Looking forward

The direction of criminal law

The Hon Justice John Dunford delivered the following keynote presentation at the Criminal Law Conference 2004, Tuesday, 27 July 2004 at the Marriott Hotel, Sydney.

To give a keynote address to a conference, the theme of which is 'Looking forward: The direction of criminal law' confronts the speaker with a dilemma. Does he endeavour to discern current trends and attempt to predict where they may lead? Does he try and anticipate, with or without regard to current trends, what political, economic and social pressures may lead to changes to the criminal law in the future? Or does he simply muse on those variations or changes that he would like to see implemented in the foreseeable future?

What I intend to say involves elements of all three without clearly distinguishing between them, but I hope to provide some thoughts for your consideration, particularly in so far as they may be relevant to the other papers to be presented during the course of the day.

Let me first, however, start with a short and rather cynical view of what I see as the future of the criminal law. I believe that people will continue to commit offences, a lot of them will be charged, their trials will get longer, and in particular the summings up will get longer as more and more directions are required, a large number of those tried will be convicted, and nearly all of them will appeal to the Court of Criminal Appeal.

There have of course been substantial amendments both to the substantive and the procedural law over the last 20 to 30 years. Some of the substantive offences have been redefined, such as provocation, diminished responsibility and self-defence in relation to murder, offences relating to drugs have been strengthened by the introduction of the *Drugs Misuse and Trafficking Act 1985* which introduced a whole new code, and more recently the further offence of ongoing supply has been introduced. Perhaps the greatest change to the substantive law has been the replacement of the offences of rape and carnal knowledge by the various categories of offences relating to sexual assault, which has not only reformulated the different offences, but has also significantly changed the definition of what constitutes sexual intercourse.

There has also been a great upsurge in the number of cases involving sexual assault. Whereas twenty years ago the most common offence of this nature was the rape of an adult woman, where the issue was either identification of the offender or whether the woman had consented, and the most common form of carnal knowledge case was the charging of 16–20 year old males for having intercourse with their 15 year old girlfriends, the most common charge nowadays relates to child sexual assault, particularly, but by no means exclusively, by fathers and stepfathers on young girls in their early teens, and these charges are most commonly brought 10–20, or even more, years after the offences are alleged to have been committed.

In addition, parliament has, in respect of a number of offences, significantly increased the maximum penalties resulting in the general level of sentences being imposed by the courts being increased, eg culpable driving or, as it is now known, dangerous driving causing death or grievous bodily harm, although in the same period the maximum sentence for manslaughter was reduced from life imprisonment to 25 years.

Photo: A media scrum surrounds a witness in a 'Lebanese gang rape trial'.
Photo: News Image Library.

There have also been a number of procedural reforms. Juries are no longer sequestrated from the commencement of a murder trial, and are allowed to separate in all cases, even whilst considering their verdicts. The statement from the dock has been abolished and the judge is, by statute, allowed to comment on the failure of an accused to give evidence although, as a result of the series of decisions of the High Court, the comment that he or she can make, has been severely circumscribed.[1]

The introduction of the *Evidence Act 1995* has produced a number of changes relevant to the criminal law, including the circumstances in which an unfavourable witness may be cross examined,[2] and in relation to complaints in sexual assault cases,[3] evidence of which now relates not only to the credibility of the complainant.[4] In relation to Commonwealth offences there has been the introduction of the Criminal Code,[5] which I understand it is hoped will eventually be applied to state offences as well, but this is apparently some way off.

In addition, legislation has been enacted to prevent offenders enjoying the proceeds of their criminal activities,[6] and providing a statutory scheme for the compensation of victims of crime,[7] and different forms of punishment, alternatives to full time imprisonment have been introduced such as periodic and home detention, and community service orders.[8] The Drug Court has been established to place emphasis on the rehabilitation of addicts[9] and the MERIT[10] and Circle Sentencing[11] programmes have been set up.

Other developments relate to the manner of police investigation, which has become much more sophisticated, particularly with the development of DNA evidence, telephone and listening device intercepts and controlled operations. Moreover, some of us can remember the old police

'verbals' which then gave way to the typed record of interview, both signed and unsigned. This was followed by the video recorded interview, which has now been further refined with the introduction of the custody manager provisions in the *Crimes Act 1900*.[12]

These reforms have all been most commendable, providing greater facility for detection of actual offenders, whilst at the same time preserving and enhancing the rights of suspects. On the other hand they all add to the length of the trial. Trials were much quicker when the main evidence in the crown case was often the evidence of the police officers reciting the verbal admissions allegedly made by the accused, and the crown prosecutor would comment to the jury, as sometimes the judge would also comment, 'why would they [the detectives] lie?' No right thinking person would regret the departure of the old ways, but the fact is that criminal trials are now much longer.

There have also been amendments to the *Bail Act 1978*, making it more difficult for those accused of offences of violence (particularly domestic violence), repeat offenders, those alleged to have committed offences whilst on bail or parole etc, or accused of terrorism offences, to obtain bail. I see that some of these matters, such as DNA evidence, search warrants, terrorism offences and bail are to be the subject of papers during the day. On a more technical basis, the distinctions between felony and misdemeanour and between imprisonment and penal servitude have been abolished.

Another recent development has been the proliferation of bodies charged with detecting and exposing of criminal, particularly corrupt, conduct, but without prosecutorial or sentencing powers. I refer to bodies such as the Ombudsman,[13] the Police Integrity Commission[14] and the Independent Commission Against Corruption.[15] These bodies can be very effective in exposing wrongful conduct, and we often see on our evening television news bulletins, sensational videos of wrongful conduct taking place. I suspect that it gives a lot of satisfaction to many to see such conduct exposed, but I believe the majority of the community wants more: they do not just want to see the conduct exposed; they want to see it punished. That must be left to the criminal courts but the courts are constrained by the rules of evidence, which these other bodies generally are not; and in addition, these other bodies generally are provided with greater facilities and financial resources than are the courts. Politicians seem to like them and give them resources, probably because they generate publicity and convey the impression that 'something is being done'.

Finally, the work of the Court of Criminal Appeal has become much more extensive. Whereas 30 years ago the court used to sit most Fridays, and finish by lunchtime, it now sits every week of the legal year, usually on most days, and sometimes sitting two separate courts. Arguments which used to be oral are now substantially by way of written submission.

Finally, a number of amendments to the sentencing laws have created greater scope for argument about the sentences imposed and there has been the development of crown appeals. The increase in the number of appeals is, of course, largely due to the fact that there are now a lot more judges, both in the Supreme Court and in the District Court, sitting in crime at any given time.

So much for the past. Let me now look at some current developments which are still evolving.

Guideline judgments

A comparatively recent development in the criminal law of this state has been the introduction of guideline judgments, dating from *R v Jurisic* in 1998.[16] The object of guideline judgments is to produce consistency in sentencing whilst preserving the individual judge's discretion, by indicating in advance the range of sentences that the Court of Criminal Appeal considers to be generally appropriate for specific offences, when particular elements are present.

They are not rules of law nor rules of universal application and the guidelines may be departed from when the justice of a particular case requires, including, where appropriate, considerations of matters such as youth, parity, assistance to the authorities, delay in sentencing etc.[17] Where a sentencing judge departs from the guidelines he or she will be expected to give reasons for doing so.[18]

Guideline judgments were in the first instances an initiative of the Court of Criminal Appeal, but following *Wong v The Queen*,[19] where the High Court held that the Court of Criminal Appeal did not have power to promulgate guidelines in respect of offences against Commonwealth law, the New South Wales Parliament amended the C*rimes (Sentencing Procedure) Act 1995* to expressly authorise such judgments in respect of state offences.[20] This amendment also provided for the attorney general to apply for guideline judgments,[21] and consequently, the most recent applications have been made by the attorney general.

Guideline judgments have now been promulgated in respect of dangerous driving causing death,[22] armed robbery,[23] break enter and steal,[24] pleas of guilty,[25] and taking into account additional offences under s33 of the C*rimes (Sentencing procedure) Act 1995*.[26]

The court declined to issue a guideline judgment in respect of the offence of assault police because it considered the circumstances so varied that no useful guideline could be formulated,[27] and it has recently reserved judgment on an application for a guideline judgment in respect of the offence of high range PCA.[28]

Generally the guideline judgments have taken a set of common or typical circumstances relating to such offences and indicated a range of sentences for cases with those typical characteristics, so that cases can be measured as to how they fit into the profile, and those which do not fit into the profile can be assessed by reference to the guideline. However, in respect of break enter and steal, and taking other offences into account, the court did not promulgate quantitative guidelines, but rather indicated relevant matters to be considered.

Although I do not have any specific statistics to rely on, the impression I have is that whilst some of the guidelines, for example *Jurisich* (now *Whyte*), and *Henry*, are more commonly relied on by the crown in crown appeals, the guideline on the utilitarian value of the plea of guilty is most commonly relied on by appellant's counsel in severity appeals, and the reason for this can be seen from the ratio for, and nature of this guideline.

That guideline was promulgated to ensure that all offenders who pleaded guilty, particularly at an early stage, received a discount on account of the utilitarian value of such pleas in the saving of court and jury time with resulting savings in costs and inconvenience, and in enabling the courts to process more cases. To encourage such pleas, it was necessary not only to give a discount on the sentence, but also to make the process transparent, so that the offender could see that he or she was in fact receiving the discount, and for this reason sentencing judges were encouraged to specify the discount. What has been apparent recently has been that some judges have been specifying a discount but then apparently not applying it, because the final sentences pronounced are in rounded periods (a specified number of years or months) incompatible with rounded periods as a starting point before allowing the indicated discount. For this reason it is desirable for judges to specify a notional sentence before the application of the discount for the utilitarian value of the plea.29

Sentencing generally

Two other recent changes to sentencing law result from the amendments introduced by the C*rimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*. That Act amended s21A by replacing the list of relevant matters to be taken into account on sentencing, with an expanded list, including those described respectively as aggravating and mitigating circumstances. It also included s3A, specifying in statutory form the objects of sentencing. Those amendments apply to all offenders sentenced after 1 February 2003, irrespective of when the offence was committed.

At the same time, but only applying to sentences for offences committed on or after 1 February 2003, s44 was amended to require the sentencing judge to first impose a non-parole

16 February 2004, Sydney. A protest by families of police and victims of crime outside the state parliament, calling for tougher sentences.
Photo: Sam Ruttyn / News Image Library

period (which was defined in statutory form) and then the balance of the sentence, which is to be not less than one-third of the non-parole period unless 'special circumstances' are shown. 'Special circumstances' in this context have been with us since introduced by the *Sentencing Act 1989*, but since *R v Simpson*[30] it has become a rather elastic and variable term. Recent statistics from the Judicial Commission show that in 2002 in the Supreme and District courts 'special circumstances', which justify a reduction in the non-parole period in comparison with the head sentence, were found to exist in 87.1 per cent of cases - which I suppose reduces special circumstances to circumstances which are not really special.31 One can ask whether there is really any purpose in specifying the relationship between non-parole periods and head sentences when it is so easily and frequently avoided.

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Another comment. Although 'special circumstances' justifying a variation in the relationship between the head sentence and the non-parole period can now amount to any number of factors, the most common reason given by sentencing judges for variation of the ratio is that he or she believes that the offender would benefit from a longer period of supervision on parole, and sentences are constructed with this in mind. However, time and time again, one hears that, although the judge has reduced the non-parole period so that the offender can have a longer period of supervision on parole, the Probation and Parole Service of its own accord, and without the consent of the sentencing judge, has ceased its supervision before the expiration of the parole period, thereby defeating the whole purpose of reducing the non-parole period, and frustrating the judge's intention in doing so. This is a matter that needs to be addressed at a suitable time.

The other new development in this regard is the specification of standard non-parole periods by the new ss54A to 54D introduced by the same Act, and applicable to sentencing for offences committed on or after 1 February 2003. This is not the time, nor the place for a dissertation on how those provisions are to be applied in practice, particularly in relation to other sentencing principles, including the other provisions of the Crimes (Sentencing Procedure) Act. They have already been discussed in some detail in R v Way32 and no doubt other cases will follow.

We live in a community where there seem to be constant calls for criminals to receive tougher sentences, and one can readily understand why victims, and in the case of homicide, members of victims' families, press for longer sentences for offenders. Those calls are taken up, as we know, by the media, particularly talk-back radio hosts and newspaper commentators, and then politicians of all parties take up the call for law and order, and threaten longer sentences with less parole, and other so-called reforms.

However, very often, in fact I believe in the majority of cases, the victims, the talkback radio hosts, the persons who telephone their programmes, the newspaper correspondents and the politicians know nothing about the particular cases except the objective facts as reported in the media, which from the nature of things are the more sensational and horrific features. They generally know nothing of the personal circumstances of the offender, his or her lack of a reasonable childhood in a loving and supportive family, his or her lack of employment or opportunity for employment, the fact that a large number of offenders are unable to read and write, their drug problems or the emotional or other problems confronting them at the time of the commission of the offence.

I am not suggesting that any of these matters constitute excuses for criminal conduct - they do not, but they are matters which need to be taken into account in the sentencing process where the object is to do justice to the community as a whole, the victims and also to the offender. Whilst I believe that general and personal deterrence have significant parts to play in the sentencing process, I also believe that to suggest that longer and longer sentences will reduce the incidence of crime and is a simple 'one stop' solution to the problem, is extremely naïve and counter productive. I also suggest that, in spite of all their posturings, the politicians do not want more persons in custody for longer periods - that necessitates the expenditure of more money on building and maintaining more gaols and paying more custodial officers.

Rather, I believe that to reduce the incidence of crime what is needed is better family support where the parents are inadequate, better special education for those who are having difficulties learning, and better employment opportunities and encouragement for young persons, particularly in the more economically deprived areas of our large cities and regional areas. On occasions, on bail and sentencing proceedings, one hears from young offenders who have left school to go on the dole, and who have never been employed, say that they got into drugs and committed crimes because they had nothing else to do – what a terrible indictment on our so-called 'lucky country'! Rehabilitation of offenders is not a luxury or a soft option – it is a necessity, and is for the benefit of the community as a whole. Drug programmes and more educational facilities in gaol are required so that, on release, offenders can get a job and settle back into the community, rather than returning to crime. Such proposals not only cost money, but also dedicated instructors and proper organisation.

Recently, the *Daily Telegraph*[33] published the results of a survey it had conducted which showed a large number of respondents were dissatisfied with the criminal justice system and wanted significant changes. The survey was said to have been

conduced amongst 7,000 readers of the *Daily Telegraph*, so it was hardly representative, because it was a comparatively small number compared to the large number of people who read that newspaper, or read other newspapers, or do not read newspapers at all, or who read the *Daily Telegraph* and did not respond to the survey. As is often the case with voluntary surveys, those who are dissatisfied tend to respond, and those who are satisfied do not bother.

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I shall return to the survey later in a different context, but for present purposes, I refer to the answers given to a question about sentencing, and in respect of most of the offences specified, a majority considered that the penalties should be 'toughened': drug trafficking 82 per cent, murder 90 per cent, sexual assault 87 per cent, gang rape 92 per cent, theft 56 per cent. The only offences where more than 50 per cent did not consider the sentences should be toughened were: drug possession 48 per cent and prostitution 30 per cent. In answer to another question, 73 per cent considered the death penalty should be introduced for murder; 54 per cent for gang rape; and 74 per cent for terrorism.

Rehabilitation, coupled with appropriate punishment, and seeking to deter others, are all appropriate components of the sentencing process, but experience shows that heavier and heavier sentences imposed in the past have failed to deter criminal activity. We should realise this particularly in Sydney, which was founded in the days when conviction for any felony carried the death penalty, and the only relief from the death penalty was for the sentence to be commuted to transportation to Botany Bay for life or 14 years, or whatever. The death penalty will not stop many people killing when under emotional stress, or in a number of other situations, nor will it stop the drug addict from committing robberies and/or larcenies, in order to feed his or her habit. An offender who is not deterred by the prospect of a three year gaol sentence is unlikely to be deterred by the prospect of a seven year sentence. Whilst I strongly believe that general deterrence has a significant part to play in the sentencing process, in some situations more than in others, I do not believe that massive 'over the top' sentences, including the death penalty, are appropriate. I regard the death penalty as a barbaric sentence for any civilised community to carry out in the twenty-first century, and mistakes cannot be reversed although unfortunately, mistakes will be made from time to time, no matter how hard we try to avoid them.

One source of the push for increased sentences comes from the loving families of homicide victims. One can understand their feelings, their grief, their loss and their frustration at what they regard as inadequate sentences for the death of their loved ones, but taking their feelings into account creates a serious philosophical problem of its own, namely, what of the man who has no loving family, the homeless, the derelict, the estranged or the unmarried orphan His life cannot be regarded as any less worthy of protection, or as of less worth than the life of a person with a loving family.[34]

One matter that a lot of people seeking higher penalties overlook is that the courts are constrained by sentencing principles such as those of parity, totality, consideration of youth, assistance to the authorities, pleas of guilty. Judges are not free agents to give free rein to their feelings in individual cases.

Another consideration often overlooked by members of the community and commentators is that when the crown accepts a plea of guilty to a lesser offence, such as manslaughter for murder or assault occasioning actual bodily harm for malicious wounding, the offender can only be sentenced for the offence for which he has pleaded guilty, and the court cannot, under the guise of sentencing him for the lesser offence, in effect sentence him or her for the greater offence.[35]

Why the director of public prosecutions accepts pleas to lesser offences is often a mystery to the judge, but he or she is virtually powerless to do anything about it.[36] Sometimes the reason will be obvious; it will be clear that the crown probably cannot prove an essential ingredient of the greater offence, e.g. intention, or there may be a risk of not getting any conviction at all, for example, where two persons have custody of a young child, and the child dies from injuries and abuse, each can blame the other with the result that a jury may not be satisfied beyond reasonable doubt which of them inflicted the injuries, so that they both have to be acquitted.

In those circumstances the crown will quite reasonably accept a plea to the lesser offence of manslaughter from one of the

April 7, 2004. Sydney, Justice Bruce James and the jury inspect the brothel where Sef Gonzales said he visited the night of the murders of his parents and sister.
Photo: Matthew Vasilescu / News Image Library

two suspects. In that situation the court can only sentence for manslaughter, it cannot sentence for murder, no matter how horrific the injuries, nor how clearly such injuries indicate an intent to kill or to do grievous bodily harm.

However, I must say that there are a number of cases where, looking at the material in the statements tended at the committal hearing, it is difficult to see any reason why the crown should accept a plea to a lesser offence and, in many cases, tender an agreed statement of facts which leaves out a lot of material which would, if admitted, make the offence more serious. There may be doubts about how the witnesses will stand up in court and whether some or all of them will be believed, but this is a matter for the jury, and the crown has nothing to lose by running the trial for the greater offence, and if the jury only finds the lesser offence proved, so be it. There is, I believe, a greater chance of justice really being done in that situation, and a greater chance of the victims, their families and the community as a whole being satisfied that justice has been done.

The jury

I turn now to the jury, and let me start by saying that I am a firm believer in the jury system for the trial of serious criminal offences. I also believe in it for the trial of various types of civil matters but that is a different question. The reason I support the jury system for serious criminal trials is that it is a feature of our democracy in that it enables ordinary men and women to take part in the judicial process and exercise their right as citizens in determining the guilt or otherwise of their fellow citizens. It is of the essence of a democracy that decisions (whether political through the ballot box or judicial through the jury system) are shared amongst the community as a whole, rather than being limited to the exercise of power by a few elite. Moreover the exercise of the common sense of the community as a whole, as opposed to the perceived attitudes of a legal elite, is desirable, and controversial or potentially unpopular decisions are more likely to be accepted by the community generally and in the media if they are decisions of fellow citizens rather than decisions of professional judges.

But most importantly, I see the jury as a bulwark against the exercise of arbitrary power by a corrupt or politically motivated judiciary - not that such is a problem in this country at present, but one only has to look to Nazi Germany or Soviet Russia, or to the threat presently posed in Zimbabwe, to understand what I mean.

Moreover, the jury system can be a check on unpopular laws, as for example when juries repeatedly failed to convict those engaged in the Eureka Stockade in 1854-55, notwithstanding the clearest, most cogent, evidence or in the censorship trials in this state in the early 1960s.

Unfortunately there are a number of persons in the legal profession who seem to regard jurors in much the same way as politicians regard voters, that is, as absolute idiots, who need to be spoon fed any information, are incapable of rational thought and can be easily swayed by irrelevant matters and information. I disagree. Jurors are our fellow citizens, our neighbours, the persons with whom we do business and so on, and they are not lawyers.

I know some lawyers believe that juries can be swayed by emotion and red herrings, but after almost 18 years on the Bench I remain, as I say, a supporter of the jury system, and over that time there are only a handful of cases where I have personally disagreed with the jury's decision, and even in those cases, I have been able to see a reasonable and logical reason why the jury has come to a different conclusion.

From time to time suggestions are made that certain types of cases should no longer be tried by juries, for example, white collar or corporate fraud cases, which are said to be too complicated for lay juries to understand, and recently a former chief justice suggested that where jury verdicts in sexual assault cases are set aside on appeal, the retrial should be by the Court of Criminal Appeal on a review of the evidence in the previous trial aided, as I understand it, by a video recording of the complainant's evidence in the earlier trial. I would not support either proposal.

In my experience juries do not find corporate fraud cases too complicated and it is up to the Crown to present the case in an intelligible form. This can often be facilitated by charging a number of specific simple offences, rather than a general conspiracy count, which tends to get lost in its own detail. An intent to defraud, which is often an ingredient in the offence, involves a subjective finding to be inferred from surrounding circumstances applying ordinary common sense based on the conscience of the community, and is accordingly a most suitable issue for trial by a lay jury of fellow citizens.

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Similarly I would not support the abolition of juries in retrials of sexual assault cases. These cases are, from their very nature, almost always cases of word against word where the essential issue in the case is the assessment of the credibility and reliability of the complainant. Unfortunate and all as it is (and it is most unfortunate), that victims of such crimes have to go through the ordeal of giving evidence a second time, I do not see how the complainant's credibility can be assessed otherwise than by a real live hearing.

Having said all this, there are some reforms which I believe could make the jury system more efficient. For one thing, I support the introduction of majority verdicts after a specified period of deliberation. I understand the proposal presently

Supreme Court judges are greeted by protesters at a Red Mass.
Photo: Marc McCormack / News Image Library

before the government is for an 11–1 majority, whereas in England and various other places a 10–2 majority is sufficient. I understand that in Scotland they have juries of 15, and an 8–7 majority is sufficient for conviction or acquittal, but I gather there are other safeguards.

The object of the 10–2 or 11–1 majority is to avoid new trials in cases where the jury is hamstrung by a perverse, disinterested or unreasonable, or simply incompetent juror, where the result of the new trial is going to be that of the overwhelming majority in the original trial. Bear in mind that the judge often knows the voting figures in the hung jury situation because it is at times included in the note he or she receives from the jury, although such figures are not disclosed to counsel, and it would be inappropriate to do so. No one so far as I am aware has suggested that say 8–4 or 7–5 majority should be sufficient for a conviction, or an acquittal.

One possible amendment which, so far as I am aware, has not been seriously floated is that where a jury is unable to agree between conviction on a more serious and a lesser offence, for example, murder, or manslaughter, armed robbery or steal from the person, the judge should have the power to enter a conviction for the lesser offence, but only if, on his or her consideration of all the evidence, he or she considers it appropriate to do so.

Recently there have been a number of cases where convictions have been upset and new trials ordered because of the conduct of what have been described as 'rogue jurors' that is, jurors who have done their own research such as by looking up newspaper cuttings of previous trials on the internet[37] or by having a private view at night in the absence of the judge, the accused, counsel and their other jurors.[38] I am not sure these persons should be described as 'rogue jurors' - they thought they were merely improving their chances at arriving at the correct end result; but, in both cases they disregarded (presumably because they were not aware of its application) the principles of procedural fairness, namely that an accused should be aware of the evidence adduced and to be taken into account against him and in the former they informed themselves of evidence which was inadmissible against the accused. The result in both cases was a new trial, a most unfortunate result, particularly for the two complainants in the second case, who will face the ordeal of having to relive and give evidence, yet again, of the alleged sexual assaults.

A journalist in this city recently published a newspaper article generally critical of the processes of criminal trials, due process, judges, and a number of specific decisions, particularly of the Court of Criminal Appeal, describing what had occurred as an 'outbreak of Brahmanism' which he explained as a 'self appointed higher caste' and accusing the Court of exhibiting a 'fetish for the rights of the defence over those of the prosecution'.[39] At least two letters were written to the editor in response, criticising the article and correcting errors in it, one by the attorney general and one a joint letter by the director of public prosecutions and the senior public defender, but the newspaper declined to publish either of them. I can only conclude that the newspaper does not believe in fairness, either to accused persons on trial for serious crime, to its correspondents who seek to put forward a different view to its own, or to its readers who might like to hear both sides of a controversy. Apparently we should all recognise that journalists are a superior caste who are capable of commenting on legal issues, without any real knowledge of the subject, and usually without reading the relevant judgments, and whose opinions cannot be questioned or contradicted in any way, particularly by those with some knowledge of the subject matter.

I understand that legislation will shortly be introduced to make it an offence for jurors to deliberately disregard directions not to carry out their own research etc.[40]

One of the greatest threats to jury trials is, I believe, the ever growing length of the average jury trial. When I was a judge's associate in 1959 the usual length of a murder trial was one to two days. When one trial involving two accused went for nine days the length of the trial was regarded as newsworthy and it was, if I remember correctly, something of a record. Now a murder trial that finishes in less than two weeks is a rarity.

There are a number of reasons for this, including the increase in scientific and technical evidence, the increasing attention to the requirement for the Crown to call all relevant evidence, even if it does not significantly assist the Crown case, the length of recorded interviews, the length (often unnecessary and excessive) of cross-examination, the very commendable abolition of the 'verbal', and the length of the summings up, which, like the trials themselves, are getting longer and longer,

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due mainly to the increasing number and complexity of directions of law or warnings about particular types of evidence, which are required to be given.

It is also necessary for the directions to be intelligible. I have no doubt that juries follow the fundamental directions, particularly in relation to the onus of proof and ingredients of the offence, but I often wonder whether they fully understand all of the others. In particular I often wonder whether most jurors understand the standard direction on circumstantial evidence, particularly if it is intoned at 3 o'clock in the afternoon when the patience and fatigue of the jury have already been tested by addresses from the Crown and defence counsel.

Or what do the jurors make of a direction that the failure of an accused to give evidence cannot be used against him as an admission that he is guilty? I suspect that a lot of jurors would nevertheless reason that if the accused did not do it, then he or she would give evidence and say they did not do it. The failure to call an alibi witnesses could be viewed the same way.

In relation to sexual assault cases, there are a large number of directions which need to be given particularly in cases where there has been delay in the making of a complaint. A catalogue of the various directions and warnings which may be required in such cases appears in the judgment of Wood CJ at CL in *R v BWT*.[41] One of the directions required is that commonly referred to as the *Longman*[42] direction and the requirements of such a direction have been discussed in detail by Sully J in the same case (i.e. BWT).

I have two concerns about this collection of necessary warnings: Firstly, how can any trial judge reasonably be expected to get all the warnings right every time, or most of the time, and still make the summing up relevant to the trial at hand and the issues in that trial; and in seeking to explain them in meaningful terms, avoid saying something which may ultimately be found to constitute appellable error; and secondly, what do the jury make of them, do they follow them and apply them, do they become so confused that they ignore some or all of them, or do they regard them as a hint from the judge that they should acquit irrespective of their own assessment of the evidence, and if so, do they regard it as an unwarranted interference with their function as the tribunal of fact?

As to the effect of giving all those directions, particularly the *Longman* direction, the anecdotal evidence is confusing. One District Court judge told me (and bear in mind these cases are always invariably heard in the District Court) that since he started giving *Longman* directions, he had not had a single conviction, whilst another told me that the more *Longman* directions he gave, the more convictions he had.

However I have become sidetracked. I was talking about how the jury system can, I believe, be threatened by the increasing length of the trials, because the jury system can only operate where we have jurors, preferably willing jurors, and if trials are going to take longer it will become more and more difficult to obtain suitable persons to serve as jurors. We do not wish to reach a stage where the only persons available to serve on juries are the unemployed and the unemployable. I am not suggesting the problem is imminent but even now a number of persons who would make ideal jurors and are willing to serve for 1–2 weeks find it necessary to be excused from trials which are estimated to last 3–4–5 or even six months.

The future generally

So much for the future of the criminal jury. What of the future of criminal law generally?

It used to be said that the purpose of the criminal law was to preserve the king's peace. As a matter of history and as a matter of present constitutional theory that is correct, but I suggest that the modern citizen, unburdened by the study of legal history and constitutional theory, would define the object of the criminal law in more contemporary terms, as being to maintain peace and good order between citizens by punishing those guilty of breaking the law, but only the guilty.

No one wants an innocent person to be convicted and punished; and safeguards must be established and maintained to avoid this happening; but the community also expects that those who are guilty are convicted and punished adequately; and if this is not done the community, encouraged by journalist and talk back radio hosts, will not be satisfied and will demand changes which, may or may not be an improvement and which politicians may be tempted to adopt if they see, or the polls tell them, that there are votes to be won.

One of the generally beneficial consequences of democracy is that if sufficient people in the community become dissatisfied with a system, the system is liable to be changed, and sometimes quite radically. An example was the abolition of the remission system in the mid 1980s when it was perceived to be subject to abuse, and had ultimately become almost farcical.

Another, more recent, example has been the changes in the law relating to damages for personal injuries. The community perceived that a number of persons were receiving large amounts of damages when they were really at fault themselves, others were getting damages for injures which were part of recreational activities resulting in the closure or restriction of those activities, while yet others were getting damages for minor injuries which should have been regarded as part of everyday life; and overall the cost of insurance premiums was constantly increasing. In other words, a significant section of

the community took the view that the system was not working adequately, and so the system has been changed: juries generally abolished, there are requirements to negotiate etc before commencing proceedings, caps have been placed on damages and now, most recently, there has been an attempt to re-define the concept of negligence itself.[43]

In the *Daily Telegraph* survey to which I have previously referred, 69 per cent of respondents believed judges and magistrates were out of touch with the community in regard to issues or murder and drug trafficking and 74 per cent in regard to sexual assault, whilst only 8 per cent believed the judicial systems is fair, whilst 78 per cent believed it favoured criminals. I have already referred to the survey's limitations, but even allowing for those, this last finding is disturbing.

As I say, the community expects those guilty of breaking the law to be convicted and punished appropriately. The community is not interested in elaborate mind games played by the Crown and defence lawyers, they expect the courts to ascertain the truth and having established the truth, deal appropriately with those involved, and if they believe that the rules of evidence or of procedure inhibit the discovery of the truth, they will push for those rules to be changed.

I have already referred to some changes that have recently been implemented, more are, I understand, under consideration such as reviews of the principles of double jeopardy and the so called right to silence. Moreover, since the decision of the High Court in *Festa v The Queen*,[44] the Court of Criminal Appeal has become more inclined to apply the proviso and dismiss conviction appeals notwithstanding that a ground of appeal has been established. In my opinion, consideration could also be given to the *Criminal Appeal Act* s6 being amended to expressly provide that a conviction appeal be dismissed notwithstanding that any ground of appeal is established if the court is itself satisfied of the guilt of the appellant beyond reasonable doubt. This would, I believe further reduce the number of re-trials, without resulting in the conviction of any innocent persons.

But if incremental changes such as those already in place or changes similar to those I have referred to do not satisfy the community, pressure may build for more radical changes such as the abolition of juries, having the judge take part in the jury's deliberations (which I understand is the case in some European countries), the abolition or modification of the adversarial system, mandatory sentencing, or having the jury involved in sentencing.

I do not see these as immediate or proximate threats, but I suggest that some at least of them may be lurking below the horizon, and the crucial question is would they effect any improvement on the present system, which would be at least debatable, and in some cases, I believe, positively disastrous.

So let us all press on with our respective functions as prosecutor, defence lawyer or judge, making the most of the present system but at the same time, I suggest we should not be afraid to take part in debate about how the system can be improved.

1 *Azzopardi v The Queen* (2001) 205 CLR 50
2 *Evidence Act 1995* s38
3 ibid., s66(2)
4 *Papakosmos v The Queen* (1999) 196 CLR 297
5 *Criminal Code Act 1995* (Cth)
6 Confiscation of Proceeds of Crime Act 1989, *Criminal Assets Recovery Act 1990*, *Proceeds of Crime Act 2002* (Cth)
7 Now the *Victims Support and Rehabilitation Act 1996*
8 The current legislation is contained in the *Crimes (Sentencing Procedure) Act 1999* Parts 5,6,7
9 *Drug Court Act 1998*
10 The Magistrates Early Referral into Treatment Program, a diversion treatment program designed for alleged offenders who come before the local courts presenting with illicit drug problems. It is governed by Local Court Practice Note no 5 of 2001
11 The Circle Sentencing Intervention Program for Aboriginal offenders is governed by the *Criminal Procedure Regulation 2000*, schedule 3
12 *Crimes Act 1900* part 10A (ss354-356Y)
13 *Ombudsman Act 1974*
14 *Police Integrity Commission Act 1996*
15 *Independent Commission against Corruption Act 1988*
16 *R v Jurisic* (1998) 45 NSWLR 209
17 *R v SDM* (2001) 51 NSWLR 530
18 *R v Henry* (1999) 46 NSWLR 346
19 (2001) 207 CLR 584
20 *Criminal Legislation Amendment Act 2001*, no 117
21 *Crimes (Sentencing Procedure) Act 1999* s37
22 *R v Jurisich*, supra, modified by *R v Whyte* (2002) 55 NSWLR 252
23 *R v Henry* (1999) 46 NSWLR 346
24 *Attorney General's Application (No 1) R v Ponfield* (1999) 48 NSWLR 327
25 *R v Thomson* (2000) 49 NSWLR 383
26 *Attorney General's Application No 1 of 2002* (2002) 46 NSWLR 147
27 *Attorney General's Application No 2 of 2002* [2002] NSWCCA 515
28 5 May 2004
29 *R v Lynn* [2004] NSWCCA 222 at [13]
30 (2001) 53 NSWLR 704
31 Judicial Commission of New South Wales: *Sentencing trends and issues* no 30 (March 2004) at pp 3–4, and see *R v Fidow* [2004] NSWCCA 172 at [20]
32 [2004] NSWCCA 131
33 *Daily Telegraph*, 12 July 2004 at p 4
34 cf *R v De Souza* (unreported – Dunford J – 10 November 1995) at p 13, and see also *R v Previtera* (1997) 94 A Crim R 76 at 85
35 *R v Di Simoni* (1981) 147 CLR 383
36 *Maxwell v The Queen* (1995) 184 CLR 501
37 *R v K* [2003] NSWCCA 406
38 *R v Skaf* [2004] NSWCCA 37
39 Paul Sheehan in the *Sydney Morning Herald*, 14 June 2004
40 *Sydney Morning Herald*, 5 July 2004 p 5
41 *R v BWT* (2002) 54 NSWLR 241
42 *Longman v The Queen* (1989) 168 CLR 79
43 *Civil Liability Act 2002* ss5B-5T
44 (2001) 208 CLR 593