

CITIZENS' JURIES PAVE THE WAY TO THE LAW COURTS

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Most will recall clearly the day it arrived in the mail. 'You are summoned for Jury Service on (date) at the Melbourne Jury Pool Room...' For some, it is an opportunity to do something important or take on a worthwhile challenge. Others accept the obligation grimly and anxiously. A significant few¹ attempt to sidestep the sudden imposition on their everyday lives.

Whilst thousands of citizens serve on trial juries in Australia every year, most know little about the experience beforehand. The media only broadcasts the verdicts of jury deliberation that involve long, complex or sensational cases. Judges routinely tell juries to set aside notions gleaned from the fiction of television drama which takes significant artistic licence.

Jurors are instructed not to discuss their cases with anybody both during and following the trial. The Jury/Juries Act in each Australian state forbids anybody, especially the media, from identifying and soliciting information from jury members about their deliberation. Covert debriefing between jurors and their best friends or relatives over coffee is conducted in guilt-struck whispers. At least in recent years the courts have made post-trial counselling available.

Such strict secrecy does not apply in the USA, where jurors have made statements to the media and written books after the trial. However, the law and the rules of evidence vary between the jurisdictions, so accounts from overseas may not be relevant in Australia.

Malcolm Knox wrote a book² about his experience on a criminal court jury in Australia. But under the threat of legal action, his publisher forced him to fictionalise much of his account, reducing it to an illustrative rather than authoritative work.

How can citizens learn about what it is really like to serve on a jury? How can the trepidation that citizens feel about jury duty service be overcome with a desire to participate? How can jurors be prepared to be better deliberators?

The citizens' jury

The answers may lie in a type of civic participatory initiative called a citizens' jury³, increasingly convened by governments or their agencies, by research institutes and by non-government organisations to access the views of the general public for decision-making purposes.

The term citizens' jury applies to both the panel of people who deliberate and to the process as a whole

(which will henceforth be abbreviated to CJ), as there is no court or trial *per se*. The CJ process, one of over a dozen participatory methods used to engage citizens, is increasingly popular because it is relatively easy and inexpensive to organise and conduct. Importantly, its outcomes have generally been well received by convenors.

The public policy issue under consideration by a citizens' jury is always contentious. It might be, for example, the allocation of expenditure on public health or the location of a necessary but unpopular public facility. The issue is usually posed as a question, metaphorically referred to as the *charge*. Unlike the binary true/false question of guilt or liability in a law court, the citizens' jury usually answers a question that begins with 'How ...' or 'What ...' To resolve the charge, a citizens' jury has the challenging responsibility to design recommendations.

There is no legislation in Australia which determines the format of CJs, although some jurisdictions elsewhere have institutionalised the process.⁴ The principle author of this article has over a decade of experience in designing, organising and studying CJs. Subtle aspects of the design and practice of CJs can be adapted to each situation. But at the core they are consistent⁵ and intended to be transparent to the stakeholders and the community they affect. A steering committee comprised of stakeholders and process design experts usually has oversight of the whole process, including the recruitment of jurors, the nomination and scheduling of witnesses and the logistics of the event.

CJs can be held in any location that can comfortably hold the jury, facilitator, witnesses, organisers and a few observers. There is no judge, but most CJs have a chairperson who carries the process through its agenda.

In Australia, criminal trial juries carry 12 members, although extras are empanelled for trials expected to be lengthy. Of the states that convene civil trials with juries, which occur rarely, NSW empanels four and Tasmania empanels seven.

On the other hand, the size of a citizens' jury is set by the steering committee and tends to range from 12 to 20 people. Larger groups can retain and share more information and more reliably reflect the diversity of their community, but establish consensus with greater difficulty.

Witnesses are usually experts or stakeholders in the issue. For example, in a CJ convened to make recommendations about the scope of future municipal capital works, witnesses might include local council

REFERENCES

1. Eamon Duff, 'Urgent inquiry into jury system', *Sydney Morning Herald* (Sydney), 1 October 2006. The NSW Attorney-General claims that for 2005–6, '102 400 jurors were summoned but nearly 40% were excused before attending court, another 11% were excused on the day'.
2. Malcolm Knox, *Secrets of the Jury Room: Inside the black box of criminal justice in Australia* (2005).
3. The capitalised term Citizens' Jury has been trademarked in the US by the Jefferson Center <http://www.jefferson-center.org>, but has been freely used in lower-case in Australia to describe many variations of the original process.
4. Planning cells, a variant of citizens' juries, are used throughout Germany. Denmark's Board of Technology routinely convenes consensus conferences.
5. Lyn Carson, 'Improving Public Deliberative Practice: A Comparative Analysis of Two Italian Citizens' Jury Projects' (2006) 2(2) *Journal of Public Deliberation*, Article 12 <http://services.bepress.com/jpd/> at 1 September 2007.

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staff, engineers, advocacy group representatives, environmental experts and business people.

In a CJ, there are no lawyers to direct questions at the witnesses who respond to the court at large. Instead, witnesses engage directly with the jury through presentations and dialogue. Jurors, whilst respectful of the witnesses and moderated by the facilitator, often interject with questions and talk to each other. Some process designs call for the jury to retire for a brief period of private deliberation before returning to ask questions upon which the jury has agreed. Sometimes, all or some of the witnesses are presented as an expert panel for a plenary discussion. However, unlike a town meeting, the process explicitly discourages conflict — the witnesses are there to help the jury understand rather than contest their positions and perspectives.

The calling of experts with conflicting subjective views presents a challenge. For expediency, some court reformers prefer for the court itself to appoint experts and remove from contention facts which are agreed upon by all parties. Others like Justice Downes believe that hearing multiple expert perspectives is important to the court.⁶ For example, the procedure referred to as 'concurrent evidence' is used in tribunals to question multiple experts simultaneously under oath.⁷

Criminal juries were claimed famously by Lord Devlin⁸ to provide 'fundamental protection against the Crown' and to be 'the lamp that shows that freedom lives', but he also wrote that:

trial by jury ensured that [the people] got the justice they liked and not the sort of justice that the government or the lawyers or any body of experts thought was good for them.

CJs specifically provide the means for the public to assess the appropriateness of advice by purported experts and of policy proposals of the unelected executive.

The recommended length for CJs is five days⁹ but almost eighty percent of Australian CJs lasted three and a half days or less¹⁰. The length is pre-determined by the steering committee after considering which witnesses to invite and the fixed duration of each witness session. This is in contrast to a court trial that may have an estimated duration but takes its course based on the evidence which arises.

Because a CJ is not convened in a publicly-funded court, a sponsor is required to cover the incidental costs, including administration, facilities and organising personnel. The sponsor may be a university, research institute, not-for-profit organisation, or the government

body which will receive the recommendations of the jury. Organisers pay attention to the venue and ensure the wellbeing of jurors¹¹. The venue is often made available by the sponsor without direct cost except for catering. Some expert witnesses demand remuneration, while stakeholder advocates usually appear without fee. Jurors may be given an honorarium or receive gifts for their attendance. The facilitator and perhaps a process consultant are also paid for their involvement.

The context for and operation of CJs are quite distinct from their cousins in the law courts. Yet the family resemblance between these two types of juries can be recognised in how they impact their respective communities, how they are assembled and how they work their way towards a resolution. These three ideals of **influence, inclusion and deliberation** are thought to be essential for deliberative democracy, the theory underpinning the design and practice of citizens' juries. These ideals form a useful framework for comparing the two jury formats.¹²

Influence

The outcome of a deliberative, democratic process must influence decision-making towards policy-setting, and ideally be implemented in total. Also, for members of a citizens' jury to perform in a committed and deliberative manner, they must have confidence that they will be influential.

The law courts are designed such that jury verdicts can be immediately implemented. On a defendant found guilty of a crime, a sentence may be passed. To the successful claimant in a civil case, compensation may be awarded. However, the outcome might not be certain, as appeals can be heard in a higher court. But such appeals are only successful if they demonstrate a significant flaw in the process of the original trial or the interpretation of the law.

To legitimise the outcome of a CJ, it is paramount that the process designer ensures that the ideals of inclusion and deliberation are met, and seen to be met. However, the implementation of the recommendations of a citizens' jury depends on the goodwill and commitment of governing bodies. This is more likely when the CJ is publicly endorsed in advance. Otherwise, there is a risk that the recommendations will be rejected or distorted if they do not align with executive judgment. Of course, a local government which implements the recommendations of a CJ on a planning issue is unlikely to have to face citizens later in a tribunal hearing.

6. Justice Garry Downes, 'Expert Witnesses in Proceedings in the Administrative Appeals Tribunal' (Speech to NSW Bar Association, Sydney, 22 March 2006). <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/pdf/ExpertWitnessesMarch2006.pdf> at 1 September 2007.

7. Administrative Appeals Tribunal, 'An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal' (November 2005) <http://www.aat.gov.au/SpeechesPapersAndResearch/Research/AATConcurrentEvidenceReportNovember2005.pdf> at 1 September 2007.

8. Lord Devlin, *Trial by Jury* (1956) 164.

9. See Ned Crosby, *Healthy Democracy: Empowering a clear and informed voice of the people* (2003); and John Gastil, *By Popular Demand* (2000).

10. See Lyn Carson and Phillip Hart, 'An inventory of democratic deliberative processes in Australia' <http://www.actedemocracy.net> at 27 February 2008.

11. See Lyn Carson, *Consult your community – Handbook. A guide to using Citizens' Juries* (2003). Prepared for PlanningNSW, Department of Infrastructure, Planning, and Natural Resources, Sydney.

12. Lyn Carson and Janette Hartz-Karp, 'Adapting and Combining Deliberative Designs: Juries, Polls, and Forums' in John Gastil and Peter Levine (eds), *The Deliberative Democracy Handbook: Strategies for Effective Civic Engagement in the Twenty-First Century* (2005) 120–138.

The cost to governing bodies of sponsoring but not advancing endorsement is that they may be viewed cynically during and after the event. Ultimately, for a citizens' jury to exercise its influence, a devolution of decision-making authority must be granted to the jury, even when the stakes are perceived to be high.

Inclusion

A deliberative, democratic process should be representative of the population and inclusive of diverse viewpoints and values, providing equal opportunity for all to participate.

Candidates for a citizens' jury are typically recruited randomly using either an electoral roll or a telephone listing for a large community. In the absence of conscription, they are invited to voluntarily participate, which inevitably allows for a degree of self-nomination. The candidates are then stratified to match a demographic profile of a given population in terms of age, gender, education, affluence, location and minorities. This calculated diversity leads organisers to claim that the jury constitutes a mini-public.¹³

Law court juries rely purely on randomness which is the ideal as long as there is genuine conscription.¹⁴ But half of those selected gain exemption.¹⁵ Many of the increasing number of casual workers cannot secure roster time off, sufficient wage or childcare coverage. The growing number of independent contract workers cannot step away from their businesses. As well, prospective jurors in trials are subject to peremptory challenge, which may further skew the representativeness of the jury.

Even holding CJs on weekends, as usually happens, still leaves many too burdened with the complexities of modern life and work to participate. The sample may no longer be demographically reflective of the whole population, although stratification can ensure that diversity is achieved.

The justification for random selection persists: that it guarantees a diverse band of people — a very different cohort than if recruitment were dependent on self-nomination. Further, this diverse band is seen to be accountable to the wider community and their own conscience, being mindful of the opinions of their fellow jurors.

Several American scholars and practitioners, including Gastil and Crosby¹⁶, have proposed that randomly selected panels of citizens should be convened routinely in the US to consider both ballot measures and electoral candidates. Few have advocated conscription for CJs although Australian Janette Hartz-Karp has advocated compulsory participation in government-initiated mini-publics. She has envisaged that people will serve 'jury duty' for public policy formulation.

Political parties will come to elections clearly stating those critical problems and opportunities facing the nation they believe will require the co-intelligence of dialogue and deliberation to resolve.¹⁷

The method of jury recruitment can affect the ability to satisfy the ideal of inclusion. If invitations from a

random short list are made by direct telephone call rather than by post, gentle persuasion may be applied to engage candidates. Some will reject such calls out of hand, as with telemarketing. Occasionally they are swayed by the compensation or honorarium that is attached, or the promise of good food during the event. But experience has shown that most of the people who accept do so because the issue or the process interests them or because they believe their vote will genuinely be heard.

Deliberation

The process should provide open dialogue, access to information, respect, space to understand and reframe issues, and movement toward consensus. The type of deliberation which is the basis for CJs is defined as 'discussion that involves judicious argument, critical listening, and earnest decision making'.¹⁸ This is consistent with a trial jury's deliberation.

The jury's final deliberation can be the most challenging period, particularly for a jury that has been given limited direction. It is essential for both trial and citizens' juries that clear guidelines are provided and they are supported to do their deliberative work.

A CJ deliberation is guided by a skilled facilitator. Like a movie score, good facilitation invisibly carries the process forward. Rather than imposing or siding with particular viewpoints, facilitation helps jury members express their views and work with each other to find common ground. Facilitators bring a toolkit of group activities which can help the jury to uncover, organise, frame, analyse, summarise and prioritise information. Most importantly, facilitators encourage jurors to empathetically explore each other's perspectives to get under the skin of the issues and establish where their values and those of the community lie. CJs use a variety of communication methods (for example, audio-visuals and field trips), and encourage critical appraisal of information.

Most courts in Australia supply jurors with a booklet which describes the trial procedure, but little assistance is offered as to how deliberation itself might proceed. The capacity of trial juries to deliberate effectively depends on members of the group making helpful suggestions. This is more likely if some members have experience with group work in their professional or service commitments. Sometimes the foreperson is compelled to take an authoritative lead in organising the deliberation, especially in instigating turn-taking and voting, the typical method used to ascertain unanimity.

With CJ deliberation, a skilled facilitator avoids the use of a majority vote, especially early in deliberation, because it can dampen deliberation and polarise a group into the two most widely supported positions. They:

... usually don't even take a vote until after they've spent some time talking over the case, sifting through the evidence, and explicitly contemplating alternative explanations. Verdict-based juries, by contrast, see their mission as reaching a decision as quickly and decisively as possible. They take a vote before any discussion, and the debate after that tends to concentrate on getting those who don't agree to agree.¹⁹

13. Fung's term for democratic, deliberative processes such as citizens' juries. See Archon Fung 'Varieties of participation in complex governance' (2006) 66 *Public Administration Review* 66–75.

14. Lyn Carson and Brian Martin, *Random Selection in Politics* (1999); and Bernard Manin, *The Principles of Representative Government* (1997).

15. The NSW Law Reform Commission is reported as claiming, for 2005/6, '102,400 jurors were summoned but nearly 40 per cent were excused before attending court, and another 11 per cent were excused on the day'. Duff, above n 1.

16. Gastil and Crosby, above n 9.

17. Janette Hartz-Karp, 'Reflective Panel: Scenario for our Democratic Future' (2006 National Coalition for Dialogue & Deliberation, San Francisco USA, 5 August 2006).

18. Gastil, above n 9, 19.

19. James Surowiecki, *The Wisdom of Crowds* (2005) 178.

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Throughout the life of a CJ the inquiry is constantly made of jury members — have all their questions been answered? This inquiry is missing from the courtroom and jurors are often left with many unanswered questions.²⁰

The task of a citizens' jury is usually challenging. The recommendations they are asked to give arise from careful consideration not only of facts presented to them by the witnesses, but also of the knowledge about their community that they bring into the deliberation. Crucially, their recommendations hinge on community values. To a large degree, their recommendations are an expression of ethical judgment in the utilitarian tradition of the common good.

Many citizens empanelled for law trials believe mistakenly at the outset that their task is to make a moral judgment. One of the authors was a member of a jury in a narcotics case. None of the jury held any sympathy for the defendant. But the evidence presented by the prosecution was circumstantial by its own admission and little more provided sufficient justification for conviction. One juror had an intravenous drug user in the family and attended carrying an obvious vendetta. It required careful effort to demonstrate to the hold-out that the jury's task was to weigh up only the presented evidence in the context of the law rather than overtly impose any personal moral stance.

Both citizens' and trial juries rely on the advice and evidence provided by experts. In the case of a criminal trial, it is the prosecution that frames the charge according to the law and provides the evidence ostensibly to support conviction. In a CJ, jurors rely on the expertise of technologists, planners or other professionals to make their case for change or policy implementation. Sometimes expertise is presented with a zeal that exceeds the objective treatment of the evidence. For example, criminal evidence may be poorly handled or the benefits of civil engineering works may be overstated for a particular community. In a civil trial or a CJ, the jury sometimes has to contend with experts with altercating views. For citizens with only lay knowledge of the subject areas such as forensics, engineering or social planning, it is often a challenge to determine the saliency and veracity of expert views.

Deliberation is informed decision-making which requires effective learning. Adults do not learn by being spoken at for hours on end. The presumption in trials is that the court simply needs to transmit the

facts to a jury, which passively takes it all in. However, jurors often get overloaded with detail and experience difficulty maintaining adequate concentration. Case studies of both citizens' and trial juries²¹ indicate that their capacity to handle complexity is often underestimated, which is not overcome by supplying endless detail but rather by suggesting meaningful and relevant connections.

One New Zealand study²² suggests that standard directions should be amended to 'remind [trial jurors] of the type of questions that they can ask the judge to assist them in their deliberations'. Studies into juries frequently reveal that jurors are unaware of their right to question witnesses through the judge. Clay Conrad writes, 'The education function of juries is thwarted by treating jurors like errant schoolchildren who must be kept under the strict control of the judge at all times.'²³

CJ designers are attuned to adult learning principles and appreciate that learning must be relevant to the learner's life experience. Adults tend to be self-directed with a sense of control over their own learning. Problem-centred learning is far more effective than content-centred learning — asking questions can yield far more learning than listening passively.

It is usual for a citizens' jury to be encouraged to ask questions and for participants to be provided with skills such as strategic questioning²⁴ and an awareness of socially-constructed knowledge. CJs have demonstrated how capable typical citizens can be even when wrestling with complex scientific and technical information — such as genetic modification or energy policies.

Most states and territories in Australia accept majority verdicts from trial juries after completing a minimum period of deliberation without reaching unanimity.²⁵ Those with experience convening public deliberations would counsel the importance of delaying a vote in such situations for the reasons described earlier. Again, jurors need to understand this and direction can be given to this effect.

With the provision of skills, jurors then understand what is expected of them and enter the CJ with confidence. More pre-trial education has been recommended for trial juries²⁶ and this is consistent with CJ practice. A one-day training program using adult learning principles, including a role-play of the jury process would be effective. Even more effective would be the appointment of a neutral, skilled learning facilitator who was able to fully brief the jury on the deliberative process and group decision-making.

20. Knox, above n 2, 316.

21. Mark Findlay, 'Juror comprehension and complexity' (2001) *British Journal of Criminology* 41, 56–76.

22. Law Commission of New Zealand, Report 69 – Juries in Criminal Trials (2001).

23. Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (1998).

24. Fran Peavey, 'Strategic Questioning: An Experiment in Communication of the Second Kind' Crabgrass <http://www.crabgrass.org/site/strategic1.html> at 27 February 2008.

25. Michael Slattery President, NSW Bar Association, interview with Paul Barry, Radio National Breakfast, 3 January, 2007.

26. *Ibid.*

Exposing a trial jury to theories of group process would also be advantageous. Knowing that a group moves through certain cycles as it develops, understanding the fluidity of leadership, acknowledging the importance of task as well as group maintenance — all could be usefully imparted to a jury in its earliest stage. This would give jurors skills they could use in other circumstances. Feedback from CJs indicates that jurors appreciate the acquisition of such useable techniques.

Conclusions

With the experience of trial jury service shrouded in secrecy in Australia and elsewhere, the more open experience of citizens' juries can pave the way to a better understanding of deliberation and less reticence towards participation.

Juries are in decline throughout the world even though Conrad believes the evidence in relation to jury competence suggests that 'bad verdicts' are more likely to be attributable to 'bad lawyering, bad laws, and bad judging' than 'bad juries'.²⁷

On the other hand, the increasing popularity of CJs²⁸ is attributable in part to citizens' desires for greater input into political decisions and decision-makers' willingness to assess or build mandates for particular decisions via mini-publics.²⁹

Some decision-makers have been more willing than others to cede power to typical citizens. The current Minister for Planning and Infrastructure in Western Australia is one example of an extremely willing politician. Alannah MacTiernan (Australia's longest serving planning minister) has convened more democratic deliberative processes, including CJs, than any elected representative worldwide.³⁰

In the UK, Prime Minister Gordon Brown recently announced his intention, as part of his broad embrace of devolution and voter re-engagement, to enshrine CJs into the requisite participative framework for local councils. In addition, the PM wants CJs to become a mainstay process for policy elaboration at the national level.³¹

An analysis of the CJ process adds weight to trial jury researchers' recommendations and indicates ways in which the latter could be strengthened, by tightening selection procedures and creating more deliberative spaces. It was also observed that the influence yielded to citizens in trial juries is something which convenors of CJs can merely envy. This leads to some final comments about the role that trial juries play and CJs could play in a democratic political system.

Whilst there are basic differences between trial and citizens' jury processes, there is considerable overlap in the deliberative experience of jurors participating in each. With more CJs occurring and the experiences of them gaining popular attention, the authors hope that more citizens will be willing to participate. This willingness should carry over to trial jury participation, which will then benefit from more representative inclusion.

Once their task is complete, trial jurors state that this is 'the best thing I'd done all year'.³² Research

has found that trial jurors are changed by their participation in an intensive deliberative process and become more politically efficacious — in other words, jury deliberation changes jurors' civic attitudes.³³ Jury participation provides more meaning and reward than pencilled marks on a ballot paper (often a citizen's only participation in an election).

John Gastil reports on several studies which demonstrate that trial jury service leads people to broader civic engagement. This suggests that deliberative processes like CJs have the potential to maintain and even restore the legitimacy of public institutions.

When citizens get a tangible sense of procedural justice, playing meaningful roles in a public process in concert with responsible, respectful public officials, they come away with a renewed respect for larger democratic procedures and principles.³⁴

This effect may be reinforced if the legal profession publicly acknowledges the merit of CJs and endorses them as valuable analogues and precursors to trial jury participation. Such support would also add confidence to sponsors and convenors that are only just beginning to consider the use of CJs to engage citizens in policy formation.

It has been noted that attacks on the trial jury system are 'radically undemocratic'.³⁵ Such attacks are not so much 'about justice, they're about power', about the inability of typical citizens to make 'good, informed, rational and unprejudicial judgments'.³⁶ Having convened and having had oversight of many democratic deliberative processes, we note repeatedly the abilities of citizens. When given adequate information and an opportunity to deliberate well, the result is always a judgment that is mindful of the common good. The answer to a fractured democracy is not less democracy, it is far more.

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27. Conrad, above n 23, xxii.

28. See Carson & Hart, above n 10. Two citizens' juries were convened in Australia from 1987 to 1996. 27 were convened from 1997 to 2006.

29. Fung, above n 13.

30. See Carson & Hart, above n 10.

31. UK Prime Minister Gordon Brown, speech to the National Council of Voluntary Organisations 3 September 2007. <http://www.number-10.gov.uk/output/Page13008.asp> at 27 February 2008.

32. Knox, above n 2, 315.

33. John Gastil et al, 'From small group member to citizen: Measuring the impact of jury deliberation on citizen identity and civic norms.' (Presented at the 2005 annual conference of the National Communication Association, Boston, MA).

34. John Gastil, *Political Communication and Deliberation* (2008) 168.

35. Conrad, above n 23, xxi.

36. Ibid xxii.