Reintroducing a criminal jury in Japan

Reform lessons for us all?

By Mark Nolan & Kent Anderson

Law reformers in Australia and elsewhere continue to attempt refinement of the nature of lay participation in criminal justice.

Law reform interest is mirrored in empirical jury research (eg, mock trials)[1] and other international comparative jury research.[2] In NSW alone, several current or recent inquiries by the NSW Law Reform Commission (NSWLRC) involve an investigation of jury trial procedure.[3] In addition to these current references, the multidisciplinary inquiry by NSWLRC researchers led them to recommend retention of unanimous verdicts in NSW criminal jury trials.[4] However, the NSW legislature did not accept these recommendations, legislating to permit majority verdicts in NSW criminal jury trials.[5]

One of the NSWLRC reviews, the *Role of Juries in Sentencing*, involves similar challenges and controversies to those surrounding current criminal trial reform in Japan. In this new era of Japanese criminal justice, a quasi-jury system, called the *saiban-in seido*, will reintroduce lay participation in serious criminal trials.

Introduction and critique of these Japanese reforms is the primary focus of this article. However, we begin our discussion by emphasising the relevance of the Japanese reforms and the Japanese reform process, for Australian law reformers interested in increasing the level and efficacy of lay participation in criminal justice.

Relevance of Japanese jury reforms for us all?

In a speech to open the Law Term on 31 January 2005, NSW Chief Justice James Spigelman suggested that it may be desirable to increase lay participation in the sentencing process to improve public confidence in the administration of justice, the quality of the (jury's) verdict decision, and the quality of the (judge's) sentencing decision.[6]

Chief Justice Spigelman suggested that low rates of lay participation in justice could mean that:

> 'public respect for the judiciary is diminished by reason of ignorance about what judges actually do, particularly, in terms of criminal sentences that are imposed.'[7]

Chief Justice Spigelman detailed his proposed jury reform:

> 'What I have in mind is the development of a system in which judges consult with juries about sentencing. There was a tradition in the United States that many states had juries which actually imposed sentences. Now, only half a dozen states continue that tradition, although there have been recent calls for its return.[8] I am not suggesting anything of that character here. The scope of relevant considerations is such that sentencing requires the synthesis of a range of incommensurable factors. This cannot be done by a group, without an undesirable process of compromise. Ultimately, an experienced criminal judge must decide, often quite instinctively, where the balance should lie.
>
> 'What I am proposing is an *in camera* consultation process, protected by secrecy provisions, by which the trial judge discusses relevant issues with the jury after evidence and submissions on sentence and prior to determining sentence...

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> 'I put forward this proposal tentatively. It requires detailed working out, perhaps by means of a reference to the Law Reform Commission. It is not possible to predict all the ramifications of such a significant change. Legislation should authorise the adoption of the system at first on a trial basis. This is what occurred a few years ago with a system of Sentence Indication Hearings, which looked good on paper but which was eventually abandoned.'[9]

Chief Justice Spigelman's hope was realised when NSW Attorney-General Bob Debus referred the inquiry *Role of Juries in Sentencing* to the NSWLRC on 25 February 2005. The NSWLRC's Issues Paper 27 was released in June 2006.[10]

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At least two questions should be asked about this reform proposal. First, can we really improve civics education via juror participation in sentencing if the prevalence of criminal jury trials in Australia is around 1% of contested jury trials? Second, can the resource and logistical implications be managed? As the Chief Justice himself suggests:

> 'I should note that the proposal has resource implications. It will not work without additional resources. It will require the recall of such proportion of the jury as is able to return to hear the evidence on sentencing. One of the factors which delays the outcome of criminal trials in this state is the fact that the Probation and Parole Service requires a period of six weeks after verdict before it can provide the information about the offender that is required for the sentencing task. Further delays arise because of availability of counsel. It is undesirable for a jury to wait for a long period before being recalled for a process of consultation about sentencing. Additional resources are required to ensure that such a process can be carried into effect in a timely manner.'[11]

Sometime before May 2009, a new criminal law will allow Japanese citizens to deliberate on verdict and sentence in mixed decision-making groups with a professional judge or judges. In contrast to the low rate of criminal jury trials in Australia (around 800 trials per year), the predicted number of Japanese *saiban-in seido* criminal trials is likely to be in the order of 3,700 cases per year.[12] Unless the low rate of Australian jury trials were to increase, perhaps any civic education or public confidence benefit of increasing lay participation in justice will be more discernable in Japan than in Australia as a result of implementing Chief Justice Spigelman's vision.

Chief Justice Spigelman suggested that a pilot period may be advisable before full implementation of his jury trial reform. Such a pilot is not part of the Japanese jury reforms. However, there are lessons to be learned from the nature of the Japanese criminal justice reforms. For example, the Japanese *saiban-in* system will be introduced after a generous five-year preparation period that allows for deep discussion, promotion, and refinement of the skeletal system as described in the enabling law.[13] Reflecting the importance of such a change, the only other time Japan has used such a five-year implementation period was the last time they introduced an (all-citizen or pure) jury trial that was available between 1928 and 1943.[14]

The Japanese reforms

In this section we introduce the basic elements of the enacted *Lay Assessor Act*[15] and all article references are to this enabling law. Many procedural details are awaiting clarification by the Supreme Court Rules expected to be drafted sometime between mid-2007 and mid-2008 as indicated in an internal document.[16] In the preparation period, a number of high-profile marketing and information campaigns have been launched with the following images and text being used.

Figure 1

Promotional advertisement. Text reads *'Watashi no shiten, watashi no kankaku, watashi no kotoba de sanka shimasu'* (I will participate through my own observations, my own perceptions, and my own words).[17]

裁判員制度

Figure 2

Logo for the lay assessor system.[18] The logo design involves two circles, representing the judges and lay assessors. The circles are linked to portray the cooperative approach to justice that is to be taken under the new system. The circles are also in the shape of the infinity symbol (∞), representing the immeasurable results to be gained from cooperation between judges, the legal masters, and *saiban-in*, the representatives of the people. They are also in the shape of an 'S' for '*Saiban-in*'. The colours chosen were friendly pastels: a red-coloured circle symbolises liveliness and enthusiasm, while a blue-coloured circle signifies level-headed judgment. Neither colour is assigned to the judges or lay assessors specifically.[19]

Cases heard by lay assessors

Two general categories of serious crimes are covered: those punishable by death or imprisonment for an indefinite period or with hard labour;[20] and those in which the victim has died due to an intentional criminal act.[21] The law does not provide the defendant with the right to waive a lay assessor panel.[22] When a defendant is charged with crimes both within the class of eligible *saiban-in* cases and outside it, the matters may be heard together by a *saiban-in* panel.[23] Thus, lay assessors will occasionally be asked to rule on matters outside the strict definition of applicable crimes.

Selection of lay assessors

Lay assessors are to be randomly selected from those 20 years and older listed on electoral rolls within the municipal jurisdictional divisions.[24] This definition of eligible lay assessors also means that permanent residents in Japan, including the large minorities of Korean and Chinese descendents, will not be eligible to serve.[25]

From those eligible, a number of people are excluded: those who have not completed compulsory education through Year Nine; those who have been subject to imprisonment; those who would be significantly burdened in their execution of lay assessor duties;[26] lawyers and politicians.[27] Also, people aged 70 years or older, currently enrolled students, and people who have served as a lay assessor in the past five years are free to decline service.[28] The court may excuse those suffering from serious illness or injury, or those with family childcare, nursing commitments, important work obligations, or unavoidable social obligations such as attendance at a parent's funeral.

A US-style *voir dire* procedure will also be used for lay assessor selection.[29] A prosecutor, defendant, or defence counsel may request that the court dismiss a lay assessor if he or she fails to respond or responds falsely to selection questions; fails to take the oath; or fails to attend the trial or deliberations.[30] The court may also disqualify persons deemed not able to act fairly in a trial.[31] It is unclear if dismissal based on fears of unfairness will require 'real evidence' in support of the application.

Composition of mixed panels

The *Lay Assessor Act* provides for either panels of three judges and six lay assessors, or panels of one judge and four lay assessors.[32] The full panels are supposed to be the default option, while the smaller panels are to be used where the facts at trial as established by the evidence and the issues identified by pre-trial procedure are undisputed.[33] All involved suggest that particularly when the system is newly introduced most, if not all cases, will be heard by a full panel of nine.[34]

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Powers and duties of lay assessors

Only the empanelled judges are to interpret the law and make decisions on litigation procedure, though lay assessors may comment on such issues.[35] It is notable that lay assessors may question witnesses, victims and the defendant.[36]

Method of deciding verdicts

Unanimous verdicts have been abandoned in the new Japanese system. Decisions are to be by a majority opinion of the panel, but must include both a judge and a lay assessor.[37] Therefore, in small *saiban-in* panels, the professional judge holds a veto. Since matters referred to the small panels will likely cover cases with uncontroversial issues, this power imbalance may not be a concern. In sentencing decisions, if a majority cannot be reached the opinions in favour of the harshest sentence are to be added to those for the next harshest option, until the requisite majority is attained.[38]

One of the major criticisms of a mixed court proposal in Japan was that it would lead to undue deference by lay participants to professional judges during deliberations.[39] The law is silent on strategies to avoid deference levels that render the lay participation redundant. Perhaps the Supreme Court Rules will enlighten. Further promotional material invites citizens to consider the nature of their new duties in any event.

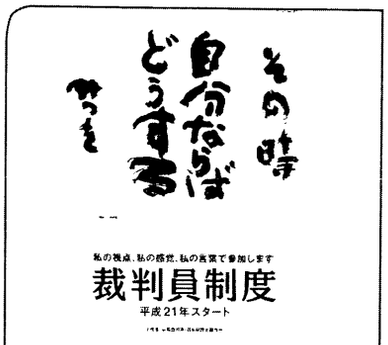

Figure 3

Haiku-like *saiban-in* promotion poster with catchphrase. Japanese calligraphy asks '*Sono toki, jibun naraba, dousuru*' (At that time, if it's you, what will you do?)[40]

Endnotes

1. D Devine et al, 'Jury Decision Making: 45 Years on Deliberating Groups' (2001) 7(3) *Psychology, Public Policy, and Law*, 622–727.
2. N Vidmar, World Jury Systems (2000); M Kaplan and A Martin (eds) *Understanding World Jury Systems Through Social Psychological Research* (2006).
3. See the article by P Hennessy of the New South Wales Law Reform Commission, earlier in this journal.
4. New South Wales Law Reform Commission, *Majority Verdicts*, Report 111 (2005).
5. *Jury Amendment (Verdicts) Act 2006* (NSW).
6. Spigelman CJ, 'A New Way to Sentence for Serious Crime' (Address to the opening of the Law Term Dinner, Sydney, 31 January 2005) <www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman310105>, at 16 May 2007.
7. Ibid.
8. Spigelman CJ cited the following: A Lanni, 'Jury Sentencing in Non Capital Cases: An Idea Whose Time Has Come (Again)?' (1990) 108 *Yale LJ* 1775; M Hoffman, 'The Case for Jury Sentencing' (2002–2003) 52 *Duke LJ* 951; J Iontcheva, 'Jury Sentencing as Democratic Practice' (2003) 89 *Va L Rev* 311.
9. Spigelman CJ, 'A New Way to Sentence for Serious Crime' (Address to the opening of the Law Term Dinner, Sydney, 31 January 2005) <www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman310105>, at 16 May 2007.
10. New South Wales Law Reform Commission, *Sentencing and Juries*, Issues Paper 27 (2006).
11. Spigelman CJ, 'A New Way to Sentence for Serious Crime' (Address to the opening of the Law Term Dinner, Sydney, 31 January 2005) <www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman310105>, at 16 May 2007.
12. Supreme Court of Japan, 'Number of Subject Cases Seen in the District Courts (2003–2005)', <www.saibanin.courts.go.jp/introduction/pdf/tihou_saibansyo_betu.pdf> (in Japanese), at 16 May 2007.
13. K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (*saiban-in seido*): Interim Report on the Road to Commencement' (2006) 21 *Journal of Japanese Law 55*.
14. K Anderson and M Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspectives' (2004) 37 *Vanderbilt Journal of Transnational Law* 935, 962.
15. *Saiban'in no sanka suru keiji saiban ni kansuru hôritsu*, Law No 63 of 2004. The law has been translated into English in K Anderson and E Saint, 'Japan's Quasi-Jury (*Saiban-in*) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials' (2003) 6 *Asian-Pacific Law & Policy Journal* 233.
16. Supreme Court of Japan, 'Image of the Schedule until Enactment of the *Saiban-in* System', <www.saibanin.courts.go.jp/shiryo/pdf/17.pdf> (in Japanese), at 16 May 2007.
17. Supreme Court of Japan. *Saiban-in Seido* [The Lay Assessor System], <www.saibanin.courts.go.jp> (in Japanese), at 16 May 2007.

Continued on page 75

Continued from page 50: 'Reintroducing a criminal jury in Japan'

18. Supreme Court of Japan, *Saiban-in seido no Symbol Mark* [Symbol Mark of the Lay Assessor System], <www.saibanin.courts.go.jp/news/symbol.html> (in Japanese), at 16 May 2007.
19. Supreme Court of Japan, *Symbol Mark no imi* [Meaning of the Logo], <www.saibanin.courts.go.jp/topics/symbol_meaning.html> (in Japanese), at 16 May 2007.
20. Art 2(i) [Subject Cases and Composition of a Judicial Panel]. The law covers cases listed in Art 26(2)(ii) of the *Courts Act*, namely crimes punishable by death, indefinite imprisonment, penalties of minimum of one-year imprisonment and above, hard labour. For example, this would cover murder, arson of an inhabited structure, destruction by explosives, etc. See Penal Code, Law No 45 of 1907, Arts 199, 108, 117.
21. For example, this would cover inflicting bodily harm resulting in death, dangerous driving resulting in death, robbery or assault resulting in death. See S Shinomiya, T Nishimura and M Kudo, *Moshimo saiban-in ni erabaretara: Saiban-in Handbook* [What if you were chosen to be a Lay Assessor: The Lay Assessor Handbook] (2005), 30.
22. This is a crucial distinction from the pre-war jury system where it is argued that that system was undermined by the vast majority of defendants currying the favour of the court by exercising their right to waive a jury. See K Anderson and M Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspectives' (2004) 37 *Vanderbilt Journal of Transnational Law* 935, 963.
23. Art 4 [Handling of Concurrently Pled Cases]. In addition, if the prosecutors change the charges to a non-*saiban-in* offence after a *saiban-in* panel is underway, the lay assessor panel, at the court's discretion, may still determine the issue. Art 5 [Handling of Cases Following Changes in the Criminal Charges].
24. Arts 20 [Notice and Allocation of the Number of Lay Assessor Candidates]; 21 [Preparation of the Proposed List of Lay Assessor Candidates]; *Kôshoku senkyo hô* [Public Election Act], Law No 100, 1950, Art 9.
25. See M Ito, 'Lay Judgment in Practice', *Japan Times*, 27 February 2005, <http://search.japantimes.co.jp/print/features/life2005/fl20050227x2.htm>, at 16 May 2007.
26. Art 14 [Reasons for Disqualification].
27. Art 15.
28. Art 16 [Reasons to Decline].
29. Art 41 [Dismissal of Lay Assessors upon Request].
30. Arts 41(viii), (i), (ii).
31. It is not fully clear what would satisfy this test, but it is assumed that this is related to individuals with strong personal beliefs that would preclude them from being objective.
32. Art 2(2) [Subject Cases and Composition of a Judicial Panel].
33. Art 2(3) [Subject Cases and Composition of a Judicial Panel].
34. K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (*saiban-in seido*): Interim Report on the Road to Commencement' (2006) 21 *Journal of Japanese Law* 55.
35. Art 6(2) [Powers of Judges and Lay Assessors].
36. Arts 56 [Questioning of Witnesses], 57 [Witness Questioning Outside the Court], 58 [Questioning of Victims], 59 [Questioning of the Defendant].
37. Art 67 [Verdict].
38. Art 67(2) [Verdict].
39. See, eg, L Kiss, 'Reviving the Criminal Jury in Japan' (1999) 62 *Law and Contemporary Problems* 261, 262–266; R Bloom, *Jury Trials in Japan* (2005), Boston College Law School Research Paper No 66, <http://pape rs.ssrn.com/sol3/papers.cfm?abstract_id=688185>, at 16 May 2007.
40. Japanese Ministry of Justice, *Anata mo Saiban-in*!! [You are a Lay Assessor Too!!], <www.moj.go.jp/SAIBANIN/>, at 2 April 2006.

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