Selection of Juries: the search for the elusive peer group

A few years ago I was sitting in a regional centre in Queensland trying an Aboriginal man from a remote community for murder. The jurors were chosen by the usual method. None of them was indigenous. I doubt that any of them had ever visited the remote community and I have no way of knowing whether any of them knew any indigenous people. This experience starkly epitomises the dilemma of trial by jury. How can we ensure that the jury represents the community and is a trial by peers? At present we do not appear to achieve either of these aims very well and yet trial by jury is fundamental to the community's involvement and confidence in the criminal justice system.

The selection and disqualification of persons for jury service has been a focus of discussion in the area of law reform in recent years. The Australian, New South Wales and Victorian Law Reform Commissions' Report on Uniform Evidence Law recommended that the Standing Committee of Attorneys-General should initiate an inquiry into the operation of the jury system, including matters such as eligibility, empanelment, warnings and directions to juries. The New South Wales Law Reform Commission has recently completed two reports on juries after reviewing the operation and effectiveness of the system for selecting jurors under the Jury Act 1977 (NSW): Report No 114 of 2006 on blind or deaf jurors; and Report 117 of 2007 on Jury Selection. Other jurisdictions have made substantial reforms with regard to the composition of juries and conditions of jury service. For example, Victoria and Tasmania have removed a juror's right to claim exemption from jury service and to limit the categories of people of people who are ineligible to serve on a jury. The United Kingdom has also removed exemptions for most people and the only people who are disqualified include people in prison or in mental institutions or who have served lengthy prison sentences within a certain period.

This paper raises some of the issues surrounding the selection and disqualification of persons for jury service and particularly considers whether juries can be representative of the community, when a significant number of people are excluded or potentially excused from jury service. This topic matters because, as Chief Justice Gleeson has observed, serving on a jury and thus

engaging in the legal process in a positive way gives the public more confidence in the legal process.[1]

Research carried out in the United States suggests that public confidence in juries is greater when jury members are more representative of the community.[2] The failure to have a representative jury led to such a jury being discharged in a District Court trial in New South Wales in 1981. The jury was discharged for lack of representativeness as the accused was an indigenous person and all the members of the jury were non-indigenous, indigenous people having been stood by by the prosecution.[3]

Historically the exemptions from jury service ensured that a jury could not be representative of the general community. Women, for example, were usually excluded by statute from serving on juries. It was not until 1957 that women in Western Australia were allowed to serve on juries. Prior to that, only men aged between 21 and 60 who owned property were allowed to serve as jurors in that state.[4] Even in New Zealand the first country in which women obtained the vote, they were long excluded from that other important civic duty: jury service.[5] And yet New Zealand had more progressive attitudes in other areas of jury selection. For almost a century, the law permitted all Maori juries in cases involving Maori accused.[6] The property qualification brought in from the British system was removed early on and replaced with a qualification that a potential juror be of good character as a property qualification was considered unsuitable to the circumstances in New Zealand.[7]

In Queensland in 1995, there were major reforms to the Jury Act to remove many unnecessary disqualifications but it could be argued that the remaining extensive list of disqualifications mean that juries in Queensland still fail to represent the community. Those disqualified from serving

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[1] Gleeson CJ, "Juries and Public Confidence in the Courts", (2007) 90 *Reform* 12.
[2] Richard M Re, "Re-justifying the Fair Cross-Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury", (2007) 116 *Yale Law Journal* 1568, 1574.
[3] Case note: Neil Rees, `R v Smith` (1982) 813 *Aboriginal Law Bulletin* 11
[4] Sonia Walker, `Battle-Axes and Sticky-Beaks: Women and Jury Service in Western Australia 1898-1957` [2004] *Murdoch University Electronic Journal of Law* 32.
[5] Michele Poules, `A Legal History of the New Zealand Jury Service: Introduction, Evolution and Equality` (1999) 29 *Victoria University of Wellington Law Review* 283.
[6] Ibid.
[7] Ibid.

as jurors in section 4(3) of the Jury Act 1995 (Qld) include:

* the governor (s 4(3)(a));
* members of parliament (s 4(3)(b));
* local government councillors and mayors (s 4(3)(c));
* lawyers engaged in legal work (s 4(3)(f)), judges, magistrates (s 4(3)(d)), police officers, (s 4(3)(g)) corrections officers, (s 4(3)(i)) and workers in detention centres (s 4(3)(h));
* people convicted of an indictable offence (s 4(3)(m)) and those actually imprisoned (s 4(3)(n));
* people with physical or mental disabilities that make "the person incapable of effectively performing the functions of a juror" (s 4(3)(l);)
* a person who is over 70 years unless the person elects to serve as a juror; (s 4(3)(j), s 4(4)) and
* people who cannot read or write in English (s 4(3)(k)).

As appears to be the case throughout Australia,[8] section 4(3) excludes a wide variety of people and it is unclear who is covered by some of the exclusions. For example, what disabilities are considered to make a person "incapable of effectively performing the functions of a juror"? Who should determine what disabilities make a person "incapable of effectively carrying out the functions of a juror"? How is it determined that a person has a mental disability that makes that person "incapable of effectively performing the functions of a juror" when such disabilities are invisible and a *voir dire* is not usually carried out during the selection process? To what level does a person need to be able to read and write English to serve as a juror? Who carries out the assessment of a person's literacy levels? What other factors may influence a person's ability to understand complex legal instructions? How does one assess the comprehension levels of all potential jurors and is it necessary to do so? How should society approach this situation while respecting people's individual approaches to understanding material? Would it be an advantage or disadvantage if people trained in the law or in the police service were allowed to serve on juries if selected? Should politicians be excluded from jury service? I will consider some of these disqualifying factors in detail below.

What constitutes a mental disability? Is it necessary for a person to have a diagnosed psychiatric

[8] Jacqueline Horan, David Tait "Do Juries Adequately Represent The Community?: A Case Study of Civil Juries In Victoria" [2007] *JJA* 179.

illness for that to constitute a "mental disability" for the purposes of jury selection? How broad is the disqualification on the basis of mental disability? Is it necessary to assess jurors prior to selection on their ability to handle stressful situations? [9] In a recent murder trial I conducted, a juror had to be discharged because she found the experience of serving as a juror so stressful that it affected her ability to be impartial. It was not possible on her selection as a juror for the prosecution or defence to assess her mental stability as such an assessment is not possible by merely looking at someone. Further, when the jury was invited to raise any matters that they thought would impact on their ability to be impartial, the juror did not raise any issues, thus indicating that she considered herself capable of serving as a juror.

An issue that was addressed by the New South Wales Law Reform Commission was whether people who are blind or deaf should be allowed to serve as jurors. While deaf and blind people are allowed to serve as jurors in other jurisdictions, they are not allowed to do so in Australia - the disqualification of blind and deaf jurors is probably justified as "a physical ... disability that makes the person incapable of effectively performing the functions of a juror": s 4(3) Jury Act 1995 (Qld). Recently, research was conducted in NSW as to whether deaf people were capable of understanding facts and instructions to the same extent as hearing people.[10] Unsurprisingly, it was found that deaf and hearing people had comparable levels of understanding - while they both understood the facts, both groups had some difficulties in understanding complex legal points.[11] My own Associate during 2007 is blind. She has nevertheless assisted me in all of the criminal trials I have conducted and has valuable insights into the evidence based on her superior listening skills. Is it unfair to defendants and to the community as well as to potential jurors to make assumptions about people's capacities or incapacities based on superficial or incorrect understanding of disabilities?

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[9] An article in the September-October 2007 issue of Judicature entitled "Courtroom Stress" analysed the stressors affecting judges and jurors because of their involvement in the justice system (Monica K Miller, David M Flores, and Ashley N Dolezilek, `Addressing The Problem Of Courtroom Stress` [2007] September-October *Judicature* NP). It suggested steps that could be taken to address juror stress including a five-step approach dependent on the juror's stress level. Practical suggestions made in the article included working towards attitudinal adjustment in the acceptance of stress as a normal part of the courtroom environment - ie reducing the stigma associated with experiencing stress; and educating jurors about strategies to cope in stressful situations.

[10] Jemina Napier and David Spencer `Deaf Jurors and the Potential for Law Reform` (2007) 90 *Reform* 35.

[11] Ibid.

I turn to consider whether those involved in law enforcement should be absolutely disqualified from jury service. This area of disqualification was recently removed in the United Kingdom by the Criminal Justice Act 2003 (UK). Baroness Hale of Richmond observed that:

> "The purpose of the legislation was to do away with the large number of blanket exclusions which meant, it was said, that as many as four million people were excluded from jury service. The policy was that everyone should be included unless there was a very good reason why they should not sit in a particular case. The jury would then become a much more representative body, drawn from all sections of society, including those involved in the administration of justice and committed to the rule of law. There is much to be said for such a policy. The whole point of a jury is that 12 different people bring their different backgrounds, experiences and views to the business of deciding the case. Their various individual view-points (or biases as some might call them) are brought to bear upon the discussion of the evidence and out of that discussion a consensus is forged."[12]

The House of Lords has considered, in the case from which I have quoted, in what circumstances police officers and other persons involved in law enforcement should be excluded from sitting on a jury on the basis of unfairness to the defendant: *R v Abdroikof; R v Green; R v Williamson* [2007] UKHL 37. Lord Bingham of Cornhill characterised the issue to be determined in these appeals as:

> "In the first two cases the trial jury included among its members a serving police officer, and in the third case it included a solicitor employed by the Crown Prosecuting Service. The common question raised by these three conjoined appeals is whether a fair-minded and informed observer, on the facts of the three cases, would conclude that there was a real possibility that the trial jury was biased."[13]

The judges differed in their opinions but each recognised the continuing importance of the principle that justice not only must be done but must be seen to be done. Abdroikof's appeal was dismissed as there was no actual or apparent bias - the police officer did not have contact with the police officers involved in the case and there was no issue of conflict between the evidence given by the defendant and the evidence of the police. Green's appeal was allowed on the basis that the police officer had worked alongside the police officer on the jury although they did not know each other. Further, there was conflict between the evidence of the accused and a police officer about what was said between them and the conduct of the search of the defendant. Williamson's appeal was allowed on the basis that one of the jurors was a full-time employee of

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[12] *R v Abdroikof; R v Green; R v Williamson* [2007] UKHL 37 at [47].
[13] (supra) at [2]

the Crown Prosecution service and therefore was too closely connected with the prosecution of the case even though he did not know the lawyers representing the Crown in the case.

Baroness Hale framed the question with regard to the police officers and the prosecutor as follows:

> "The fair-minded and informed observer, in deciding whether there was a real possibility of unconscious bias, would draw a distinction between this and the sort of conscious or unconscious biases to which we are all subject. She would understand that a CPS solicitor has a particular expertise in weighing up the evidence and deciding whether it is sufficient to justify prosecution, let alone conviction. She would understand that a police officer has a particular expertise, among other things, in evaluating the truth and accuracy of what he has been told. But she would also understand why a person cannot be a judge in a case to which he is a party and so she would consider the closeness of the identification between the juror and the prosecutor."[14]

Having considered these cases, should people directly involved in law enforcement or in the criminal justice system be allowed to serve on juries at all? If so, what are the circumstances in which they should be excluded? Are people directly involved in the criminal justice system or in law enforcement less capable than people not involved in the system of putting aside their own prejudices and biases? Do people involved in the administration of justice appear to be more biased than people not involved in the justice system? Why do they appear more biased? In considering that one concern often raised is that lawyers and others involved in the administration of justice may have specialised knowledge that would enable them to influence the jury, should others with specialised legal knowledge to some extent - ie law students or those who have previously been litigants in court - also be prohibited from serving on juries? Former police officers are prevented from serving on juries in Queensland. Once a person has worked in the police service, should they always be prevented from serving on a jury, regardless of the length of time they have spent working in the police service? If so, why doesn't the same exclusion apply to lawyers - only lawyers who are working as lawyers are currently excluded.

Turning to another area of disqualification, is the disqualification of people who have been convicted of an indictable offence at any time under the Jury Act 1995 (Qld) too broad? If one

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[14] (supra) at [50]

accepts that people make mistakes but can be rehabilitated, is it reasonable to continue to deny them the opportunity of sitting on a jury? Litigation surrounded the provision of lists containing information about a potential juror's non-disqualifying convictions to the Director of Public Prosecutions by the Victorian police.[15] This was done so that the prosecutor could use peremptory challenges to exclude a wider variety of potential jurors deemed unsuitable for jury service. The High Court dismissed Katsuno's appeal, allowing such lists to be used by prosecutors. Some have argued that such jury vetting should be banned by legislation.[16] The arguments put in favour of that point of view include infringements of a potential juror's right to privacy; the fact that lists are not provided to the defence; that the prosecution has the ability to challenge a proposed juror in circumstances where it may give the prosecution a significant advantage; and that it may undermine public confidence in the process as it is secret and lacks due process. But would a system that supports the use of a *voir dire* as in the United States be an appropriate way of assessing a juror's impartiality?

It has been suggested that experienced litigators in the United States use the *voir dire* as their primary decision-making tool in jury selection as opposed to stereotypical understandings of a person's potential biases based on their visual or known characteristics.[17] But that system is far from foolproof. In the US, situations have arisen in which jurors have been found to have lied about their backgrounds on a *voir dire* resulting in a retrial after the verdict was presented to the court.[18] Situations like this highlight the vulnerability of the jury system and may provide an argument for widening jury qualification, if it is accepted that all people have biases and prejudices.

In general, is it possible to determine whether members of a jury are impartial? Is it enough to rely on the honesty of jury members? To try to ensure that a potential juror is honest during a *voir dire* or when the judge asks them whether there is any reason why they cannot be impartial, is it appropriate to enact penalties for dishonesty as there are for all others who appear before the

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[15] *Katsuno v The Queen* (1999) 199 CLR 40.
[16] Tom Percy, Anthony Papomatheos, `Jury Vetting In Western Australia` (2006) 33 *Brief* 6.
[17] William C Smith, `Challenges Of Jury Selection` [2002] 88 *ABA Jour* 34.
[18] For an examination of this situation in Florida, see Donald A Blackwell and Stephanie Martinez, `The Burden of Truth: Have Florida courts gone far enough in addressing the problem of juror misconduct?` (2007) 81 *Florida Bar Journal* 8

court? [19]

It is considered central to the administration of justice that jury members be impartial.[20] However, the availability of a wide variety of information on the internet is making this harder to achieve. Chief Justice McLachlin cites the example from Canada, where a judge allowed the media to observe the questioning of a jury before a trial provided that the media did not publish information about the jury. While the Canadian media respected the publication ban, the US media did not and the information covered by the ban was soon available to everyone connected to the internet.

People may be excused from serving as jurors under s 21 of the Jury Act 1995 (Qld). Essentially, people can be excused from serving as a juror if being a juror would cause substantial hardship to them or their dependants. This also raises questions about what constitutes the hardship necessary for excusal? What proof of hardship should be provided?

Although many people are exempted from jury service and many more are easily excused, is the membership of juries nevertheless broadly representative of the community? A case study undertaken by Jacqueline Horan and David Tait in Victoria[21] demonstrated that civil juries in Victoria are now representative of the community in their gender balance. However, they contend that people from non-English speaking backgrounds are slightly under-represented and that people with university education are over-represented. But how do you determine whether a jury is representative when so many people are already excluded? For example, if you were to assess whether people with disabilities served on juries compared with the percentage of people with disabilities in the community, people with most disabilities would be likely to be significantly under-represented as jurors.

In conclusion, there are a wide variety of issues that need consideration with relation to the

[19] For a discussion on this topic, see Donald A Blackwell and Stephanie Martinez, `The Burden Of Truth: Have Florida Courts Gone Far Enough In Addressing The Problem Of Juror Misconduct` (2007) 81 *Florida Bar Journal* 8.
[20] Beverley McLachlin, "Courts, Transparency and Public Confidence: to the Better Administration of Justice" (2003) 8 *Deakin Law Review* 1.

selection and disqualification of potential jurors. These include objectively assessing a person's potential to serve as a juror; determining whether people involved in law enforcement should be excluded from serving on juries; when should a physical or mental disability disqualify a person from serving as a juror; and how can the impartiality criterion for a juror be satisfied.

Justice Roslyn Atkinson
Supreme Court of Queensland
11 December 2007.

[21] Jacqueline Horan, David Tait "Do Juries Adequately Represent the Community? A Case Study of Civil Juries in Victoria" [2007] *JJA* 179.