they are free to take some notes. Counsel, of course, are not ready to resume cross-examining the next morning unless they have already got the transcript, and if the transcript was not available for various reasons counsel cannot resume cross-examining. Of course, I exaggerate because there are those who would continue to do so, but the point simply is this, that the system so far as the lawyers and the judges are concerned cannot continue without the transcript. But for a jury asked to retire two weeks before Christmas when the indictment was read in the first week of September, we expect them to decipher their scrawled notes, to ignore their etchings of the Crown prosecutor and the defence counsel, and to try and remember, if they could take shorthand, precisely the nuances that occurred throughout the trial. Similarly we have in the situation, and I will not go into it in any great detail because it will come up in more recent trials that are about to occur, where the juries are not able, except by consent, to retire with copies of transcript of intercepted telephone calls. The fact of the matter is that there are now trials in which 30 and even more hours of relevant conversations are relied upon, and the juries, unlike the judges and those who participate in the trials, are not, except by consent, permitted to take copies of the transcripts of those recordings but are expected to take the recordings out into the jury room and play them. In seeking to defend the jury system, as I would endeavour to do, those types of problems can only lead to questioning about the facility of the jury system and its continued effectiveness.

Mr. Byrne in his paper refers to the fact that there has only been a 3% level of disagreement in jury trials over a period of statistical analysis. That figure does not take into account what I would perceive to be the inordinate number of jury verdicts, unanimous verdicts, which are given immediately after luncheon adjournments and shortly before the judge threatens for the second time to lock the jury up at night. One finds that cuts both ways. I had an experience for an accused earlier this year where on an armed robbery trial he ran a defence that he had been forced to sign the records of interview. It was the Thursday before Easter, and, of course, when the jury retired at 9.45 a.m. and had not returned with a verdict by dinner time or tea time one thought one was sitting pretty. At all events when it got to 10 p.m. one was convinced that perhaps somebody had a reasonable doubt.

When the jury was told that was it, and they came back with a conviction at 10.30 p.m., one was left with a sour taste in one's mouth which certainly does not show up as one of the 3% disagreement. It is not the only way it occurs, and it certainly occurs for the prosecution as well. It is invariable that one finds, to my experience, an amazing number of verdcits where after perhaps a day's deliberation the jury are told that it costs a lot of money to run a trial, and before they are sent off with the officers to a motel asked if they can reach a verdict in the next half hour. It is unbelievable the number of verdicts that can be obtained in that last half hour before they are sent off to the motel for the night. That, of course, does not show up in that 3% of disagreement, it shows up as an unanimous verdict whether it was a conviction or an acquittal, and perhaps it has not found its way into the Commission's deliberations.

Brian Roach, Solicitor for Public Prosecutions

I might be able to throw some light on that 3% figure that is being talked about. I notice that Paul Byrne indicated that that figure had been arrived at after an assessment of a 40 or 50 year period.

Paul Byrne

We did a survey which ran from September to December 1985. We looked at some earlier surveys, one which was conducted in 1934, one which was done in 1977, and one in 1972 but they were all pretty similar rates. It was not an accumulation over a 50 year period, but the oldest one we had was 50 years ago.

Brian Roach

I had a look at the results for Sydney District Court over the period March, April, May of this year and of the 46 cases that have gone to trial and been disposed of in that period there were only two disagreements and that is about 4.3%. I know that is still a low percentage, but in relative terms, it is still a good deal higher than 3%.

I suggest to you that it is over 30% higher than has been suggested in Paul Byrne's paper which is a fairly significant increase. Over the period of last year the percentage of disagreements is a little bit higher at 4.9%. Again it is all a question of relativities. There are at the moment, 3,000 cases awaiting disposal in the District Court in New South Wales. Now at Paul Byrne's figure of 3% that is still in the order of 100 of these trials resulting in a disagreement. If one considers that the average length of a criminal trial, and this is a conservative estimate, is something in the order of 3½ days and it costs somewhere between $2-$3,000 a day to run a criminal trial, we are literally talking about millions of dollars. Although Dr. Woods tries to dismiss the notion that one should not look at the purse strings in considering an issue like this, it nevertheless must be a very relevant issue. I think it is particularly relevant when generally the arguments for and against majority verdicts are fairly delicately poised with good points on both sides. I suggest that ultimately it should come down to this financial consideration. It is a very real one and I think for that reason the balance should swing in favour of majority verdicts.

David Neal, University of New South Wales

I would like to express reservations about the Law Reform Commission's proposal to allow defendants to waive jury trials. That proposal seems to me to sit ill with your concern about the public accountability and the public susceptibility of

the jury system. It is particularly the case when the proposal is to allow that right of waiver in the cases which attract a lot of publicity and are therefore the most controversial. It seems to me that in many ways if you are concerned about the general acceptability of the criminal justice system that those are the very cases where you would want juries, because that is the most acceptable way to the public, on your assertion at least, for deciding such cases. There is a subsiduary issue here which seems to be an unstated premise that jurors are less able to deal with the publicity surrounding these cases than are judges, and I think that has not been substantiated by you. Indeed, I would have thought that 12 people being directed to put publicity to one side might stand a better chance of overcoming the effects of that publicity than one judge. I for one do not accept the proposition that judges are immune from public controversy to any greater extent than general members of the public.

David Thorley, Office of the Director of Public Prosecutions

I find myself in some agreement with Mr. Parnell and adopting what Mr. Nelson said. As we all know the jury is a tribunal of fact. Instead of requiring a jury to give a verdict of 'guilty' or 'nor guilty', why not require the jurors to make specific findings of fact, which the judge can then interpret, as a matter of law as to whether or not the proven facts amount to a verdict of 'guilty' or 'not guilty'? This would seem to solve the problems both of, first, juries not understanding the judge's decision and also allowing the juries to deal with the factual issues which comprise specific defences; and secondly, there is a middle road in satisfying to some extent a perceived need for reasons for a jury's decision.

Ivan Potas

A general comment about that last question is it seems to me, that if we are going to legitimise the jury system it should be the tribunal that makes the decision on verdicts and it seems to me that this cannot be done if the judge is to have the last word. You would have to ask the jury questions one at a time presumably, or you would have to give the jury a whole list of questions and it could say "Yes, we think that the accused was at the scene of the crime", "Yes, we believe he took X amount of money", and so on. Is it not just as simple to ask them whether the elements of the crime are present, and then, if they are satisfied that those elements are present, ask them to return the general verdict of guilty? Nothing is to be gained in throwing the ball back into the judge's court.

In my presentation I spoke about the complexity of some jury trials — that needs to be put in perspective. It seems to me that in most cases trials do not involve great complexities, and that in the majority of cases jurors have no difficulty carrying out their duty. I am reminded of an old case before Mr. Commissioner Kerr in the 19th century when he was directing the jury and what he said was something like this: "Gentlemen of the jury, the accused stole the duck. Consider your verdict". We laugh at that because the judge is usurping the jury's function. I believe we still want the jury to make the primary decision upon guilt, and any lesser role is quite unsatisfactory.

Tom Molomby

That sort of proposal would obviously tend to take away from the jury the consideration I drew attention to, and which is the power to say 'not guilty' even when the law and the facts say 'guilty'. I am not sure that one can entirely put aside

history in these matters. History can be regarded as accumulated wisdom (or accumulated acquiesence) but there was a great historical struggle which culminated in 1792, which might seem to some people to be a long time ago, in the Act which because known as *Fox's Libel Act* in prosecutions for defamation which had a great political significant at the time. It involved a struggle to put into the hands of the jury the power to find the general verdict of 'guilty' or 'not guilty' rather than being confined solely to the issue of whether or not the publication had been made, which was the state which obtained until 1792. I think you are perhaps trying to wind back history and that might not be a terribly good idea. I would certainly be against it for the reasons I indicated in my paper.

Jeremy Kinross, Barrister-at-Law

Do the members of the panel think that there may be a possibility that juries may get it less wrong with the possible introduction of legal studies in schools in 1988? We will not of course see an immediate effect but if juries become more familiar with the legal system they may therefore get it less wrong. Is any member of the panel aware of the effect of the introduction of the subject in Victoria?

Ivan Potas

I might just say on the question of education the literature on juries seems to indicate there is a positive correlation between understanding and education. Those with education are better able to understand technical evidence, or complex instructions than those with limited education or schooling.

Chairman

Is there discussion on the point that Mr. Molomby makes about the desirability of jurors having an ultimate freedom to return a verdict of 'not guilty' in a case may offend their sense of community responsibility and he has cited the *Ponting* case in England. There is a marked trend in this State by juries not to convict in cases of abortion where the accused is a legally qualified medical practitioner. It was quite an observed trend even though the Crown case may have been quite strong. Are there any views about the desirability on the broad issue of whether juries ought to be free to express community conscience by a verdict of 'not guilty' in a particular prosecution which they may regard as abhorrent to our democracy?

John Parnell, S.M.

I cannot see the point in having a tribunal if it is not prepared to honour its oath. The jury are charged to bring in the verdict according to the evidence and the High Court covered this quite clearly in *Gammage's* case in dealing with the merciful verdict.

Chairman

The point I was making does not convey doubt as to the existing state of the law. The question I raise is whether we should free the jury from the constraint. At the moment if they give way to their sensitivities they may then be recreant to their oath. Should we free them? It is not a question of what is the law. We all know what the law is. They are bound to give a verdict according to the evidence and the law but is that an undesirable constraint? I don't suggest that I think it is. I merely raise it for discussion.

John Parnell, S.M.

There would be no point in having the tribunal. You might as well toss coins.

Dr. G. D. Woods, Q.C.

When Mr. Thorley from the Director of Public Prosecutions Office said the words he did I (apparently like Tom Molomby) thought myself translated back in time. There was indeed an enormous constitutional battle fought over this very question. The right for the jury to bring in a general verdict is one of the fundamental pillars of the jury system. If you do away with that you might as well have some other system entirely. I would not agree with the proposition, and I do not think Mr. Molomby would advance it, that the jury should be told that they can do what they like regardless of the evidence. I do not think he would go that far. I think that is a possible view. Sometimes one feels that is what they ought to be told, but, of course, if it cut both ways you could have plaintiffs and defendants and prosecutors and defence counsel inviting the jury to ignore not only their oath but all the evidence and just find in accordance with whatever particular form of prejudice seemed to influence them at that particular time. That would be undesirable but, by the same token there are situations where public opinion about a particular matter is so strong that law reform via the parliament is snagged up in complex and insoluble political difficulties, as in the case of the abortion issue here some years ago. In country areas, in cases of cattle stealing (for example) juries (even though they are told by the judge and the counsel for the prosecution and the defence that they must follow the evidence and follow their oath) often will not convict. In my opinion, the right of the jury to give a sincere verdict is fundamental to our democracy. I think that any reversion to a system of special verdicts (which is what Mr. Thorley is advocating) would be entirely retrograde. The suggestion is to be deplored. I hope it is not seriously being advocated.

The Honourable Mr. Justice Adrian Roden

I was interested in what Mr. Potas had to say (especially when he was quoting me!), about what I think is one of the major problems that we have with regard to jury trials today. I find it embarrassing when, as I frequently do, I find it necessary to apologise to a jury because of the complexity and seeming nonsensicality of the directions which I am bound to give. It has been suggested that the search should be on for a simpler form of directions to cover the complex rules. I think that is a contradiction in terms. I do not believe that complex rules, particularly those of Viroesque proportions, admit of simple explanation.

That is not the only reason for which I say that the solution is to be found in simplifying the rules, rather than the means by which the rules are to be explained; and I can perhaps draw on Mr. Potas and his paper in support of that. At page 35 he said, if I quote him correctly, that the partial defences — as he terms them — of diminished responsibility, provocation, and excessive self-defence in homicide cases, are valuable because they enable the jury to fine tune its verdict to the perceived moral culpability of the offender. I believe that that is the purpose of those partial defences, but I ask, rhetorically of course, "what have the Viroesque rules to do with the moral culpability or the perceived moral culpability of the offender?"

We use juries as representatives of the community. We assume, and this is the basis of those partial defences, that the community believes that there are cases of homicide which would otherwise be murder but which ought to be regarded as

manslaughter only, because of the presence of elements of provocation, abnormality of mind, or a self-defence situation to which the offender has responded excessively. If those laws do reflect community attitudes, then it seems to me that it is the representatives of the community on the jury who should decide in each case whether the provocation is sufficient to be regarded as reducing the offence from murder to manslaughter, whether the self-defence situation to which the offender responded excessively is sufficient for the purpose, or whether the abnormality of mind is sufficient for the purpose. I think it is with a degree of arrogance that lawyers, and judges in particular, direct juries as to the circumstances in which they may be of the view that the moral culpability is sufficiently diminished to warrant the lesser verdict.

And indeed the law, it seems, is being inconsistent in requiring juries to examine complex rules before determining whether the lesser verdict will be returned. Reference has been made to *Gammage's* case. Before 1969 is was regarded as the right of every person charged with murder to have the jury informed that, quite apart from all principles of law, they had the power to return a merciful verdict of not guilty of murder but guilty of manslaughter. The effect of *Gammage,* as I understand it, is to say that juries do have and do retain that power, but they must be told. Twelve years later in this State, the Court of Criminal Appeal in *Schneidas'* case said: "Well, they can be told if they ask, but not otherwise." And that is perhaps as illogical though not as unsatisfactory as in the *Greciun-King* situation with regard to the unsworn statement.

If we do acknowledge that the jury has the power to say "manslaughter" when the facts and the law add up to "murder", and with Mr. Molomby and Dr. Woods we acknowledge that the jury has the power to say "not guilty" although the facts and the law add up to "guilty", why is it that in these special areas, or indeed in any area, we find it necessary to seek to impose upon juries the task of behaving like lawyers, and handling complex rules in order to make that moral assessment?

It seems to me that there are two possible ways of going about trying to explain extremely complex propositions of law to a jury, and there are two possible outcomes.

One way of going about it is to try to get the jury to understand. That involves looking at the jury, trying to assess what that jury would understand, giving illustrations to the jury, repeating where necessary, and trying hard to explain in words that might get across to the jury. Two dangers flow from that approach. One is that, like the students at legal studies courses in our secondary schools, the jury will be given that little knowledge which my neighbour commented before I rose can be a very dangerous thing. They can believe that there is some difficult principle with which they had to grapple; they may try, and they may fail. The other possibility, of course, is that the efforts that the judge makes to explain to his jury, within the context of his trial, will involve the use of different words from those that can be found in any of the reports or "standard directions", with the attendant risk that the appellate tribunal will not be satisfied. They are the two dangers of really trying.

Now, if you do not really want to try to help the jury, what you can do is pick up the appropriate volume of C.L.R., and read Mr. Justice Mason to the jury, with the full knowledge that there is no possibility whatsoever that they will know what you are talking about, but with full confidence that when it gets up to the 13th floor, no one will be able to find anything wrong with those directions. That may sound

odd; it may sound amusing. But to those who are close to the activity, it probably sounds too terribly true.

If we have juries as representatives of the community, to make decisions on behalf of the community, we should call upon them to make decisions that they can understand in accordance with their methods and their attitudes. If on the other hand we want decisions in serious criminal trials to depend upon whether the facts fit into the framework of excessively complex legalistic rules, then we must have complex legalistic people and minds to determine them. Lawyers and judges, I have said, are arrogant; and I believe that they are, in their attitude that their methods and *their* approaches can properly be imposed on the rest of the community.

Within the Law Reform Commission, in its discussion of "Juries in Criminal Trials", there is one point on which I won. (I think there were actually more than one, but there is one in particular.) The suggestion was made that judges should be required to give juries a glossary of terms, explaining the meanings of commonly used legal terms likely to be heard during the course of the trial. What I believe to be the better view, and the view that prevailed, is that it is the obligation of the judge to use language that the jury will understand, and not require the jury to learn the judge's language. It is because of that approach that I do not go along with Mr. Potas so far as standard directions or pattern directions are concerned. The appropriate directions in any case will have to be tailored, in my view, to the circumstances of the particular case; and if that need is ignored, then I believe that the most fundamental principles behind the art of communication are being ignored.

The difficulty with these complex rules, I believe, is that they are unsuitable for jurors. It is not that we are cleverer than they are, that they cannot understand though we can; it is simply that they impose on jurors a method of thought and an approach which is not natural to them.

And I wonder if those who advocate the use of written directions have pondered on how inconsistent this is with the attitude of the law in other fields. If in a trial in the civil jurisdiction there is a statute to be construed, a contract to be construed, or some other document the meaning of which is to be determined, then whether or not it is a document written in legalistic terms, the law says, as I understand it, that it is the duty of the trial judge to determine what that statute or what that document means. That is a question of law, and not for the jury. But when it comes to criminal trials, a document containing the six points in *Viro,* or a document reproducing section 23A of the *Crimes Act,* or a document setting out some other complex principle of law, is to be handed to the jury for them to make of what they will. This seems to me to be inconsistent. And more importantly it seems to be inappropriate.

We have jurors there because we want to obtain the assessment of the community on the particular trial. If that is so. I believe it will not be obtained by the use of the type of technical, complex direction presently used.

David Nelson

Might I say I thoroughly agree with everything Mr. Justice Roden said. The only thing I wish to add is, and Mr. Byrne may not be aware of this, applications under s.365 never succeed and I have not heard one made for at least ten years.

David Thorley

Both Mr. Molomby and Dr. Woods refer to my proposal taking us back several hundred years. I find some inconsistency in that comment when the same people would advocate the retention of the unsworn statement from the dock, when we consider that it was introduced to overcome the inability of an accused person to give evidence on his own behalf. Surely, now that an accused is a competent witness, does not the same logic require the abolition of the unsworn statement?

Greg James, Q.C.

What has been said by His Honour Mr. Justice Roden concerning the form of directions is indeed only one example of the problem that is experienced by juries in trials at present. His Honour is well aware, as every practitioner is well aware, that the way in which trials commonly commence in New South Wales is for an incomprehensible document called an indictment to be read to a jury. Taking a simple version of it in the form of trial that occurs daily in this state an accused may be charged with the offence that he did on such and such a day, say, he did somewhere supply a particular drug. If you examine the Act which defines the offence behind that charge there are some 162 ways in which that offence can be committed. A Crown prosecutor will then rise and in a very short and very vague opening, because he does not really know just what the police officers will say and what record of interview may or may not get in, explain to the jury that the task of finding the facts is for them and he will then call evidence. Eventually counsel will address the jury and at that stage the factual issues may start to crystalize out or may get more confusing. Finally at the end of this confusing experience amid the directions on law the jury will have to look at what facts are relevant by casting their memories back without transcript. That is the format in which they go out to the jury room. If there are only 4.9% disagreements then we have very intelligent and capable juries.

Paul Byrne

I think the matter that I should say something about is the question of challenges. The recommendation that the Commission made has been looked upon unfavourably by three speakers, Mr. Nelson, Mr. Melham and Dr. Woods.

I should explain that the way the Commission approached this issue was to ask what the current system of exercising peremptory challenges actually achieves. The answer that we found was that it does not achieve very much. We also looked at other aspects of the process of jury selection with a view to ensuring that the quality of representativeness was preserved if not enhanced. One of the things we looked at for instance was the practice of "jury vetting" as it is known in the United Kingdom, where, least in certain trials, the prosecution are given the names of the potential jurors and then given the opportunity of checking out the backgrounds and previous histories of those people to see whether or not they are, from the prosecution's point of view, suitable people to serve on the jury. We concluded unanimously that that sort of practice should not be permitted in New South Wales. We also looked at whether or not there were other processes or other procedures that might be used to achieve some of the legitimate objectives that the peremptory challenge was said to have. What we ultimately decided was that there was really only one reason why the process of peremptory challenge should be preserved, and that is the reason that Mr. Nelson, Mr. Melham and Dr. Woods have referred to,

that is that the accused would feel that he had some participation in the jury selection process. It then became something of an arbitrary decision as to what the extent of that participation should be. But our final conclusion, and I should emphasise that it was not an unanimous conclusion, it was only four of the six members of the Commission, was that the right of the accused to participate in the jury selection process would be served by him having three challenges. That would also at the same time prevent the kind of thing happening that occurred in the *Georgia Hill* case. I think I can say most of us, if not all of us, were concerned about that. We took it from the basic principle that representativeness was desirable. There was no principle that the accused or the Crown had the right to the jury of their choice, but there was merit in the proposition that the accused should have some participation. The final number that we came up with in our recommendation is, as I said, an arbitrary one and may represent something of a compromise but that is the sort of reasoning that got us to that conclusion.

The question of costs did not ever really come into it at all — it was very much a subsiduary thing. I appreciate what Dr. Woods said about more subtle unconscious influences. All that I can say is that it was not one that was aired in the course of our discussions.

One other matter I should make comment on. The point that David Neal made about our recommendation to permit an accused person to make an application to be tried by judge alone. He criticised that on the basis that it would reflect poorly upon the jury system, that in some way jurors were less able than judges to put prejudicial material out of their minds. The most important reason why we recommended that was because we could see situations where an accused person would legitimately feel that imposing a jury trial upon him would be doing him an injustice. The accused would not feel he could get a fair trial from the jury but may feel that he would get a fair trial from a judge. If that was the view that was taken and was based on some legitimate ground, then, as I said, it was something that we thought should be accommodated within the system.

On the question of majority verdicts, just very briefly in reply to Mr. Kinchington and Mr. Roach, the arguments about majority verdicts have been very thoroughly aired over a long time. Ultimately it comes down to a question whether you consider unanimity to be a desirable principle or not, and if it is desirable how desirable it should be. I would suggest when talking about statistics that majority verdicts, if you are talking about 11 to 1 majority verdicts, are no complete answer to the problem of jury disagreements. In all the cases that I have ever been involved in where there have been jury disagreements, the disagreement has been along the lines of 9-3 or an even wider distribution so that majority verdict would not solve those problems. Our figure of 3% might be reduced somewhat but it certainly would not be eliminated by introducing majority verdicts.

Ivan Potas

I make two basic points in my paper: the first is that the law needs to be accurately stated. If it is not accurately stated then it is likely to be reversed on appeal or there is likely to be a miscarriage of justice.

The second point is that the law needs to be understood. In this regard I agree with Mr. Justice Roden at pages 75-77 that there is an obligation on judges to speak the jury's language. There are difficulties. If the law is complex how do you speak the jury's language? My submission is that if guidelines were to be developed so that much of the complexity in the law could be put into simpler language, and aids

such as flow charts and the like could be used, and complex questions broken down into a series of simple ones, it may then be possible to communicate more effectively with the jury.

The Americans have made progress in this area, but here in Australia little research has been conducted on jury comprehension. In my submission, and with due regard for the wise words of Mr. Justice Roden, the time has come to redress this situation. The development of guideline directions should be given top priority.

Tom Molomby

I would like to address an issue which I did not cover in my paper but which has been addressed at some length in the discussion, and that's the question again of majority verdicts. I would, with respect to all of those who have spoken, *not* agree that the arguments are more or less evenly balanced or, indeed, that there is anything really that should be argued about. I would suggest to you that majority verdicts are a breach of a very fundamental principle, indeed, as I see it, *the* fundamental principle on which our system of criminal justice is constructed, and that is that while convicting as many of the guilty as we possibly can we should take all steps to ensure that no innocent person is convicted. I suggest to you that majority verdicts will inevitably result in the conviction of the innocent. It is impossible, I submit, to reconcile a majority verdict with the proposition that no innocent person will be convicted. If you want to reconcile the two, you will have to say that the minority on a jury will never be right, and when I say "be right" I do not mean only in the sense of being right that on an intellectual evaluation the evidence does not satisfy the burden of proof. I mean "be right" in some circumstances on the issue that the person is, in fact, innocent. That is what I am talking about. Unless you are to say, I repeat, that the minority will *never* be right, a majority verdict will result necessarily sometime in the conviction of the innocent.

I suggest to you that that proposition embodies an authoritarian assumption which cannot be justified. Minorities in history have been right and minorities in actual trials in our courts in actual jury cases have been right. There are some examples in our recent history. May I point out that there is a fundamental lack of logic in the proposition that majority verdicts are acceptable.

If you are going to avoid convicting the innocent you have to say that a minority of one or two (which seems to be the form in which it is usually suggested) can never be right. But if you are going to draw the line there, the logic must be — assuming that there is logic in it — that while one or two can never be right, three or more might be. Otherwise why draw the line at one or two? Where is the logic in that? I submit that is fundamentally irrational and further demonstrates that majority verdicts breach the great principle that the innocent should not be imperilled.

In Scotland, where they have had majority verdicts for many years, they follow the logic (if there is a logic) of the majority verdict through and they have a simple majority of the jury (which they call panel, and which has 15 members, not 12). May I remind you that two of the greatest and best recognised miscarriages of justice of this century have been Scots cases. One involved a man called Oscar Slater who was in Peterhead for 19 years for something he did not do and is now recognised as one of the great mistaken identity cases. The other is the case of a man of much more recent times called Patrick Meehan who again was convicted of something which he very clearly did not do and, finally, I might say was pardoned. Both of those convictions rested on majority verdicts.

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