

Problems faced by modern juries

By Peter Lowe

This article argues that the institutional integrity of the jury system in common law jurisdictions is under severe threat. While the focus of this article is the criminal jury, similar if not identical concerns exist with regard to the civil jury. In the past, the nature of the challenge was primarily external: jury packing, jury vetting, qualifications for jury duty, compilation of jury lists – the list goes on. Sadly today the challenges are more commonly, but not exclusively, of an internal nature: technology, the complexity of the task and comprehension, the quest for the reasoned verdict. The question must be asked, do these challenges – both external and internal – presage the end of the jury system as we know it?

The essential feature of the modern common law jury is the institutional integrity and independence of its decision-making processes. Crucially, jurors are not told about issues such as the character of an accused which, if discovered or disclosed, could well affect the outcome of their deliberations. Protection of the jury from receipt of any information regarding the accused has now become a rod for their own back. Information about trial matters is freely available and impossible to control, even with the delivery of extensive warnings by the trial judge. The problems that jurors face today are thus very different from the past: juror misconduct; access to information; and complexity of criminal laws illustrate that the challenge to the jury process is chiefly of an internal nature. The problems emanate from within the jury – constituted by a failure of comprehension or to follow warnings. So significant have these problems become that it is necessary to consider a variety of proposals for reform in order to preserve the jury for future generations: taping of jury deliberations; the introduction of jury facilitators; reduction and simplification of judicial directions; reconsideration of the utility of sequestration; these among other reforms, need to be considered.

A. Juror misconduct

Juror misconduct has been around for as long as there have been common law juries. Indeed, a review of the Year Books and Abridgments for the fourteenth and fifteenth centuries reveals about one hundred cases which deal with juror misconduct, involving allegations of bribery, embracery, runaway jurors, and drinking and eating during deliberations. Nowadays,



Juror number eight stands alone. Photo: Getty Images

juror misconduct typically involves one or more of the following:

- an unauthorised visit to the scene;
- consultation of outside substantive information;
- communication with non-jurors;
- physical intimidation or coercion by other jurors; and
- bribery and improper suasion of jurors.

Part of the problem of juror misconduct must be suspected to be the enduring pull of popular culture, particularly such films as *12 Angry Men*. In Australian jury research, jurors consistently tend to compare their own experiences with that film.¹ Many other films and television programmes may well form part of the constitutive experience of the juror, but *12 Angry Men* provides a foil as to how a juror might approach his or her task as a prospective juror.

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The movie is notable for how a lone juror (juror number eight, played by Henry Fonda) stands alone when he enters the jury room, saying that he has a reasonable doubt, and eventually sways the rest of the jury, by reasoned argument, to the same conclusion.

For example, juror number eight's doubts are reinforced by the fact that the murder weapon is not as unique as the prosecution would contend. He buys an identical knife from a pawn shop near the scene of the crime. He

brings it into the jury room and jams it into the table. His driving the knife into the table is a turning point in the jury's deliberations, unleashing other jurors' hitherto undisclosed doubts.

Juror number eight does what the defence lawyer failed to do: he tests the prosecution case to see whether there is any room for reasonable doubt.² It is in this that the allure of the movie resides.

Conversely, the movie has legitimately attracted criticism for its depiction of serious juror misconduct.³ Charles Weisselberg has identified the following juror irregularities:

- conducting an unauthorised visit to the accused's neighbourhood;
- the giving of unsworn, hence untested, evidence in the jury room regarding an identical knife that was purchased near the home of the accused;
- juror number five (played by Jack Klugman) giving expert evidence as to the use of a switchblade knife;
- speculative calculations regarding train speed and noise; and
- conducting an experiment, not based on any evidence adduced at trial, as to whether a witness could reach a door within 15 seconds.

In fact the nature of the speculative activity of the jury in the movie drove United States Supreme Court Associate Justice Sotomayor, when sitting as a lower-court judge, to refer to the movie in instructing jurors how *not* to carry out their duties.

1. Unauthorised visits to scene

In Australia, an extra-curial investigation by the jury in the trial of Bilal and Mohammed Skaf for aggravated sexual intercourse without consent proved pivotal in forcing judicial change regarding directions given to juries on carrying out such investigations. The foreman of the jury went with another juror to ascertain the prevailing conditions under which the complainant was able to identify the accused. The misconduct led the New South Wales Court of Criminal Appeal to quash the conviction on the basis that the jury's verdict was tainted by misconduct.⁴ The foreman of the jury told the court, 'I only went to the park to clarify something

for my own mind. I felt I had a duty to the court to be right'. Whilst the judicial direction now given is admirable for its clarity on the issue, jurors still seek to circumvent the direction. This was exemplified in the recent discharge of a New South Wales jury in a high-profile murder case where the Crown contended that the victim was forcibly thrown head first off a cliff. A jury member called a radio station to complain that a fellow juror was a bully and had already made her mind up, and that the jurors were planning to visit the cliff site. The jurors were questioned by the trial judge the next day, and his Honour concluded that the caller was a member of the jury and that one or more jurors had misconducted themselves. He discharged the jury.

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2. Juror research – the challenge of technology

The last three decades have proved to be a watershed in the development of technology and the challenges it poses to the institutional integrity of the jury. Since the 1980s they have witnessed the first commercially available mobile phone (1983), SMS text messaging (1989), Google (1996), the first mobile phone with wireless email and internet (1996), and the launch of Wikipedia (2001), Facebook (2004), YouTube (2005) and Twitter (2006). There are yet more microblogging and social network sites providing an unknown and unknowable opportunity to affect the functionality of the jury.

It is a truism that social networking, the World Wide Web, and smart phones have altered our daily lives, and they now have the potential to alter the way jurors decide cases. As one insightful writer on this issue has said the new technology is transforming the 'jury box into Pandora's box'.⁵ There are now some in society who do not really know how to survive without information technology – and to tell anyone from the millennial generation not to retrieve information available at their fingertips is a red rag to a bull.

Professor Cheryl Thomas was recently commissioned by the United Kingdom Ministry of Justice to undertake an empirical study of the fairness of juries *vis à vis*

jurors' internet usage.⁶ This was probably the largest study done so far on jurors' use of the internet. The study showed that in standard cases five per cent of all jurors looked for information about the case they were presiding over while the case was going on. Over twice as many jurors serving on high profile cases (12 per cent) admitted to doing so. The figures are proportionally higher in relation to seeking media reports regarding the trial, with 13 per cent doing so in standard cases and 26 per cent in high profile cases. Surprisingly, the great majority of jurors looking for information about their case (68 per cent) were aged 30 years or older.

Australia is not immune from such impropriety. In June 2011, following the announcement that the jury in a high profile Victorian murder trial were deadlocked, court officials discovered that a jury member had gone online to 'Google' a legal term and download information from an online encyclopedia. The juror was released without a conviction being recorded, but on a 12-month good behaviour bond and with a \$1,200 fine. There have been more reported instances of the same type of conduct elsewhere in Australia.⁷

Social networking sites have been accessed by jurors to seek background information about offenders and victims. In one sexual abuse trial in the United States, jurors looked up the MySpace profile of two victims who gave evidence. So much for the careful safeguards on introducing character evidence against victims in sexual offences trials.

It should also be said that there is no guarantee that the information retrieved by an aberrant juror has not been put online by the accused him- or herself, or through an agent. Such information has as much potential to affect the deliberations of the jury as information retrieved from Wikipedia or any other apparently objective source, precisely because of free access to the internet, and the lack of peer review of such information. Providing the website is ranked sufficiently high on Google's search engine, it will be found fairly easily – usually within the first page or so of the search results. A similar point was made in November, 2010, by Lord Judge, the Lord Chief Justice of England and Wales, that Twitter could be used by campaigners in a bid to influence the outcome of a trial. His warning, given before the misconduct of a juror named Joanne Frail (as to which, see *post*), that it may be necessary

to deal with an aberrant juror for contempt and treat the misconduct with the 'seriousness that it requires' was remarkably prescient, and Lord Judge was later responsible for imposing an eight-month sentence of imprisonment on Ms Frail.

For his Lordship:

the misuse of the internet represents a threat to the jury system, which depends, and rightly depends, on evidence provided in court which the defendant can hear and if necessary challenge. He is not to be convicted on the basis of material which from his point of view is secret material – not only secret material, which is bad enough, but material which may be inaccurate and could also be false.

The issue of digital injustice has the potential to derail the very basis upon which justice is administered and must, on that score alone, be addressed if the notion of a fair trial according to law is to be preserved.

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3. Improper contact and the challenge of social media: When all that twitters is not told

Technology not only provides unprecedented opportunities for juror research; it appears that, precisely because of its anonymity and immediacy, the siren song of the web encourages transgressions through the phenomenon of 'disinhibition', leading to impulsive behaviour.⁸

In November, 2008, a female juror serving on a Lancashire child abduction and sexual assault trial posted that 'I don't know which way to go, so I'm holding a poll'. As she didn't use any privacy settings on her profile, the Facebook post could be seen and read by anyone. After some users responded that the defendant should be found guilty, the court authorities were tipped off anonymously and she was dismissed from the jury.

In March, 2011, a 20-year-old female juror from Detroit was caught posting on her Facebook page 'actually excited for duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY'. This was during a trial for resisting police arrest. The comment was apparently posted on a lay day in the proceedings, when the

prosecution were still in their case and the defendant was yet to give evidence. The juror was found guilty of contempt of court and fined \$250.

In another case, a juror in a criminal trial in Victoria posted 'everyone's guilty' on his Facebook page. Luckily, that posting was discovered before the trial had proceeded far, and after he had failed to show up for jury duty. The jury were discharged and the trial judge referred the matter for prosecution.

The internet has also been used by jurors to criticise other jurors. In January, 2011, a Scottish juror used her Facebook page to post claims that the accused was innocent and that her fellow jurors were 'scum bags' for convicting him.

Researchers typed 'jury duty' into Twitter's search engine and found that 'tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes'.

Special mention should be made of the potential for sites such as Twitter to challenge the functional viability of a jury. Twitter is a free social networking and micro-blogging service that has changed the way many people communicate. Twitter allows users to send 'tweets', or text-based posts, up to 140 characters long via phone or internet. Thus, a juror in a murder trial in Washington, DC, was dismissed after tweeting 'Guilty Guilty... I will not be swayed. Practicing [sic] for jury duty'.

A recent Reuters analysis undertaken in late 2010 revealed that blogging, tweeting and other online diversions were causing a headache with jurors in the United States. Researchers typed 'jury duty' into Twitter's search engine and found that 'tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes'.⁹ It may be inevitable that in the near future jurors will be subjected to questioning regarding their internet and social networking habits.

The examples above all represent improper contact by jurors broadcasting their opinions to the public, or at least a considerable sector of the public. But social media also makes direct interpersonal contact considerably easier than before. In what is colloquially known as the 'Facebook five' case, Facebook was used by a number

of jurors all of whom were Facebook friends to discuss the case. Needless to say, discussions of trial matters in the absence of other jurors is not permitted.

But Facebook contact can take a much more sinister turn.

At first glance, Joanne Fraill would have appeared as a typical Facebook user. She was 40-years-old, a mother who had three children and three step-children. She was adept in using Facebook to communicate with the world. Her downfall came when serving as a juror in a trial for conspiracy to supply heroin and amphetamines. In August 2010 the trial collapsed in a spectacular fashion after it was discovered that Ms Fraill had communicated on Facebook with one of the

accused being tried by the jury regarding deliberations taking place in the jury room. The pair exchanged 50 messages in a 36-minute chat about the trial including the latest position of the jury. Her misconduct was discovered when the female accused confided in her solicitor the following day. Both Fraill and the female accused were convicted of contempt of court and Fraill was sentenced to eight months' imprisonment.¹⁰

Fraill's case may be a taste of things to come. In January 2012, again in the UK, Theodora Dallas was found guilty of contempt of court for conducting research on the internet while serving as a juror. She had carried out a search into the accused's prior acquittal of sexual assault and communicating that fact to the other jurors. One of the jurors then told a court officer about what she had said in the jury room. Dallas told the court that she didn't fully understand the trial judge's warning not to carry out research but that excuse was rejected and the university academic was sent to gaol for six months.

New technologies make improper contact easier, but such contact existed long before their advent. Thus, a remarkable case of attraction between a juror and an accused – involving far greater contact than Joanne Fraill's Facebook chat – occurred in an eight-month murder trial held in 1995 in Vancouver, Canada. In this

trial for two gang-related slayings, Gillian Guess was a juror, and became romantically attracted to one of the accused. Later on, in the jury room, she was instrumental in securing his acquittal. Immediately after the trial, she commenced a sexual relationship with him. She was eventually prosecuted for obstruction of justice, and her case was a *cause célèbre* in Canada. It represented the only case where a juror faced criminal sanctions for what happened in the jury room, and evidence was admitted, at her trial, of those very same jury room discussions. Guess was found guilty and sentenced to 18 months' imprisonment, plus 12 months' probation. An appeal against that sentence was dismissed.

Infatuation of a juror with an accused is by no means an isolated problem. In July, 1998, a juror had to be discharged, when she asked the trial judge for the accused's date of birth, as she wished to draw up his star-chart.

Occasionally, a juror's infatuation is with someone else in court. Impropriety arguably may exist where a juror becomes sexually attracted to counsel in the case (usually counsel for the prosecution) and decides a case against an accused. Some years ago, in a trial where a female juror propositioned counsel in the days following the trial, the conviction appeal alleging impropriety was dismissed on the basis that the presumption of impartiality had not been rebutted.

It is, however, beyond doubt that tweeting, emailing, or contacting the accused or a witness over Facebook, is far easier than getting hold of them by more traditional means, and most forms of social media will, subject to the public viewing settings on your social media page, broadcast what would formerly have been a private opinion – or one expressed to a few confidants – for all to see.

4. The problem of intimidation, bullies and racists

It is trite to observe that one essential aspect of a jury is that they should be impartial. Impartiality requires that jurors be, and be seen to be, independent, disinterested and unbiased. Because of the impenetrability of the jury's verdict, the potential problem of what actually happens in the jury room rarely gets aired. But is this a problem that is restricted to isolated cases?

There is a dearth of research on the impact of

intimidation on the jury deliberation process. In the wake of a public outcry in Western Australia about acquittals due, allegedly, to the intimidation of juries, the attorney-general there commissioned research into jurors' experience. The report revealed that, although the incidence of intimidation, whether actual or perceived, was relatively rare, there was a problem of intimidation taking place inside the jury room.¹¹

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How jurors suffer such intimidation was revealed by New Zealand research. In relation to four juries whose deliberations were the subject of disclosure, it appeared that deliberately intimidatory jurors were given free rein, refusing to discuss things rationally, making adverse or mocking comments about other jurors' opinions, hurling insults at them, and monopolising the process.¹² It is difficult to extrapolate much from the research as only four juries were involved, save that intimidation is not an isolated event.

On a more positive note, recent empirical research in relation to the jury system in England and Wales has revealed that racial considerations may be less of a problem there than previously thought. The research revealed that jury conviction rates showed only small differences based on defendant ethnicity.¹³

Some practical suggestions have been advanced to minimise the potential for juror harassment. The jury's deliberations could be broken by 'time out' at the direction of the trial judge – say for five or ten minutes per hour. Alternatively, the judge could proactively ask the jury whether they were having difficulties in their deliberations.¹⁴

5. Coercion of the jury: bribery, tampering and jury nobbling

Bribery and other forms of improper suasion of the jury have existed from the time of the early development of the common law jury and remain as prevalent a practice today as in the past. They also remain as difficult to detect.

In England and Wales, concern about jury nobbling was instrumental in causing legislative change by introducing majority verdicts to prevent intimidation or bribing of jurors. Legislation was also passed making it an offence to intimidate a juror or potential juror, intending to obstruct, pervert or interfere with the course of justice. Where an acquittal is tainted by such intimidation, the High Court may quash the acquittal and order a retrial.

Such was the nature of the concern in England and Wales regarding the problem of jury tampering that the step of sanctioning judge-alone trials in relation to indictable offences was taken to remedy the problem.

Australia is not immune from allegations of jury tampering.¹⁵ In almost all Australian jurisdictions, legislation providing for majority verdicts has been introduced.¹⁶ Where federal offences are involved, however, the jury are required to return a unanimous verdict.¹⁷

Legislation has been passed in Queensland and Western Australia permitting the court to take into account conduct constituting intimidation, corruption or threatening of a juror in determining whether to proceed by judge alone.¹⁸

B. Solutions to juror misconduct

1. Legislation

There is no uniform legislation in Australia which covers jury impropriety and confidentiality of jury deliberations. That said, a number of Australian jurisdictions have enacted legislation which addresses these issues. In Queensland, there is a statutory prohibition on jurors making an inquiry into the accused, including any use of the internet to obtain that type of information.¹⁹

Taping, if permitted, could constitute direct evidence of the jury's deliberations and the integrity of the reasoning process.

Further, jury room confidentiality can be pierced during the currency of a trial where there are grounds to suspect bias, fraud, or an offence relating to a person's membership of the jury or to the performance of functions of a member of the jury.²⁰

In New South Wales, jury deliberations may be disclosed to the court during the course of a trial where there are reasonable grounds to suspect any irregularity in relation to membership of the jury, or in relation to the performance of another juror's functions, where such would include, among other things, any misconduct, the refusal to take part in or lack of capacity to participate in the jury's deliberations, partiality, or reasonable apprehension of bias or conflict of interest.²¹ A former jury member who has reasonable grounds to suspect any irregularity can complain to the sheriff.²²

In Victoria, jurors are precluded from making an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial. This is defined to include research by any means, with specific reference being made to the internet and viewing or inspecting an object that is relevant to the trial.²³ A person who is or was a juror is specifically permitted to disclose to the judge or a court any information about the deliberations of the jury.²⁴ In addition to the above the Uniform Evidence Act, as it applies in various Australian jurisdictions, would permit the admissibility of evidence of jurors in relation to matters affecting the conduct of a trial or of their deliberations.²⁵

By virtue of the application of these provisions to the disclosure of an irregularity following completion of the trial, both New South Wales and Victoria permit appellate court review of the evidence of deliberations in the jury room and of whether a miscarriage of justice has been occasioned as a result of those deliberations.²⁶ In all three states, the trial judge is empowered to conduct an inquiry into jury room deliberations on the basis of suspected juror misconduct. The failure of a trial judge properly to address the misconduct could itself become the basis for holding that there had been a miscarriage of justice.

2. Taping of jury deliberations

It may be an unpalatable suggestion, but serious consideration should be given to reviewing the absolute prohibition on taping jury room deliberations. Currently no jurisdiction in Australia permits the taping of jury deliberations. No jury deliberations have ever been recorded in Australia.²⁷

As discussed above, certain jurisdictions in Australia have remedial legislation relating to disclosure of jury

deliberations. Taping, if permitted, could constitute direct evidence of the jury's deliberations and the integrity of the reasoning process. Such direct evidence would demonstrate whether the presumption ordinarily underpinning juror deliberations, that they comply with their oath and assiduously follow the trial judge's instructions, was well-founded and, even if not the case, whether a miscarriage of justice has been occasioned.

A study in Milwaukee of the impact of videoing juries has revealed that it did not seem to have any effect on jury deliberations. Jurors in one case openly decided to ignore the evidence and acquit the defendant. This raises the spectre that access to the taped evidence may be used by the prosecution to overturn an acquittal, subject to legislation permitting such an appeal.

C. The challenge posed by complexity of criminal laws

Complexity, either in terms of facts or the law, makes reaching a verdict more difficult to achieve. This is because complex criminal laws require detailed directions to the jury regarding elements of the offence, available defences, as well as relevant warnings required to be given at common law and, more usually nowadays, by statute. The complexity, prolixity and ubiquity of directions given to the jury are under review in a number of jurisdictions in Australia at the current time.²⁸

The review of directions to the jury is driven by various studies and research reports revealing that jurors, on the whole, have a great deal of difficulty understanding the law or the judge's instructions. New Zealand research revealed that of the 48 trials examined, there were only 13 trials (27 per cent) where 'fairly fundamental misunderstandings of the law at the deliberation stage did not emerge'.²⁹ Empirical research into the same subject undertaken in England and Wales showed that when jurors were directed to answer two questions relating to whether the defendant acted in self-defence – those questions being whether the defendant believed it was necessary to defend himself and whether he used reasonable force – 31 per cent of jurors accurately identified both questions. A further 48 per cent correctly identified one of the two questions and 20 per cent did not correctly identify either question. The study did not attempt to examine how juror understanding affected deliberations, but no relationship was found between

jury verdicts and the number of jurors who correctly identified the two legal questions.³⁰

In Australia, the Queensland Law Reform Commission commissioned a research project into juror understanding of directions as to the *burden of proof* given by a trial judge. That research related to 14 trials that proceeded either before the Supreme or District courts and 33 jurors (out of a total 168 jurors) agreed to participate. Only 61 per cent of jurors correctly understood the direction. Where the juror's sense of understanding of *burden of proof* was flawed, the more they relied on their common sense and the prosecution evidence, and the less they relied on defence evidence in arriving at a verdict.³¹

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The advice that Kirby J gave for trial instructions – that they should be comprehensible, not imposing unrealistic or over-subtle distinctions on the jury, distinctions which are counter-productive of the end sought – should apply in equal measure to criminal laws.³²

Complexity of the law is in large measure driven by the need to cover the wide-ranging activity the subject of prohibition. By their nature, simple rules tend to be over or under inclusive in fulfilling their purpose, increasing the potential for undesirable consequences – and this is even more true of complex cases. In the absence of research into juror understanding of such complexity, there must be a sneaking suspicion that a flawed understanding of the law may well favour the prosecution, in much the same way as revealed by the Queensland research, above.

The *Criminal Code Act 1995* (Cth) is a case on point. It arose out of the work of the Gibbs Committee which published a major report in 1990 regarding the general principles of criminal responsibility, together with a draft Codifying Bill, and from work undertaken by the Model Criminal Code Officers Committee (MCCOC), later known as the Criminal Lawyers Officers Committee (CLOC).

The codification was undertaken in a staged process commencing with the introduction, by the *Criminal Code Act 1995* (Cth), of Chapter 2 of the Criminal Code (Cth) which provided general principles of criminal responsibility. The code is meant to replace the common law regarding criminal responsibility. It came into effect on January 1, 1997.

Offences consist of physical elements and fault elements, and the law that creates an offence may provide different fault elements for different physical elements.³³ There is now an elaborate degree of parsing required in respect of any Commonwealth offence in order to determine how many physical elements there are in any particular offence and, once that is established, what the corresponding fault elements are.³⁴

So far so good. The task is made more difficult and complex by the tripartite nature of the inquiry that needs to be undertaken as the physical elements of an offence may consist of conduct, the result of conduct ('result') and a circumstance in which conduct, or a result of conduct, occurs ('circumstance').³⁵ The fault element for a physical element can either be intention, knowledge, recklessness or negligence.³⁶ In addition, there are offences which have no fault element.³⁷ There are many offences found in the Criminal Code which do not specify a fault element for a physical element. Current exegetical analysis of offences found in the code finds overlapping aspects of conduct, result and circumstance. Where a physical element *only* involves conduct, the default is that intention is the fault element.³⁸ Where the physical element consists of a circumstance or result, the default fault element is recklessness. Hence, it is conceivable and entirely possible that any direction to a jury in a Commonwealth trial today will have both intention and recklessness intermingled. If the legal profession is muddled and confused about all of this (I say nothing here of judicial officers), pity the poor jury who has to apply the directions of law regarding that offence.

This is not a call for the code to be abandoned, just an observation that any analysis of the problem should include an understanding of what drives the complexity of the current trial process. The inherent difficulty in composing comprehensible jury instructions originates in the complexity of the law itself.

In practice, the substantive offence charged may

aggravate this complexity. For instance, in *R v Ansari*,³⁹ a number of brothers who ran a *bureau de change* were charged, in effect, with money laundering. The trial lasted some six months and the offence before the jury was a conspiracy to deal with money where there was a risk that the money would become an instrument of crime, with recklessness as to the fact that the money would become an instrument of crime. The trial judge's directions were reduced to writing and occupied 18 pages, single spaced. The directions were fulsome and traversed the issue of substantial risk, instrument of crime, recklessness, unjustifiable risk, and conspiracy. It was a formidable task for the judge. Ultimately, the complexity of the case was mirrored in the High Court decision regarding the concept of recklessness as it applied to the physical elements of the offence.

There is no way of telling whether the complexity of criminal laws is altering the way juries deliberate. The point has been recently made that it is not difficult to predict that the task of juries will become more difficult in the future, precisely because of the increase in the prosecution of complex corporate and financial crimes.⁴⁰ Short of testing jurors on their ability to understand instructions before hearing the actual case, it is just not possible to make that assessment.⁴¹ It may be that the complexity of certain criminal laws provides a compelling case for empanelling jurors with specialist skills and knowledge. What is known is that simplicity is always to be preferred to complexity. Surely, the aim of the criminal law – in terms of its enforcement and understanding by all participants in the criminal justice system, particularly jurors charged with applying those same laws to the facts as they find them – ought to be simplicity.

D. Making the trial process more understandable to jurors

In recent years, Australia has seen considerable research – and substantial proposals for reform – aimed at making the jury trial process more understandable to jurors. That work has already brought tangible results in the form of changes to trial procedure intended to render the trial process less daunting for the lay juror. These steps include:

- pre-trial education of jurors;
- judicial instructions at the commencement of the trial;
- the encouragement of juror participation in the

FEATURES

trial process (note-taking, access to transcripts and asking questions);

- improved use of visual aids;
- length and timing of the summing-up;
- the reduction of trial directions to written form for dissemination to the jury;
- a re-evaluation of the necessity to give particular directions or warnings to the jury during the course of the summing-up.

This research and these proposals for reform have been complemented by significant research into juror comprehension and understanding undertaken in New Zealand.⁴² In addition, there are the enlightening results of the research into the fairness of juries undertaken in England and Wales which revealed that jurors, regardless of ethnic background, do not racially stereotype black, Asian or white defendants as more or less likely to commit certain crimes.

Each of these steps could improve the criminal trial process, and builds on the rich history that underpins the notion of a jury of one's peers. Further, it is fitting that the process of interaction between judge and jury is continually changing to reflect socio-cultural change and the continuing impact of technological development.

Beyond this, various options for reform have been advanced to address jurors' understanding of directions of law *within the jury room*. Many of these suggestions have the added benefit of guarding against certain forms of juror misconduct. One is that when the jury retire to consider their verdict, the judge should retire with them to assist and guide them in their deliberations.⁴³ This is a variation of the French criminal trial model where the judicial officer is present in the jury room. Another is that a jury facilitator should be provided – a person trained and experienced in helping groups come to decisions. Such a person would not be entitled to vote or express an opinion regarding the evidence, but would try to ensure that the jury's deliberations focussed on consideration of the evidence, and to minimise the discussion of irrelevant matters and the airing of biased opinions.

E. Implications for the civil jury

The jury in civil proceedings in Australia is very much a threatened species. Almost all states and territories

have passed legislation severely eroding the right to a civil jury. Indeed, it has been abolished altogether in South Australia and in the Australian Capital Territory.⁴⁴ In New South Wales civil proceedings are to be tried without a jury unless the court orders that it is in the interests of justice to require a trial by jury.⁴⁵ A coronial jury is still available in that state but not elsewhere.⁴⁶ In Western Australia the right to a jury trial is restricted to claims of defamation, libel, slander, fraud, malicious prosecution, false imprisonment, seduction or breach of promise of marriage.⁴⁷ In Queensland, there is a prima facie right to a civil jury in common law cases unless the right is denied by statute.⁴⁸ In Tasmania, a trial by jury in civil matters is permitted by order of the court.⁴⁹

Where proceedings are brought before the Federal Court trial by jury exists in exceptional cases – because, by virtue of statute, the ordinary mode of trial is by judge alone.⁵⁰

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Most jury trials in civil proceedings are now conducted in Victoria. The reason for this is that where proceedings are commenced by writ and are founded on contract or tort, the mode of disposition is prescribed to be by jury unless the court orders otherwise.⁵¹

Since the introduction of substantially uniform Defamation Acts in 2005 and 2006 the jurisdictions of New South Wales, Victoria, Queensland, Western Australia and Tasmania permit that a party may elect for trial by jury, unless the court otherwise orders.⁵² The court may, however, order that such proceedings are not to be tried by jury if they involve prolonged examination of records, or any technical, scientific or other issue that cannot conveniently be considered and resolved by the jury.⁵³

Many of the concerns canvassed earlier in this article in discussing the criminal jury apply with equal force to the civil jury. There is a similar pressing need to curtail extrajudicial investigation by jurors, as both civil and criminal

The jury in civil proceedings in Australia is very much a threatened species.

matters have the same potential to generate prejudicial pre-trial publicity. The problem may not properly be appreciated where the civil jury is concerned. This is exemplified by the significant difference in the Criminal and Civil Trials Bench Book directions to be given upon the empanelment of juries – the criminal jury is given detailed instructions regarding that issue, whereas the civil jury direction is limited to just a few lines.⁵⁴

Complexity of the task, either in terms of complicated technical issues as well as the jury's ability to comprehend highly nuanced legal arguments, is one criticism invariably raised to reduce the right to have a jury determine civil cases. Legal minds may and do differ as to the sagacity of retaining the civil jury.⁵⁵ At least one such mind is a strong admirer of the jury – Rares J – has written, in the context of discussing defamation proceedings and the retention of the civil justice system, that the 'solution is not the abolition of civil juries, but rather lucidity, succinctness of advocates and judges and appropriate case management by the trial judge'.⁵⁶ In the context of the ongoing erosion of the civil jury to the limited extent it exists in Australia today such a useful insight may well be considered a rage against the dying of the light. Sadly, the erosion of the right can and should be seen as having contributed to the erosion of another fundamental aspect in the pursuit of justice, the decline of the art of public advocacy where suasion of the jury was the order of the day.

Endnotes

This is an edited and updated version of a longer article which appeared in [2011] *Journal of Commonwealth Criminal Law* 175 published by the recently established Association of Commonwealth Criminal Lawyers (see <http://www.acclawyers.org>). The association has been established to promote lawyers' understanding of criminal law in each other's jurisdictions as well as current developments in common law criminal justice.

1. See New South Wales Law Reform Commission (NSWLRC), *Majority Verdicts*, (NSWLRC R111, 2005), para.4.29.
2. Juror number eight memorably says, at one point, 'It is also possible for a lawyer to be plain stupid, isn't it?'.
3. Charles D. Weisselberg, 'Good Film, Bad Jury' (2007) 82 *Chicago-Kent Law Review* 721, 726.
4. *R v Skaf* [2004] NSWCCA 37, (2004) 60 NSWLR86.
5. John G. Browning, 'The Online Juror' (May-June 2010), 93 *Judicature* 231, 234.
6. Cheryl Thomas, 'Are juries fair?' (Ministry of Justice Research Series 1/10, February 2010).
7. *R v Folbigg* [2007] NSWCCA 371 (information from the internet regarding the retention of body heat in a deceased baby), *R v K* [2003] NSWCCA 406, (2003) 59 NSWLR 431 (material acquired from an unreliable internet source).
8. Caren Myers Morrison, 'Jury 2.0' (2011) 62 *Hastings Law Journal* 1579, 1613.
9. Brian Grow, 'As jurors go online, US trials go off track', Reuters US (Atlanta, December 8, 2010).
10. *R v Fraill and Stewart* [2011] EWHC 1629 (Admin.), [2011] 2 Cr App R 271.
11. Judith Fordham, *Juror Intimidation: an investigation into the prevalence and nature of juror intimidation in Western Australia* (Report to the attorney general of Western Australia, approved for publication April 1, 2010).
12. Warren Young, Neil Cameron, Yvette Tinsley, New Zealand Law Commission, *Juries in Criminal Trials, Part Two: A Summary of Research Findings* (NZLC PP37, vol. 2, 1999), paras 6.35-6.39.
13. Thomas (n 6), 24, fn 7.
14. Phillip Boulten, 'Trial by jury or trial by ordeal?', *Bar News* (Winter 2011) 62, 63.
15. *R v Richards & Bijkerk* [1999] NSWCCA 114, (1999) 107 A Crim R 318; *R v Elfar & Tier*, unreported, October 9, 1995, NSWCCA).
16. Available from 1927 in South Australia, *Juries Act 1927* (s 57); in 1936 in Tasmania, *Juries Act 2003* (ss 3 and 43); in 1960 in Western Australia, *Criminal Procedure Act 2004* (s 114); in 1963 in the Northern Territory, *Criminal Code Act 1983* (s 368); in 1994 in Victoria, *Juries Act 2000* (s 46); and finally in New South Wales in 2006, *Jury Act 1977* (s 55F). A unanimous verdict is still required in relation to trials held in the Australian Capital Territory.
17. Commonwealth Constitution, (s 80). See *Cheatle v The Queen* [1993] HCA 44, (1993) 177 CLR 541.
18. *Criminal Procedure Act 2004* (WA), s 118, and *Criminal Code Act 1899* (Qld), s 615.
19. *Jury Act 1995* (Qld), s 69A.
20. *Jury Act 1995* (Qld), s 70.
21. *Jury Act 1977* (NSW), s 75C(1) and (4).
22. *Jury Act 1977* (NSW), s 75C(2).
23. *Juries Act 2000* (Vic), s 78A.
24. *Juries Act 2000* (Vic), s 78(3)(a)(i).
25. *Evidence Act 1995* (Cth), (NSW) and (ACT), *Evidence Act 2001* (Tas), and *Evidence Act 2008* (Vic), ss 16, 129.
26. Thus overcoming the difficulty of investigating jury impropriety after delivery of verdict because of the principle of secrecy of jury deliberations, which grounded a common law rule that, whilst jury impropriety could be investigated, any evidence obtained was strictly inadmissible, see *R v Skaf* (n 4); *R v Rinaldi* (1993) 30 NSWLR

- 605; *R v K* [2003] NSWCCA 406, (2003) 59 NSWLR 431, and *R v Potier* [2005] NSWCCA 336 (in that case, a journalist wrote a book regarding his experiences as a juror on Mr Potier's trial and an attempt to call the journalist to give fresh evidence on the hearing of the appeal was refused).
27. See Jacqueline Horan, 'Communicating with jurors in the twenty-first century' (2007) 29 *Australian Bar Review* 75, 93, fn 92.
 28. Queensland Law Reform Commission, *A Review of Jury Directions: Report*, vol. 2 (QLRC R 66, 2009); Victorian Law Reform Commission, *Jury Directions* (Final Report 17, 2009); and New South Wales Law Reform Commission, *Jury Directions* (NSWLRC CP 4, 2008).
 29. See Young et al., NZLC, *Juries in Criminal Trials, Part Two* (n 12), para 7.12.
 30. See Thomas (n 6), 36-37.
 31. Blake McKimmie, Emma Antrobus and Ian Davis, *Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials* (November 2009) found as Appendix E to QLRC, *A Review of Jury Directions: Report*, vol. 2 (QLRC R 66, 2009).
 32. *Zoneff v The Queen* [2000] HCA 28, (2000) 200 CLR 234, [65].
 33. *Criminal Code 1995* (Cth), s 3.1.
 34. *ibid.*, s 3.2
 35. *ibid.*, s 4.1.
 36. *ibid.*, s 5.1.
 37. *ibid.*, s 3.1(2).
 38. *ibid.*, s.5.6(1).
 39. Unreported, November 10, 2006 (District Court); see also *Ansari v The Queen* [2007] NSWCCA 204, (2007) 70 NSWLR 89; and *Ansari v The Queen* [2010] HCA 18, (2010) 241 CLR 299.
 40. Justice Peter McClellan, 'Looking inside the jury room' *Bar News* (Winter 2011) 64, 68.
 41. The testing of jurors has in fact been suggested: see Bob Hycran, 'The myth of trial by jury' (2005-2006) 51 *Criminal Law Quarterly* 157, 167.
 42. New Zealand Law Commission, *Juries in Criminal Trials* (NZLC Rep. No.69, 2001).
 43. Justice Roslyn Atkinson, 'Juries in the 21st Century; Making the Bulwark Better' <http://greekconference.com.au/papers/2009/atkinson.pdf>. Justice Atkinson raises two fundamental problems with such a course. First, any advice or assistance to juries would be given in private rather than in open court. Second, it increases the role of the judge at the expense of ordinary members of the community.
 44. *Juries Act 1927* (SA), s 5; *Supreme Court Act 1933* (ACT), s.22.
 45. *Supreme Court Act 1970* (NSW), s 85; *District Court Act 1973* (NSW), s 76A. Those provisions and their subsequent interpretation have all but stopped the use of civil juries in those courts, except in relation to defamation proceedings which fall outside the ambit of those provisions (s 85(6) and s 76A(4) respectively). Their desuetude is confirmed by the *Civil Trials Bench Book* published by the NSW Judicial Commission which referred to the role of the civil jury having been gradually diminished 'almost to the point of extinction save in defamation cases' http://www.judcom.nsw.gov.au/publications/benchbks/civil/civil_juries.html
 46. *Coroners Act 2009* (NSW), s 48. Elsewhere in Australia the coroner sits without a jury.
 47. *Supreme Court Act 1935* (WA); SCR, O 32; *District Court of Western Australia Act 1969*, s 52. Such civil jury trials are rare as, apparently, no such trial has occurred since 1994 and only a dozen or so trials have occurred in the past four decades, Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors, Discussion Paper* (2009) 11. In any event, the reference to claim for breach of promise of marriage is anomalous, as such claims were abolished under s 111A of the *Marriage Act 1961* (Cth).
 48. *Supreme Court Act 1995* (Qld); *District Court of Queensland Act 1967*, s 75; UCPR rr 472, 474 and 475. Statutory exceptions arise under the *Civil Liability Act 2003* (Qld), s 73 and matters listed as a commercial cause.
 49. *Supreme Court Civil Procedure Act 1932* (Tas), s 27. The general rule is that there be a trial without a jury- *Supreme Court Rules 2000*, rr 556 and 557.
 50. *Federal Court of Australia Act 1976* (Cth), ss 39 and 40.
 51. *Supreme Court (General Civil Procedure) Rules*, rr 47.02 and 47.04.
 52. *Defamation Act 2005* (NSW), s 21(1) and analogous provisions. There is no such provision in the legislation in South Australia, the Australian Capital Territory or the Northern Territory. For a useful discussion of the availability of juries in defamation proceedings, see Justice Steven Rares, 'The jury in defamation trials' (2010) 33 *Australian Bar Review* 93.
 53. *Defamation Act 2005* (NSW), s 21(3)(a) and (b).
 54. Both bench books are published on the NSW Judicial Commission website <http://www.judcom.nsw.gov.au>
 55. Justice Peter McClellan, 'The Australian Justice System in 2020' (2009) 9 *Judicial Review* 179; Rares (n 52); Jacqueline Horan, 'The Law and Lore of the Australian Civil Jury and Civil Justice System' (2006) 9 *Flinders J L Reform* 29, and by the same author, 'Perceptions of the Civil Jury System' (2005) 31 *Monash U L Rev* 120.
 56. *Ibid.*, 105.