NSW Law Reform Commission

REPORT 48 (1986) - CRIMINAL PROCEDURE: THE JURY IN A CRIMINAL TRIAL

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REPORT 48 (1986) - CRIMINAL PROCEDURE: THE JURY IN A CRIMINAL TRIAL

Terms of Reference and Participants

New South Wales Law Reform Commission
To The Honourable T W Sheahan, BA, LLB, MP,

Attorney General for New South Wales

CRIMINAL PROCEDURE REPORT: THE JURY IN A CRIMINAL TRIAL

We make this Report under our reference from your predecessor, the Honourable F i Walker, QC, MP, to inquire Into and review the law and practice relating to criminal procedure and, in particular, the practices and procedures relating to juries In criminal proceedings.

Keith Mason QC

(Chairman of the Commission)

Paul Byrne

(Commissioner in Charge)

Greg James QC

(Part-time Commissioner)

Her Honour Judge Jane Mathews

(Part-time Commissioner)

The Honourable Mr Justice Adrian Roden

(Part-time Commissioner)

Ronald Sackville

(Part-time Commissioner)

March 1986

Terms of Reference

To inquire into and review the law and practice relating to criminal procedure, the conduct of criminal proceedings and matters incidental thereto; and in particular, without affecting the generality of the foregoing, to consider-

(a) the means of instituting criminal proceedings;

(b) the role and conduct of committal proceedings;

(c) pre-trial procedures in criminal proceedings;

(d) trial procedures in matters dealt with summarily or on indictment;

(e) practices and procedures relating to juries in criminal proceedings;

(f) procedures followed in the sentencing of convicted persons;

(g) appeals in criminal proceedings,

(h) the classification of criminal offences;

(i) the desirability and feasibility of codifying the law relating to criminal procedure.

F J Walker QC

Attorney General

17 January 1982

Participants

For the purpose of this Report in the Criminal Procedure Reference the following members of the Commission have acted as a Division constituted by the Chairman in accordance with s12A of the Law Reform Commission Act 1967.

Commissioners:

Paul Byrne (Commissioner in charge of reference)

Greg James QC (from 7 August 1985)

Keith Mason QC (Chairman of the Commission)

Her Honour Judge Jane Mathews

The Honourable Mr Justice Adrian Roden

Ronald Sackville

(Miss Deirdre O'Connor was for a period a member of the Division but did not participate in the final Report)

Research Director:

Mark Richardson (to 21 June 1985)

Ms Fiona Tito (Acting, 24 June 1985 to 19 September 1985)

William J Tearle (from 18 November 1985)

Senior Legal Officer:

Ms Meredith Wilkie

Additional Research Assistance:

Ms Janice Edmond

Mr Gordon Renouf

Ms Clare Sneddon

Secretary:

Mr John McMillan

Typing and Word Processing:

Ms Lorna Clarke

Mrs Margaret Edenborough

Ms Nozveen Harris

Miss Meg Orr

Librarian:

Mrs Beverley Caska

Administrative Assistance:

Miss Zoya Howes

Ms Dianne Wood

REPORT 48 (1986) - CRIMINAL PROCEDURE: THE JURY IN A CRIMINAL TRIAL

Summary of Recommendations

Chapter 2: The Jury in the Criminal Justice System

Recommendation 1: A person who is charged with a serious criminal offence should continue to have the right to trial before a judge and a jury of 12 people randomly selected from the community. (Para 2.1)

Recommendation 2: The Crimes Act 1900 should be amended to provide that where there is a discretion to prosecute a charge either summarily or on indictment, and where the prosecutor elects to proceed summarily and the accused person does not consent to this, the magistrate should order that the charge be tried before a judge and jury if he or she considers it to be a 'serious" case. The determination of seriousness should be made by reference to a specified set of criteria. (Para 2.15)

Chapter 4: Ensuring a Representative Jury

Recommendation 3: Section 9(2) of the Jury Act 1977 should be amended to provide that every electoral subdivision shall be assigned to a particular jury district. (Para 4.10)

Recommendation 4: The Sheriff should increase the size of jury rolls so as to make it likely that a person on the roll will only be summoned once for jury service during the currency of the roll. (Para 4.14)

Recommendation 5: Schedule I to the Jury Act 1977 should be repealed and recast so as to disqualify:

1. a person who at any time within the last ten years in New South Wales or elsewhere has served any part of a sentence of imprisonment or penal servitude;

2. a person who at any time within the last five years in New South Wales or elsewhere has been detained in an institution for juvenile offenders having been found guilty of an offence; and

3. a person who is currently bound by an order of a court made in New South Wales or elsewhere pursuant to a criminal charge or conviction. (Para 4.17)

Recommendation 6: Commonwealth public servants should be available to perform jury duty in New South Wales unless they are otherwise ineligible. (Para 4.23)

Recommendation 7: The spouse of a person who is. by Schedule 2 to the Jury Act 1977, ineligible for jury service by virtue of that person's association with the administration of justice or the enforcement of the law, should continue to be ineligible. (Para 4.24)

Recommendation 8: Where the spouse of a person of a nominated occupation is made ineligible for jury service by Schedule 2 to the Jury Act 1977, a de facto partner of a person of that nominated occupation should also be ineligible. (Para 4.24)

Recommendation 9: Any person who has at any time held the position of judge, magistrate, Crown prosecutor, public defender or police officer should be ineligible for jury service: Schedule 2 to the Jury Act 1977 should be amended accordingly. (Para 4.27)

Recommendation 10: Any person who has actually served on a jury within the previous three years should be ineligible for jury service: Schedule 2 to the Jury Act 1977 should be amended accordingly. (Para 4.29)

Recommendation 11: The ability to read English should continue to be a qualification for jury service. It would be good practice for the judge to direct the jury panel that any person who cannot understand and read English is ineligible and should advise the court. (Para 4.30)

Recommendation 12: The age at which a person is entitled to claim exemption as of right from jury service on the ground of advanced age should be raised from 65 to 70 years: Schedule 3 to the Jury Act 1977 should be amended accordingly. (Para 4.35)

Recommendation 13: People who have a conscientious objection to serving on a jury in a criminal trial should be entitled to claim exemption as of right from jury service: Schedule 3 to the Jury Act 1977 should be amended accordingly. (Para 4.36)

Recommendation 14: The practice of "Jury vefting" as used in the United Kingdom, whereby the prosecuting authorities make special inquiries regarding the background of the prospective jurors, should not be introduced in New South Wales. (Para 4.43)

Recommendation 15: It would be good practice for personal applications to a judge to be excused from jury service to be made where practicable in the presence and hearing of the accused person and counsel for the prosecution. Where an unsuccessful personal application is made in their absence, they should be advised of that fact. (Para 4.46)

Recommendation 16: The Jury Act 1977 should be amended to confirm that the right to challenge a particular juror for cause may be exercised before or after all rights of peremptory challenge have been exhausted. (Para 4.52)

Recommendation 17: The United States procedure of conducting an examination of prospective jurors as a prelude to the exercise of the right of challenge should not be introduced in New South Wales. (Para 4.54)

Recommendation 18: Section 42 of the Jury Act 1977 should be amended to provide that the maximum number of peremptory challenges available to an accused person should be reduced to three irrespective of the offence being tried. This recommendation should be read in conjunction with recommendations 20, 21, 22, 25, 59 and 60. (Para 4.69)

Recommendation 19: The maximum number of peremptory challenges available to the Crown should be reduced to three for each accused person irrespective of the offence being tried. (Para 4.59)

Recommendation 20: The Attorney General should, in consultation with the Crown Prosecutors, establish guidelines to govern the Crown's exercise of the right of peremptory challenge. These guidelines should be published. (Para 4.73)

Recommendation 21: The Jury Act 1977 should confirm the power of the judge to discharge a jury where the process of exercising peremptory challenges has created the potential for or the appearance of unfairness. The fact that an unobjectionable selection process has nevertheless left the jury lacking a member of a particular group within the community should not of itself be a ground for exercising the power. (Para 4.76)

Recommendation 22: The Jury Act 1977 should be amended to provide that where each of the parties in a criminal trial believes that a prospective juror should for any reason not be empanelled, the juror may be challenged by consent. Such a challenge would not affect the rights of peremptory challenge of any party. (Para 4.77)

Chapter 5: Protecting the Jury

Recommendation 23: Section 40(1) of the Jury Act 1977 should be amended to provide that It is an offence for any person to inspect a list of the members of the jury or jury panel relating to a particular criminal trial at any time without the permission of the court. (Para 5.8)

Recommendation 24: When a person is called to the jury box after being balloted in the jury selection process, he or she should be referred to by his or her title and family name only, unless two or more people with the same family name answer to the call. We suggest that consideration might be given to issuing a Practice Direction to this effect. (Para 5.9)

Recommendation 25: The current law and practice in criminal cases whereby the occupation and address of jurors and prospective jurors Is not disclosed should be continued except where this information is revealed as part of the procedure proposed in Recommendation 60 for allowing certain categories of prospective jurors to be challenged. (Para 5.11)

Recommendation 26: It would be good practice if the names of jurors were announced in open court only during the process of empanelling the jury and at no later stage during the trial except in the event of a challenge to the identity of a juror. (Para 5. 12)

Recommendation 27: The Jury Act 1977 should make it an offence to disclose, without lawful excuse, during the course of the trial, any information which identifies someone as a juror in a particular trial. (Para 5.13)

Recommendation 28: Section 68 of the Jury Act 1977 should be amended to provide that it is an offence to publish material which identifies a person as a former juror in a particular trial unless the person consents to his or her identification. (Para 5.13)

Recommendation 29: Where it is considered necessary to take special precautions to maintain the security of the court or the personal security of the jurors, the measures intended to be taken should, where possible, be revealed to the court and to the accused person but not to the jury. (Para 5.17)

Chapter 6: Making the Jury's Task Easier

Recommendation 30: The Notification of Inclusion on a Draft Jury Roll should be improved by adding:

(a) a brief explanation of the nature of jury service and the role of the jury in the legal process-,

(b) an explanation that a penalty may be imposed if the recipient fails to advise the Sheriff that he or she is disqualified from or ineligible for jury service; and

(c) an explanation that the Sheriff has a discretion to excuse people from jury service on particular occasions for good cause. (Para 6.4)

Recommendation 31: A notice in the major community languages should accompany the Notification of Inclusion on a Draft Jury Roll. This notice should explain what the Notification is and advise that people who are unable to read or understand English are ineligible for jury service and must inform the Sheriff of that fact. (Para 6.5)

Recommendation 32: To enable people to respond accurately to the Notification of Inclusion on a Draft Jury Roll, the language and setting out of the schedules listing classes of disqualification, ineligibility and exemption as of right should be made clear and unambiguous. (Para 6.6)

Recommendation 33: The Jury Summons should be amended to:

(a) advise recipients that applications to be excused may be made to the Sheriff and encourage applicants to approach the Sheriff at their earliest convenience;

(b) include a map showing the location of the court and the attendance point for prospective jurors;

(c) advise prospective jurors to contact the relevant telephone information service on the night before attendance is required to check attendance details; and

(d) give adequate notice (21 days) of the date of attendance, unless a shorter period has been directed by a judge.

(Para 6.8)

Recommendation 34: When a jury panel is summoned for a particular trial which is expected to take 4 weeks or longer, the Jury Summons should include a notice to this effect and should invite recipients to apply to the Sheriff to be excused if jury service for that length of time would cause hardship. (Para 6.12)

Recommendation 35: An explanatory booklet should be prepared and distributed to every person summoned for jury service. This booklet should describe the nature of a juror's rights and responsibilities, the jury's role, the conduct of trials and explain common concepts which are likely to be referred to in the trial. (Para 6.13)

Recommendation 36: It would be good practice for the judge to indicate the estimated length of the trial to the jury panel. If the trial is expected to be lengthy, the judge should invite applications to be excused on the ground that jury service for that length of time would be likely to cause hardship. (Para 6.16)

Recommendation 37: It would be good practice for the judge to address the jury at the beginning of every criminal trial on:

(a) the general course of the trial

(b) the role of the jury; and

(c) such principles of law as the judge considers will assist the jury in their understanding of the case. (Para 6.17)

Recommendation 38: The Jury Act 1977 should be amended to confirm the right of jurors to take notes and to require that:

(a) jurors be provided with the means to take notes;

(b) the Judge advise the jury of their right to take notes;

(c) jurors not remove any notes from the courthouse; and

(d) after the trial, notes made by jurors should be destroyed by order of the court. (Para 6.20)

Recommendation 39: It would be good practice for the judge to advise the jury, in his or her opening remarks, of their rights:

(a) to direct queries to him or her concerning the case;

(b) to request that questions be asked of witnesses; and

(c) to ask for a view. (Para 6.22)

Recommendation 40: It would be good practice for the judge to advise the jury. at the end of the summing-up, of their rights:

(a) to request clarification of the summing-up; and

(b) to request that portions of the transcript of the trial be read to them. (Para 6.22)

Recommendation 41: The person chosen by the jury to communicate with the court and announce the verdict should no longer be referred to as the foreman but should in future be referred to an the jury's representative. The term foreman is likely to mislead jurors about their respective roles in the jury room. (Para 6.23)

Recommendation 42: The juror's oath or affirmation should be simplified and should state clearly the juror's obligation to give a verdict according to the evidence presented in court. (Para 6.25)

Recommendation 43: The Crimes Act 1900 should be amended to permit the accused person or defence counsel, immediately after the Crown's opening address, to announce any matters of fact which are not in issue and outline briefly the issues in the defence case. (Para 6.26)

Recommendation 44: The Crimes Act 1900 should be amended to provide that counsel may introduce a witness to the jury by briefly stating the issues to which the witness' evidence relates. (Para 6.27)

Recommendation 45: Statute should provide that, if the judge considers it would assist the jury and would not cause unfairness, the evidence of an expert witness may be given by:

(a) the witness reading a document;

(b) a party tendering a document, provided that the witness is available to give oral evidence if required; or

(c) the witness presenting the evidence in any other manner or form approved by the judge which is not already permitted by the laws of evidence. (Para 6.28)

Recommendation 46: All courtrooms in which jury trials are heard should be supplied with equipment which can be used by counsel, witnesses or the judge to present the case to the jury in a more effective way. (Para 6.29)

Recommendation 47: Archaic terms and concepts should be eliminated from all communications to the jury. The jury should not be provided with a glossary of legal terms because this would encourage the use of legal jargon injury trials. (Para 6.31)

Recommendation 48: It would be good practice for the jury to be provided with multiple copies of photographs and documents as they are admitted into evidence where the judge considers this would assist the jury. (Para 6.32)

Recommendation 49: The Jury Act 1977 should confirm the discretionary power of the judge to provide a copy of all or part of the transcript of evidence to the jury in the jury room. (Para 6.33)

Recommendation 50: The Jury Act 1977 should confirm the discretionary power of the Judge to give the jury any direction of law in writing. (Para 6.36)

Recommendation 51: It would be good practice for the judge in suitable cases to provide the jury with a statement setting out the available verdicts and the circumstances in which each is appropriate. (Para 6.37)

Recommendation 52: The Jury Act 1977 should be amended to provide that the judge may order that an exhibit should not be available to the jury in the jury room where the safety of the jurors or the integrity of the exhibit could be at risk. (Para 6.38)

Recommendation 53: Section 55 of the Jury Act 1977 should be amended to provide that jurors have a right to be provided with reasonable amenities and refreshment during adjournments of a trial. (Para 6.39)

Recommendation 54: The Regulations to the Jury Act 1977 providing for the amount of jury fees should be amended to provide that the fee should be:

(a) $23 for a person attending but required for less than four hours on one day only;

(b) $46 per day for each of the first five days of jury service; and

(c) the equivalent of one-fifth of New South Wales male average weekly earnings for the sixth and each subsequent day of service subject to a deduction in respect of any wage or salary income the juror is entitled to receive. (Para 6.40)

Recommendation 55: The Jury Act 1977 should be amended to provide that jurors injured at court or on their journey to or from court should be compensated on the same basis as applies to injured employees pursuant to the Workers Compensation Act 1926. (Para 6.45)

Chapter 7: Reducing Bias and Prejudice

Recommendation 56: The Crimes Act 1900 should be amended to provide that, in all criminal cases which are to be tried on indictment, the accused person should have the right to make an application that the trial be conducted by a judge sitting without a jury. Applications of this kind should be determined in the following manner.

(a) The application should not be entertained unless the judge hearing it is satisfied that the accused person has either obtained legal advice on the matter or understands the nature and consequences of the application.

(b) The onus should be on the accused person to show that there are legitimate grounds for dispensing with the jury.

(c) The decision as to whether the trial should be conducted without a jury should be made by a judge at a pre-trial hearing.

(d) The Crown should be represented at such a hearing and entitled to be heard on the merits of the application.

(e) The accused person should have the right, with the leave of the court, to withdraw the election to be tried by judge alone. (Para 7.3)

Recommendation 57: Legislation should expressly prohibit the publication before trial of material which simultaneously identifies a person as being charged with an offence and as having a prior criminal history if the hearing of the offence charged is likely to be before a jury. (Para 7.17)

Recommendation 58: Legislation should expressly prohibit the publication of the criminal history of a person known to be suspected of an offence which is likely, if a charge is laid, to be dealt with by a jury, unless the publication of the information is to assist in the investigation of the suspected offence or is made in the interests of public safety. (Para 7.19)

Recommendation 59: The Jury Act 1977 should be amended to provide that, before empanelling a jury, the Crown prosecutor shall be required, if requested by the judge, to inform the jury panel of the nature of the charge, the identity of the accused person and the principal witnesses who are to be called for the prosecution. After this information has been given, the judge should request members of the jury panel who feel that they would be unable to give impartial consideration to the case to apply to be excused. (Para 7.23)

Recommendation 60: The Jury Act 1977 should be amended to provide that where the judge is, on application by a party, satisfied that the nature of the issues to be tried is such that people of a nominated occupation, or who live in a nominated area, may be unsuitable as jurors, the judge should ask the jury panel whether any of their number is a member of that group. Any potential juror who answers this question in the affirmative should be liable to challenge for cause without further proof being required of the grounds for the challenge. (Para 7.29)

Recommendation 61: The Jury Act 1977 should be amended to confirm that, where it is alleged that prejudicial material has been published during a trial which may have influenced jurors, the judge has a discretion to question the individual jurors to determine in the first place whether they have seen, read or heard the offending material and in the second place whether it has had any effect upon them. Where the judge is satisfied that there is no actual prejudicial influence, the trial should be allowed to continue. (Para 7.31)

Recommendation 62: The Jury Act 1977 should be amended to provide that where a judge is satisfied that the impact of prejudicial information disclosed during a trial is such that the accused person may not have a fair trial, the judge has the power to allow, where the parties consent, the trial to continue after the disclosure of such information on the basis that if the jury returns a verdict of guilty, the trial should be regarded as a nullity, the verdict set aside and a retrial ordered. Unless the court orders otherwise, any reporting of the order declaring that this procedure shall apply should be prohibited. (Para 7.32)

Recommendation 63: The court officers who are to have jurors in their charge whilst they are absent from the court room should, on commencing their employment, be administered an oath of office undertaking not to discuss with jurors any factual or legal issues relevant to the case which they are trying. (Para 7.33).

Recommendation 64: It would be good practice for the jury to be instructed by the judge at. the commencement of the trial that they are not to discuss any factual or legal issues relevant to the case with the court officers. (Para 7.33)

Recommendation 65: Section 54 of the Jury Act 1977 should be amended to provide that the judge should have the discretion to permit the jury to separate after they have retired to consider their verdict. (Para 7.37)

Recommendation 66: Section 54 of the Jury Act 1977 should be amended to provide that members of the jury should, at the discretion of the judge, be entitled to make personal telephone calls during any period for which they are locked up. (Para 7.41)

Recommendation 67: The Jury Act 1977 should be amended to provide that the jury should be discharged forthwith upon delivering its verdict. It would be good practice for the members of the jury to be informed of the subsequent course of proceedings and advised of their right as individual citizens to remain in court if they wish to do so. (Para 7.42)

Chapter 8: Promoting Satisfactory Verdicts

Recommendation 68: It would be good practice, where there are several counts or several accused people charged in an indictment. if the judge were to consider exercising the discretionary power to require the jury to consider verdicts separately on individual accused people or individual charges or both. The Crimes Act 1900 should be amended to permit separate addresses by counsel where this procedure is followed. (Para 8.3)

Recommendation 69: Section 66 of the Jury Act 1977 should be amended to provide that a jury which is not likely to agree on its verdict may be discharged at any time at the discretion of the judge. (Para 8.4)

Recommendation 70: The maximum time during which a jury may be required to consider its verdict should continue to be at the discretion of the judge. (Para 8.6)

Recommendation 71: The Jury Act 1977 should be amended to provide that the verdict of the jury be verified by each member of the jury signing a document which records the verdict. This document should become part of the official record of the trial. (Para 5.7)

Recommendation 72: The Jury Act 1977 should be amended to provide that the practice of polling the jury to determine the verdict of each Individual juror should not be used unless the trial judge considers it necessary. (Para 8.7)

Recommendation 73: The right of a jury to add a recommendation for mercy to a verdict of guilty should continue to be available. It should continue to be the practice that the jury should not be informed of this right, either by the judge or counsel, unless the jury asks whether it may qualify its verdict in this way. (Para 8.13)

Recommendation 74: Legislation should provide that the judge has the power to acquit the accused person and discharge the jury in those cases where the judge would be entitled to direct the jury to find the accused person not guilty. (Para 8.21)

Recommendation 75: Legislation should provide that the judge should not direct the jury that they must find the accused person guilty. (Para 5.22)

Recommendation 76: Where the facts of the case or the charge being tried make It likely that evidence of a complex, scientific or technical nature might be called, the right to trial by jury should not be affected. (Para 5.24)

Recommendation 77: The qualifications of jurors for jury service should not vary according to the subject matter of the trial. In particular, there should be no requirement that a person should have obtained a certain educational standard to qualify as a juror in the trial of a complex case. (Para 5.34)

Chapter 9: Requiring the Verdict to be Unanimous

Recommendation 78: The verdict of a jury in a criminal trial should continue to be the unanimous decision of the individual members of the jury. (Para 9.1)

Recommendation 79: The Jury Act 1977 should be amended to provide that the judge is required to direct the jury that their verdict must be unanimous. (Para 9.51)

Chapter 10: Saving Time and Money

Recommendation 80: A system of pre-trial hearings should be implemented for the purpose of resolving matters of law before trial and planning the efficient presentation of the case to the jury. (Para 10.6)

Recommendation 81: The Jury Act 1977 should be amended to give the judge the power to empanel up to three additional jurors where the trial is estimated to take in excess of three months. The judge should have regard to the likely wastage of jurors over the expected length of the trial and empanel as many additional jurors as is thought necessary to ensure that there will be 12 jurors ultimately called upon to consider the verdict. (Para 10.16)

Recommendation 82: If the requirement that the verdict be unanimous is retained, as the majority of the Commission recommends, then whenever there remain more than 12 Jurors following the judge's summing-up, the extra jurors should be balloted out. (Para 10. 20)

Recommendation 83: If the jury's verdict may be less than unanimous, then, whenever there remain more than 12 jurors following the judge's summing-up, they should all participate in the

deliberations and the verdict of all but one should be capable of being taken as the verdict of the jury. (Para 10.20)

Recommendation 84: Where a judge has indicated that additional jurors are to be appointed, the number of peremptory challenges available to the Crown and each accused person should be increased by one irrespective of the number of additional jurors to be appointed. (Para 10.22)

Recommendation 85: The consent of all parties should continue to be required before the judge Is entitled to allow a trial to continue with fewer than 10 jurors. It should be provided by legislation however, that, in a trial which has lasted more than six months, the judge has a discretion to allow the trial to continue with a minimum of eight jurors irrespective of the consent of the parties. (Para 10.23)

Recommendation 86: Where the panel from which the jury is to be selected is exhausted before the required number of jurors is chosen, the judge should have the power to retain those jurors who have already been empanelled as the core of the jury and order that a fresh panel be called, after a suitable adjournment, so that the balance of the jury can be selected. (Para 10.30)

Recommendation 87: An accused person should be entitled to apply for trial by a judge sitting without a jury where the court is satisfied that the only issue in the case is a matter of law. The conditions outlined in Recommendation 56 should apply. (Para 10.35)

Recommendation 88: An accused person should be entitled to apply for trial by a judge sitting without a jury on the ground that, having regard to the Interests of the accused person and of the community, it would not be in the interest of justice to conduct the trial with a jury. The conditions outlined in Recommendation 56 should apply. (Para 10.38)

Recommendation 89: The District Court of New South Wales should be invested with the jurisdiction to try indictable cases summarily in order to allow trial by judge alone in that Court where an accused person's application for that mode of trial is successful. (Para 10.42)

Recommendation 90: The right of the Crown to maintain a prosecution after the jury has failed to reach agreement at two previous trials should continue to be a matter within the discretion of the Crown. (Para 10.43)

Chapter 11: Disclosing the Deliberations of the Jury

Recommendation 91: The Jury Act 1977 should be amended to provide that it is an offence to solicit or harass a juror or former juror for the purpose of obtaining for publication information regarding statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of a jury. (Para 11.24)

Recommendation 92: Any amendments to the Jury Act 1977 which have the effect of placing any restriction upon former jurors disclosing information should expressly reserve to the Attorney General the power to authorise the conduct of research projects involving the questioning of former jurors about their jury room experiences. (Para 11.25)

Recommendation 93: The Jury Act 1977 should be amended to provide that it is an offence for a person who is serving or has served on a jury to seek or obtain a financial advantage by disclosing information regarding the jury's deliberations in a manner which identifies the particular trial. (Para 11.27)

Recommendation 94: The Jury Act 1977 should be amended to provide that it is an offence for a person who is a member of a jury in a criminal trial to disclose during the trial any information regarding the deliberations of the jury unless that disclosure is made for the purpose of

reporting to the judge an irregularity affecting that particular jury or in answer to a question asked by the judge. (para 11.30)

Recommendation 95: Apart from the changes to the law proposed in Recommendations 91, 92. 93 and 94, there should be no immediate action taken relating to the disclosure by jurors of information about their deliberations. (Para 11.31)

REPORT 48 (1986) - CRIMINAL PROCEDURE: THE JURY IN A CRIMINAL TRIAL

Preface

This the first major Report that the Commission has published in the Criminal Procedure Reference. In the research which has been done on the jury system, many issues which were more clearly associated with other aspects of the reference have been encountered. In determining the ground to be covered by this Report the Commission has concentrated on those Issues which primarily concern the jury system. The related issues will be dealt with in later reports under this Reference.

The Commission has been given valuable assistance by a large number of people but there are two who deserve particular mention. The work done by Meredith Wilkie, Senior Legal Officer, in relation to the Discussion Paper The Jury in a Criminal Trial has provided a valuable foundation for this Report. Our task would have been much more difficult without her significant contribution at that stage of the reference, in the conduct of the surveys upon which much of the Report Is based and in the preparation of the Report itself. Particular mention should also be made of the outstanding contribution made by Gordon Renouf, Legal Research Consultant, who spent many hours checking the draft of this Report and making innumerable improvements to it.

REPORT 48 (1986) - CRIMINAL PROCEDURE: THE JURY IN A CRIMINAL TRIAL

1. Introduction

I. BACKGROUND

A. The Terms of Reference

1.1 The terms of the Commission's reference on Criminal Procedure, reproduced at page vii, are wide ranging. They invite us to consider the administration of criminal justice both generally and in particular aspects of its operation. The Commission has divided the broad terms of this reference into the following areas:

the classification of criminal offences;

procedure before trial;

trial procedure;

the jury in criminal trials;

penalties and sentencing;

appeal procedure;

criminal investigation; and

the Organisation of prosecuting agencies.

1.2 The various components into which the Criminal Procedure reference has been divided are nothing more than a convenient means of managing the large volume of work under this reference. We do not imply that they are distinct topics which bear no relation to each other. The nature of the criminal justice system is such that all of its elements are Interdependent. Any change made in one aspect of criminal procedure will have a consequential Impact upon one or more other aspects of procedure.

1.3 The association between the various elements of procedure is well illustrated by the other issues the Commission has dealt with while researching the jury system. During that time we have also been examining that area of the reference dealing with procedure before trial. We have in addition published a Report Unsworn Statements *of Accused Persons*,[1] In both of these areas we have had to consider important issues relating to the use of juries in criminal trials. In examining procedure before trial, we have looked at ways of reducing the length and complexity of jury trials by implementing procedures which may define the issues before the trial starts. In our work on unsworn statements, we considered the way instructions should be given to juries regarding their assessment of the unsworn evidence of accused people.

B. The Jury in a Criminal Trial

1.4 The Commission has been expressly requested to examine "practices and procedures relating to juries in criminal proceedings". In November 1984 research was commenced on this area of the reference. In September 1985 a Discussion Paper The Jury in a Criminal Trial[2] was published for the purpose of inviting community responses to the issues with which the Commission was dealing.

1.5 At the time we began our inquiry into the jury system, there had been considerable publicity surrounding certain jury trials, in particular the *Chamberlain* case and the *Splatt* case. The concern expressed about those cases was one of the factors which led this Commission to

choose to examine the jury system before other aspects of the criminal justice system. Another was that we had recently completed research on the jury for our Report Conscientious *Objection to Jury Service*.[3] Some of that research provided a useful foundation for our work on juries within the Criminal Procedure reference.

1.6 This Report has been written after considering responses to the Discussion Paper and in the light of the results of various surveys which have been made possible as a result of a generous grant given to the Commission by the Law Foundation of New South Wales. We describe the Commission's empirical research programme in the next part of this chapter. We refer to Its findings in detail where they are relevant. The full results of our programme of empirical research will be published separately later this year.

1.7 We were requested by the Attorney General to provide this Report by February 18th, 1986. Whilst this allowed the Commission a slightly shorter period of community consultation than is usual, there has been sufficient time to absorb a wide variety of views and opinions on this subject. We have been fortunate to have had the help of many people.[4]

1.8 Since we commenced our inquiry on the use of juries in criminal trials, interest in the jury has reached unprecedented levels following further celebrated trials. This level of interest in the jury system goes far beyond anything that the Commission could have achieved by the means which it usually uses to stimulate public interest in an area which it has under consideration. We have had that task done for us and have benefited enormously from the close public scrutiny to which the jury system has been subjected. It has meant that the Commission has had access to a much wider range of views than is usually the case. This upsurge in interest has been reflected In reports and legislative activity in other States. The approaches taken in those other jurisdictions has been an additional source of assistance to us.

C. The Commission's Empirical Research Programme

1.9 In the course of preparing our Discussion Paper the lack of empirical information on the nature and functioning of the jury system in New South Wales became apparent.[5] This inhibited and complicated the assessment of both the current position and of proposals for change. We decided to conduct our own empirical research. A series of surveys was designed with the assistance of the Commission's consultant statistician, Ms Concetta Rizzo. Funding was obtained from the Law Foundation of New South Wales to conduct the surveys, to analyse the responses and to publish a report on the findings.

1.10 The Commission considered that it would be valuable to obtain information on the following questions, among others.

Who actually serves on juries?

What kind of information are jurors given before jury service?

What do jurors expect their role to be?

In what way do certain court practices affect the constitution of thejury?

Is there a need for better communication between the court and the jury?

What do jurors themselves think of the role which they have played?

What is the attitude of the judiciary towards various aspects of trial by jury?

Is there a need for additional measures to protect the jury from outside influences before, during and after trial?

The following paragraphs briefly describe the various aspects of the Commission's empirical research programme. As we have noted above, a full report of the results of this research will be published separately this year.

1. Survey of the Compilation of Jury Rolls

1.11 The jury roll for each jury district is renewed at least once every three years. This is a continuing process for the Sheriff's Office which is responsible for compiling the rolls.[6] During 1985 jury rolls were renewed for some 49 districts. From those renewed during the second half of the year the Commission chose to examine the process of finalising the roll in a metropolitan district (Penrith), a large city (Newcastle), and three country districts of varying size (Dubbo, Cessnock and Bathurst). This process involves the Sheriff's officers considering individual notifications from jurors who acknowledge that they are disqualified or ineligible or who claim exemption. The Commission examined each notification.[7] By this means we have determined the relative Incidence of the various reasons for deletion from the jury roll. We have used this information to formulate the terms of our recommendations in Chapter 4 on enhancing the representative character of juries.

2. Survey of Grounds for Excusal from Jury Service

1.12 Each person whose name is included on a final jury roll is liable to receive a summons to join a jury panel.[8] A person who receives a jury summons may apply to the Sheriff to be excused from attending. The Sheriff has the power to excuse for "good cause".[9] in order to discover both the reasons put forward by people who applied to be excused and the reasons accepted by the Sheriff, the Commission examined a sample of written applications received by the Sheriff in a period commencing in September 1985. Applications are usually made in the form of a statutory declaration. In this survey applications from people In the Penrith, Newcastle, Dubbo, Cessnock and Bathurst jury districts were examined.[10] We were able to assess the relative significance of unavailability for jury service through disqualification, ineligibility and exemption and the discretionary processes of excusing people from jury service insofar as they affect the representative character of juries.

3. Survey of Prospective Jurors

1.13 All people attending courts in New South Wales to join criminal jury panels in a two week period in October 1985 were invited to complete a short anonymous questionnaire. This questionnaire sought information in a number of categories-.

> information about the attitudes of prospective jurors to jury service;
>
> information about their understanding of the role of the jury;
>
> the financial loss or inconvenience, if any, caused by attendance at court; and
>
> demographic information about each prospective juror's sex, age, employment status, occupation, education, country of birth, ethnic origin and physical disabilities.

We received 1779 completed questionnaires. This number represents approximately 95% of all prospective jurors attending court in the survey period.[11]

4. Survey of Jurors

1.14 Of those people who receive a jury summons, only a minority actually serves as jurors. The Commission was interested to know whether the representative character of juries is affected by personal applications to the judge to be excused or by the exercise of peremptory challenges. In addition, we wanted to know what jurors themselves thought about the jury system and their attitudes to the task they had just completed. Subject to the agreement of the

judge, jurors serving in criminal trials commencing between 30 September and 13 December 1985 were invited to complete an anonymous questionnaire. By this means we were able to survey the attitudes of 1834 jurors, which represents a substantial proportion of all jurors who served in a criminal trial in this State during the period.[12] To permit direct comparison, the demographic details sought were identical to those in the Survey of Prospective Jurors. Jurors were also asked about some of the practices adopted during the trial on which they served, whether they understood the proceedings, whether they were inconvenienced, their attitudes to juries generally and their suggestions for improvements. This latter category of information has been particularly helpful in formulating our recommendations in Chapter 6.

5. Survey of Court Procedures

1.15 More detailed and precise information about the criminal trials in which juries participated was obtained from a lengthy form completed by the presiding judge's associate in almost all criminal jury trials commenced between 30 September and 13 December 1985 in New South Wales. 197 trials were covered by the survey. Information was sought in the following categories. They were:

details of the trial (location, date, duration, number of accused persons, etc);

the selection of jurors (personal applications to be excused, challenges, composition of the jury)-,

jury absences from court (time spent out of court, reason for absence);

assistance to jurors (use of exhibit, visual aids and other material to assist jurors);

discharge of individual jurors, or the whole jury, during trial:

other incidents involving the jury (unsuccessful applications for discharge of the jury, "no case to answer" submissions, use made of the transcript);

questions asked by the jury;

the jury's deliberation (time taken, verdict, attempts to qualify the verdict); and

discharge of the jury following verdict.

The survey provided the Commission with comprehensive information about the criminal trials in which juries participated and gave us additional insight into the operation of the jury system generally.

6. Survey of Judges

1.16 To complement our Survey. of Jurors, the Commission also sought information directly from judges about their practices in criminal jury trials and their attitudes to a range of proposals for reform. Their views regarding the suitability of juries for the trial of complex cases were also sought. This information was gathered by means of an anonymous questionnaire distributed in July 1985 to the sixty New South Wales Supreme Court and District Court judges who either preside at criminal trials or sit in the Court of Criminal Appeal. Forty-one judges completed the survey. A further six judges wrote to the Commission. We are most grateful to the Chief Justice, the Honourable Sir Laurence Whistler Street, KCMG, and the Chief Judge of the District Court, His Honour Judge J H Staunton, CBE, QC, for their permission to conduct the survey and for the enthusiastic support which they gave. The Commission also wishes to thank the judges who responded to our survey for their co-operation and assistance.

7. Survey of Crown Prosecutors

1.17 Additional information was sought from all Crown Prosecutors. They were surveyed anonymously in June 1985. Questions were asked about their use of the Crown's right to make peremptory challenges, the content of their opening address to the jury, their use of visual aids and their opinions on measures aimed at improving juror orientation and comprehension. We wish to thank the Crown Prosecutors who assisted the Commission by completing the survey.

II. PRINCIPLES UNDERLYING OUR WORK ON THE JURY SYSTEM

1.18 The issues raised in this Report have been examined against a background of certain principles or values which we regard as fundamental. These principles have played an important role in our work on the jury system. We have referred to them when assessing the current law and practice, in deciding whether there is a need for change and in evaluating the merit of various proposals for reform that we have considered. As these values have played a crucial role in our work, we think it important for us to articulate them so that the views and opinions we express in this Report, and the nature of the recommendations for reform that we make, may then be better understood.

A. Seven Principles

1. The Pursuit of Truth

1.19 Obviously each criminal trial involves an attempt to establish the facts on which to base the final decision. Nevertheless, whilst the pursuit of truth is clearly a desirable goal of criminal procedure it is not to be sought at any cost. As the Australian Law Reform Commission has said:

The serious consequences of conviction, fear of error, a concern for individual rights and fear of abuse of governmental power have limited the search for truth in criminal matters.[13]

2. Minimising the Risk of Convicting the Innocent

1.20 The rules of criminal procedure have traditionally been formulated so as to minimise the risk that people who are In fact innocent are wrongly convicted. The balance struck between the desirability of convicting the guilty and the safeguarding of the innocent can be seen to have changed from time to time. Since it is influenced by community standards, "the point of the fulcrum varies over time''.[14] The traditional court procedures and the rules of evidence recognise that the ideal of discovering the truth Is sometimes impossible to achieve after the event at issue, and for that reason it is necessary to establish safeguards even at the cost of concealing otherwise relevant matters. The rationale behind this approach is found in the often quoted (and often misquoted) words of Blackstone, that "It is better that ten guilty persons escape than that one innocent suffer".[15]

3. Public Confidence: Acceptance and Accountability

1.21 The criminal justice system must be acceptable and accountable to the community it serves. Public confidence in the criminal justice system is a prerequisite to its effectiveness, and ultimately to the authority of the criminal courts to decide disputes between private individuals and the State. The criminal law itself must be capable of absorbing and reflecting community standards. The process of determining guilt should be consistent with contemporary standards within the general community.

1.22 Community participation is one means of encouraging accountability. Community participation also promotes the acceptability of the processes and determinations of the criminal justice system. Participation should involve all members of the community, not just those associated with the administration of the system. If community participation Is seen as a right or privilege, then it should be available to all but those who are legitimately disqualified. If

it is seen to impose a burden, then that burden should be evenly distributed by being shared equally among members of the community.

4. Fairness and Justice

1.23 The essential feature of any system of criminal justice is that It be fair. Fairness has a number of aspects. It requires certainty and consistency in the law and procedure, although there must be flexibility in order to cope with the variations between cases and different and changing circumstances. The occasions on which flexibility is warranted are properly determined by reference to contemporary community standards. In achieving the goal of fairness, the principle that justice should not only be done but be seen to be done is important. The appearance of justice is part of the substance of justice. The objective of fairness must be seen from the perspective of each of the parties in a criminal case. Every litigant should perceive the trial to be a fair one if the decision of the court is to be generally acceptable.

5. Efficiency

1.24 It is trite to observe that the administration of criminal justice should be efficient. The criteria for the assessment of efficiency are more controversial. Efficiency should be measured primarily by reference to the standard and quality of justice and, secondly, by reference to the cost and duration of criminal proceedings. The efficient use of available resources involves those resources being applied to obtain a fair result in an acceptable manner for the least possible cost and in the shortest possible time. Error, duplication, waste, unfairness, delay and uncertainty are all indicators of inefficiency.

6. Effective Communication

1.25 The tribunal called upon to make decisions in a criminal case must make those decisions in an informed way. This necessarily requires access to materials which are relevant and clear definition of the issues which the case raises. The proceedings should be conducted in a manner which allows them to be readily understood by the participants in the trial. As Mr Justice Deane has written:

> [a] system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and Issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings.[16]

7. Openness and the Publicity of Criminal Proceedings

1.26 There is a traditional distrust of secret trials which associates them with the unjust persecution of the individual. In order to guard against the use of the courts as an instrument of oppression, to prevent the abuse of judicial power, to ensure that the accused person will have a fair trial and generally to secure the impartial administration of justice according to law, the right to public trial of a person accused of crime is generally recognised. The openness of public trials increases information about and awareness of the criminal justice system in the community. It tends to deter or reduce improper practices by leaving proceedings open to scrutiny. By revealing the proceedings In a criminal court to the public, there is also a greater likelihood of injustice being detected and a remedy for that injustice being made available. The public nature of criminal trials Is a feature intended to benefit the individual who has been accused of a crime, but it is also for the protection of the public generally.

1.27 The recognition of the need for the courts to be open to public scrutiny implies that the community has the right of access to, and information about, court proceedings. There are, however, circumstances in which otherwise legitimate publicity will prejudice the conduct of a

fair trial. Where this occurs there is a conflict between the objectives of conducting a fair trial and of maintaining the public's access to the criminal courts. In our view the former is the primary concern of the judicial system. The latter is an interest which must yield where circumstances demand it.

B. The Relationship of these Principles to the Jury System

1.28 By reference to the above ideals, we have considered the operation of the jury system and concluded that no fundamental changes are required to the manner in which it operates. Because it complies with and serves the principles, ideals and values which we have set out above, the jury system is the most appropriate means of determining the guilt of people who are accused of committing serious crimes.

1.29 Particular values and ideals have motivated us to examine specific aspects .of the jury system. For example, the ideal of community participation has led us to consider, in Chapter 4 of this Report, the extent to which the jury currently represents the community and its standards. The ideal of a competent tribunal has led us to consider, in Chapter 6, ways in which juries might be assisted to make better and more informed decisions. This has also raised a more fundamental question as to whether juries are competent decision-makers in extremely complex cases. This question is dealt with in Chapter 8. Issues of fairness and freedom from bias have provoked our consideration in Chapter 7 of the general area of prejudicial pre-trial publicity. This examination involves the application of the competing principles we have referred to above (paras 1.26-1.27)

C. The Reason for Law Reform

1.30 One practical rule which we have applied in considering proposals for reform of the jury system is that we should not recommend change for the sake of change. The current system should not be altered unless there is a clearly demonstrated need for reform. Accordingly, those who propose reforms carry the burden of exposing the failure of the current laws and practices and the utility and desirability of the new laws or practices which they propose. On the other hand, we should recognise that the jury system has changed much over the years. Where change is warranted, we should not be reluctant to adapt the jury system to meet current needs.

1.31 The reason for placing the onus on the proponents of reform is twofold. Firstly, the administration of the system of criminal justice involves a balance being struck between different interests. The system must be sensitive to competing needs and claims within the community. The process of change, which is likely to alter the current balance, must be approached with caution. Secondly, we are conscious of the traditional and symbolic roles of the jury and of the danger of undermining these roles by rapid change which is ill-considered. The jury is an institution which has evolved slowly. In the absence of a demonstrated need for fundamental change, we consider that this process of gradual evolution is a proper course. Our recommendations are for that reason evolutionary in character. They are designed to strengthen the jury system by equipping it to cope with the demands placed upon it by the modern criminal trial.

FOOTNOTES

1. LRC 45, 1985.

2. DP 12, 1985.

3. LRC 42, 1984.

4. A list of those people who made submissions or otherwise assisted the Commission is included as Appendix A to this Report.

5. The only publications of relevance to New South Wales were a report prepared for the Law Foundation by Peter Grabosky and Concetta Rizzo Jurors *in New South* Wales (June 1983) and a report prepared by the New South Wales Bureau of Crime Statistics and Research Jurors Statistical Report 4, Series 2 (1975).

6. Jury Act 1977 s10.

7. There was a total of 13103 notifications of disqualification, Ineligibility and claims of exemption.

8. Jury Act 1977 s26.

9. Jury Act 1977 s38(1).

10. Approximately 159 applications of this kind were examined.

11. In one country court only prospective Jurors not empanelled were surveyed and in another the forms could not be distributed.

12. In some cases the presiding judge did not agree to the survey being distributed. In others, the Jurors did not complete the survey.

13. Australian Law Reform Commission Evidence (ALRC 26 Interim 1985) para 58.

14. A phrase used in another context by Justice M D Kirby "Pre-trial Publicity - Free Speech vs Fair Trial" paper delivered to International Criminal Law Congress, Adelaide, 9 October 1985.

15. Commentaries (4th ed 1765) Book 4, Ch 27, Vol IV, p358.

16. *Kingswell v The Queen* (I 986) 60 ALJR 17 at 31.

2. The Jury in the Criminal Justice System

I. THE RETENTION OF THE JURY

A. The Threshold Question

> **Recommendation 1: A person who is charged with a serious criminal offence should continue to have the right to trial before a judge and a jury of 12 people randomly selected from the community.**

2.1 Although the proposals for reform we put forward in our Discussion Paper were tentative in their nature, we made one departure from that general approach. This was in relation to what we described as the threshold question: whether the system of trial by a jury of citizens drawn from the community should remain a feature of the criminal justice system. We answered this question in the following way.

> The Commission is firmly of the opinion that trial by jury should be retained in serious criminal cases. The jury is an effective institution for the determination of guilt. It has the added benefit of possessing the ability to do justice in the particular case. The jury system is, moreover, an important link between the community and the criminal justice system. It ensures that the criminal justice system meets minimum standards of fairness and openness in its operation and decision-making, and that it continues to be broadly acceptable to the community and to accused people. The participation of laypeople in the system itself validates the administration of justice and, more generally, incorporates democratic values into that system.[1]

We adhere to these opinions. They have indeed been strengthened considerably by the research we have conducted, the submissions we have received in response to the Discussion Paper and by information gleaned from the various surveys we conducted. The response on this topic by people who made submissions to the Commission, most of whom had direct experience in the conduct of criminal jury trials, was overwhelmingly in favour of retaining trial by jury.

2.2 An interesting indication of the apparent impact of jury service may be found in comparing the rate of support for the jury system expressed by prospective jurors with that expressed by people who had actually served on juries. In our Survey of Prospective Jurors, only 70% of respondents to the question believed that the jury system benefited the community.[2] However, when we conducted our survey of people who had served as jurors, one question asked was whether juries should continue to be used in criminal cases. Almost all of this group believed that the jury system should be retained. 97.1%[3] of respondents to the question answered it in the affirmative. Jury service itself generates confidence in the value of the jury system.

2.3 The arguments advanced questioning the effectiveness of the jury system[4] need to be dealt with in some detail. The principal arguments for the abolition of juries in criminal trials are set out below.

> As the evidence in criminal trials has become more complex because of the frequent use of scientific and technical evidence, the ability of people who are unqualified or inexperienced in such areas to comprehend the evidence has either diminished or disappeared.
>
> Juries increase the cost of criminal litigation because of the time that must be taken to allow them to absorb the evidence and to explain the relevant law to them.
>
> The length of jury trials contributes to congestion in the criminal courts and therefore adds to the Incidence of delay in the disposition of criminal cases. Inordinate delay is itself a major cause of inefficiency in the administration of criminal justice.
>
> Juries are required to make decisions in a manner which is not conducive to rational verdicts since they do not generally ask questions of the witnesses and counsel and are not always assisted by access to all the relevant evidence and exhibits. This feature of the operation of the jury system is said to be compounded by the fact that a jury is not required to give reasons for its decision.

Jurors are susceptible to strong prejudices which are inconsistent with the properly impartial role of those called upon to determine the issue of the guilt of accused persons. In many cases this prejudice may not be apparent, nor can it be effectively eliminated.

The jury system is socially and economically disruptive because it requires ordinary citizens to Interrupt their personal and working lives to serve as jurors.

In many cases juries acquit where the evidence of guilt is overwhelming. If this is true, it means that a criminal is allowed to go free and is therefore a cause of general dissatisfaction amongst those whose role it is to bring offenders to justice.

If these criticisms were valid, or were not counterbalanced by other more persuasive considerations, there would be a need to restrict the use of juries, or to abandon them altogether.[5]

2.4 The principal arguments in favour of the retention of the jury system are set out below.[6]

A jury brings to bear on its decision a wide diversity. of experience of life which represents the accumulated experience of human affairs and the collective ability to make judgments of its individual members.

Since there are twelve people, it is likely that the individual standards and values held by the jury will be representative of the general community. This number of people should mean that particular prejudices are negated by the existence of different or alternative views within the jury as a group.

Because the jury deliberates as a group, it has the advantage of collective perception, recollection and analysis. This process Is more likely to be an effective way of determining contested facts and issues because each detail is explored and subjected to scrutiny by the group rather than by individuals.

The jury, unlike a judge who is bound to apply the law In a strict and technical way, is able to base its verdict on the broad equities in the case and is able to bring the conscience of the community to bear upon the merits of the case.

The jury system has a practical and symbolic function as a democratic institution. It is the means by which the people participate in the administration of justice. It legitimises the criminal justice system by providing a link between that system and the community.

The use of a jury of citizens drawn from the community ensures that the legal system does not become distinct from, nor alien to, the community. The use of juries keeps the criminal justice system in step with the standards of ordinary people and ensures that the support of the community for the criminal justice system is maintained.

The jury system is a bastion against oppressive conduct by the State either in the making of the laws or in their application and enforcement. By its existence as an institution with a decisive role to play, the jury assumes a degree, of responsibility for the integrity and fairness of the criminal justice system.

2.5 In the Commission's view, the trial of serious criminal cases should continue to be conducted before a tribunal constituted by a judge and a jury of citizens randomly selected from the general community. Although the research which we have carried out has been extensive, and consultation prior to the publication of our Discussion Paper was widespread, at no stage of our work have we been presented with a compelling argument in support of the abolition of the jury system. This is not to say that arguments to that end have not been put forward. At times the abolition of the jury has been advocated with fervour by people of standing. Professor Colin Howard has recently described the jury as "a very weak link in the administration of criminal justice."[7] In our view the force of arguments of this kind is found wanting by the fact that there is an absence of compelling evidence of the inadequacy of the jury system. The inability of those who criticise the jury system to propose an acceptable alternative is an additional flaw in their argument.

B. Alternatives to the Jury

2.6 We do acknowledge the substance of some of the criticism levelled at particular features of the jury system. These objections can be met by changes to the operation of the system. We do not believe that the jury system is perfect, but those who criticise the jury system must, before they mount a compelling case for its abolition, be able to offer a viable alternative to trial by jury. The range of alternatives we have been presented with includes:

trial by judge alone;

trial by a panel of judges;

trial by a judge and lay assessors;

trial by a judge and a panel of laypeople assisted by people who are qualified as experts in a field which is at issue in the trial; and

trial by a judge and a special jury comprising people with qualifications relevant to the issues at the trial.[8]

2.7 Some of these alternative procedures might overcome some of the legitimate criticisms of the jury system as it exists today. None of them meets them all. Nor do they offer sufficient advantages over the present system of trial by jury to justify their introduction. Our conclusion has been very heavily influenced by the absence, in most of these alternative mechanisms, of a high degree of community representation and participation. For the reasons stated in para 2.4, and developed more fully in Chapter 4, we consider this to be the single most desirable feature of the jury system in its current form.

C. Subsidiary Questions

2.8 Our recommendation that the jury system should be retained for serious criminal cases does not mean that we do not see any room for change or any need for improvement in the operation of the system. There is a need to ensure that the time which juries are required to spend in determining criminal cases should be more efficiently used. Efficiency may be measured by reference to the effort involved, the time taken and the financial cost. There is, moreover, a need to ensure that the jury is a more effective component of the criminal justice system. In some areas the jury system can be improved in the sense that verdicts are likely to be more reliable and therefore more acceptable to the participants in a criminal case and to the general community.

II. THE USE OF THE JURY

A. The Incidence of Jury Trials

2.9 The role which the jury plays in the criminal justice system has changed since it was first introduced in criminal trials in New South Wales in 1832. In our Discussion Paper we traced the history of the jury system and noted that the range of cases in which a jury is not necessarily required has increased gradually over the years but more rapidly in recent times. In order to give some perspective to the role of the jury within the overall criminal justice system, it must be recognised that only a small percentage of criminal cases are heard before a judge and jury. Table 2.1 sets out the relevant figures to show the incidence of jury trials in New South Wales.

Table 2.1

The Incidence of Jury Trials

					Year
		1980	***1981***	***1982***	***1983***
A	Jury Trials	698	857	773	966
B	Total Cases in Higher Courts	3,937	4,733	4,824	5,441
	A/B%	17.7	18.1	16.0	17.8

C	Trials in all Courts	14,172	12,831	12,643	*
	A/C%	4.9	6.7	6.1	
D	Total Cases in all Courts	71,310	80,123	82,586	*
	A/D%	1.0	1.1	0.9	

A: People dealt with by higher courts and pleading not guilty, i.e. trials by jury.

B: Total number of criminal cases prosecuted on indictment.

C: Total number of criminal trials in all courts, i.e. cases where the accused person pleaded not guilty.

D: Total number of criminal cases prosecuted in all courts.

*: 1983 figures are unavailable.

Note: A "criminal case" refers to single prosecutions of an accused person irrespective of the number of offences charged at any one appearance.

2.10 Those who are unfamiliar with the criminal justice system in practice may be unaware of the small proportion of cases which are actually heard by juries. The jury as an institution is, nevertheless, an important component of the criminal justice system. In the first place, the most serious criminal cases are tried before a judge and jury. In those cases where the State makes allegations of the most grave kind which are contested by the accused person, the responsibility for the determination of guilt is not vested in a single public official. It Is placed in the hands of a group of 12 citizens chosen in a random manner as representatives of the general community. In this way the institution of the jury serves as an important aspect of the declaratory or denunciatory function of the criminal law. The maintenance of trial by jury emphasises the serious nature of the criminal offences which are so dealt with. On the other hand, there is an implication if an offence is dealt with summarily that it is not serious. In the second place, an important part of the impression which the general community has of the criminal justice system is formed by its perception of the way the system operates in the most serious criminal cases. Putting this another way, the image of the criminal justice system is largely dependent upon Its performance in serious cases. The level of confidence which the individual citizen has in the quality of the administration of justice Is therefore closely related to the system of trial by jury. Improvements made to the operation of the jury system will in consequence serve to increase the level of public confidence in the administration of criminal justice.

B. Serious Criminal Cases

2.11 The phrase "serious criminal cases" has been used to describe the kinds of matters which we consider should be tried before a judge and jury. Because of the frequent changes which have been made over, the years in the summary jurisdiction of the criminal courts, It is necessary to explain this term in greater detail. In general, a serious criminal case is one in which the accused person Is at risk of a severe penalty, or where the facts and circumstances which are involved in the case render it a matter of significance within the calendar of criminal offences.

2.12 In *Kingswell v The Queen* [11] the High Court was called upon to determine the application of s80 of the Commonwealth Constitution which provides that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury". In his judgment, Mr Justice Deane dealt in detail with the question of whether particular offences could be dealt with summarily. He noted that there were many instances of nineteenth century legislation requiring justices or magistrates to determine whether a particular charge could be disposed of summarily, and that the general thrust of legislation in England and Australia at the time of Federation and soon after was that the less serious offences punishable summarily before justices or magistrates were restricted to offences for which the maximum punishment was a term of imprisonment of not more than one year. He went on to say:

> . . . it appears to me that the correct criterion of what constitutes a serious offence is that it not be one which can appropriately be dealt with summarily by justices or magistrates. Within the limits of those offences which are capable of being appropriately so dealt with, the question whether a particular offence should, as a matter of legislative policy, actually be dealt with summarily by justices or magistrates is a matter for the Parliament.[12]

2.13 In *Baldwin v New York*,[13] the Supreme Court of the United States, in a decision which is applicable to both Federal and State trials, fixed the point above which a crime must be regarded as 'serious' as being any criminal charge which, upon conviction, may result in imprisonment for six months. In the United Kingdom, the general rule is that offences which carry a maximum penalty of more than six months are triable on indictments.[14] This replaced earlier legislation which set the figure at three months.[15]

2.14 In our view the maximum penalty which may be imposed on the accused person is not the only relevant criterion of seriousness. It may be that an ,otherwise insignificant matter is brought into the category of "serious" because of the impact which a conviction may have upon the accused person. It is ultimately impossible to construct a precise formula which will enable a case to be classified on one side of the line or the other. Since many of the factors to be taken into account in determining whether a case is serious are subjective, universal agreement on the status of those cases which fall close to the line is a similarly impossible goal.

C. Trial by Jury in Cases where Jurisdiction is Optional

> **Recommendation 2: The Crimes Act 1900 should be amended to provide that where there is a discretion to prosecute a charge either summarily or on indictment, and where the prosecutor elects to proceed summarily and the accused person does not consent to this, the magistrate should order that the charge be tried before a judge and jury if he or she considers it to be a "serious" case. The determination of seriousness should be made by reference to a specified set of criteria.**

2.15 We have mentioned that the use of juries in criminal trials has been gradually declining over the years (para 2.9).[16] We noted that there Is a large range of indictable offences which were formerly tried by judge and jury which are now capable of being tried summarily. In some of those, most notably offences governed by s476 of the Crimes Act, the choice of jurisdiction is a matter for the accused person in the first instance. He or she may insist on jury trial irrespective of the views of the magistrate. The magistrate's approval however is needed before the matter may be dealt with summarily.[17] In a second class of offences the choice of jurisdiction is initially made by the prosecution. This class includes those indictable offences to which s501 of the Crimes Act applies, and certain offences relating to drugs,[18] firearms[19] and listening devices.[20] These offences may be charged as either indictable or summary matters.

2.16 The effect of s501 of the Crimes Act is not clear. One view is that it is merely procedural: the prosecutor's initial election of summary jurisdiction is subject to the magistrate's endorsement. On this view the accused person is free to request the magistrate to order that the case be heard by a jury despite the prosecution's initial election. This view appears to have the support of Courts of Criminal Appeal in New South Wales and the United Kingdom.[21] If, on the other hand, s501 is seen as actually creating specific offences, then even the possibility of arguing before the magistrate that trial by jury is appropriate would not appear to be available in a case where the prosecution elect summary trial. This view is given support by the repeal of s548A of the Crimes Act in 1974.[22] Even If the former view is taken it is rare that a magistrate will entertain a submission that a matter charged under s501 should be heard before a jury, and rarer still for any such application to be granted.

2.17 In the case of offences under the Poisons Act 1966 and the Listening Devices Act 1984 it is clear that the magistrate must not deal with a matter to finality if it appears that it cannot properly be disposed of summarily.[23] These Acts expressly empower the magistrate to commit an accused person for trial in a case which has begun as a summary prosecution. There is no guidance given, however, as to what matters should be taken into account in determining whether a case is sufficiently serious to warrant jury trial.

2.18 It should also be noted that a magistrate has the power to commit a person for trial wherever he or she is satisfied on the evidence presented that an indictable offence has been committed.[24] It may be that this general power is broad enough to enable a magistrate to commit any case to a higher court if it is capable of being dealt

with on indictment. It is nevertheless, in practice, rare that a case in which the prosecution has elected for summary trial is committed to a higher court.

2.19 We consider that there are some cases which are currently capable of being dealt with summarily without the consent of the accused person which, by reference to their subject matter or to the consequences of conviction for the accused person, are so serious that the accused person should have the right to trial by jury. We acknowledge the enormous relative cost of jury trial and recognise that it is a slower means of disposition than summary trial. These factors, even in combination, do not amount to a sufficiently strong case against maintaining the right of an accused person to have a serious criminal case dealt with by a judge and jury.

2.20 The law should be clarified to affirm the right of an accused person charged with an indictable offence to be tried by a jury whenever the magistrate is satisfied that the circumstances of the case are sufficiently serious. We suggest that the conventional practice in courts of summary jurisdiction be altered so that the right of an accused person to trial by jury in an appropriate indictable case is guaranteed in a true sense.[25] The accused person should have the right to apply for trial by jury even though the prosecution may wish the matter to be heard summarily. The accused person's application should be determined by the magistrate by reference to statutory criteria. The application of the statutory criteria by the magistrate should be subject to review In a higher court.

2.21 In the case of matters where the accused person has the option to elect trial by jury or ask the magistrate to deal with it in the Local Court, the prosecution's view should be taken into account when the magistrate decides whether he or she thinks the case is suitable for summary trial.[26]

D. The Size of the Jury

2.22 In most common law jurisdictions the jury in a criminal trial is comprised of 12 people.[27] In some states of the United States of America criminal cases are tried by six member juries.[28] six member juries were also used in two territories of Canada until they were declared unconstitutional in 1985.[29]

2.23 The larger the number of people on the jury the greater is the likelihood that a wider range of different groups within the community will be represented on the jury. A particular bias or prejudice is far less likely to gain prominence in a 12 member jury than it might have in a smaller group. It is improbable that the individual prejudices of such a large number of jurors will all point in the same direction.[30] It is more likely that any existing prejudices will tend to cancel each other out.

FOOTNOTES

1. The Jury in a Criminal Trial (DP 12, 1985) para 2.27.

2. Of 1779 prospective jurors surveyed, 1678 (94.3%) answered the question. 1168 of these (69.9%) believed the jury system benefited the community. This figure corresponds closely with the results obtained in an opinion poll conducted by Irving Saulwick and Associates at the end of September 1985. Of those interviewed, 59% expressed confidence that the jury system was working well. Bearing in mind the difference in the questions, the results are remarkably consistent with our own. See publication in *The Sydney Morning Herald* and *The Age* on 9 October 1985.

3. Of 724 jurors surveyed, 704 (97.2%) answered the question. 680 of these (97.1%) thought we should continue to have the jury system. Furthermore 99 people, 15% of respondents, said that the experience of jury service changed their opinion of juries.

4. These arguments are set out in greater detail in paras 2.6-2.16 of the Discussion Paper.

5. See for example, comments attributed to Mr S I Miller, Commissioner, Victoria Police reported in The *Age* 5 June 1984 and the Sunday *Observer* 5 August 1984. See also Professor C Howard "Is the Jury System Really Necessary for Justice?" *The Age* 31 July 1985.

6. These arguments are set out in greater detail in paras 2.17-2.27 of our Discussion Paper.

7. *The Age* 31 July 1985. See also editorial comment In the same paper 9 August 1985.

8. See, eg, S Ricketson Trial by Jury unpublished paper, University of Melbourne, March 1983, pp27-30.

9. Source for A, B: Australian Bureau of Statistics Higher Criminal *Courts New South Wales* 1982 (Cat 4502.1) *Higher Criminal Courts New South Wales 1983* (Cat 4502.1) Table 3; Source for C,D: C Rizzo *Statistical Background Paper* (unpublished Commission Document 1984).

10. *Justice Breaking the Rules* (1980).

11. (1986) 60 ALJR 17.

12. *Id* at 35.

13. 90 S Ct 1886 (1969); see also Paul Lermack, *Rights on Trial: the Supreme Court and the Criminal Law* 1983 p 70.

14. Criminal Law Act 1977 s15(1)(a).

15. Magistrates Courts Act (UK) 1952 s25.

16. See also Discussion Paper paras 1. 17-1.19.

17. Crimes Act 1900 s476(2), (5)(a).

18. Poisons Act 1966.

19. Firearms and Dangerous Weapons Act 1973.

20. Listening Devices Act 1984.

21. *R v Stramandinoli* (unreported) Supreme Court of New South Wales, Court of Criminal Appeal, 2 September 1977; *Rex v Justices ofbodmin, ex parte McEwen* [1947] 1 KB 321.

22. Section 548A read as follows: "On the hearing of a charge for any offence referred to in sections five hundred and one or 526A of this Act, if the justices are of opinion that the charge should not be disposed of summarily they shall abstain from any adjudication thereupon, and shall deal with the case by committal or holding to bail as in an ordinary case of an indictable offence". We do not consider that the repeal of this section has necessarily abolished the power it expressly vested in magistrates.

23. Listening Devices Act 1984 s26; Poisons Act 1966 s45AB (inserted in 1979). There is no equivalent provision in the Firearms and Dangerous Weapons Act.

24. Justices Act 1901 s41.

25. See D Wolchover "The Scandalous Denial of Jury Trial in Assault on Police Cases" *The Law Society's Gazette* (UK) 24 October 1985, p 3010.

26. Crimes Act 1900 s476 makes no mention of the prosecution role in determining mode of trial in this category of offences.

27. In Scotland there are fifteen people on a criminal jury.

28. See *Apodaca v Oregon* 406 US 92 (1972); Williams v Florida 399 US 78 (1970)

29. The National December 1985 p6. The six member jury proposed for the sparsely populated Yukon Territory and Northwest Territories was held to contravene s15.1 of the Canadian Charter of Rights and Freedoms which guarantees equal treatment for all Canadians.

30. See Sir Murray McInerney QC “There’s No Substitute for a Jury” (1985) 59 *Law Institute Journal* 1084 p1085.

3. The Form of Our Recommendations

I. THE GOALS TO BE ACHIEVED

3.1 Once we had reached the conclusion that the jury system should be retained in serious criminal cases, the fundamental issue had been answered. This does not go far, however, towards completing our task. Whilst we have concluded that there is no present need for substantial change, we do consider that the operation of the jury system is in need of improvement. The remaining chapters of this Report deal with different ways in which the system might be improved. The titles of the chapters express the goals which reform of the jury system should achieve.

A. Ensuring a Representative Jury: Chapter Four

3.2. The goal is to make juries more representative of the general community and thereby ensure that juries possess the broadest possible range of views, opinions and experience. From another point of view, this may be seen as distributing the burden of jury service across a wider range of the community so as to lessen the extent of that burden on each individual citizen. Alternatively, it may be seen as extending one of the privileges of citizenship to a greater number of people.

B. Protecting the Jury: Chapter Five

3.3 The goal is to protect the jury from improper interference, which may take the form of harassment, intimidation or even physical violence. Whilst we have not found interference with juries to be a practical problem in New South Wales, we recognise, in the light of overseas experience, the need to prevent it. We consider that the enhancement of security will increase the efficiency of the jury system by reducing the level of apprehension and by eliminating an influence which may discourage people from serving as jurors.

C. Making the Jury’s Task Easier: Chapter Six

3.4 The goal is to make the task of the jury in a criminal trial easier. After examining the way juries operate in practice, we have identified a number of areas where the jury can be given assistance in understanding both the role it plays In general and the law and evidence in the case presented to it. Whilst many of these are relatively minor improvements, their cumulative effect should be significant in ensuring that the jury is better informed and better equipped to perform its function in a criminal trial.

D. Reducing Bias and Prejudice: Chapter Seven

3.5 The goal is to reduce the incidence and appearance of bias and prejudice in criminal trials. We make certain recommendations designed to eliminate actual bias. We consider that in many instances the existence of bias is more imagined than real. There is nevertheless much to be said for reducing the potential for prejudice so that justice is not only done but is seen to be done. Accordingly, we have suggested that some positive measures be implemented to achieve this end. The procedures we have recommended should result in fewer trials being interrupted or abandoned because of prejudicial influences.

E. Promoting Satisfactory Verdicts: Chapter Eight

3.6 The goal is to make jury verdicts clearer, more certain and more reliable. To some observers the current practice leaves room for debate about the meaning of the verdict and for disquiet about its accuracy. The recommendations we have made in this regard are designed to make jury verdicts more acceptable to the participants in the trial and to the community at large.

F. Requiring the Verdict to be Unanimous: Chapter Nine

3.7 In this chapter we discuss whether majority verdicts should be introduced. Arguments for and against the rule which requires that jury verdicts be unanimous are considered. Our conclusion is that the present requirement of unanimity should be retained.

G. Saving Time and Money: Chapter Ten

3.8 The goal is to introduce procedures which contribute to the efficiency of the jury system by saving time or reducing costs. Whilst we expressly identify this as one of our goals, we emphasise that fairness is a more important feature of jury trials than mere efficiency measured either in financial terms or by reference to the level of inconvenience which jury trials cause. Whilst efficiency is desirable, fairness is essential.

H. Disclosing Jury Deliberations: Chapter Eleven

3.9 In this chapter we consider the extent and nature of disclosure which may legitimately be made by jurors after their deliberations have been completed. The publication of such disclosures and their admissibility as evidence in subsequent legal proceedings are related topics for consideration.

II. INTERDEPENDENCE OF OUR RECOMMENDATIONS

3.10 In formulating our recommendations for improving the way in which the jury system operates in the criminal courts, It has been necessary to bear in mind the way in which various parts of the system are interdependent. Changes In one area may have an impact on another area, sometimes in a way that is not readily apparent. We have made our recommendations after considering these links. For the same reason, these recommendations should be regarded as a group of proposals which, taken together, will improve the way in which the jury system operates. Some of these proposals may be isolated from others without affecting the remainder. We would caution, however, against selective implementation without serious consideration being given to the way in which the proposal in question relates to the other recommendations we have made. For example, the recommendation we make in Chapter 4 regarding the rights of peremptory challenge are closely linked to other recommendations for procedures to eliminate bias and for the protection of jurors.

III. IMPLEMENTATION OF OUR RECOMMENDATIONS

3.11 The recommendations we have put forward could be implemented by one, or in some cases by a combination, of the following:

> *legislation* giving effect to procedures of universal application;
>
> *administrative arrangements* to be made by the Attorney General's Department and in particular by the Office of the Sheriff; and
>
> *procedural changes* effected by participants in the criminal justice system simply changing the way in which certain things are done.

3.12 Because there are different means of implementing the recommendations we make, we will, in the case of each recommendation, identify the way in which we consider it should be implemented. Those procedures which we consider should be adopted universally will often be best achieved if they were to be made binding upon the courts by legislation. Other procedures may be suitable in some cases, unsuitable in others. In that case, it may be appropriate for the matter to be left to the discretion of the judge to determine whether or not the suggested procedure is suitable in a particular case. Some of the other changes we propose are not the concern of the courts, at least in the first instance.

3.13 We have also considered whether it is desirable for a Code to be enacted to declare and regulate the procedure related to the administration of the jury system.[1] The legislation which currently operates in this field is the Jury Act 1977. This legislation represents a comprehensive review of the law relating to juries which does not require major changes. The implementation of those recommendations which we consider should be the subject of legislation can be effected by amending the current legislation.

IV. AREAS FOR FUTURE CONSIDERATION

3.14 From time to time we will raise issues which are not finally dealt with in this Report. This is a practical illustration of the interdependent nature of the various components of the criminal justice system we have referred to above., For example, when we discuss the possibility of changing the manner in which cases are presented to the jury, we come into the field of evidence law reform. Some of the proposals which we might like to make to assist jurors amount to fundamental changes in the law of evidence. Where such a position is reached, we take the approach of sign posting the possibility that further research in another field might benefit the jury system. It would be impractical and far beyond the boundaries of our immediate inquiry for us to attempt to proceed any further into that other field. Apart from the laws of evidence, there are three major topics which need to be examined thoroughly as a possible source of effective improvements for the jury system, but which cannot, for reasons of practicality and utility, be dealt with here. They are:

> the general law of contempt so far as it relates to the publicity of criminal proceedings and the right to comment upon the decisions of courts. This topic is discussed in Chapters 7 and 11;
>
> the development of standard form directions on matters of law, requiring a thorough examination of the current position and experiments to see whether suggested changes are likely to be effective. This is referred to in Chapter 6; and
>
> the classification of substantive criminal offences, a task which may result in the simplification of the criminal law and a consequent increase in the level of juror comprehension. This topic is raised in Chapter 8.

We should add that each of these matters falls squarely within the terms of the Commission's reference on Criminal Procedure. They will be further examined in a context which we consider is more appropriate than a Report which is exclusively concerned with the operation of the jury system in criminal trials.

3.15 Many of the matters upon which we make specific recommendations, and others to which we merely make reference, will be kept under review as we proceed through the broad terms of the Criminal Procedure Reference. This is, again, an illustration of the interdependent nature of the rules of criminal procedure. Some of the conclusions we have reached in the course of preparing this Report will be re-examined. It may be that in some cases we will need to reassess those conclusions in the light of further research and greater experience. At this stage, however, we put forward our recommendations with the firm conviction that they will improve the operation of the jury system in criminal trials.

FOOTNOTES

1. For an example of this approach see the Report of the Canadian Law Reform Commission *The Jury* (Report 16, 1982).

4. Ensuring a Representative Jury

I. INTRODUCTION AND BACKGROUND

4.1 Chapter 1 of our Discussion Paper reviewed the historical development of the role of the jury in the criminal justice system. Since juries were introduced for criminal trials in New South Wales in 1832[1] there has been a clear pattern of gradually extending the range of eligibility to serve as a juror. Property qualifications were abolished in 1947. Women, who were previously eligible only upon volunteering to serve, became qualified and liable to serve in the same way as men in 1977.[2] The Jury Act 1977 also effected a significant reduction in the number of people previously entitled to claim an exemption from jury service. The primary aim of the Act, as stated by the then Attorney General, the Honourable F J Walker, QC, MP, when introducing it in the Parliament, was that:

> . . . jury service, so far as practicable, will be shared equally by all adult members of the community.[3]

Jury rolls are now required by statute to be compiled at random by the Sheriff directly from the electoral rolls.[4] The legislative changes in 1977 were complemented by administrative improvements which were designed to ensure that the roll for each jury district did not continually comprise the same people. In particular, the legislation now provides that the life of a jury roll is limited to a maximum of three years and that no person is compelled to be on two consecutive rolls.[5]

4.2 In consequence of these legislative and administrative developments, the group of people from which a jury Is selected in a modern criminal trial in New South Wales is reasonably representative of the community at large. Our surveys conducted in late 1985 confirmed this, although they revealed that certain sections of the community were under-represented on jury rolls.[6] In this chapter we consider whether the representative character of the jury can be enhanced.

4.3 At the outset we examine why the principle of sharing the responsibility for jury service is an important value. The representative character of the jury ensures that it performs its essential function of maintaining the values applied in the administration of criminal justice in accordance with the standards of ordinary people. The public clearly has a vital interest in the proper administration of justice. The jury is the most important means by which members of the public can observe the system at work and participate in it. This fosters a greater sense of community responsibility for the overall effectiveness of the system. As we have already observed in outlining the values on which this Report is based, community participation is one means of ensuring that accountability is preserved as a real and practical feature of the system of criminal justice.

4.4 It is proper that a jury should bring to bear the broad community conscience and that it should temper technical or legal considerations with what it regards as more general standards of fairness and justice. The jury's unique character has been described by Justice William 0 Douglas, formerly of the Supreme Court of the United States, in this way:

> A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision and melts away. It is not present the next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do.[7]

4.5 One of the virtues of a jury is that It contributes a diversity of experiences to decision-making. As the Criminal Law and Penal Methods Reform Committee of South Australia stated, it is generally true that:

> . . . among the twelve jurors there should be a cross-section of the community, certainly not usually accustomed to evaluating evidence, but with varied experiences of life and of the behaviour of people.[8]

4.6 A jury system which operates to exclude particular groups within society, unless it is demonstrably clear that they should be free from the call to perform jury service on the grounds of public necessity or personal hardship, could lead to verdicts being challenged on the grounds of partiality or bias. If one of the virtues of the jury system is indeed the diversity of experience which it brings to the decision-making process, then people of all backgrounds should be liable to perform jury service.

4.7 As a general rule jury service is a civic duty for which every citizen should be liable. It should be recognised and appreciated as an important source of cohesion within the community. However, because it may impose a burden of inconvenience and disruption, it should be equally shared among the members of the community. Insofar as the jury reflects the conscience of the community, universal representation improves the jury's ability to express the conscience of the whole community. By serving on a jury, the individual citizen is given the chance to participate in setting the standards which the community should observe, if only in an isolated instance in relation to a single accused person. The accumulation of the decisions of juries will, however, reflect an overall community standard for the determination of guilt in serious criminal cases.

4.8 What follows from these conclusions is that legal and administrative measures should ensure that all members of society who are competent to participate as jurors should have an equal chance of actually serving. There are two clearly identifiable exceptions to the general rule. The first is that those whose presence would be inimical to the aims of achieving and appearing to achieve fairness in the criminal justice system should not be allowed to serve as jurors. The second is that those whose work is of such importance that society expects them to give their complete attention to that work should not be required to perform jury service. In dealing with the latter exception, we shall bear In mind that the jury service requirements are capable of modification, within limits, so that people who would not be available to serve in long trials would still be available to serve in short trials.

4.9 The goal of making the jury as representative as possible needs to be approached at each of the three levels at which selection or exclusion of potential jurors takes place. This commences with the compilation of the jury rolls, continues to the time when a person is summoned to serve and extends as far as the empanelling of the jury at trial.

II. COMPILATION OF JURY ROLLS

A. The Draft Jury Roll

> **Recommendation 3: Section 9(2) of the Jury Act 1977 should be amended to provide that every electoral subdivision shall be assigned to a particular jury district.**

4.10 The procedures laid down in the Jury Act 1977 for the compilation of jury rolls and the selection of jurors are outlined in detail in Chapter 6 (paras 6.2-6.11). There are 72 jury districts in New South Wales. The complete electoral rolls assigned to a jury district are fed into a computer which selects at random the number of names requested by the Sheriff. The number selected varies greatly between districts, depending on the estimated number required for jury service. Each person selected receives a Notification of Inclusion on a Draft Jury Roll.

4.11 Section 5 of the Jury Act provides:

> Subject to this Act, every person who is enrolled as an elector for the Legislative Assembly of New South Wales pursuant to the Parliamentary Electorates and Elections Act 1912, is qualified and liable to serve as a juror.

The generality of this provision is cut down by its opening words. Section 9 of the Jury Act, which creates jury districts for each place appointed for sittings of the Supreme Court or the District Court, provides that a jury district "shall comprise such electoral districts or subdivisions as are prescribed".[9] Until recently over 10% of electoral subdivisions had not been allocated to any jury district. In our Discussion Paper (paras 3.17-3.18) we expressed concern about these omissions and tentatively proposed that all subdivisions should be used thus ensuring that everyone in the State would have an equal opportunity to be included on a jury roll, subject to disqualification and ineligibility. Since the publication of our Discussion Paper, the regulation allocating subdivisions to jury districts has been replaced.[10] Almost all subdivisions are now allocated.

4.12 The new allocation omits only five subdivisions, namely Baradine, Coonabarabran, King (Lord Howe Island), Tottenham and Tumbarumba. The reason for each of these omissions is clear. Each is a great distance from the nearest courthouse. We consider, however, that this is an insufficient reason for excluding these subdivisions. A person living more than 56 kilometres from the courthouse at which he or she is required to attend for jury service may claim an exemption as of right. These people should be given the opportunity to determine this matter for themselves. Even if it is the case that all people in the five excluded subdivisions will claim an exemption, this would not greatly Increase the administrative burden for the Sheriff. This would, however, establish the important principle that all adult citizens of New South Wales are equally liable and equally entitled to serve on a jury. The populations of those subdivisions are relatively small and only a small percentage would be likely to be selected for any one draft jury roll.

4.13 The results of our survey of the practice of compiling jury rolls reveal that some groups within the community are under-represented on jury rolls. The particular group which is of concern is young adult males. 28.7% of adult males are under 30. Only 22.5% of the male prospective jurors surveyed were under 30. 23.6% of the male jurors surveyed were under 30. We cannot be certain of the reasons why members of this group are not proportionately represented on juries. it may be because they are not on electoral rolls, or simply that they do not attend courts in answer to a jury summons with the same frequency as other groups. On the other hand, it may be that because they are a more mobile section of the general population they do not always receive the jury summons, or it may be that they are more likely to fall within those classes of people who are disqualified, ineligible or exempt as of right. Whilst the significant under-representation of any group is undesirable, the under-representation of young adult males is of particular concern since the overwhelming majority of accused people come from this group. Since we are not able to cite with any confidence the reason for the under-representation of young adult males, we do not think It appropriate to make any specific recommendation to meet this problem. We note, however, that consideration might be given to using an additional source for the names of potential jurors. Jury rolls could be compiled from lists of licensed drivers as well as the electoral rolls. This system is used in many parts of the United States, apparently with success.

Recommendation 4: The Sheriff should increase the size of jury rolls so as to make it likely that a person on the roll will only be summoned once for jury service during the currency of the roll.

4.14 A number of people who have assisted the Commission in its work on the jury system have commented on the fact that a person whose name is on a jury roll can be required to serve on a jury twice or even three times during the three year period for which the roll is current. Whilst this may be unusual, it is far from unusual for people to be required to attend court in answer to a jury summons two or three times in three years. This represents, in our view, an unwarranted disruption to the normal life of an individual citizen. We have been informed by the Sheriff that increasing the size of the jury roll would not create serious administrative difficulties. It can be done by simply programming the computer to select more names from the electoral rolls. The implementation of this recommendation would ensure, among other things, that the inconvenience of having to appear at court will be imposed on people less frequently.

B. Grounds for Deleting People from the Jury Roll

4.15 Certain people are disqualified from serving as jurors,[11] others are ineligible to serve,[12] and others are entitled as of right to be exempted from serving as jurors if they claim exemption.[13] These three categories involve people whose names are deleted from the draft jury roll. There is another important group to consider in this context, namely those who are on the jury roll but who, after being summoned for jury service, are excused "for good cause" by the Sheriff from attending court or by a judge when they attend.[14] These processes recognise that the principle of representativeness must yield to other values in particular cases, notably the requirement that people who are regarded as incapable of performing jury service adequately or whose presence on a jury might create or give the appearance of bias, or cause undue hardship to themselves or others, should not be required to serve.

4.16 We have examined the sections and schedules of the Jury Act 1977 which require or permit people who are selected for a jury roll or to answer a jury summons to be relieved of their obligations to serve. This has been

done in conjunction with our survey of the compilation of the Penrith, Newcastle-Cessnock and Dubbo-Bathurst-Lithgow jury rolls and has led the Commission to recommend a number of specific changes.

1. People Disqualified from Serving as Jurors

> **Recommendation 5: Schedule 1 to the Jury Act 1977 should be repealed and recast so as to disqualify:**
>
> > **1. a person who at any time within the last ten years in New South Wales or elsewhere has served any part of a sentence of imprisonment or penal servitude;**
> >
> > **2. a person who at any time within the last five years in New South Wales or elsewhere has been detained in an institution for juvenile offenders having been found guilty of an offence; and**
> >
> > **3. a person who is currently bound by an order of a court made in New South Wales or elsewhere pursuant to a criminal charge or conviction.**

4.17 Currently, a person is not qualified or liable to serve as a juror if that person is, for the time being, disqualified from serving as a juror. Schedule I to the Jury Act currently provides that the following people are disqualified:

1. A person convicted in New South Wales or elsewhere of

    (a) treason;

    (b) an offence carrying a penalty of imprisonment, or penal servitude, for life; or

    (c) any offence and sentenced to imprisonment, or penal servitude, for a term exceeding 2 years.

2. A person who at any time within the last 10 years in New South Wales or elsewhere -

    (a) has served any part of a sentence of imprisonment or penal servitude or has been on parole In respect of any such sentence; or

    (b) has been found guilty of an offence and detained in an institution for juvenile offenders.

3. A person who at any time within the last 5 years in New South Wales or elsewhere-

    (a) has been convicted of any offence which may be punishable by imprisonment or penal servitude;

    (b) has been bound by recognizance to be of good behaviour or to keep the peace;

    (c) has been the subject of a probation order made by any court; or

    (d) has been disqualified by order of a court from holding a licence to drive a motor vehicle or omnibus for a period in excess of 6 months.

4.18 If one regards the right or duty to serve on a jury as a civil right akin to the right to vote (and historically it has been treated that way), it is logically consistent that people who have been subjected to criminal sanctions which have resulted in the suspension of the right to vote should also see their right and duty to serve on a jury similarly affected. Apart from the practical problem of bringing a person who is in custody to court, the rationale behind Schedule I is clearly the belief that there would be a risk of bias if a person who is currently the subject of an order made by a criminal court were to serve as a juror. As we pointed out in our Discussion Paper (para 3.21) some people have challenged this last mentioned principle. We consider it sound, provided that it does not offend, in principle or practice, the policy of the rehabilitation of people convicted of criminal offences.

4.19 The current law is unsatisfactory in that it disqualifies from jury service people who may have been convicted of relatively minor offences in the preceding five years. In our view this is too long. On the other hand,

the current law does not disqualify people who have been charged with criminal offences, but who have not yet had those charges finalised. We consider that this group should, because of the currency of their association with the criminal justice process, be disqualified.

4.20 The concept of being “bound by order of a court pursuant to a criminal charge or conviction” should include people who are currently on probation, subject to community service orders, disqualified from driving, subject to undischarged recognizances, released on bail pending trial or sentence, or remanded in custody pending trial or sentence.

4.21 Several people made submissions to us which criticised the harshness of the current law, insofar as it relates to the rights of people previously sentenced to imprisonment or detention in an institution for juvenile offenders. We are conscious of the fact that modern penological theory has emphasised the importance of rehabilitation, and that many governments are examining the issue of the expungement of criminal convictions.[15] We consider, however, that people convicted of offences which were regarded as sufficiently serious to justify the imposition of a custodial sentence, should not be qualified to serve as jurors until a substantial time has elapsed since the expiry of that sentence.[16] Our recommendation avoids some of the harsh consequences of the current provisions, while at the same time respecting the rationale for disqualification described above. We consider that there should be a distinction between adult and juvenile offenders. A person who has not re-offended within five years of being released from an institution for juvenile offenders should be entitled to serve on a jury.

2. People Ineligible to Serve as Jurors

4.22 A person is ineligible to serve as a juror if he or she is a person referred to in Schedule 2 to the Jury Act.[17] Schedule 2 describes 24 categories of persons ineligible to serve. These categories are designed to exclude, among others, those who would be unable to serve effectively on a jury,[18] those who are directly associated with the administration of justice or the enforcement of the law[19] and those who have an occupation which is of such public importance that they ought not to be at risk of being called away to serve on a jury.[20] We have examined the categories listed in Schedule 2 and recommend that there should be several amendments.

> **Recommendation 6: Commonwealth public servants should be available to perform jury duty in New South Wales unless they are otherwise Ineligible.**

4.23 The general ineligibility for jury service in New South Wales of Commonwealth public servants[21] cannot be justified on the basis of partiality or the relative importance of the function they perform. Most State public servants are liable for jury service unless they are directly engaged in the administration of justice or the enforcement of the law. There seems to be no reason for excluding all Commonwealth public servants unless they occupy a position which makes it inappropriate for them to perform jury service. Most Commonwealth public servants are third and fourth division officers and most of those are engaged in clerical duties. They are generally liable for jury service in Victoria, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory.[22] The exemption contained in the New South Wales statute backs up Federal legislation purporting to have the same effect.[23] It appears to be a recognition of the dubious constitutionality of Commonwealth legislation purporting to exempt Commonwealth public servants from performing a generally accepted and essential civic duty.

> **Recommendation 7: The spouse of a person who is, by Schedule 2 to the Jury Act 1977, ineligible for jury service by virtue of that person’s association with the administration of justice or the enforcement of the law, should continue to be ineligible.**

> **Recommendation 8: Where the spouse of a person of a nominated occupation is made ineligible for jury service by Schedule 2 to the Jury Act 1977, a de facto partner of a person of that nominated occupation should also be ineligible.**

4.24 Whilst it is clear that people in certain occupations directly associated with the administration of justice or the enforcement of the law should be ineligible to serve as jurors[24] we have given serious consideration as to whether the spouse of such a person should also be disqualified. The concept of a spouse being presumptively under the influence of his or her partner is no longer compatible with current social or legal attitudes. The spouse of an ineligible person is eligible to serve as a juror in Victoria, Queensland, the Australian Capital Territory

(except for judge's spouses), the United Kingdom and New Zealand.[25] The Law Reform Commission of Western Australia has said that the current law in that State, which closely resembles the law in New South Wales, is unjustified for these reasons:

> . . . while shared attitudes may exist in some cases the Commission is not aware of any research which shows that this is so to any significant extent, or that the spouses of those concerned are not as capable as anyone else of fulfilling their duty as jurors. If spouses of those in ineligible occupations are to be made ineligible, so probably should their children, parents, relations or even close friends. It would be undesirable in principle to extend ineligibility so far.[26]

4.25 However, even if shared attitudes do not operate, an accused person may well fear that the spouse of a police officer or magistrate would be inclined to adopt the known attitude of that person.[27] The accused person will be aware that a juror might discuss the trial with his or her spouse and that a spouse in an ineligible occupation might bring emotional pressure to bear on that juror. The juror might in turn bring similar pressure upon other jurors. An accused might also fear that a police officer could reveal to a juror-spouse that the accused person has a criminal record or "is known to police". Although actual bias might not occur if spouses of those in ineligible occupations were permitted to serve, it could be argued that they should not be permitted to do so if accused people, on reasonable grounds, fear or suspect bias. We have concluded, accordingly, that there should be no change to the existing law where, in a number of categories, the spouses of those in ineligible occupations are also ineligible for jury service.

4.26 This does not dispose of the matter at issue. Our conclusion that spouses of those in ineligible occupations should not be eligible for jury service leads us inevitably to the position that de facto spouses should also be excluded. The definition of a de facto relationship is now well understood by the law. It is used in various statutes which courts and tribunals have not found unduly difficult to interpret and apply.[28] The term "de facto partner" is defined for the purposes of the De Facto Relationships Act 1984 to mean:

> (a) in relation to a man, a woman who is living or has lived with the man as his wife on a bona fide domestic basis although not married to him, and
>
> (b) in relation to a woman, a man who is living or has lived with the woman as her- husband on a bonafide domestic basis although not married to her.

Recommendation 9: Any person who has at any time held the position of judge, magistrate, Crown prosecutor, public defender or police officer should be ineligible for jury service: Schedule 2 to the Jury Act 1977 should be amended accordingly.

4.27 Former members of the Police Force may claim exemption as of right. We consider that people in this category should be ineligible to serve as jurors. Whilst it is arguable that former police officers should not be permanently excluded, we think on balance that the reasons for the ineligibility of serving members of the Police Force apply equally to former members. That is, a police officer's association with the law is a key part of his or her working life. Police officers are constantly involved in the criminal justice process and almost always on the same "side".

4.28 We are conscious that none of the other categories of ineligible people include people who are former members of that group. Former prisoners are disqualified for ten years, but no other exclusions are made by reference to what a person once was. The reason for our recommendation relating to police officers is not that we consider them likely to have an attitude of mind making them unsuitable jurors, but because of the very nature of their association with the criminal law. Their exclusion from juries would contribute to the cause of justice being seen to be done. For similar reasons, we consider that former judges, magistrates, Crown prosecutors and public defenders should be ineligible for jury service.

Recommendation 10: Any person who has actually served on a jury within the previous three years should be ineligible for jury service: Schedule 2 to the Jury Act 1977 should be amended accordingly.

4.29 We have referred above to the desirability of juries comprising a wide range of members of the community.[29] We have also recommended[30] that the size of jury rolls be increased so that people on the roll would be called less frequently. In the Canadian Law Reform Commission's Working Paper on the jury system it is noted that in Canada no person can serve on a jury twice within a period of five years.[31] In our view this is sensible and practical. If the recommendation set out above were implemented it would in fact mean that an individual citizen would be unlikely to serve on a jury more than once in six years, since a person who is already on an existing jury roll is entitled to claim exemption as of right if notified of inclusion on a draft jury roll.[32] A provision of this kind would have the benefit of minimising the personal disruption caused by jury service by ensuring that the burden of jury service is more equitably distributed. It would also expose more people to the educative role of jury service and make juries less "case-hardened" and more representative of the community.

> **Recommendation 11: The ability to read English should continue to be a qualification for jury service. It would be good practice for the judge to direct the jury panel that any person who cannot understand and read English is ineligible and should advise the court.**

4.30 Any person who is unable to read or understand the English language is ineligible to serve as a juror. This ground of ineligibility caused the Commission some concern.[33] Some of those who made submissions to us considered that it should not be a qualification for jury service. If the emphasis in the criminal trial were to remain on the presentation of oral evidence and argument, we would not have thought the ability to read English was essential. In the light of our recommendations elsewhere (Recommendations 48-51, paras 6.32-6.37) that the jury be provided with more written material than it now receives, we consider that the ability to read English is necessary and should be a qualification. It has been suggested that prospective jurors should be given a short comprehension test which "a student in Year 10 at high school could be expected to pass with relative ease".[34] There are, however, difficulties associated with such a procedure. The examination would need to be conducted before the trial and would clearly take some considerable time to be given and for answers to be checked. Whilst we recognise that the ability to read and understand English should be established before the trial commences, we consider that this would best be done by the method we have outlined in this recommendation coupled with that suggested in Recommendation 31 (para 6.5) proposing that the Notification of Inclusion on a Draft Jury Roll should be accompanied by advice in major community languages.

3. People who may Claim Exemption as of Right from Jury Service

4.31 Certain people are entitled to be exempted from serving as a juror if they claim exemption in the appropriate manner. Schedule 3 to the Jury Act contains the following categories of people who may claim exemption:

1. Clergymen in holy orders, ministers of religion having established congregations and vowed members of any religious order.

2. Dentists registered under the Dentists Act, 1934, and actually practising.

3. Legally qualified medical practitioners, actually practising.

4. A person of or above the age of 65 years.

5. Pregnant women.

6. A person having the care, custody and control of children under the age of 18 years (other than children who have ceased to attend school) but not including more than one person having the care, custody and control of the same children.

7. A person residing with, and having the full-time care of, a person who is aged or in ill-health.

8. A person notified of his inclusion on the draft jury roll for a jury district who is on the existing jury roll for that jury district or for any other jury district. .

9. A person who is entitled to be exempted under section 39 on account of previous lengthy jury service.

10. A person who resides more than the prescribed distance from “the place at which he is required to serve.

11. Members and secretaries of all statutory corporations, boards and authorities.

12. Pharmacists registered under the Pharmacy Act, 1964, and actually practising.

13. Mining managers and under-managers of mines.

14. Members of a permanent rescue corps established under section 14(l) of the Mines Rescue Act, 1925.

15. Former members of the Police Force.

16. A person who holds the office of-

(a) Manager, Maintenance;

(b) Assistant Manager, Maintenance, or;

(c) Operating Trouble Officer,

in the Mechanical Branch of the State Rail Authority of New South Wales.

17. A person who holds the office of-

(a) superintendent or assistant superintendent of; or

(b) instructor at,

central rescue station under the Mines Rescue Act, 1925.

4.32 The bulk of these categories were included because jury service would create substantial hardship either for the people in question[35] or others who may be dependent on them.[36] The decision whether or not to serve on a jury remains one for the individual to make. We emphasise that none of the categories listed in Schedule 3 is concerned with the issue of financial loss which may be suffered by the individual in question. Rather, the only consideration is whether undue suffering of a physical or personal kind might be caused by requiring that a person of the particular class is compelled to serve on a jury.

A General Category of Hardship?

4.33 In our Discussion Paper we raised the issue whether the categories in Schedule 3 should be deleted and replaced by a single category which would provide that the only ground for exemption as of right should be hardship to the applicant or to others. Approximately 50% of people whose names are deleted from draft jury rolls claim exemption under one or other of the categories listed in Schedule 3.[37] The Commission was at one stage minded to recommend that a single ground of “public necessity and personal hardship” should replace the multiplicity of specific categories nominated in providing for exclusion from jury rolls. We decided against this for two reasons. The existing arrangement promotes administrative efficiency and is a public statement, which has been endorsed by the Parliament, of the classes of people who should be entitled to exemption. This is preferable to having this important decision left in the hands of a public official whose unpublished criteria for excluding certain classes might be perceived as unduly favouring particular groups within the community. If these criteria were to be published, we are sure that they would closely resemble the current law in any event.

4.34 If there were a single general category of hardship we would expect the Sheriff to formulate guidelines which would include sub-categories of exemption and that, in practice, people would secure exemption virtually automatically by showing that they fell within those sub-categories. It would be unduly burdensome to require every applicant for exemption to have to write a letter explaining the grounds on which he or she claims hardship, particularly where it is patently obvious that such hardship exists as to make jury service out of the question. It is, we conclude, simpler to retain various fixed categories of exemption, leaving it to the Sheriff to determine whether

people who claim exemption fall within those categories. Should a person who is entitled to exemption either neglect or fail to obtain it there remains the Sheriff's and the court's power to excuse a person actually summoned to serve as a juror as the appropriate means of providing for those where hardship escapes the protective net of Schedule 3. We have also considered the possibility of including in Schedule 3, as a supplement to the existing categories, a general category of personal hardship. We have decided against this primarily on the ground that it would probably encourage a large number of applications putting forward grounds which may be sufficient for excusal on a particular occasion but insufficient to justify deletion from the jury roll.

Recommendation 12: The age at which a person is entitled to claim exemption as of right from jury service on the ground of advanced age should be raised from 65 to 70 years: Schedule 3 to the Jury Act 1977 should be amended accordingly.

4.35 The Law Foundation's survey of jurors in 1983 found that the elderly were under-represented on juries. This phenomenon will increase as the proportion of the population aged 65 and over increases. While it is estimated that 14.6% of the population aged over 18 is 65 or over,[38], only 3.0% of prospective jurors in our survey and only 2.0% of jurors surveyed were in this age group. The Commission considers that people aged under 70 should not be exempt from inclusion on a jury roll unless they fit into one of the other specified categories of exemption. This age has been chosen chiefly because it is the mandatory retiring age for judges in New South Wales and because the increasing age of the population suggests the need for change in this direction to maintain representativeness.

Recommendation 13: People who have a conscientious objection to serving on a jury in a criminal trial should be entitled to claim exemption as of right from jury service: Schedule 3 to the Jury Act 1977 should be amended accordingly.

4.36 The Commission dealt with this issue exhaustively in its Report *Conscientious Objection to Jury Service* [39] made under the Community Law Reform Program. The recommendation set out above reflects the conclusion reached in that Report. We should also note, however, that this issue was expressly raised in one of the submissions made to the Commission in response to our Discussion Paper.[40] People who claim conscientious objection have to attend court and make out their case by demonstrating the genuineness of their belief in open court. They are liable to questioning by the judge. People who seek to be excused on this ground are almost always excused by the trial judge. In our view it is unnecessary to impose this process on conscientious objectors. In some cases, the prospective juror will be required to attend court three times while on a jury roll and make the same application each time. From the point of view of administrative efficiency and certainty of panel numbers, it is desirable that people who have a conscientious objection should be entitled to claim an exemption as of right. If an application for exemption as of right from a conscientious objector were refused by the Sheriff the applicant would have a right of appeal (as do all people refused a claim for exemption) to a Local Court.[41]

4.37 Other proposals for changes to Schedules 2 and 3 were raised in our Discussion Paper (paras 3.25, 3.26 and 3.28), or were proposed in the consultation phase of this Report. For various reasons, the Commission decided not to include them as recommendations in this Report. The following proposed changes were considered but ultimately rejected.

People aged 70 or over should be ineligible for jury service.

People who have the responsibility of caring for young children should no longer be exempt as of right. At the same time child care facilities should be made available near the courts at which people are required to attend for jury service.

People who have legal qualifications or who are law students at a recognised institution should be ineligible for jury service.

People who are physically handicapped should be encouraged to perform jury service by the provision of facilities in courthouses which improve access to, and accommodation in, those buildings.

People who are employed by barristers and solicitors should be ineligible for jury service on the ground that they are indirectly associated with the administration of justice.

For the same reason, the spouses and de facto partners of barristers and solicitors should be ineligible for jury service.

People who are employed in sole enterprises or who work in a one person business which would be crippled by the requirement to serve on a jury should be entitled to claim exemption as of right.

4.38 These proposals were rejected for various reasons. Notwithstanding that the retiring age for judges is 70, we consider that people of or above that age should not be ineligible for jury service. The inclusion of the elderly who want to serve will enhance the representative nature of the jury. The provision of adequate facilities for child care is a general community issue which is much wider than that of the liability of the parents for jury service. The proper care and supervision of young children is, we believe, a more important responsibility than jury service. People who have such responsibilities should not be compelled to abandon them for the sake of jury service. Whilst barristers and solicitors themselves should continue to be ineligible because of their likely association with the administration of justice and the probability that because of their training they will exert an undue influence over the balance of the jury, we do not consider that their spouses, de facto partners or employees are similarly placed. The question of law students and the legally qualified poses a problem of definition. Should, for example, people with qualifications in economics, commerce or accountancy, which may involve the study of commercial law, be ineligible? Although we acknowledge the risk that this group may play an unduly prominent role in jury deliberations, we do not consider that their association with the administration of justice is sufficiently close to justify their being ineligible.

4.39 We consider that people who are self-employed represent too vague a category to be included in the class of people who may claim exemption as of right. People in this group may be liable for jury service on some occasions, particularly where the trial is a very short one, but it is clearly unsuitable to require them to serve where the trial is expected to be lengthy or where the demand for their services is such that jury service would impose undue hardship on the person in question or on others who may be dependent on them. People on the land, for example, experience times when they are indispensable, others when their presence is not required daily. The decision in situations of this kind is best left to be made in the light of the circumstances at the time the person is called for jury service. Whilst we do not consider that self-employed people should be exempt from inclusion on the jury roll, we acknowledge that they may have compelling grounds for excusal on a particular occasion.

4.40 This completes our consideration of the categories of people who, because of disqualification, ineligibility or exemption as of right, should not be included on the rolls from which prospective jurors are selected. We reaffirm the general principle that the responsibility for jury service should be shared among the whole community. The main reason for this principle is that juries should be broadly representative of the community. We also consider that jury service will be more acceptable to the individual called upon to serve if he or she is aware that it is the common duty of almost all members of the community. When people receive a Notification of Inclusion on a Draft Jury Roll making them liable to be called up for jury service at some time during the next three years, their reaction will not be “Why me?” but rather “Now it is my turn”.

III. SUMMONING A JURY

A. Excusing People from Jury Service on a Particular Occasion

4.41 Once a person is on the jury roll, he or she is liable to be called for jury service. This is done by sending a summons to attend a courthouse on a nominated day. Upon receipt of a summons, the person has the right to apply to the Sheriff to be excused. The Sheriff has a discretion to grant an application to be excused “for good cause”.[42] The Commission conducted a survey over a three-month period to determine the grounds on which the Sheriff grants these applications. The grounds which we found to be prominent were:

travel plans for holiday or business (70 of 159 applications)	44.0%;
self-employed (22 of 159)	13.8%
temporary care of children or sick relatives (17 of 159)	10.7%; and
temporary illness (13 of 159)	8.2%.

One excuse which the Sheriff usually does not accept is that the prospective juror is needed at his or her place of work.

4.42 If the Sheriff refuses an application to be excused the person summoned must attend at court. At that stage, a personal application may subsequently be made to the presiding judge for excusal from service at the particular trial. Prospective jurors who have not asked the Sheriff for excusal may also make an application of this kind. The fate of these is a matter for the discretion of the judge. We have examined the practice of judges presiding at criminal trials over a three-month period. Our survey covered 197 trials at which a total of 633 personal applications for excusal were made. Of these, 549 (86.7%) were successful. Some of the more frequently used grounds on which excusal was granted were:

employment difficulties	29.1%;
ill health	14.1%;
self employed	11.8%;
trip planned	10.7%; and
care of the young or the sick	9.0%.

The power of both the Sheriff and the presiding judge to grant applications to be excused on a particular occasion is an important power which should be retained. This power acts as a safeguard against possibly harsh results flowing from the limitation of the number of grounds for exemption. It also provides discretionary powers which are wide enough to enable the judge to excuse prospective jurors for any reason which serves the legitimate interests of the parties.

B. Jury Vetting

> **Recommendation 14: The practice of "Jury vetting" as used in the United Kingdom, whereby the prosecuting authorities make special inquiries regarding the background of the prospective jurors, should not be introduced in New South Wales.**

4.43 "Jury vetting" has been used in the United Kingdom "at least since 1948, and probably since a great deal earlier than that''.[43] The term has generally been used to describe two rather different practices. In the first place, it refers to the practice of supplying the Crown with a list of the jurors summoned for the trial of any offence which falls within a vaguely defined class of "special" prosecutions.[44] In these cases, where it is sometimes expected that the court may be asked to sit in camera, the Attorney-General has the power[45] to authorise that checks be made of the records of Police Special Branch files to identify people whose:

> . . . political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of a sectarian interest or pressure group to a degree

which might interfere with [their] fair assessment of the facts of the case or lead [them] to exert improper pressure on [their] fellow jurors.[46]

It is not possible to define precisely the classes of case to which this practice is to be applied in the United Kingdom. They include serious offences where strong political motives are involved and serious crimes alleged to have been committed by one or more of a gang of professional criminals.[47]

4.44 The expression 'Jury vetting" is also used to describe the more general practice whereby police check the criminal records of prospective jurors. In England the practice of merely checking police records has developed so that the police have been able to pass on to prosecution counsel any information revealed by the checks, even if that information does not statutorily disqualify a prospective juror.[48] This practice is said to occur in a number of other jurisdictions as well[49] but in New South Wales the Jury Act 1977 prohibits inspection of the panel by anyone before the trial.[50]

4.45 We consider the practice of jury vetting in either of its forms to be inherently improper, primarily on the ground that it offends against the principle of random selections[51] An editorial in The Times described the practice as "a significant dent in the principle of random selection of juries''.[52] There are, however, other reasons for our recommendation that the practice of jury vetting should not be used in New South Wales. In the first place, it is by definition a secret exercise. The prospective jurors concerned have no means of knowing whether the facts upon which the challenge is based are true. The secrecy of the practice also allows the possibility for vetting beyond that which is authorised.[53] Secondly, the law relating to Crown privilege is by itself sufficient to ensure that sensitive information need not be disclosed to the wrong people. There is, putting it simply, no demonstrated need for jury vetting in New South Wales. Thirdly, the practice is exclusively in the hands of the prosecuting authorities. By permitting the Crown to manipulate the composition of the jury panel it is given an unconscionable advantage in the process of jury selection.

C. Personal Applications to the Judge

Recommendation 15: It would be good practice for personal applications to a judge to be excused from jury service to be made where practicable in the presence and hearing of the accused person and counsel for the prosecution. Where an unsuccessful personal application is made in their absence, they should be advised of that fact.

4.46 Where people are summoned for jury service to a place where there is only one courthouse and therefore only one judge presiding, personal applications for excusal will naturally be heard by that judge. This will usually be done in the presence of the accused person and counsel who are to appear at the trial. The situation is different, however, at those locations where there is more than one court at the place where the jury is summoned. That is the case for the criminal courts at Taylor Square (Darlinghurst), Queen's Square (Sydney), Parramatta, Liverpool, Wollongong and Newcastle. In these locations prospective jurors may be transferred from one court to another. Those not selected on the jury to try a case to be heard in one court may be used to constitute the jury panel in another court. Personal applications are usually made only once. Prospective jurors who make unsuccessful applications for excusal to one judge will not normally make the same application before another judge. Although they are entitled to, they are not usually informed of this right. The result is that the empanelling of a jury can be conducted in ignorance of the fact that a prospective juror has made an unsuccessful application to be excluded from jury service.

4.47 The fact that a person is a reluctant juror should be known to both the accused person and the prosecution. Indeed, it would be desirable for the parties to know the grounds on which the juror asked to be excused. Both the Crown and the accused person may have good reason to think that a reluctant juror may not be a suitable juror. The grounds on which exemption is claimed may be an important factor in exercising the right of peremptory challenge. In extreme cases those same grounds may legitimately be the foundation on which a challenge for cause is based. Notwithstanding the fact that the presiding judge does not consider that the application to be excused is justified, either or both of the parties might regard the fact of unwillingness to serve or the grounds for it as being important. Accordingly, where an unsuccessful application of this kind is heard in the absence of the accused

person and counsel for the prosecution, it should either be repeated in their presence or they should be informed of that fact.

D. Procedures to Exclude Bias in a Particular Trial

4.48 Elsewhere in this Report[54] we have made recommendations which would, if implemented, affect the selection of jurors at trial. In particular, we recommend[55] the adoption of procedures designed to reduce the prospect of people who may be biased acting as jurors in a particular trial. One aspect of the proposed procedure is dependent upon an application being made by counsel to the judge.[56] It is suggested that the other should be used as a matter of course. Each of them should have the effect of excluding jurors who would otherwise be excluded by relying on the traditional forms of challenge.

IV. THE RIGHTS OF CHALLENGE

4.49 The rights of challenge were dealt with in our Discussion Paper (paras 4.8-4.22). This was one of three topics that provoked the greatest discussion within the Commission and among those who made submissions to the Commission. There are three traditional forms of challenge which must be considered: the challenge to the array, the challenge for cause and the peremptory challenge. We also consider an additional type of challenge which we refer to as “consent challenges”.

A. Challenge to the Array

4.50 A challenge to the array is a challenge to the constitution of the entire jury panel. It may be made either by the accused person ‘ or the Crown and is essentially based on the unrepresentative or unsuitable nature of the panel from which the jury is to be chosen. It is a common law right which has been preserved in the current Jury Act.[57] In order to challenge the array successfully, the applicant must show that the Sheriff has failed to comply with the provisions governing the selection and summoning of jurors.[58] The question of relevance to the issue of representativeness which was raised in our Discussion Paper (para 7.12) is whether judges should be empowered to order that members of the social or peer group of the accused person should be included on the jury. The notion of “trial by a jury of one’s peers”,[59] in the very strict sense of a trial by a jury of people who are of similar ethnic background, sex, age or economic status as the accused person, is not valid. The jury should be drawn randomly from a wide cross-section of the community. In New South Wales this is achieved by making the entire adult population, subject to certain nominated exceptions based on public necessity or personal hardship, eligible for jury service. As a matter of principle, the jury should be representative of the whole of the population of the State, not that segment of the population which shares certain characteristics with the accused person. Quite apart from the question of principle involved, a provision requiring the selection of a jury of the direct peers of an accused person would create immense practical difficulties. On what basis would the peer group of the accused person be determined? Would it be similarity of age, occupation, race, religion, some other significant characteristic or perhaps a combination of all of these?

4.51 The elimination of bias and the overriding principle that justice should be seen to be done are positive attributes which should be actively pursued. In Recommendation 21 (para 4.74) we propose that the power of a judge to discharge the jury where the selection process has been unfair should be affirmed.

B. Challenges for Cause

> **Recommendation 16: The Jury Act 1977 should be amended to confirm that the right to challenge a particular juror for cause may be exercised before or after all rights of peremptory challenge have been exhausted.**

4.52 Both the accused person and the Crown have an unlimited right to challenge individual prospective jurors for cause.[60] This challenge must be made after the person has been called to take his or her place on the jury but before he or she is sworn.[61] The grounds for the challenge must fall into one of three categories: that the person is not qualified under the Jury Act 1977 to serve as a juror; that the

person is disqualified or ineligible pursuant to Schedule 1 or 2 to the Act; or that the person is suspected of bias.[62] In New South Wales the challenge is determined by the presiding judge.[63] A prospective juror who is challenged for cause may be questioned on oath by the challenging party, but not before good grounds are established. The challenge must first be made, the cause stated and some evidence tendered by counsel in support of the objection before the person challenged may be examined to prove the cause to the judge.[64] In New South Wales the challenge for cause is very rarely used.[65]

4.53 One of the submissions made to us[66] revealed that the practice of at least one judge is not to allow a challenge for cause to be made until the rights of peremptory challenge have been exhausted. In our view this approach Is at best undesirable. The right of challenge for cause is different in nature from the right of peremptory challenge. The exercise of that right should not be dependent upon an arbitrary factor, namely whether all available peremptory challenges have been made. Our recommendation will clarify the present practice. In every other respect there should be no change to the current law relating to challenges for cause.

Recommendation 17: The United States procedure of conducting an examination of prospective jurors as a prelude to the exercise of the right of challenge should not be introduced in New South Wales.

4.54 A number of people have raised this issue in submissions to the Commission. One of the most valuable came from a United States lawyer.[67] She nominated the process of examination of prospective jurors, known in the United States as the “voir dire”, as one of the most unsatisfactory aspects of trial procedure in jury cases in the United States. She described it as being unduly time consuming and as allowing counsel in the trial to engage in questioning which was designed to ingratiate themselves with prospective jurors. The origin of this procedure can be traced back to the trial of Aaron Burr on charges of treason in 1806.[68] The Chief Justice of the United States Supreme Court, John Marshall, allowed prospective jurors to be asked at length questions about their personal characteristics with a view to establishing whether they were biased generally or in a particular respect. The procedure was previously unknown to the common law. It has apparently never been allowed in courts in Canada[69] and only once in Scotland.[70] In a conspiracy trial at the Old Bailey in 1973, the trial judge allowed counsel for eight people accused of terrorist bombings to ask extensive questions about the political views of the jurors. Following the trial a practice direction was issued prescribing the manner in which judges should use their discretion in this area.[71] The practice direction proposed that questions as to whether jurors are personally connected with the case may be permissible. General questions designed to discover the political views of jurors are not.[72]

4.55 One of the submissions we received proposed that a restricted version of the “voir dire” examination of jurors should be introduced in New South Wales. It was suggested that counsel for the Crown and the accused could advise the judge of specific questions they wanted to put to the members of the jury panel to determine the existence of potential bias and prejudice. Such questions as were approved would then be asked by the judge, thereby avoiding the risk of improper questioning of the prospective jurors. The exercise of challenges, both for cause and peremptorily, would follow. This procedure would considerably lengthen criminal trials, both by the time taken to settle the issue of whether the questions were necessary and then by the questioning process itself. It must be remembered that in the “voir dire” examination the members of the jury panel are asked questions. At the trial of an individual accused person, the jury panel usually numbers in excess of forty people.

4.56 The procedures we suggest below in Recommendations 57 and 58 (paras 7.19-7.25) are designed to reveal sources of potential bias before the empanelling process begins and are a more efficient means of eliminating bias and prejudice[73] which is the ultimate purpose for which the “voir dire” examination is conducted in the United States. They are more efficient in the sense that they would take less time and would not be as intrusive for the prospective jurors. At the same time they would serve to ensure that the jury selected for the trial is impartial.

C. Peremptory Challenges

4.57 After the accused person pleads not guilty to the charge read from the indictment, the members of the jury are chosen by drawing cards at random from a box of cards. This procedure is known as balloting. The names of the jurors are read aloud and they are requested to come to the jury box to be sworn in as jurors. Before the juror is sworn, he or she may be challenged peremptorily, that is without the need to state a reason, by any party. A person challenged in this way is excluded from serving in that trial. Whilst this is the law, the conventional practice in New South Wales is to require peremptory challenges to be made before the Bible is placed in the hands of the prospective juror. Despite this practice, the right, at least in theory, remains available between the time the juror takes the Bible and the time that the juror is sworn.

4.58 In New South Wales twenty peremptory challenges are allowed where the offence is murder and eight are allowed in any other case.[74] Each side has the same number of peremptory challenges except that. where there are multiple accused, the number of Crown peremptory challenges is equal to the sum of the challenges available to the individual accused.[75] In order to place this issue in its historical perspective, it should be noted that at common law an accused person was entitled to 35 peremptory challenges.[76] The Crown had no such right but was empowered to "stand aside" jurors without restriction. This involved the Crown prosecutor requesting that a prospective juror should not be empanelled unless and a until the remainder of the panel was exhausted. Traditionally the Crown only exercised this right for good reason and it was used only rarely. The power to "stand aside" jurors was abolished In New South Wales in 1977 and replaced by the Crown's right to challenge peremptorily.[77] The use made of this right can be seen from the results of our Survey of Court Procedures. The Crown exercised its right of peremptory challenge in 125 of the 197 trials surveyed. In all, 363 challenges were made. This information, coupled with that obtained by means of our Survey of Crown Prosecutors, indicates that the Crown's use of its right to challenge is reasonably extensive but varies considerably among prosecutors.

1. The Rationale for Peremptory Challenges

> **Recommendation 18: Section 42 of the Jury Act 1977 should be amended to provide that the maximum number of peremptory challenges available to an accused person should be reduced to three irrespective of the offence being tried. This recommendation should be read in conjunction with recommendations 20, 21, 22, 25, 59 and 60.**
>
> **Recommendation 19: The maximum number of peremptory challenges available to the Crown should be reduced to three for each accused person irrespective of the offence being tried.**

4.59 From the standpoint of the accused person the peremptory challenge has its origin in the concern that an accused person should "have a good opinion of his jury".[78] Given that the right of challenge for cause is currently of little value having regard to the lack of information available to an accused person and his or her counsel, the peremptory challenge is the primary means whereby people with actual or perceived predispositions against the accused person may be excluded from the jury. From the Crown's point of view, the peremptory challenge replaces the right to "stand aside" jurors. There is much debate as to the circumstances in which it is proper for the Crown to exercise its right of peremptory challenge. We deal with this issue below.[79]

4.60 There will be some occasions, particularly where the trial is conducted in a small country centre, when a party knows something specific about a prospective juror. Usually however, challenges are based upon information derived from the name of the prospective juror or on factors which are believed to be discernible from the juror's appearance, such as sex, age, race and dress. These factors are of dubious utility. We strongly believe that there is much unhelpful mythology abroad as to the accuracy of these factors in excluding a juror with a perceived unsuitability or bias. The majority of those contacted by the Commission who frequently represent accused people acknowledged that exercising challenges involves a large degree of guesswork. They nevertheless were strongly opposed to the suggestion put forward in our Discussion Paper (para 4.20) that the number of peremptory challenges should be reduced. The main argument advanced in favour of the existing rules insofar as they relate to the accused person is that they serve the important function of ensuring the acceptability of the ultimate verdict through the participation of the accused person in the selection of the jury. An accused person who has some input into the composition of the jury will be more inclined to accept that the trial has been a fair one.

4.61 The use of the right of peremptory challenge may serve to cut across the principles of representativeness which we have outlined at the beginning of this chapter and the important functions which they serve. It is desirable that the jury express the conscience of the entire community, not just the conscience of those "least obnoxious to the parties to the litigation".[80] The object of the process of jury selection should be to pick 12 people who can be fair. It should not be a tactical manoeuvre by which each side tries to secure the 12 most sympathetic jurors from their particular point of view. The number of challenges available to the parties determines the extent to which they can mould the jury and either exclude important classes of the population[81] or cause them to be disproportionately represented.

4.62 Since we have identified representativeness as a desirable characteristic in a jury, the extent of the right of peremptory challenge currently enjoyed In New South Wales is called Into question. In order to argue for the retention of this right, it is necessary to show that it achieves a valuable and legitimate goal such as might offset the damaging effect it may have on the representative character of the jury. We have referred to one such goal above.[82] Another legitimate purpose for giving the parties the right of peremptory challenge is the removal of actual or perceived potential sources of bias without the need to give reasons, In a situation where the disclosure of the reasons may cause prejudice or embarrassment to the parties or to the juror challenged, or to both. An additional reason put forward to us for preserving the right of peremptory challenge is that in some cases the jury panel itself is so lacking in its representative quality that the right of peremptory challenge may need to be exercised in order to obtain a representative jury. The principles of random selection make it highly unlikely that a jury of 12 people will in fact be unrepresentative of the community. In any case in which the selection process has been demonstrably unfair, the judge would have the power to exercise his or her discretion to discharge the jury in accordance with the recommendation we make below (Recommendation 21, para 4.75).

2. Options for Reform

4.63 The various options available were discussed in paras 4.12-4.22 of our Discussion Paper. They are:

retention of the status quo;

abolition of the peremptory challenge;

abolition of the Crown's peremptory challenges only; and

reduction in the number of peremptory challenges.

We do not intend to repeat at length the various arguments. It must, however, be stressed that this subject is linked to others which are under consideration, such as the amount of information disclosed about prospective jurors and procedures adopted to eliminate prejudice and bias. We have endeavoured to bear this in mind in formulating our recommendations.

4.64 The number of peremptory challenges currently available to the accused person and to the Crown can be used to ensure that a particular group within the community is not represented on the jury or to obtain an over-representation. This can be so particularly where there are several accused people tried together, where the various accused people acting in concert or the Crown asserting its numerical superiority may affect the representative character of the jury. Whilst we are firmly committed to the principle that each of the parties in a criminal trial has the right to be tried by a jury which is impartial both in fact and in appearance, we do not consider that there should be any right in any party to be tried by a jury of its choice. The purpose of jury selection is to obtain an Impartial jury on which a cross-section of the community is represented, not a jury which is slanted in favour of one of the parties. Since the current rules relating to the right of peremptory challenge run counter to the principle of a representative jury, we consider that they should be changed in accordance with the recommendation set out above and subject to the qualifications regarding the Crown's right of challenge which we discuss below.

4.65 For many years the law in New South Wales allowed twenty challenges to a person charged with a capital offences. The provision of twenty peremptory challenges in murder trials was retained because the penalty for murder, unlike other capital offences, was fixed at mandatory penal servitude for life when capital punishment was generally abolished in 1955. This law was repealed in 1981.[83] While penal servitude for life remains the sentence most frequently imposed upon people convicted of murder, the judge now has a discretion to impose a lesser penalty where certain specified conditions are satisfied. This change in the law has made it necessary to re-examine the rule relating to peremptory challenges in murder trials. The offence of murder may still occupy a special position within the calendar of crimes, but we do not consider that this means that the rules of criminal procedure should differ depending on whether the charge is murder or some other serious offence. There are many other offences which carry a maximum penalty of life imprisonment on convictions.[84] Indeed, conviction on a charge of causing injury by discharging a weapon in the course of a hijacking offence carries a penalty of mandatory life imprisonment on conviction, yet only eight peremptory challenges are available to a person accused of this offence.[85]

4.66 Although the availability of any right of peremptory challenge may conflict with the principle of representativeness, it is vital that such right remain for the reasons summarised in para 4.57, particularly since the right of challenge for cause is of little practical importance in New South Wales. We commenced this chapter by stating the reasons why it Is desirable for juries to be representative of the general community. Some of the recommendations we make are designed to enhance the representative character of the jury.[86] We are satisfied that the exercise of a large number of peremptory challenges could adversely affect the representative character of the jury, and thereby make those recommendations less effective. We also believe that there are other ways of achieving some of the legitimate functions of the right of peremptory challenge. in order to maintain the representative character of the jury, and bearing in mind that other recommendations we make should obviate at least some of the need for peremptory challenges, we consider that there should be a reduction in the number of challenges currently available.

4.67 The availability of Crown challenges if exercised to ensure that the jury is representative may lessen, but will not remove, the potential for skewing the randomly selected jury drawn from a representative panel. With twenty peremptory challenges for each side where the charge is murder, New South Wales has the highest number of any Australian jurisdiction. In Victoria, Queensland and Western Australia the accused person has eight challenges for all offences. In Tasmania, the Northern Territory and New Zealand the accused person has six peremptory challenges. In South Australia and the United Kingdom the accused person has three.[87] We note that in England there has been a move to review the right of the accused person to make peremptory challenges.[88] The Committee established in the United Kingdom to examine the conduct of fraud trials has recommended the abolition of peremptory challenges.[89]

4.68 We also consider it appropriate to have some regard to the “cost” factor. By this we do not mean the financial cost alone but also the personal inconvenience caused to the large numbers of jurors required to be summoned to provide a panel large enough to accommodate the available number of peremptory challenges. More significant, however, is our belief that the real benefit of the right of challenge lies in its participatory aspect rather than in its capacity to exclude biased jurors. This is not unduly affected by a reduction in the number of peremptory challenges. The right of the accused person to play an active role in the selection of the jury is retained in a real but limited sense.

3. Our Recommendation

4.69 Realising that views will legitimately differ on what is the appropriate ultimate balancing of these factors, the Commission has, by majority, reached the conclusion that a reduction to three peremptory challenges for both the accused person and the Crown represents a fair result. This would allow both parties to take steps to remove bias, without going so far as to enable them to select the jury of their choice. Two members of the Commission do not support this conclusion. Mr James’ view is that if the number of peremptory challenges is to be reduced at all, it should not be reduced below six. Judge Mathews’ view is that four peremptory challenges would be sufficient, but only if each party were to be advised of the occupation and place of residence of each prospective juror so that each challenge could be used in a more informed way. In the majority’s view this information should only be revealed if it can

be shown to be relevant to the particular trial. In Recommendation 60 the Commission proposes a procedure which would satisfy this requirement.

4.70 The ability of the parties to introduce a bias in the jury by the exercise of the right of peremptory challenge has been challenged by some of those who made submissions to us. It has been put to the Commission that the parties cannot by this means eliminate from the jury particular groups who may be seen as unsympathetic to the case for either party. In the United States and in the United Kingdom, practices have developed in the last two decades which do imply that favourable juries can be selected by exercising the right of peremptory challenge. In some celebrated criminal trials, the accused person has arranged for the conduct of public opinion polls to determine which groups within the community have a favourable or unfavourable bias towards either the facts of a particular case or the accused person who is on trial. These practices might be used where the preliminary proceedings have received widespread publicity or where particular types of accused people are on trial. The information obtained can be used to slant the jury in the desired direction. In the United States opinion polls were used in some of the trials which followed the Watergate scandal and in the trial of John De Lorean on drug charges. These polls determine the attitudes held by particular groups in the community to the issues in the trial. The use of police enquiries and jury vetting in the United Kingdom have been seen to have a similar effect. Jury vetting has been used at the trial of members and sympathisers of the Irish Republican Army. Because of the expense involved in polling, it Is naturally only available to accused people who have substantial means. The prosecution have unique opportunities to vet the prospective jurors. Such practices take the exercise of the right of peremptory challenge out of the “hunch and guesswork” category and make it a carefully orchestrated process designed to increase the prospect of a jury being favourably disposed towards the case for one of the parties.

4.71 As we have stated above, the right of the Crown to exercise peremptory challenges should remain. The Crown has a right to an impartial jury. The Commission has received a number of submissions which express concern about the way in which the Crown’s rights of challenge are exercised. Some point to the fact that before the 1977 legislation was enacted, the Crown only exercised its right to have jurors “stand aside” for exceptional reasons.[90] It was for this reason rarely used. Others have drawn our attention to cases In which the way the right was exercised had the effect of creating an unrepresentative jury.

4.72 Some of the submissions we received proposed that the Crown’s right of challenge should be abolished. It is argued that the Crown’s legitimate interests are adequately catered for by the schedules which specify those classes of people who are either ineligible, disqualified or exempt from jury service, and that the legislature has spoken on behalf of the community by removing from juries those people whom it regards as unsuitable to be jurors. The legislation aims to ensure that juries are impartial and representative. The legislation is an expression of the community’s view regarding the composition of juries. It is argued that the community, through the Crown Prosecutor, should not be given what amounts to a second chance to determine the composition of the jury. However, the legislation is not by itself sufficient to ensure that in every case a representative and impartial jury will be empanelled. In some case there might need to be a supplementary means of removing perceived prejudice. We consider that the right of the Crown to make peremptory challenges should be preserved but that they should be used more consistently.

4. Guidelines for Crown Challenges

> **Recommendation 20: The Attorney General should, in consultation with the Crown Prosecutors, establish guidelines to govern the Crown’s exercise of the right of peremptory challenge. These guidelines should be published.**

4.73 The question of how many challenges should be available to the Crown has caused considerable debate among the members of the Commission. The Court of Criminal Appeal in New South Wales has interpreted section 43 of the Jury Act 1977 to mean that the number of challenges available to the Crown is the sum of the challenges available to each accused person.[91] We recognise that the power of co-accused who act in concert In making peremptory challenges may be used to diminish, perhaps significantly, the representative character of the jury. If the Crown does not have a similar number of challenges, its power to restore or preserve the representative character of the jury is restricted. We regard providing the Crown with the same number of challenges as the accused as a means of ensuring that representativeness is maintained as a feature of the jury in a trial of several accused people. We

are concerned, however, that the Crown should not, nor should it be seen to, exercise Its right of peremptory challenge in an improper way. It should be stressed that where co-accused are not acting in concert In exercising the right of peremptory challenge, the Crown has a huge advantage. To permit the Crown to retain this right in such large proportions without restricting the manner of its exercise would create the potential to significantly affect the representative character of the jury. For this and other reasons we recommend that guidelines be drawn to govern the exercise by the Crown of the right of peremptory challenge.

4.74 Another suggested approach was that the Crown should be restricted to making challenges for cause. This could be achieved by making the Crown's exercise of the right of peremptory challenge subject to objection from the accused person, in which case the Crown would be required to explain the grounds on which the challenge is made. We consider that this procedure could create undue embarrassment for the juror challenged. The grounds for the Crown's objection might be of a sensitive or personal nature which, in fairness to the prospective juror, should not be disclosed. The right to make challenges without showing cause gives the Crown the power to challenge jurors who are in fact disqualified or ineligible without publicly disclosing the grounds.

4.75 In order to overcome the apparently Inconsistent approaches taken by different counsel appearing for the Crown, it is desirable that guidelines be established which set out the grounds on which the Crown should make peremptory challenges. It is appropriate that the Attorney General should issue such guidelines not only to achieve consistency but to ensure that challenges are made on legitimate grounds. We would expect that the terms of the guidelines provide that prospective jurors should not be challenged solely on the grounds of, for example, race, sex or age. If these guidelines were to be made public, the role of the Crown in prosecuting criminal offences would be better understood by both lawyers and the general community alike. Guidelines of this kind have been issued In Victoria.

D. Judicial Discretion to Discharge a Jury

> **Recommendation 21: The Jury Act 1977 should confirm the power of the judge to discharge a jury where the process of exercising peremptory challenges has created the potential for or the appearance of unfairness. The fact that an unobjectionable selection process has nevertheless left the jury lacking a member of a particular group within the community should not of itself be a ground for exercising the power.**

4.76 We consider that this power, which derives from the inherent jurisdiction of a criminal court to ensure that justice is not only done but is seen to be done, should be affirmed by legislation. Although it has been exercised only rarely,[92] we can envisage circumstances where it would be justified. Since some doubt has been expressed as to whether a judge has this power, the position should be clarified. In formulating the terms of this recommendation we have had in mind the need to give the courts specific and effective powers to enforce the observance of the guidelines we have suggested In Recommendation 20. It should be emphasised that the judge's power in this regard is dependent upon some identifiable irregularity in the selection process. It is not envisaged that it should be invoked because a particular group within the community is not represented on the jury.

E. Consent Challenges

> **Recommendation 22: The Jury Act 1977 should be amended to provide that where each of the parties in a criminal trial believes that a prospective juror should for any reason not be empanelled, the juror may be challenged by consent. Such a challenge would not affect the rights of peremptory challenge of any party.**

4.77 A prospective juror is clearly an unsuitable juror if, for example, he or she is intoxicated, or obviously so lacking in personal hygiene as to create a risk to the other members of the jury. Similarly, a prospective juror who is a relative or close friend of either counsel would be an unsuitable juror. A challenge for cause would probably succeed, but this may be avoided to save embarrassment to the challenged juror. In the past, such people have been excluded from the jury by the Crown exercising its power to "stand aside" a juror. More recently the Crown has usually used its right of peremptory challenge. If our recommendation to reduce the number of peremptory challenges is implemented, this position may change. Accordingly, we consider that the notion of "challenge by

consent" should be introduced to exclude jurors who are unsuitable to both of the parties in the case. The trial judge has an inherent power to dismiss any prospective juror. This may be exercised on the application of the parties or on the judge's initiative. In our view, however, where both of the parties desire a potential juror not to serve, they should have the right to exclude that person irrespective of the judge's view.

FOOTNOTES

1. 2 William IV, No 3.

2. The only exception is that pregnant women may claim exemption as of right: Jury Act 1977 s5 and Schedule 3 cl 5.

3. NSW Parliamentary Debates, Legislative Assembly, 22 February 1977 p4254.

4. Jury Act 1977 ss9,12. Compilation is in fact done by computer.

5. Jury Act 1977 s10 and Schedule 3 cl 8.

6. See para 4.13.

7. Almanac *of Liberty* (1954) p 112.

8. Criminal Law and Penal Methods Reform Committee of South Australia *Court Procedure and Evidence* (Third Report, 1975) p84.

9. Jury Act 1977 s9(2).

10. Jury Regulations Nos 421 and 519 of 1985.

11. Jury Act 1977 Schedule 1.

12. Jury Act 1977 Schedule 2.

13. Jury Act 1977 Schedule 3.

14. Jury Act 1977 s38 (1)(a).

15. See Australian Law Reform Commission Discussion Paper No.25 Criminal Records (ALRC DP25 1985); Law Reform Division, Department of Justice (NZ) *Living Down a Criminal Record: Problems and Proposals* (November 1985); Law Reform Commission of Western Australia *The Problem of Old Convictions* (Discussion Paper, Project No.80, 1984).

16. Compare the English provisions. The Juries (Disqualification) Act 1984 provides that people who have received a suspended sentence or a community service order are disqualified from jury service for ten years. Those who have been sentenced to imprisonment for more than five years are disqualified for life.

17. Jury Act 1977 s6(b).

18. For example, people unable to read or understand the English language and people who are unable because of illness or infirmity to discharge the duties of a juror.

19. For example, members of the police force and their spouses.

20. For example, people employed by the Board of Fire Commissioners of New South Wales.

21. Jury Act 1977 Schedule 2 cl 16.

22. Jury Exemption Regulations No 131 of 1970 (Cth) cl 6 and 7.

23. Jury Exemption Act 1965 (Cth) s4.

24. See para 4.22 above.

25. Juries Act 1967 (Vic) Schedule 3: Jury Act 1929 (Qld) s8; Juries Ordinance 1967 (ACT) s11: Juries Act 1974 (UK) Schedule 1: and Juries Act 1981 (NZ) s8.

26. Law Reform Commission of Western Australia *Report on Exemptionfrom Jury Service* (Project No 71, 1980) para 3.29.

27. See Discussion Paper para 3.20

28. See generally NSW Law Reform Commission *De Facto Relationships* (LRC 36, 1983) Chapter 13; *Lambe v Director-General of Social Services* (1981) 38 ALR 405;*L and L* [1984] FLC 91-563.

29. Paras 4.3-4.7.

30. Recommendation 4, para 4.14.

31. *The Jury in Criminal Trials* (WP27, 1980) p65.

32. Jury Act 1977 Schedule 3 cl 8.

33. See Discussion Paper para 3.29.

34. Ms Theresa Guzzo, letter to the Attorney General.

35. For example people of or above the age of 65 years and pregnant women.

36. For example practising dentists, medical practitioners and mining managers.

37. In our Survey of the Compilation of Jury Rolls 7,507 of 13,103 deletions were based on Schedule 3.

38. Australian Bureau of Statistics *Estimated Resident Population by Sex and Age, State and Territory of Australia* (Cat 3201.0 June 1984).

39. LRC 42, 1984.

40. Sean Flood, Public Defender, 16 December 1985.

41. Jury Act 1977 s15.

42. Jury Act 1977 s38(1).

43. Mr Sam Silkin, Attorney-General, House of Commons Debates, Vol 958, col 28, November 13 1978, quoted in R J East “Jury Packing: A Thing of the Past?” (1985) 48 *Modern Law Review* 518 p520.

44. See Attorney-General’s guidelines on jury checks [1980] 2 All ER 457, [1980] 3 All ER 785.

45. The guidelines stipulate that jury vetting may only be undertaken with the personal authority of the Director of Public Prosecutions or his Deputy, who have to report to the Attorney-General if authority is given. See East note 43 above, p523.

46. [1980] 3 All ER 785. See also *R v Mason* [1980] 3 All ER 777.

47. Attorney-General's guidelines [1980] 2 All ER 457 para 4(a), noted in East, note 43 above, p522. See also F Gibb "Putting Juries on Trial" *The Times* January 9, 1986.

48. East, note 43 above, p525.

49. See for example Juries Act 1981 (NZ) s14; Juries Act 1967 (Vic) s21(3): Juries Ordinance 1967 (ACT) s24; Discussion Paper para 4.19.

50. Jury Act 1927 s40(1).

51. "Jury Vetting" (1985) 135 *New Law* Journal p69; see also *R v Crown Court at Sheffield, Ex parte Brownlow* [1980] 2 All ER 444.

52. "Dangers Remain in Jury Vetting" *The Times* August 2, 1980.

53. East, note 43 above, pp529-530, 534.

54. See generally Chapter 7.

55. Recommendations 59, 60, paras 7.19-7.25.

56. See Recommendation 60.

57. Jury Act 1977 s41.

58. *R v Grant and Lovett* [1972] VR 423 at 425.

59. Originally found as "Judicium parium suorum" in Magna Carta 1215, but a concept which has been taken to mean much more than it did in that declaration: See Sir William Holdsworth A History *of English Law* (1966 Reprint) Vol II pp214-215.

60. The details of the common law right to challenge for cause are set out in Chitty 1 *Criminal Law* (1836) at 540-44.

61. Jury Act 1977 ss45, 46.

62. *Halsbury's Laws of England* (4th ed 1979) Vol 26 para 627.

63. Jury Act 1977 s45. Of the Australian jurisdictions, only Queensland retains the traditional method of determining a challenge for cause: trial by the jurors already empanelled or by two indifferent people chosen by the court from the panel: Jury Act 1929 (Qld) s39 and Criminal Code Act 1899 (Qld) s612.

64. *R v Chandler* [1964] 2 QB 322; *McMahon v Sydney City Council* [1963] 63 SR (NSW) 507.

65. In our Survey of Court Procedures only two cases of challenge for cause were recorded.

66. J L Glissan QC, personal communication.

67. Maryann Motza, Director, Professional and Legal Services Division, Colorado Judicial Department.

68. K Beyler "Improving the Jury Selection Process" (1984) 73 *Ilinois Bar* Journal 150 p154; A Nevins and H S Cominager America (3rd ed 1.966) p144.

69. Van Dyke "Votr dire: How it Should be Conducted to Ensure that Our Juries are Representative and Impartial" (1976) 3 *Hastings Constitutional Law Quarterly* 65 p69.

70. *M v H M Advocate* [19751 Crim LR 108.

71. Practice Note [1973] 1 All ER 240.

72. “The Tradition of Jury Vetting” *State Research Bulletin* Vol 3 No. 15 (Dec 1979-Jan 1980), pp43-44.

73. Professor Brodeur has described the voir dire examination as an “ineffective screening device because of the lack of skill of the lawyers conducting it”: “Voir Dire Examinations: An Empirical Study” (1965) 38 *Southern California Law Review* 503.

74. Jury Act 1977 s42.

75. *R v Dickens* [1983] 1 NSWLR 403.

76. Blackstone Commentaries on *the Law of* England (4th ed 1765) Vol 4 at pp353-355; Chitty 1 *Criminal Law* (1836) pp534-37.

77. Jury Act 1977 s43.

78. H Broom Commentaries on *The Laws of England* (1869) Vol IV p442.

79. Paragraph 4.71.

80. K Beyler “Improving the Jury Selection Process” (1984) 73 *Illinois Bar Journal* 150.

81. *Id* pl53.

82. Paras 4.59, 4.60.

83. Crimes (Homicide) Amendment Act 1982 s3; see *R v* Burke [1983] 2 NSWLR 93.

84. For example, manslaughter (Crimes Act 1900 s19); conspiracy to murder (s26); maliciously inflict grievous bodily harm with intent (s33); setting fire to a dwelling knowing a person to be inside (s196).

85. Crimes Act 1900 s32C.

86. See Recommendations 3-10.

87. Jury Act 1899 (Tas) s54; Juries Act 1962 (NT) s44(1); Juries Act 1927 (SA) s61; Criminal Law Act 1977 (UK) s43; Jury Act 1929 (Qld) s35(2)(3); Juries Act 1981 (NZ) s24(1); Juries Act 1957 (WA) s38(1).

88. Editorial comment The Guardian 17 November 1985; *The Times* 8 November 1985.

89. *Report of the Fraud Trials Committee* (Chairman; Lord Rosktill) (HMSO 1986) para 7.38.

90. For example, Justice Paul Stein, 3 February 1985. Cf para 4.58.

91. *R v Dickens* [1983] 1 NSWLR 403.

92. See Discussion Paper para 4.13; J Scutt “Trial by a Jury of One’s Peers?” (1982) 56 *Australian Law Journal* 209.

5. Protecting the Jury

I. INTRODUCTION

5.1 It is self-evident that the members of a jury must be protected from personal harassment, intimidation or physical violence before, during and after the time when they perform their vital and often difficult role. Their deliberations are to be based solely upon the evidence observed by them and the arguments and legal directions presented in court.

5.2 We are not aware of any proven direct intentional interference with jurors prior to verdict in New South Wales, although one case of an unsuccessful attempt improperly to influence a juror was noted in our Discussion Paper (para 9.9).[1] Nevertheless we consider that the goal of making jurors personally secure from interference of any nature is an important one which, for various reasons, calls for legislative and administrative changes as well as changes in courtroom practice. The main thrust of these changes is to endeavour to guarantee, as far as possible, the anonymity of individual jurors.

5.3 The first and major reason for proposing these changes is the fact that there is evidence from which one can conclude that some jurors believe that they should be secured from the risk of any interference by steps taken to give them anonymity. The Sheriff of New South Wales has informed us that jurors do from time to time express concern for their personal safety.[2] In the longest criminal trial ever conducted in New South Wales, which lasted for approximately 10 months in the Supreme Court, a specific request by the members of the jury was made to the judge that their names not be read out at the beginning of each day's proceedings. The jurors did this because they were concerned for their safety.[3]

5.4 The second reason is that experience overseas illustrates that jurors In other common law jurisdictions have been subjected to various forms of Interference. These forms of interference vary dramatically in the threat which they pose to the personal security of jurors. The future course of criminal justice in New South Wales can not necessarily be predicted by the past. It may be that we have been fortunate to avoid so far the uglier examples of intimidation of people In the administration of justice that have occurred in some jurisdictions overseas. It may also be that there have been undetected incidents in New South Wales. Having discovered the existence of this problem elsewhere, we consider that It is sensible to examine it. If there are steps that can be taken to prevent this kind of activity occurring here, then they should be implemented provided that no other Important values are put at risk.

5.5 The third reason for proposing change in this area is that there have been incidents in recent times in Australia where jurors have been sought out by parties or their representatives after the trial.[4] In an incident which occurred in Western Australia in December 1985 a prisoner who had, been convicted of murder sent Christmas cards to the jurors who had found him guilty.[5] The cards read:

> Here is hoping you have a very pleasant, family Christmas. Think of me while you are having your Christmas dinner.

They were signed by the prisoner.[6] This incident was made possible by the fact that the documents in the case which were given to the prisoner to assist him in the preparation of an appeal, included a list of the jurors at his trial. This incident was widely publicised, a fact which would hardly assist jurors in other trials to feel secure in their anonymity. We should emphasise that, in New South Wales, convicted people are not given access to the jury list.

5.6 In the United States jurors have been paid for radio and television appearances as commentators, written books about their experiences as jurors and have been hired as consultants to advise on the conduct of related litigation. On occasions approaches have been made to former jurors in an endeavour to obtain information relevant to a challenge to a conviction or to give guidance on the appropriate manner in which to conduct the defence case in a re-trial.[7] Whether or not any such approaches can ever be justified is not the concern of this chapter[8] but they illustrate that jurors can be

and are contacted by parties or their representatives in circumstances where the contact is not of the former Jurors' choosing. We consider that jurors should be protected from such contacts and from possible harassment.

5.7 In addressing this issue we recognise that some measures designed to increase the personal security of Jurors may be so intrusive as to create an atmosphere of fear among jurors and prospective jurors. This would naturally make people reluctant to serve on juries and make the task of jury service a less comfortable one. We are concerned that any such measures which might be implemented should not have the counter-effect of making jurors feel insecure. We are also concerned that the introduction of overt security measures may foster a prejudicial atmosphere for the conduct of the trial.

II. SPECIFIC RECOMMENDATIONS

A. The Secrecy of the Jury Panel

> **Recommendation 23: Section 40(l) of the Jury Act 1977 should be amended to provide that it is an offence for any person to inspect a list of the members of the jury or jury panel relating to a particular criminal trial at any time without the permission of the court.**

5.8 Section 40(l) of the Jury Act 1977 currently prohibits the inspection of the jury panel prior to or during a criminal trial. Curiously, however, there is no sanction against those who breach this provision. The purpose of our recommendation is to better ensure that no person can obtain information about the identity of a prospective juror.[9] In our view, no party to a criminal case has any legitimate reason for knowing the identity of the prospective jurors before the trial. Nor should either party have access to the panel during or after the trial. Only those people who are authorised to see the jury lists should be given access to them. Obviously the Sheriff's officers will need to inspect the panel at various times. It may be that others need to do so. In order that the effective administration of the jury system is not interfered with unduly, we recommend that the court should have the power to permit inspection as the need arises.

B. Reference to Individual Jurors in Court

> **Recommendation 24: When a person is called to the jury box after being balloted in the jury selection process, he or she should be referred to by his or her title and family name only, unless two or more people with the same family name answer to the call. We suggest that consideration might be given to issuing a practice direction to this effect.**

5.9 This change is designed to impede any attempt to contact a juror during or after a trial and to make jurors comfortable in the knowledge that they are unlikely to be harassed. At present the judge's associate, who selects a juror from the panel, does so by randomly drawing cards provided by the Sheriff one at a time and reading aloud the full name of the juror appearing on that card. Judges could direct their associates to restrict the announcement in court to the title and family name only. That is to say, instead of calling, for example, "John William Kennedy", the associate would call "Mr Kennedy". This would make it more difficult for anyone to trace that juror. This practice would require modification where there is, on the jury panel, more than one person of the same sex who has the same family name. The likelihood of this occurring is not high but where it does the security of the jurors concerned would not be threatened if they were to be distinguished by the Initials of their first given names.

5.10 Some of those who made submissions in response to our Discussion Paper advocated that jurors should not be referred to by name at all. We did give consideration to a suggestion that total anonymity could or should be achieved by the Sheriff assigning a different number to each prospective juror. Each person would be referred to during empanelling and throughout the trial as "the juror whose assigned number is X". A similar practice is used in some jurisdictions in the United States. We ultimately rejected this suggestion principally because it might itself create apprehension In jurors but also because it might be seen as demeaning to jurors to be addressed otherwise than by name. Bearing in mind that there has been no recorded instance of successful intimidation of jurors in New South Wales, we think it unnecessary that such an impersonal method of addressing jurors should be introduced.

C. Information about Prospective Jurors

Recommendation 25: The current law and practice in criminal cases whereby the occupation and address of jurors and prospective jurors is not disclosed should be continued except where this information is revealed as part of the procedure proposed in Recommendation 60 for allowing certain categories of prospective jurors to be challenged.

5.11 A number of the people who made submissions to the Commission were of the view that the parties should be entitled to know more about the prospective jurors. It was suggested in particular that the following information be made available:

the occupation of the prospective juror;

the suburb in which he or she lives;

whether the prospective juror has previously served on a jury; and

his or her age.

The first two items of information are currently available to counsel in civil trials.[10] There was considerable debate among the members of the Commission as to whether they should be available in criminal cases (cf para 4.68). We ultimately concluded, principally on the ground of preserving the anonymity of jurors, that none of the above information should be revealed in court or disclosed before challenges are made. The only exception we make is where the information is disclosed as a part of the procedure proposed in Recommendations 59 and 60. We also note that Judge Mathews is of the view that this information should be provided if the number of peremptory challenges available to the parties is to be reduced.[11]

D. Reading the Jurors' Names

Recommendation 26: It would be good practice if the names of jurors were announced in open court only during the process of empanelling the jury and at no later stage during the trial except in the event of a challenge to the identity of a juror.

5.12 As we have noted, the current practice in New South Wales is for the full name of a prospective juror to be read at the time a juror is balloted and again when he or she is "called to the book to be sworn".[12] Where a trial continues into a second or subsequent day, it is the practice of some judges to ask counsel for the accused person and the prosecution whether or not they wish the names of the jurors to be read. Counsel rarely require this to be done. However, the names of the individual jurors are usually read before the jury delivers its verdict when each juror is asked to acknowledge his or her presence In court. These practices are presumably designed to ensure that the jury comprises the same people throughout the trial. In our view they are unnecessary and should be discontinued.[13] We find it unbelievable that the jurors themselves would not be aware of such an occurrence and consider that there Is no need for a special procedure to be followed. Even if there were such a need, It is scarcely met by the roll call procedure.

E. Identifying the Jurors in a Criminal 'trial

Recommendation 27: The Jury Act 1977 should make it an offence to disclose, without lawful excuse, during the course of the trial, any information which identifies someone as a juror in a particular trial.

Recommendation 28: Section 68 of the Jury Act 1977 should be amended to provide that it is an offence to publish material which identifies a person as a former juror in a particular trial unless the person consents to his or her identification.

5.13 Section 68 of the Jury Act 1977 provides:

> A person shall not, except in accordance with this Act, publish or print any material or broadcast or televise any matter of such a nature that a person may thereby be informed, whether by implication or otherwise, of the identity or address of any juror.

The reason for this prohibition is obvious. The privacy of the individual jurors should be protected throughout a trial. This tends to reassure jurors about their personal security and makes it more difficult for improper approaches to be made to them. A juror may not be identified during the trial regardless of his or her consent as this could lead to an improper attempt to contact him or her.

5.14 It is not clear whether s68 applies to disclosure of the identity of a juror made otherwise than by way of a public statement. In some circumstances the non-public disclosure of information may lead to Interference with the jury. Accordingly, we recommend that the prohibition should be extended to cover such disclosures made without lawful excuse. The term “lawful excuse” is used in this context to mean something broader than “legal excuse” or legal right.[14] In so framing the terms of our recommendation we intend to guard against the risk that harmless incidents of honest disclosure may be prosecuted as offences.[15] It is also unclear whether s68 applies once a trial has been completed. Whilst we are not aware of instances where there has been post-trial public identification of a former juror without his or her consent, we suggest that the section should be clarified by extending it in express terms to cover that situation. However, we do not propose that it should be an offence for this identification to take place after the trial if it is done with the individual juror’s prior consent.[16] The question of whether the identification of jurors should be prohibited on wider grounds is discussed in Chapter 11 of this Report.

5.15 Some specific examples of the kind of material we are referring to should be noted. Where a particular trial is well-publicised, television cameras are commonly used to film the precincts of the court in order to show the participants in the trial entering or leaving the courtroom. On some occasions, this film is broadcast “live”. The coverage of these events should never extend to filming or photographing the jurors. We should note by way of contrast the practice In the United States, where the members of the jury are not only photographed, but frequently interviewed by reporters at the end of the trial.

5.16 Similarly, criminal trials and other court proceedings are often reported in newspapers and on television with accompanying sketches of courtroom scenes. These sketches are done by professional illustrators and may be quite accurate in their representation of the participants in the trial. They are used because it is not permissible to take photographs of proceedings in court. Again, this should be contrasted with the position in the United States, where some criminal proceedings are broadcast “live” on television. In our view, courtroom sketches which are likely to be made public should not include the members of the jury.

> **Recommendation 29: Where it is considered necessary to take special precautions to maintain the security of the court or the personal security of the jurors, the measures intended to be taken should, where possible, be revealed to the court and to the accused person but not to the jury.**

5.17 There are no standard criteria for making a decision to increase security in a particular trial.[17] Similarly there is no one person responsible for making this decision. The judge may personally direct that extra security be provided or the initiative may come from the Sheriff’s Office, the police or the Court’s security department. In cases where the police obtain advance notice that there is likely to be trouble at a particular trial, or where a number of people accused of a violent crime are to be tried together, there will usually be extra security measures taken at the trial. It has been held by the Court of Criminal Appeal in New South Wales that the judge has absolute authority for security within the courtroom itself and that this extends to matters of security affecting jurors.[18]

5.18 The Commission is concerned at the risk that unfair prejudice may be created in those cases where special measures are taken. For example, the use of police sharpshooters to man the rooftops of courtrooms where criminal trials are to take place is obviously prejudicial to the conduct of a fair trial if the jury is made aware of their presence. The High Court of Australia has recently observed that the decision to use extraordinary security measures should be made in the light of the prejudicial impact which they may have upon prospective jurors. Having observed that special care should be taken to ensure that security precautions are no more obvious than is necessary, the Court suggested that consideration should be given to advising the accused person of the

action proposed. By giving the accused person the opportunity to express his or her views about the planned security arrangements, unfairness might be avoided.[19]

FOOTNOTES

1. See also *R v Boland* [1974] VR 849; *R v Stretton* (1982) VR 25 1; *R v* Zampaglione (1982) 6 A Crim R 287.

2. Mr D M Lennon, Sheriff of New South Wales, personal communication.

3. Mr Justice A V Maxwell, Supreme Court of New South Wales, personal communication.

4. See. for example, Prothonotary *v* Jackson [1976] 2 NSWLR 457; *Ex Parte Hartstein; in re a Solicitor* (unreported) ACT Supreme Court, 4 June 1971, noted in (1972) 46 *Australian Law Journal* 369,

5. *The Daily News* (Perth) 9 January 1986.

6. *Sydney Morning Herald* 4 January 1986.

7. “Jurors Find Fame and Fortune In US” *The Weekend Australian* 4-5 January 1986 p13.

8. We deal with the issue of disclosure of jurors’ deliberations in Chapter 11 of this Report.

9. Compare the practice in Queensland and Western Australia where the names of the jury panel must be displayed in a prominent place in the precincts of the court for some days before the trial.

10. Jury Act 1977 s40(2).

11. See para 4.68. A similar recommendation is made in the *Fraud Trials Committee Report* (Chairman: Lord Roskill) (HMSO, 1986).

12. Jury Act 1977 s48(2).

13. See text accompanying note 3.

14. *Roffey v Wennerbom ex parte* Wennerbom [1965] Qd R 42 p57;R *v Marche de Quebec* [1969] 1 Ex CR 3.

15. Cf Crimes Act 1900 s417; Justices Act 1902 s145(2).

16. See Law Reform Commission of Canada The Jury (Report 16, 1982) pp52-53.

17. The Office of the Sheriff, personal communication.

18. *R v E J* Smith [1982] 2 NSWLR 608 at 616,617; See also *R v* Stretton and Storey (1982) VR 25 1: *R v Dodd* (1982) 74 Cr App R 50.

19. *Edward James Smith v The Queen* Application for Special Leave to Appeal, High Court of Australia, 26 September 1985, noted at [1985] 19 Leg Rep SL 1. We acknowledge the assistance of Mr P A Johnson, Barrister.

6. Making the Jury's Task Easier

I. INTRODUCTION

6.1 The jury's task in a criminal trial is two-fold. Firstly, the jury is required to listen to and observe the evidence and arguments presented in open court and the judge's directions. Secondly, the jury deliberates in private making findings of fact to which they then apply the law in accordance with the directions given by the judge. The result of this process is a general verdict which, according to the juror's oath, must be a true verdict according to the evidence. The public and the participants in the trial will usually see nothing of the jury's workings other than its verdict. Common sense suggests that the jury's task is an onerous one.

> Most jury members have no prior understanding of normal court procedure, legal terms or ethics, and this in itself places them at a disadvantage. Jury experience initially can be quite confusing, a situation not helped by its total isolation within the processes of the court.
>
> Conscientious jurors do have a difficult time trying to remember all the evidence, the dates, times, names, events, and how each fits in with the rest. And how can ordinary people cope with highly technical evidence when the experts cannot agree?[1]

It is our view that efforts should be made to simplify the task of juries. We reject the argument that the difficulties identified lead necessarily to the conclusion that juries should be abandoned. In this chapter we recommend ways in which, at various stages, the task of the jury can be made easier, by which we mean more convenient, more comfortable, simpler and fairer. The easier this task is made, the more effective will be the jury's performance and the more reliable the verdict. We are here concerned with the competence and confidence of juries, their effective participation and their working conditions. In particular, this chapter deals with:

> the provision of information to jurors both before and during the trial;
>
> the effective presentation of evidence and other aspects of trial presentation-,
>
> the improvement of the physical working conditions of jurors; and
>
> the means by which the effects of jury service on the private lives of jurors may be minimised and adverse consequences eliminated.

II. INFORMATION PROVIDED BEFORE THE TRIAL

6.2 As we noted in our Discussion Paper (para 5.2) the performance of a juror's task is impaired if he or she is confused about the role and obligations of jurors and about procedures in the court and in the jury room. Our surveys of prospective jurors and those who actually served as jurors sought suggestions as to what further information would have been useful. 229 of the prospective jurors we surveyed (the total sample was 1779) stated that they would have liked further information before attending court:

> 38% of those who made suggestions required general information on how the system works, car parking, a contact number for information and overnight stays;
>
> 21% wanted information on court procedure;
>
> 20% wanted information on the role, duties and rights of jurors including their right to take notes and their anonymity; and
>
> 15% wanted information on jury selection procedures, exemption criteria or the length of service.

Serving jurors were also asked about the nature and quality of information provided to them before coming to court. 276 jurors (the total sample was 1834) made at least one suggestion for improving the information given to jurors before coming to court. Of those 276 people:

33% suggested that information be provided on the role, rights and duties of jurors;

24% wanted information on court procedure; and

22% wanted general information about practical matters such as meals and sleeping arrangements.

6.3 The provision of additional and more useful information before the day of the trial would not only reassure prospective jurors and assist jurors to perform their task. It would also enhance administrative efficiency in the Sheriff's Office. The jury roll for each jury district In New South Wales is compiled in two stages. A list of names is selected at random from the relevant electoral roll and all those listed are notified of their inclusion. If they are disqualified, ineligible or wish to claim an exemption as of right pursuant to the schedules to the Jury Act 1977, they are required to notify the Sheriff so that their names may be deleted. Once these deletions have been made, the jury roll is certified and comes into effect. Deletions from the roll continue to be made, however. One reason for this is that some people do not notify the Sheriff of reasons warranting their deletion until they first receive a Jury Summons. The difficulties caused to the Clerk of the Peace when determining the proper number of jurors to be summoned to a jury panel probably will never be entirely solved. However, clearer information about the categories of people not qualified to be jurors would increase the rate at which such people report this fact to the Sheriff at the proper time, thus improving the reliability of the jury rolls and the Sheriff's confidence in the availability of people on the rolls. Clear information about the procedures for applying to be excused would increase the proportion of people who make applications before the date of the trial. In this way the Sheriff would have greater certainty in the adequacy of the numbers summoned for a jury panel and, in addition, the half day jury fee payable to the many people who attend court and are then excused by the judge would be saved.

A. Improving the Notification of Inclusion on a Draft Jury Roll

Recommendation 30: The Notification of Inclusion on a Draft Jury Roll should be improved by adding:

(a) a brief explanation of the nature of jury service and the role of the jury in the legal process;

(b) an explanation that a penalty may be imposed if the recipient fails to advise the Sheriff that he or she is disqualified from or ineligible for jury service; and

(c) an explanation that the Sheriff has a discretion to excuse people from jury service on particular occasions for good cause.

6.4 To enable people receiving the Notification to understand what they are being called on to do and to encourage people to stay on the jury roll, the Notification of Inclusion on a Draft Jury Roll should briefly explain the nature of jury service and the ramifications of being on the jury roll. A statement covering the following matters is suggested:

the importance of jury service;

the likely frequency of jury service;

the manner of summoning jurors,

the law concerning disqualification, ineligibility and exemption as of right; and

the jury fees and expenses.

To ensure more care in the completion of the forms and in the interests of fairness, the Notification should specify the penalty for failure to respond where appropriate.[2]

Recommendation 31: A notice In the major community languages should accompany the Notification of Inclusion on a Draft Jury Roll. This notice should explain what the Notification is and advise that people who are unable to read or understand English are ineligible for jury service and must inform the Sheriff of that fact.

6.5 The purpose of a notice in major community languages would be to ensure that people who are unable to read and understand English do not remain on the jury roll by default. It is apparent from our surveys that this does occur at present. Applications to be excused made to the Sheriff or to the judge by people summoned were sometimes based on an inadequate understanding of English. The Sheriff's certainty in the availability of an adequate proportion of members of panels summoned will be enhanced if those who are ineligible for this reason remove themselves at the proper time. There will also be greater certainty that people with an inadequate command of English do not actually serve on juries. A large majority of respondents to the Commission's Discussion Paper supported this proposal. Those few who expressed reservations queried the need for a statement of the kind proposed in major non-English languages on the basis that, in their view, the ability to read English should not be any longer an essential qualification for jury service. The majority of respondents, however, were in favour of the retention of this qualification and the Commission considers it to be necessary in the light of our recommendations to increase the amount of written materials provided to juries (Recommendations 48,49.50 and 5 1, para 6.32-6.37).

Recommendation 32: To enable people to respond accurately to the Notification of Inclusion on a Draft Jury Roll, the language and setting out of the schedules listing classes of disqualification, ineligibility and exemption as of right should be made clear and unambiguous.

6.6 The Notification of Inclusion on a Draft Jury Roll currently informs recipients of the categories of exclusion simply by setting out the schedules in their legislative form. The language of the schedules is obscure in some respects and needs to be clarified or simplified. Schedule 1, providing for disqualification due to prior convictions, is particularly difficult to comprehend. We recommend (Recommendation 5, para 4.17) that this schedule be repeated and we suggest a substitute. The point to be made in this chapter is that a substitute must be drafted primarily to ensure that people who come within the schedule are so informed upon reading it. Although we are unable to point to any under-reporting of disqualifications, we have noted an amount of inaccurate reporting of them. Some 33 people in the jury districts of Penrith and Newcastle-Cessnock notified the Sheriff that they were disqualified when in fact the period of their disqualification had expired. Almost 6.5% of people reporting that they were disqualified were in fact no longer disqualified. The results of the Commission's other surveys also raise some doubt as to whether Schedule 3 is fully understood by people who receive a Notification of Inclusion on a Draft Jury Roll. For example, our Survey of Court Procedures revealed that some people who could probably have claimed exemptions as of right had not, but had raised the matter when making personal applications for excusal to the judge.

6.7 Savings which could be made if more people who are disqualified, ineligible or exempt removed themselves at the proper time would be substantial:

fewer people would need to be summoned;

court time spent dealing with personal applications would be saved;

a proportion of the fees paid to people who attend court and are excused (currently $23.00 for a half day attendance) would be saved,

a proportion of the travelling expenses paid to such people would be saved;

inconvenience to the individual would be avoided; and

the jury rolls would be a more accurate record of the people in fact available to attend if summoned.

B. Improving the Jury Summons

Recommendation 33: The Jury Summons should be amended to:

(a) advise recipients that applications to be excused may be made to the Sheriff and encourage applicants to approach the Sheriff at their earliest convenience;

(b) include a map showing the location of the court and the attendance point for prospective jurors;

(c) advise prospective jurors to contact the relevant telephone information service on the night before attendance is required to check attendance details; and

(d) give adequate notice (21 days) of the date of attendance, unless a shorter period has been directed by a judge.

6.8 Respondents to the Commission's Discussion Paper were overwhelmingly in favour of a proposal along these lines. It is clear that efficiency would be greatly improved if applications to be excused were made, where possible, to the Sheriff. Savings in juror fees and travelling expenses and in court time would again apply and the Sheriff could be more certain of the available panel numbers. The method of making applications to the Sheriff should be explained in the Jury Summons. Some 14.1% of people making personal applications to the judge in our survey period (89 of 633 applications) were then suffering illness or injury. It should be unnecessary for such people to attend court to make their applications. Since a statutory declaration or a medical certificate should suffice, they should be expressly advised of their right to apply in this way. Again, 11.8% of personal applications to be excused were made by sole business operators (75 of 633 applications). This frequently accepted ground for being excused could be dealt with readily by the Sheriff. Some applications to be excused necessarily will continue to be dealt with on the day of the trial by the judge. Two categories are those where the problem has only recently arisen and those, dependent on the estimated length of the trial, which relate to future plans. However, most applications should be dealt with by the Sheriff so as to achieve the advantages listed above (para 6.7).

6.9 Another difficulty prevents the timely disposition of applications to the Sheriff. The Sheriff's power to excuse has been delegated to only a few officers, all of whom are based in Sydney. Applications received in country centres only two or three days before the trial are not posted on to Sydney for fear that they will be held up in the post. Instead they are held at the relevant court to be dealt with by the judge. This procedure does not require applicants to attend court to make their applications in person but it could cause uncertainty on the part of the applicant as to whether he or she will be excused. The Sheriff is, therefore, urged to consider ways to avoid this situation. The delegation of the excusal power to senior officers located in country districts would appear to be the best means of overcoming this problem.

6.10 The current statutory minimum notice period for a Jury Summons is 7 days.[3] This period is insufficient. The Sheriff's practice is to give at least 21 days notice at all times. Consideration should be given, for example, to professional or self-employed people who must make alternative arrangements with respect to their businesses and practices if they are to be encouraged or required to serve. In determining how long the notice period should be, the administrative demands upon the Sheriff's Office need to be considered. The Commission recommends that 21 days should be the statutory minimum notice period. This period would give the Sheriff sufficient time to consider and respond to all but the most tardy applications for excusal. We note that a judge may now order a shorter notice period to apply[4] and consider this to be a useful provision in unusual circumstances. We propose that this power should be retained.

6.11 The Commission recognises that the longer the notice which must be given the more likely is the cancellation of the panel. This is because in the longer pre-trial period there is a greater chance of criminal charges being withdrawn, of changes of plea, or of the jury not being required for other reasons. While panel cancellations are notified on the telephone jury information service, people who attend without having contacted the service are currently paid for their attendance. The Sheriff, Mr D M Lennon, opposes any change to this policy because he considers it to be unfair to refuse to pay people who have attended in response to a Jury Summons. The current form of the Summons merely suggests that a check be made with the telephone information service. Greater emphasis should be placed on the need to telephone the service. The policy of paying prospective jurors attending court for cancelled panels should be reviewed after a period of experience with a more strongly worded advice to make contact on the eve of the trial.

Recommendation 34: When a jury panel is summoned for a particular trial which Is expected to take 4 weeks or longer, the Jury Summons should include a notice to this effect and should invite recipients to apply to the Sheriff to be excused if jury service for that length of time would cause hardship.

6.12 This procedure would be another way of saving jurors' trips to court, jury fees and expenses and court time, and of giving greater certainty in the numbers available to constitute the panel. There are practical difficulties with this proposal. It is not always easy to predict the length of a trial. It is unfortunate that the situation could develop where the jury in one long trial has notice of the fact as early as the Jury Summons and the jury in another is not warned until the beginning of the trial. The advantages of giving proper notice where it is possible, however, outweigh the disadvantage which arises when jury panels are treated differently. We consider the difference in treatment to be in a minor respect only.

C. Providing An Explanatory Booklet

Recommendation 35: An explanatory booklet should be prepared and distributed to every person summoned for jury service. This booklet should describe the nature of a juror's rights and responsibilities, the jury's role, the conduct of trials and explain common concepts which are likely to be referred to in the trial.

6.13 Prospective jurors currently receive an information sheet with the Jury Summons which covers trial procedures, the difference between civil and criminal cases, the telephone information service, empanelling of jurors, rights of challenge, election of foreman and how to obtain further information. This document should be expanded into a booklet dealing in an interesting, informative and comprehensible way with the following matters:

the history of the jury system;

the nature of the jury - its constitution and its place in the trial;

the distinction between civil and criminal trials and the place of jury trials in thejustice system,

the jury selection process, including the possibility that panels will be cancelled and that individuals will not be balloted or will be challenged;

general information for prospective jurors - jury fees and travelling expenses, court hours, isolation during trial and deliberations, the law as to employers of jurors;

the juror's role in the trial - taking notes, asking questions, the text and meaning of the oath and a note to the effect that a juror may make an affirmation and how this wish is to be indicated;

the respective roles of the other participants in the trial;

the conduct of trials; and

common legal concepts.

The responsibility for preparing a booklet of this kind rests generally with the Attorney General's Department which has produced such booklets in the past. One Organisation which should be in a position to offer expertise is the New South Wales Legal Aid Commission which is empowered to:

> . . . initiate and carry out educational programmes designed to promote an understanding by the public, or by sections of the public, of their rights, powers, privileges and duties under the laws of New South Wales.[5]

6.14 Information provided before trial in this manner would have several beneficial effects. It would, if properly produced, assist in setting jurors' minds at ease about what is expected of them and would familiarise them with some of the important aspects of the task ahead of them. This in turn would permit jurors to focus their concentration more fully on the task at hand and would also give them a greater feeling of participation and

control, enhancing their confidence and morale. The surveys we conducted revealed a need among prospective jurors for further information before coming to court.

D. Showing a Short Orientation Video Film

6.15 In our Discussion Paper (para 5.11) we raised the issue whether prospective jurors should be shown a video film before jury empanelment proceeds. This method of jury orientation is used in some of the United States. In contrast to the favourable response to our proposal for the provision of an explanatory booklet, fewer than half (15 of 32) of those responding to our Discussion Paper on this point felt a video film would be a good idea. Although there may be difficulties in producing a film which avoids stereotyping the trial participants and prejudicing particular cases, there are positive benefits to be obtained from a suitable film. The most important of these is both the consistency and increased effectiveness of the orientation of jurors which would be achieved if a standard tape were shown to prospective jurors. We understand that the Sheriff is already Investigating the feasibility of such a film.

E. Estimating the Length of the Trial

> **Recommendation 36: It would be good practice for the Judge to indicate the estimated length of the trial to the jury panel. If the trial is expected to be lengthy, the judge should invite applications to be excused on the ground that jury service for that length of time would be likely to cause hardship.**

6.16 Such notice would be desirable if only as a matter of fairness and courtesy to prospective jurors. Even if the trial is expected to be a short one, knowledge of this fact could allay concern among some jurors. There are, moreover, other benefits to be obtained. If such an indication were to be given, the risk that the jury might be reduced over time through unavailability of jurors would be limited. The current difficulty, noted by one judge making a submission to us,[6] of estimating trial length in advance would be eased with the introduction of pre-trial hearings to discuss this among other matters. The obvious desirability of this procedure is highlighted by the fact that those responding to our Discussion Paper were unanimously in favour of it. At present only one-fifth of the District Court judges who responded to our survey and fewer than one-fifth of the Supreme Court judges always give this notice to the jury panel. We expect that most of the remainder do give such a notice when the trial is expected to be lengthy.

III. INFORMATION PROVIDED AT TRIAL

A. Judge's Orientation Address to the Jury

> **Recommendation 37: It would be good practice for the judge to address the jury at the beginning of every criminal trial on:**
>
> > **(a) the general course of the trial;**
> >
> > **(b) the role of the jury; and**
> >
> > **(c) such principles of law as the Judge considers will assist the jury in their understanding of the case.**

6.17 In our Discussion Paper (para 6.2) we recognised the need for preliminary directions as a means of focusing the jury's attention on the task at hand. One respondent to our Survey of Jurors made the following comment:

> It would have helped had we known more in advance. We always felt that everyone else - the crown, the defence and the judge, knew so much more than we did about the trial and yet we the jury were going to have to make the verdict.

Judges responding to our Survey of Judges varied greatly in their views as to which of such preliminary information should be provided, although almost 90% of responding District Court judges (26 of 29 respondents) and 75% of responding Supreme Court judges (9 of 12 respondents) agreed that the jury would be assisted by preliminary instructions on all or some of the matters listed. Current judicial practice varies greatly. For example, almost one-quarter of responding judges always give a preliminary instruction on the burden and standard of

proof, but fully one-half never do so. It could be that some of the latter group require the Crown Prosecutor to give this information in the Crown opening. Well over one-half of responding judges always explain the sequence of events to be followed at the trial and the general role and obligations of Jurors, but 40% of them never explain the nature of the case at hand, again possibly leaving this matter to be dealt with in the Crown opening. The Commission believes that it is appropriate for the judge to provide information and instruction on these matters.

> To acquaint the juror with his duties and responsibilities in a new environment and to increase his understanding of the processes of a trial can hardly be objectionable . . . [7]

All but one of the respondents to our Discussion Paper who made submissions on this point agreed generally with this proposal.

6.18 The orientation address would give the jury time to settle into their surroundings and should allow for jurors to ask questions to clarify points made. We envisage that the judge's address would briefly cover at least the following matters:

> the procedure to be followed, including the order of presenting evidence and the examination of witnesses, the functions of the judge and counsel, and the fact that the jury may need to be excluded while matters of law are determined;
>
> the role of the jury, including the function of the jury as sole judges of the facts, the restriction of their consideration to the evidence, admonition as to outside conversation and newspaper, radio and television reports during the trial, and an explanation of the verdict and how it is reached; and
>
> basic matters of law, including the presumption of innocence, the standard and onus of proof, and such other matters as are appropriate to the particular case.

6.19 The practice of instructing the jury on the law at the beginning of a trial may overcome the following existing problems:

> the difficulty for jurors of fitting the evidence and their impressions of witnesses into a legal framework provided only after the presentation of evidence;
>
> the danger that the jury will not assess the evidence in the light of the relevant legal principles; and
>
> the difficulty of redirecting a jury at the end of a trial throughout which it has misunderstood the matters at Issue, the Crown's burden and/or its own role.

We consider that at least elementary instructions should be given to focus the jury's attention on the matters at issue. Preliminary instructions would provide the appropriate framework to focus jurors' reception and retention of the evidence and arguments and their discussions before their deliberation. This framework could be amended when it becomes necessary throughout the trial and in the summing-up. Currently, however, more than half of the judges surveyed (26 of 41) never instruct a jury at the beginning of the trial on the elements of the offence charged.

1. Jurors' Right to Take Notes

> **Recommendation 38: The Jury Act 1977 should be amended to confirm the right of jurors to take notes and to require that:**
>
> > **(a) jurors be provided with the means to take notes;**
> >
> > **(b) the judge advise the jury of their right to take notes;**
> >
> > **(c) jurors not remove any notes from the courthouse; and**
> >
> > **(d) after the trial, notes made by jurors should be destroyed by order of the court.**

6.20 Just under one-third of jurors who completed the Commission's Survey of Jurors had taken notes during the trial. Almost one-half of those respondents (506 of 1050) who did not take notes stated they would have been assisted by notes. Most judges, however, do not encourage jurors to take notes. Only one-quarter of judges surveyed tell jurors that they may take notes at the outset of the trial and one-fifth never give this instruction. One judge commented:

> It may be desirable for the jury to note figures (amounts of money etc). Otherwise I think it is a dangerous practice. it could result in a defective record of the evidence being made privately and with no notice of it to anyone. The record should be public and open to everyone, although I would not generally be in favour of the jury having the actual transcript of evidence as opposed to the evidence read to them.

Another judge suggested that note-taking "should be limited to trials containing complex or technical issues".

6.21 Most of those making submissions on this question favoured our proposal that juries be provided with notebooks and told of their right to take notes. Most of the objections against juror note-taking were listed in our Discussion Paper (para 6.15). They are:

> the danger of a juror with notes exerting greater Influence because of them;
>
> the danger that notes will not reflect the relevant issues and may be unreliable; and
>
> that note-taking will be distracting.

These objections can be directed equally against unaided reception of oral evidence. In other words, they are the dangers inherent In jury trials. Note-taking can be seen as one way to mitigate the problems of retention and Organisation of evidence which jurors face. As one eminent Hong Kong practitioner noted in his submission to the Commission:

> Judges make notes, counsel make notes, solicitors make notes, policemen use notes so why should not jurors be given the opportunity to make their own notes. If jurors are likely to argue about notes they are equally likely to argue about their recollection and impression of witnesses.[8]

While we consider that jurors should have a right to take notes, we do not propose that this right should be unqualified. Jurors' notes should be used solely for the purposes of their deliberations. To avoid improper use of notes after the trial and, particularly, in the interests of the confidentiality of the jury's deliberations, the notes should be left behind when the jury is discharged and should later be destroyed. The majority of the Commission consider that this right should be incorporated in the Jury Act by a provision modelled on the following Illinois rule.

> A petit juror in any court of the state of Illinois shall be entitled to take notes in connection with and solely for the purpose of assisting him in the performance of his duties as a juror, and the sheriff of the county in which such juror is serving shall provide writing materials for that purpose. Such notes shall remain confidential, and shall be destroyed by the sheriff after the verdict has been returned or a mistrial declared.[9]

Mr Justice Roden does not support the terms in which this recommendation is expressed. Whilst agreeing in principle with the right of jurors to take notes, he does not consider it should be a statutory right, nor that it should be mandatory for judges to direct juries in the manner recommended by the majority.

2. Jurors' Rights to Ask Questions

> **Recommendation 39: It would be good practice for the Judge to advise the jury, in his or her opening remarks, of their rights:**
>
> > **(a) to direct queries to him or her concerning the case;**
> >
> > **(b) to request that questions be asked of witnesses; and**
> >
> > **(c) to ask for a view.**

Recommendation 40: It would be good practice for the Judge to advise the jury, at the end of the summing-up, of their rights:

(a) to request clarification of the summing-up; and

(b) to request that portions of the transcript of the trial be read to them.

6.22 These procedures would enhance the jurors' ability to participate in the trial and would go some way towards ensuring that jurors understand the evidence. Over one-third of the judges who completed our Survey of Judges never advise jurors at the beginning of the trial of their right to ask questions, while approximately another third always do so. If jurors were advised of their right to ask questions, it is likely that more of them would be inclined to do so. Over one-half (55.8%) of the 197 juries surveyed in our Survey of Court Procedures did not ask any questions during the trial or their deliberations. Those which did asked questions mainly during the jury's deliberations. These questions were chiefly requests to be reminded of the evidence or of the summing-up. Of a total of 201 questions asked, only 65 (32.3%) were requests made during proceedings for additional evidence or for clarification of the evidence. In all only 16% of juries (31 of 197) sought additional information and clarification in the course of proceedings. While we consider it to be very important that jurors should feel free to participate in the proceedings, it could, naturally, be disruptive to counsel's presentation of the case if jurors were permitted to interrupt at will. It is counsel's function to present the evidence to the jury. In order to avoid unwarranted interruption, jurors should be told to submit their questions to the judge. The jury should also be cautioned to wait until the examination of a witness is complete before submitting questions.

3. The Role of the Jury Representative

Recommendation 41: The person chosen by the jury to communicate with the court and announce the verdict should no longer be referred to as the foreman but should in future be referred to as the jury's representative. The term foreman is likely to mislead jurors about their respective roles in the jury room.

6.23 We have considered the proper role of the jury representative, currently known as the foreman, and have determined that the present description "foreman" does not accurately describe the position of this juror. The representative is not a leader in the jury group but an equal with the 11 other jurors. It is important, we consider, that the name given to the representative should not lead other jurors to believe that that person has more influence than they. We have also been concerned at the continuing use of the masculine form in referring to the representative. We consider that the term "representative" best describes the functions of this position and has the advantage of being suitable whether the person is male or female.

6.24 Currently most judges require the jury to elect a foreman as soon as convenient. The difficulties juries face in this matter were described by one recent juror who made a submission to the Commission.

The present method of nominating a foreman leaves much to be desired. How can one assess the capabilities of a proposed foreman when 12 mostly nervous strangers have only just met? In my view it needs someone experienced in controlling a discussion group and with a knowledge of court affairs to act as liaison between the jurors and the judge. The most competent person isn't necessarily the most voluble and I fear this latter characteristic is often the criteria used to hastily select a foreman.[10]

We recognise that there may be cases in which the jury is reluctant to commit itself as a group to one representative in the very early stages of the trial. We have considered whether the jury should be formally directed as to the timing and manner of the appointment of the representative. We have determined that the procedure to be followed in this regard is best left to the decision of each jury. This is a subject which should be covered in the explanatory booklet suggested in recommendation 35 (para 6.13).

B. The Juror's Oath or Affirmation

Recommendation 42: The juror's oath or affirmation should be simplified and should state clearly the juror's obligation to give a verdict according to the evidence presented in court.

6.25 In the interests of fairness, both to the jurors themselves and to the parties, the effectiveness of the jurors' performance of their task and the reliability of their verdict, the form of the oath or affirmation should communicate clearly and unambiguously the jurors' obligations. New South Wales jurors are currently required to acknowledge that they will:

> . . . well and truly try and true deliverance make between your Sovereign Lady the Queen and the accused whom you shall have in your charge and a true verdict give according to the evidence.

The juror's oath has recently been simplified in England[11] and Western Australia. An oath or affirmation similar to that used in Western Australian should be adopted in New South Wales.

> I swear by Almighty God to (or, I solemnly and sincerely declare that I will) give a true verdict according to the evidence on the issues to be tried by me.

The Sheriff should instruct his officers to inform jurors that they may either make an affirmation or take an oath.

IV. PRESENTING THE EVIDENCE, ARGUMENTS AND SUMMING-UP TO THE JURY

A. The Defence Opening

> **Recommendation 43: The Crimes Act 1900 should be amended to permit the accused person or defence counsel, immediately after the Crown's opening address, to announce any matters of fact which are not in issue and outline briefly the issues in the defence case.**

6.26 It is the practice in the United States for the defence to open immediately after the Crown opening. We do not suggest that the defence be entitled to open at this stage, rather they could make a short announcement briefly outlining the issues to be contested but not referring to evidence proposed to be called. The purpose of such an announcement, where defence counsel chooses to make it, would be to alert the jury at an early stage of the trial as to the nature of the accused person's defence. In this way the issues in the case could be narrowed and defined. To avoid the disadvantage to the Crown which could arise if the Crown opening were to be substantially separated from the Crown case, the defence outline (or outlines in the case of multiple accused) should not be lengthy or argumentative. Rather this opening should simply outline the issues and identify those matters not in contention. Time could be saved in some cases where this option was exercised because the number of disputed matters could be reduced. It is likely that the jury's understanding of the case would be increased. Their efforts can be concentrated on the issues rather than on assessing evidence that is not in dispute. We emphasise that this procedure should naturally be an optional one as there is no obligation on the accused person to put forward a defence to a criminal charge.

B. Introduction of Witnesses

> **Recommendation 44: The Crimes Act 1900 should be amended to provide that counsel may introduce a witness to the jury by briefly stating the issues to which the witness' evidence relates.**

6.27 This procedure should also be optional. Its adoption would assist the jury to focus attention on the relevance of the witness' evidence and place It in perspective. There should be no danger that the jury could confuse what the witness actually said with the introduction because the latter would be limited to a very brief factual statement along the lines. for example, of "this witness will give evidence as to the cause of death". Judges surveyed by the Commission did not generally favour this proposal with 75% of responding Supreme Court judges (9 of 12) and 65% of responding District Court judges (19 of 29) opposed. Some judges were concerned that the introduction could be abused, giving unfair weight to the witness' evidence and not much assistance to the jury. On the other hand, some judges were favourably disposed to the idea recognising that such an introduction would assist the jury to focus on the important parts of the evidence. It was suggested that the procedure would be particularly useful in complicated trials where there may be a long gap between the Crown opening and the calling of a particular witness, or where there may be a large body of formal evidence which is not in dispute.

C. Technical and Scientific Evidence

Recommendation 45: Statute should provide that, if the judge considers it would assist the jury and would not cause unfairness, the evidence of an expert witness may be given by:

(a) the witness reading a document;

(b) a party tendering the document, provided that the witness is available to give oral evidence if required; or

(c) the witness presenting the evidence in any other manner or form approved by the judge which is not already permitted by the laws of evidence.

6.28 Judges responding to our survey tended to agree that scientific and technical evidence is a major cause of jury trial complexity. Over one-half (24 of 41) of judges surveyed considered that some trials are too complex to be suitable for a jury and about three-quarters of that group cited scientific and technical evidence as one of the causes of that complexity. For the reasons set out in para 2.4, we strongly support the retention of the jury as the arbiter of guilt In serious criminal cases. It is vital that the system be made suitable for juries and we regard the alternative solution of reducing or abolishing the use of juries as inferior and unacceptable. The procedures proposed as possible alternatives to the presentation of expert evidence in oral examination would potentially improve the jury's understanding of it. Expert witnesses and those calling them have a special obligation to present their evidence in a manner which is unambiguous and precise, and which is comprehensible to the jury. The availability of the alternatives proposed should encourage counsel and witnesses to give careful thought to the best means of presenting complex technical or scientific evidence in a jury trial. We are impressed, for example, by the way in which some science documentaries broadcast on television are able to convey difficult concepts in a manner which can be understood by the public.

D. Other Evidence

Recommendation 46: All courtrooms in which jury trials are heard should be supplied with equipment which could be used by counsel, witnesses or the judge to assist in presenting the case to the jury in a more effective way.

6.29 The presentation of evidence to the jury in a criminal trial is almost exclusively by way of the spoken word. Witnesses give their evidence orally, the addresses of counsel are in the form of speeches and the judge's summing-up is supplemented by written material only in exceptional cases. The experience of teachers and others whose task it is to communicate sometimes complex information to an audience unfamiliar with the subject clearly demonstrates that effective communication cannot always be achieved by exclusive reliance upon the spoken word. it is obvious that, from time to time, the task faced by counsel or the judge in presenting factual or legal issues may be simplified by other forms of presentation. Some experienced practitioners who have assisted the Commission have stressed the need for basic equipment in courtrooms. For example, at the close of a long trial, it would greatly assist the jury for photographs of the witnesses to be projected onto a screen as their evidence is referred to by counsel in closing addresses. This would assist the jury to remember the evidence of each witness and the impression they formed of him or her. Effective communication could also be assisted by the use of less sophisticated equipment such as blackboards or whiteboards for presenting the case in a more graphic manner. There should not be any objection to the jury itself having access to these materials where they feel that it would be of use to them.

E. Judge's Instructions to the Jury

6.30 Studies have revealed a large number of difficulties in the comprehensibility of common judicial language.[12] These difficulties raise serious doubts as to whether juries fully understand some of the instructions of law they are given. In our Survey of Judges we asked whether standard jury instructions would ease this problem. Some two-thirds (27 of 41) of responding judges considered standard form instructions would assist jurors. A higher proportion, about three-quarters of respondents, considered standard forms would assist judges themselves. Draft standard instructions have been developed by a committee of Supreme Court and District Court judges in New South Wales partly with a view to improving the level of comprehension among jurors. In our Discussion Paper (para 6.29) we described the further development needed and foreshadowed that the Commission would be involved in this research. The empirical testing and expert development of standard instructions is a lengthy

process and involves other considerations which are not relevant to juries. For these reasons we have deferred discussion of standard jury instructions until a later stage of our reference.

F. Communicating with Juries

> **Recommendation 47: Archaic terms and concepts should be eliminated from all communications to the jury. The jury should not be provided with a glossary of legal terms because this would encourage the use of legal jargon in jury trials.**

6.31 In our Discussion Paper (para 6.8) we raised the issue whether juries should be provided with a glossary of legal terms. Only 13 of the 34 people making submissions on this issue felt that such a glossary should be provided. We consider that the availability of a glossary to the jury would further entrench the use of legal jargon injury trials.[13] We would not wish to encourage this. Counsel and judge should try to use plain English, especially when communicating with the jury.

> One of the keys to effective communication is to use the language of the person to receive the message, rather than that of the person delivering it.[14]

We consider that archaic terms and concepts should be eliminated from all communications to the jury. We have suggested (Recommendation 42, para 6.25) simplification of the jurors' oath by the dropping of outdated language such as "true deliverance make" and "have in your charge". Similar changes should be made to all other communications with the jury and to indictments themselves. To avoid misunderstanding, the archaic language and awkward phrasing of indictments should be abandoned and all indictments cast in modern English. Another important example is the form of words often used to place the accused person into the charge of the jury. The jury is told:

> Upon this indictment [name of accused person] has been arraigned and upon the arraignment he has pleaded that he is not guilty. Your charge, therefore, is to inquire whether he be guilty or not, to hearken to the evidence and to give your verdict according to the evidence.

All such statements should be phrased in clear and simple language.

V. MATERIALS TO ASSIST THE JURY

A. The Documents in the Case

> **Recommendation 48: It would be good practice for the jury to be provided with multiple copies of photographs and documents as they are admitted into evidence where the judge considers this would assist the jury.**

6.32 The provision of the indictment would ensure that no misunderstanding, at least as to its text, would arise among the jurors. Understanding would also be enhanced if each juror received a copy of each documentary exhibit and photograph as it is admitted into evidence. Each juror would then be in a position to follow the explanation of the exhibit as it is given by the witness. The desirability of this procedure was recognised by Mr Justice Lee of the Supreme Court of New South Wales in an address to the Institute of Criminology in 1982.

> If, for instance, a record of interview is to go into evidence, the jury should have a copy of it in their hands when counsel is cross-examining on it. How often have I seen an effective cross-examination of police officers on a record of interview, go right over the heads of a jury because they could not follow the fine but significant nuances which counsel was seeking to reveal.[15]

The opportunity to refer to the relevant photograph or document is also invaluable when reference is made to it in closing addresses or summing-up. Over one-half (55.1%) of people who completed Jurors' Surveys (981 of 1834 jurors) had not been provided with an individual copy of documentary exhibits and photographs. Almost one-half (48.2%) of those people (473 of 981) stated they would have found an individual copy helpful. We are aware of the practical difficulties which could arise in some cases in providing the jury with individual copies of documents and photographs. For this reason we do not propose that the practice should be mandatory. The question

whether the practice is to apply in a particular case should be decided by the judge. In some cases it would be convenient for this determination to be made at a pre-trial hearing. There are many cases in which the provision of copies of documentary exhibits would be valuable. The practice would extend to jurors an aid available as a matter of course to judges both at the trial and at the appellate level.

B. The Transcript

> **Recommendation 49: The Jury Act 1977 should confirm the discretionary power of the judge to provide a copy of all or part of the transcript of evidence to the jury in the jury room.**

6.33 The jury should be assisted to deliberate effectively and rationally on the evidence presented in court. We have recommend above (Recommendation 38, para 6.20) that jurors should be provided with notebooks as a matter of course and permitted to make notes during the trial. The provision of the transcript in addition could compensate for any lack of reliability In the notes made and could save time in the jury's deliberations. The transcript would be particularly useful where complicated technical or scientific evidence has been given. It is our firm view that when a jury requests a transcript which records such complex evidence it should be kept from them only for very sound reasons. We recommend above (Recommendation 45, para 6.28) that complex evidence might be tendered in documentary form. We also recommend (Recommendation 48, para 6.32) that a copy of the document be given to the jury. If this is done, the jury should also have that portion of the transcript recording the cross-examination, if any, on the document. The provision of the transcript is one way of ensuring that the information upon which the jury acts is accurate. Almost 17% of questions asked by juries (34 of 201 questions asked) recorded by our Survey of Court Procedures were requests to have part of the transcript read to them. One juror stated that "The jury was surprised that a transcript was not available". Nearly one-half (45%) of jurors completing Jurors' Surveys stated that they would have been assisted by a copy of the transcript.

6.34 Almost 40% (16 of 41) of judges responding to our Survey of Judges, however, considered that juries would never be assisted by access to the transcript. These judges were concerned that jurors would lose the factual picture in their attempts to find relevant sections in unedited and un-indexed transcripts. On the other hand, another 40% of judges surveyed (17 of 41) believed that a transcript might be provided in certain situations. For example, one judge suggested that the jury should have the transcript:

> . . . where the case turns upon:
>
> (a) precise words in conversation;
>
> (b) a comparison of details of events given by witnesses;
>
> (c) complex descriptions.

In some cases it will no doubt be appropriate for the jury to be provided with the transcript. When the transcript Is provided the judge should, of course, remind the jury that they should also take into account the Impression they received of the witnesses when giving oral evidence. The major administrative problems In providing a transcript are that:

> it may be impossible to produce a transcript in time and, in some districts, at all;
>
> the transcript would have to be edited to ensure inadmissible material was omitted; and
>
> the transcript would still lack indexes and markings to guide jurors to the section required.

None of these difficulties is insurmountable. The impact of the practical problems to which we have adverted can be reduced, although not entirely avoided, by recognising that it would only seldom be appropriate to provide more than part of the transcript. We consider that the transcript may be so useful in some cases that judges should have the option to provide it.

6.35 Another means of recording the evidence presented in a criminal trial should be considered. We are aware of developments overseas, particularly in Canada and the United States, which take advantage of the technological equipment currently available for recording and storing information. This equipment, which we

acknowledge is too expensive to be installed in courtrooms in New South Wales at this time, could be adapted for use in criminal trials in the future. The evidence of witnesses could be recorded by electronic equipment linked to a computer. This would permit the immediate recall of the evidence by the press of a button. It could also be used to store the information contained in documentary exhibits. Some insight into the way in which a jury might conduct its deliberations in the future is given in the Report published by the Shorter Trials Committee in Victoria.[16]

C. Written Directions of Law

> **Recommendation 50: The Jury Act 1977 should confirm the discretionary power of the judge to give the jury any direction of law in writing.**

6.36 Whilst it is clear that judges currently have this power,[17] some are wary of exercising the discretion over the objections of counsel. A statutory provision would clarify the position and confirm that judges have this discretion. Over one-half (24 of 41) of judges surveyed by the Commission considered that juries could be assisted to understand complex or difficult oral directions of law if the directions were also provided to them in writing. Some judges, however, suggested that lucid oral exposition and repetition accompanied by jury note-taking are preferable to providing written directions. There are, of course, practical problems in producing written directions in advance of the summing-up. However, there are many cases in which written directions could be of great assistance to the jury. One outstanding example is the direction on self-defence which judges are required to give.[18] Another example is the case in which complex issues arise together. The jury would often find useful a document setting out the elements of the offence being tried. If provided to them at the commencement of the trial, such a document would be particularly useful when linked to counsel's introduction of witnesses by reference to the issues to which their evidence relates (Recommendation 44, para 6.27). Over one-half (52.8%) of the jurors completing Jurors' Surveys (969 of 1834) stated they would have been assisted by having a written copy of the whole or a part of the judge's summing-up.

D. Written Statement of Alternative Verdicts

> **Recommendation 5 1: It would be good practice for the judge in suitable cases to provide the jury with a statement setting out the available verdicts and the circumstances in which each is appropriate.**

6.37 Everyone making submissions to the Commission on this point agreed generally with this proposal in our Discussion Paper (para 10. 18). This procedure would ensure a more formally correct verdict and could be used to give order to the jury's deliberations. The procedure was approved by the New South Wales Court of Criminal Appeal in *Petroff*.[19] Nearly one-half (48%) of jurors surveyed by the Commission (880 of 1834) stated they would have been assisted by a written statement setting out the available verdicts. There are obviously some relatively straightforward cases where this procedure would not be necessary. Where, for example, the accused person is tried alone on a single count which does not admit of any alternative verdict, it would hardly seem necessary to give the jury a written statement of the alternative verdicts. If, however, there is more than one accused or more than one charge, then a list of the relevant questions the jury is to be asked, in the order they are to be asked, would be of value in ensuring a correct verdict is announced.

E. Material Exhibits

> **Recommendation 52: The Jury Act 1977 should be amended to provide that the judge may order that an exhibit should not be available to the jury in the jury room where the safety of the jurors or the integrity of the exhibit could be at risk.**

6.38 In general all exhibits accompany the jury into the jury room when they retire to consider their verdict, although there may be a discretion to exclude "exhibits of a highly inflammatory and prejudicial character".[20] Apart from this latter category of exhibits, there may be exhibits which should be kept from the jury for other reasons. Such exhibits are of two kinds.[21] Firstly, there will be some exhibits which require expert supervision because of their dangerous character and which could put the jurors at risk if left with them unsupervised. Secondly, there are exhibits of a sensitive kind whose own integrity would be at risk if subjected to the jurors' scrutiny. In both cases, the value of access to the exhibits to assist the jury in their deliberations must be

balanced against the risks involved. The discretion of the judge to exclude exhibits on these grounds should be confirmed.

VI. JURORS' CONDITIONS OF SERVICE

A. Refreshment and Amenities

> **Recommendation 53: Section 55 of the Jury Act 1977 should be amended to provide that jurors have a right to be provided with reasonable amenities and refreshment during adjournments of a trial.**

6.39 This proposal, advanced in our Discussion Paper (para 5.14), won the overwhelming support of people making submissions to the Commission. It is proposed for the sake of certainty and fairness. The jury system has evolved considerably since the days when jurors were not permitted to eat or drink while deliberating. Section 55 of the Jury Act currently empowers the judge to permit the jurors to be supplied with such refreshments as he or she thinks fit. Just as jurors have a statutory right to a fee, their right to daily sustenance at the court's expense should be recognised and stated. Since it is inappropriate to define in the Jury Act what are "reasonable amenities and refreshments", we do not make detailed recommendations on this question. We note, however, that substantial improvements to the existing conditions are clearly necessary, although we are aware of the practical difficulties in dealing satisfactorily with all suggestions. Of greatest concern is the complaint of many jurors responding to our Survey of Jurors that they had been unable to hear some or all of the witnesses, counsel and judge. Microphones are clearly called for in some, if not all, court rooms. In addition, a large number of responding jurors complained about the uncomfortable seating In the jury box. We consider that early attention should be given to this matter.

B. Jury Fees

> **Recommendation 54: The Regulations to the Jury Act 1977 providing for the amount of jury fees should be amended to provide that the fee should be:**
>
> > **(a) $23 for a person attending but required for less than four hours on one day only;**
> >
> > **(b) $46 per day for each of the first five days of jury service; and**
> >
> > **(c) the equivalent of one-fifth of New South Wales male average weekly earnings for the sixth and each subsequent day of service subject to a deduction in respect of any wage or salary income the juror is entitled to receive.**

6.40 Since 1978 annual increases injury fees have ensured that they maintain rough parity with the New South Wales male average weekly minimum wage. *A Review of the Allocation, Utilisation and Funding of Juries* prepared within the New South Wales Attorney General's Department in August 1985 recommended that costs could be saved if increases in the jury fee were made only once every two years. The Commission considers that jurors should not suffer in the interests of cost-cutting. If jurors themselves and the community at large are to believe that Juries are a very important component in the criminal justice system, then jurors should be given fair payment for the work they do. The Commission considers that the current fee of $46.00 per day is appropriate In short trials (ie one week or less) but that in longer trials the fee should be increased so as to reflect the greater demands placed on the jurors and the likelihood that their personal lives will be more severely disrupted by a longer trial. The jury fee is currently recognised as payment for the work of jurors and not in any sense as compensation for loss of earnings. As such a payment, however, the current fee under-values the difficulty and the importance of jury service. A juror serving in a trial lasting eight sitting days, for example, currently receives fees totalling $379.00.[22] Under our proposal such a juror would receive a little over $488.00. Because this would make jury service on long criminal trials less of a burden to income earners, it would mean that a wider range of people would be available to serve on such long trials, thereby enhancing the representative character of the jury in a long criminal trial. A detailed costing of our proposal is set out in Appendix B.

6.41 The Jury Act 1977 does not require an employer to continue paying a salary to an employee who serves on a jury. There are, however, a number of employers who do not stop an employee's wage or salary when the employee is performing jury service. This is so especially when the period of service is short. In the Commission's view a juror whose employer continues to pay him or her during his or her period of service should

not receive an advantage over a juror whose employer does not. No juror should receive a dual income for the period of jury service. In our Discussion Paper (para 5.22) we sought to meet this problem by suggesting that where a juror continues to receive a wage or salary he or she should only be entitled to an amount over and above his or her income for the period of service so that the total equals the full amount of the jury fee. One difficulty with this proposal is that people may be tempted not to declare income received from other sources and so gain an unfair advantage over more honest jurors. Furthermore the Sheriff's Office has indicated that the proposal put forward in our Discussion Paper would create serious administrative difficulties.

6.42 We have reconsidered our earlier proposal in the light of these problems. Our recommendation is that an amount in respect of salary and wages received should only be deducted from the jury fee payable for the sixth and subsequent days, that is when it is paid at the higher rate. Only about 8% of jurors serve for six days or more (see Appendix B) and thus the problem of administering this aspect of the payment system would be less significant.

6.43 An employer who does not receive the services of an employee for over a week due to jury service may well be justified in refusing to continue paying the employee's wage or salary. The burden of the cost of jury service should fall on the State and not employers. Nevertheless, it should remain open for employers to "top-up" an employee's earnings for the period, and for employees to bargain for awards to require employers to continue paying their wages or salaries, or to "top-up" their earnings, whilst employees serve on juries. Employees earning more than the jury fee are particularly likely to find this course desirable.

6.44 The Commission's proposal would mean that the expenditure on fees for serving jurors would increase by about eight per cent (see Appendix B). Some of our other proposals would dramatically reduce the number of prospective jurors summoned, attending court and, being not required or excused, only being paid for a half day's attendance. These recommendations include:

> improvement of the Notification of Inclusion on a Draft Jury Roll;
>
> improvement of the Jury Summons;
>
> improved efficiency in the Sheriff's dealings with applications to be excused; and
>
> reduction in the number of peremptory challenges.

Considerable savings in this area can, therefore, be expected.

C. Personal Injury Compensation

> **Recommendation 55: The Jury Act 1977 should be amended to provide that jurors injured at court or on their journey to or from court should be compensated on the same basis as applies to in ured employees pursuant to the Workers Compensation Act 1926.**

6.45 At present a person injured whilst serving on a jury usually receives an ex gratia payment from the Department of the Attorney General, but generally only if the injury takes place in court. In our view injured jurors should have the same rights to compensation as employees. Like employees they should have an enforceable right to compensation and they should be covered for injuries which they receive on the way to and from the court as well as when actually present. All but one of those making submissions in response to our Discussion Paper (para 5.25) agreed with this proposal, and several people expressed surprise that it did not already apply. This basic protection should be extended without delay.

FOOTNOTES

1. B J O'Donnell, Letter, *The Age* 9 August 1985.

2. Jury Act 1977 s61.

3. *Id* ss27(2), 31(2).

4. *Id* s27(2). This power may be used, for example, when a jury is discharged during country sittings and the judge determines to recommence the trial the following day. The Sheriff can contact jurors summoned for a later trial and bring the date forward.

5. Legal Aid Commission Act 1979 s10(2)(m).

6. His Honour Judge B R Thorley, 12 November 1985, pp3-4.

7. *People v Izzo* 14 III (2d) 203 p209; *J J* DeSanto "Improving the Trial Process" (1 984) *Illinois Bar Journal* 166 p167.

8. J R Sulan, Deputy Crown Prosecutor, Hong Kong, Submission, 5 December 1985, p4.

9. Illinois Revised Statutes ch 78 s36(b) 1983 cited in De Santo see note 7 p167.

10. S Findlay, 12 November 1985, pp1-2.

11. [1984] 3 All ER 528.

12. See for example R P Charrow and V R Charrow "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions" (1979) 79 *Columbia Law Review* 1306; A Elwork, B D Sales and *J J* Alfini *Making Jury Instructions Understandable* (Contemporary Litigation Series, Michie Co., Charlottesville Va. 1982) ppl3-14; A N Doob and H Kirshenbaum "Some Empirical Evidence on the Effect of s12 of the Canada Evidence Act upon the Accused" (1973) 15 *Criminal Law Quarterly* 88; R W Buchanan, B Pryor, K P Taylor and D U Strawn *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions* unpublished report cited by L J Severance and E F Loftus "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" (1982) 17(l) *Law and Society Review* 153 p174; R Forston "Sense and Non-Sense: Jury Trial Communication" [1975) Brigham Young *University Law Review* 601; D U Strawn and R W Buchanan "Jury Confusion: A Threat to Justice" (1976) 59(10) *Judicature* 478.

13. See Fraud Trials Committee (Chairman: Lord Roskill) *Improving the Presentation of Information to Juries in Fraud Trials,* Research Study No. 1, A Black "The Effects of Glossaries on Jurors' Comprehension in Fraud Trials" (HMSO, 1986).

14. The Hon Mr Justice Adrian Roden "The Law and the Gobbledegook" Proceedings of the Institute of Criminology University of Sydney *Criminal Evidence Law Reform* 1981) pp28-29.

15. Proceedings of the Institute of Criminology, University of Sydney *The Criminal Trial on Trial* (1982).

16. *Report on Criminal Trials* (September 1985) pp 1 95-198. See also "Judges and Lawyers with Wigs, Gowns and Floppy Disks" *The Age* 21 Jan 1986 p41.

17. *R v* Ruano (unreported) Supreme Court of New South Wales, Court of Criminal Appeal, 15 February 1977; *R v* Salem (unreported) Supreme Court of New South Wales. Court of Criminal Appeal, 13-14 March 1979; *R v Petroff* (1980) 2 A Crim R 101.

18. *Viro v The Queen* (I 976-78) 41 CLR 88 p 1 46-147 per Mason J. See also *Morgan v* Coleman (1981) 27 SASR 334 and *R v* McManus (unreported) New South Wales Court of Criminal Appeal, 21 June 1985 per Street C J, discussed at (1985) 59 *Australian Law Journal* 644.

19. (1980) 2 A Crim R 101; See also *R v Mills and Others* (unreported) Supreme Court of New South Wales, Court of Criminal Appeal, 19 July 1985.

20. *Kozul v The Queen* (I 980-1981) 147 CLR 221 at 234 per Stephen J.

21. Law Reform Commission of Canada The Jury (Report 16 1982) pp73-74.

22. Jury fees in other jurisdictions are as follows:

(1) Victoria: $25 per day for days 1-6; $50 per day thereafter: Statutory Rule No 23 1982 reg 4B.

(2) Queensland: $31.50 per day for days 1-3; $38 per day for days 4-10; $47.50 per day for days 11- 15: S54 per day for days 6-20; $77.80 per day after the 20th day: Rule of Court IS October 1984.

(3) ACT: $55 per day: Juries Fees Regulations No 46 1982.

(4) Western Australia: $15 per day for days 1-3; $20 per day for days 4- 10; at discretion of Attorney General after day 10: Govt Gazette 13 August 1982.

(5) South Australia: $20 per day: personal communication, Sheriff of South Australia.

(6) Tasmania: What is lost in salary up to $60 per day: Jury Amendment Regulations No 2 1974 reg 2(a).

(7) Northern Territory: $60 per day: personal communication, Sheriff of Northern Territory.

In Queensland, Western Australia, South Australia and the Northern Territory there are provisions for jurors to claim, in addition to the jury fee, compensation for actual economic loss.

23. Some invalid pensioners are ineligible for jury service and those receiving sickness benefits could apply to be excused.

7. Reducing Bias and Prejudice

I. INTRODUCTION

7.1 Our goal is to reduce the incidence of and the potential for bias and prejudice in criminal trials. There are positive steps which can be taken to eliminate actual bias. There are also measures which reduce the potential for prejudice. The introduction of the former will have a direct effect upon the substance of justice. The latter should contribute to the appearance of justice. The appearance of justice is itself an important component of the substance of justice.

7.2 The specific recommendations which we make. in order to overcome the existence and influence of bias and prejudice can be divided into three separate areas. in the first place, the issue of pre-trial publicity is considered and recommendations made with a view to reducing the prejudice which may be created by it. Secondly, the conduct of the trial proceedings is examined. Thirdly, there is a recommendation made which concerns procedure after trial. Before dealing with the question of pre-trial publicity we should emphasise that this subject will be dealt with in greater detail in our forthcoming Discussion Paper *Procedures Before Trial in Criminal Cases*. The matter has been dealt with in our research into the jury system because the rules regarding pre-trial publicity are essentially designed to reduce or eliminate the likelihood of prospective jurors forming views about the case they are to hear before the trial begins. More importantly, those rules should attempt to ensure that any preconceived views cannot be based on material which would not be allowed to be presented in court.

II. PRE-TRIAL PUBLICITY

A. Trial by Judge Alone

> **Recommendation 56: The Crimes Act 1900 should be amended to provide that, in all criminal cases which are to be tried on indictment, the accused person should have the right to make an application that the trial be conducted by a judge sitting without a jury. Applications of this kind should be determined in the following manner.**
>
> > **(a) The application should not be entertained unless the judge hearing it is satisfied that the accused person has either obtained legal advice on the mafter or understands the nature and consequences of the application.**
> >
> > **(b) The onus should be on the accused person to show that there are legitimate grounds for dispensing with the jury.**
> >
> > **(c) The decision as to whether the trial should be conducted without a jury should be made by a judge at a pre-trial hearing.**
> >
> > **(d) The Crown should be represented at such a hearing and entitled to be heard on the merits of the application.**
> >
> > **(e) The accused person should have the right, with the leave of the court, to withdraw the election to be tried by judge alone.**

1. The Need for Trial by Judge Alone

7.3 The likely impact of pre-trial publicity on any group of potential jurors is a matter for speculation. Its influence is not always apparent in advance of the trial. In some cases, however, it may be that publicity which is adverse to the accused person is so prolonged and widespread that it is clearly impossible to eliminate its impact upon potential jurors.

7.4 In the absence of a procedure such as the “voir dire” examination of potential jurors used in most parts of the United States, In which jurors can be questioned as to whether they have a preconceived view of the case, there

is no really effective way of knowing whether potential jurors have been influenced by pre-trial publicity. For the reasons put forward in paras 4.54-4.56, we consider that this procedure should not be implemented in New South Wales. Since there are cases in which the extent and nature of pre-trial publicity will give rise to concern about the impartiality of jurors, there is a need to examine alternative means of ensuring that the trial is conducted fairly.

7.5 The ability of jurors to put inadmissible and prejudicial material aside when considering the case against an accused person has always been a matter of concern for the administration of criminal justice. Traditionally, elaborate steps have been taken to ensure that juries are not exposed to prejudicial material during the trial. In those cases where these measures have not been effective, the courts have discharged the jury unless satisfied that any prejudice can be overcome by appropriate directions.[1] This is usually done on the basis that the proceedings cannot be continued with any confidence that the jurors will ignore the prejudicial material when considering the case against the accused person. An important factor to be taken into account In deciding whether to discharge the jury in these circumstances Is that justice should not only be done, It should also be seen to be done. The principles which apply when considering prejudicial material during the trial apply equally to prejudicial material published before the trial. The traditional view appears to be that juries are incapable of disregarding seriously prejudicial evidence.

7.6 Judges, on the other hand, have been regarded as capable, by virtue of their qualifications, training and experience, of disregarding prejudicial material to which they are exposed and deciding the case strictly on the admissible evidence. We consider that a judge will normally be better equipped than a jury to disregard prejudicial material so that it does not affect the determination of guilt. There will be cases in which the publicity has been so extensive that the conduct of a fair trial may only be possible if it is by judge alone. For these reasons, we consider that an accused person should have the right, where legitimate grounds are shown, to make an application to be tried by judge alone. In Chapter 10 we recommend that trial by judge alone may be appropriate in other circumstances as well.

7.7 In our Discussion Paper (para 7.23) we suggested that the-problem caused by extensive pre-trial publicity could be overcome by giving accused people the option of trial by judge alone. The response we received on this topic is In our view significant. Among the people who made submissions to its, there was considerable support for this proposal. 46% of those who completed the comment sheet agreed with it. We should note, on the other hand, that we have received a number of other submissions which have questioned the validity of the proposal, chiefly on the ground that they see it as the “thin end of the wedge” which could lead ultimately to the abolition of the use of juries in serious criminal cases. The proposal has been criticised as a measure which contributes to the further erosion of the right to trial by jury in serious criminal cases. It has also been argued that it is unnecessary because the problem which it is designed to solve can be met by more acceptable changes to the current law and practice. In particular, it is argued that strict rules which limit the publication of prejudicial material before trial would eliminate the problem of pre-trial publicity rendering it Impossible to empanel an impartial jury. The existence of such strict rules is of course no guarantee that they will not be broken. Even If offenders were prosecuted, this would not remove the influence on jurors of published prejudicial material.

7.8 The constitutional validity of trial by judge alone is at the heart of a matter which is presently before the High Court. It has been submitted to that Court that, in the case of proceedings for Federal offences, a provision which gives the accused the right to trial by judge alone is in breach of s80 of the Constitution. We deal with this issue in greater detail in Chapter 10 (para 10.40).

7.9 We expect that applications for trial by judge alone will not be frequent. The cases in which pre-trial publicity is widespread are rare. Previous experience of similar provisions has shown that people charged with serious criminal offences which would normally be tried by a jury are reluctant to surrender that right. This is true of the “corporate crime” provisions in New South Wales.[2] Legislation in South Australia providing for trial by judge alone was enacted in January 1985. No accused person elected this form of trial in the first six months of its operation.[3] An apparently different result has been obtained in cases under s476 of the Crimes Act where the choice available to an accused person is either trial by jury or trial before a magistrate sitting alone. By far the majority of accused people elect trial by magistrate. The influence of reduced maximum sentences when the summary mode of trial is chosen, as well as the prospect of having the matter disposed of much more rapidly, are probably significant factors in explaining this result.

2. Procedure on Applications for Trial by Judge Alone

7.10 We have already stated that the right to trial by jury is a fundamental right available to people charged with a serious criminal offence. We do not consider that this important right should be dispensed with without good cause. There should be additional safeguards provided to ensure that an accused person does not, whether through ignorance or under the influence of undue pressure, surrender the rights which he or she is legitimately entitled to exercise. We propose that an application to be tried by judge alone should not be granted unless the judge determining the application is satisfied that the accused person has either obtained legal advice on the matter or understands the nature and practical consequences of the application. There is a similar provision in equivalent South Australian legislation.[4] The principle which is embodied in this part of our recommendation can be found in the procedures to be followed when an accused person accepts a "paper committal" in place of traditional committal proceedings.[5] We consider a safeguard of this kind to be essential. It should be borne in mind by those who would regard the very existence of the power to waive such fundamental rights as dangerous that an accused person who pleads guilty is waiving the same right without this safeguard.

Onus on the Accused Person

7.11 Our primary conclusion In this Report is that the trial of serious criminal cases should as a general rule be before a Judge and a jury of twelve citizens selected at random from the general community (para 2.1). In the light of this we propose that trial by judge alone should not be available to an accused person as a matter of right. The concept of jury trial incorporates both the right of the accused person and the right of the community to have serious criminal cases dealt with in a manner which ensures that the standards of the community have been applied in the determination of guilt. Neither of these rights should be removed without good cause. We recognise, however, that other circumstances may render trial by jury unsuitable in particular cases. The normal mode of trial for serious criminal offences should be employed unless it can be shown that it is, in the circumstances of the particular case, unsuitable because of overwhelmingly prejudicial publicity before trial. The onus of establishing that there are legitimate grounds for conducting the trial without a jury should be borne by the accused person.

7.12 In some cases the publicity given to a criminal case may be localised. For example, an offence occurring in a country region may be publicised in that region alone.[6] The investigation of the crime, the arrest of the accused person and the conduct of preliminary proceedings in court may have all been given publicity. Where the publication of prejudicial material Is localised, the more appropriate means of overcoming the problem would appear to be to change the venue of the trial.[7] However, the proliferation of the electronic media means that where an offence or investigation has created statewide or even national interest, changing the venue of the trial will not help to reduce the influence of prejudicial publicity.

Pre-Trial Hearings

7.13 The determination of an application to be tried by judge alone must, for the sake of efficient management of the court lists and to avoid unnecessary inconvenience to jurors, precede the commencement of the trial. Since we do not regard it as being of great significance, we do not think it matters whether or not the decision is made by the judge who Is to preside at the trial. There is an argument in favour of the application being heard by another judge on the ground that It is undesirable for the trial judge to be directly exposed to supposedly prejudicial material, if that is the basis for the application.

The Rights of the Crown

7.14 Since the community has an interest in ensuring that the mode of trial is appropriate to the case, the Crown should have the right to be heard on the merits of an application by an accused person to be tried by judge alone. The representation of the Crown's interest should not, however, amount to a right of veto. The ultimate decision must be made in the exercise of a judicial discretion.

Withdrawing the Election

7.15 The accused person should generally be able to withdraw the election to be tried by judge alone. Whilst this might be seen to create an opportunity to delay the proceedings, we do not consider that this will be a problem in reality. Applications of this kind can be expected, as we have noted, to be infrequent. In any event, we do not

consider that the prospect of causing some delay outweighs the importance of retaining the right to trial by jury for those accused people who change their minds about the desirability of being tried by judge alone.[8]

7.16 The question has been raised whether the accused person should be entitled to know the identity of the trial judge before making an election. It is argued by some that this is a crucial factor in deciding whether to make such an election. On the other hand, "forum shopping" would be encouraged by providing the name of the trial judge in advance. The apparent problem is met by our proposal that the accused person should be able to change his or her election to be tried by judge alone with the leave of the court. An accused person who changes his or her mind about giving up the right to trial by jury should not be compelled to abide by his election unless the judge considers the change to be prompted by an improper motive. There are many circumstances when such a change may be legitimate, for example where an accused person changes his or her legal representation.

B. Additional Remedies

> **Recommendation 57: Legislation should expressly prohibit the publication before trial of material which simultaneously identifies a person as being charged with an offence and as having a prior criminal history if the hearing of the offence charged is likely to be before a jury.**

7.17 There have been strong objections expressed to the proposal that an accused person should have the right to trial by judge alone. It has been submitted to us that the strict enforcement of rules prohibiting the publication of prejudicial material is a more suitable means of controlling the influence of such material. We recognise the force of those submissions but, as explained at para 7.7, we do not consider that such an approach is by itself sufficient to solve the problem. We do agree, however, that there should be rules to discourage the publication of information which is likely to prejudice the fair trial of an accused person. There have been some scandalous examples of publications of this kind.[9] The right of the public to be informed of the criminal history of an accused person should be suspended until there is a reasonable probability that the charges will not ultimately be determined by a jury. This principle has often been acknowledged by the courts in words such as those set out below.

> Another matter referred to by the applicant was the publication in a Sydney newspaper of an article dealing with a case in which he was involved only shortly before this trial and in which references were made to him of a character which was calculated to prejudice him . . . Newspaper reports of police court proceedings should not contain such comment as might be prejudicial to an accused person. That is a vital principle of the law and of justice which should always be strictly observed.[10]

In the case of some criminal offences, it is uncertain whether or not a particular matter is likely to be heard by a jury. The most serious criminal charges, and it will usually be these with which the media are concerned, are, however, dealt with exclusively on indictment. Only where there has been an indication of a plea of guilty can it be said that there Is little prospect of these cases being heard by a jury. We consider that the recommendation above should be implemented in order to make sure that prospective jurors are not given information which would generally be inadmissible in a criminal trial.[11]

7.18 There may be exceptional circumstances in which the publication of an accused person's record is justifiable. The publication of such information should never be made, however, in a context which identifies that person as being charged with an offence if that offence is likely to be dealt with by a jury. Take, for example, the case of a man with a long criminal record of sexual offences who is seeking to establish an institution for the care of homeless children. The fact that he was also charged with an offence which was awaiting trial by a jury should not prevent the publication of material which is designed to show he is unsuitable for a position of that kind. Any such publication should not, however, make reference to the fact that he is awaiting trial because that would clearly jeopardise his prospects of being tried by an impartial jury.

> **Recommendation 58: Legislation should expressly prohibit the publication of the criminal history of a person known to be suspected of an offence which is likely, if a charge is laid, to be dealt with by a jury, unless the publication of the information is to assist in the investigation of the suspected offence or is made in the interests of public safety.**

7.19 There have been instances where the media have published the criminal history of a person who is suspected of offences but not yet charged. In cases such as this there is obviously a risk that the publication of that information will jeopardise the prospect of a fair trial. It must, nevertheless, be recognised that the effective investigation of the case may require publications of this kind to be made. Where, for example, the suspected person has escaped from custody and is considered to be so dangerous that the public should be warned not to approach him or her, there is justification for publishing the information. We do not consider, however, that a person's criminal history should be published indiscriminately and without regard to the likely impact on subsequent proceedings.

7.20 In *James v Robinson* The High Court of Australia held that a prosecution for contempt of court is incompetent In a case where, at the time of the publication of the prejudicial material, there are no proceedings commenced in any court.[12] Mr Justice Windeyer qualified this by saying that once a person had been arrested a court has become seised of the case because the arrested man must be taken before a magistrate.[13] The English courts have given a more liberal interpretation to the law of contempt, holding that a contempt might be committed "when proceedings are imminent but have not yet been launched".[14]

7.21 The impact of the prejudicial material is unlikely to be any different depending upon whether the suspected person is being pursued or has been charged. Where criminal proceedings are virtually certain to be instituted, the distinction between the case where an arrest is imminent and the case where an arrest has actually been made is artificial. We do not consider that the law should be based on such an artificial distinction.[15] There are cases where the prejudicial information has been published before the commencement of the formal criminal process. As an English court has said, "it Is possible very effectually to poison the fountain of justice before it begins to, flow".[16] The terms of our recommendation do not offend the spirit of the judgment in *James v Robinson* since the Court was unanimous in holding that whilst publication before arrest was not contempt of court, it could be prosecuted as a common law misdemeanour.[17]

7.22 Other matters which might be considered in this context of regulating pre-trial publicity include the publication of allegations that the accused has made a confession or admission, details of any such confession or admission and information disclosed at committal proceedings or other pre-trial proceedings. We have considered whether additional rules should be made in respect of the publication of other items of prejudicial material before trial. We have examined the law in Canada which prohibits the publication before trial of a confessional statement alleged to have been made by an accused person.[18] We have also considered the practice in Scotland where there is a blanket prohibition on the publication of information disclosed at proceedings which are preliminary to a trial before a judge and jury.[19] We do not consider it appropriate for us to make any other specific recommendations at this stage. This topic will be examined by the Commission in greater detail in our Discussion Paper *Procedures Before Trial in Criminal Cases* which will be published later this year. It is also under consideration by the Australian Law Reform Commission as a part of its reference on the law of contempt.[20]

III. PROCEDURES BEFORE EMPANELLING THE JURY

A. Identification of the Juror's Association with the Case

> **Recommendation 59: The Jury Act 1977 should be amended to provide that, before empanelling a jury, the Crown prosecutor shall be required, if requested by the judge, to inform the jury panel of the nature of the charge, the identity of the accused person and the principal witnesses who are to be called for the prosecution. After this information has been given, the judge should request members of the jury panel who feel that they would be unable to give impartial consideration to the case to apply to be excused.**

7.23 Jurors are sometimes discharged during a criminal trial because it is discovered that they have an association with the case which renders them unsuitable to be Jurors. In a serious instance the trial judge may consider that the whole jury should be discharged and the trial aborted. Many of the occurrences of this kind are foreseeable and could be avoided by the giving of appropriate directions at the start of the trial.

7.24 The current law and practice does not require the trial judge to give any specific direction, nor make any specific inquiry of the jury panel with a view to excluding jurors who may be biased. It is, however, the practice of

some judges to inform the jury of relevant details of the case (having obtained them from the Crown prosecutor) and then to ask any prospective jurors who feel that they are unable to give impartial consideration to the case to apply to be excused. Our Survey of Judges revealed that some Judges vary their practice according to whether they are sitting in the city or in the country on the ground that the likelihood of an association between the parties was greater in the country. It also revealed that several judges who do not follow this procedure nonetheless thought it was a good idea and that it would have an appreciable impact on the incidence of prejudice among jurors. Some of the comments made by the judges who responded to the survey are valuable.

> If the accused is a well-known person with many acquaintances or contacts, this direction is given so as to give a juror the opportunity of disclosing any relationship.
>
> Four situations can be identified: (1) country towns, (2) well-known accused, (3) significant pre-trial publicity, (4) re-trials.
>
> This may be particularly helpful where there are multiple counts and multiple accused. It helps to identify the accused for the jury. It is also more likely that there will have been publicity or that an association exists where the case is a massive one.
>
> The giving of such a direction may assist in communicating to the jury the seriousness of its role. The fact that this is done at an early stage is desirable.
>
> Giving such a direction on bias is valuable. Even where no juror is so embarrassed as to be unable to serve, an atmosphere of fairness and impartiality, both of which are important, is created right from the outset.

In our Discussion Paper (para 7.6) this procedure was proposed and comments invited. A large majority of those who made submissions approved of the proposal.

7.25 It is not envisaged that this procedure should take very long. The outline of the case would be far shorter than the opening which is normally made by a Crown prosecutor after the jury has been empanelled. All that is required is a brief summary of those features of the case which would alert a prospective juror to the fact that he or she either may have an association with one of the important participants or is in some other way so connected with the case as to be an unsuitable juror.

7.26 Although some people who made submissions to the Commission objected to the procedure proposed there is, in our view, no danger in making it mandatory. One objection was that the procedure is unnecessary and might have the effect of removing people from jury panels who are not In fact biased or prejudiced by their prior knowledge of the case or association with witnesses. The direction given by the judge, however, could emphasise the fact that potential jurors should only apply to be excused where the nature of their previous association with the case or the witnesses is such as to give rise to a real risk of bias or prejudice or a real risk that bias or prejudice may be seen to exist. A second objection was that such a procedure would be ineffective because those jurors who come forward and say that they are concerned about the fact or risk of prejudice are likely to be the jurors who would be most capable of leaving that prejudice aside when considering the case. The procedure recommended cannot be a guarantee that prejudice will be eliminated. Nevertheless, the fact that it would almost certainly reduce the incidence of aborted trials due to belated discovery of jurors being associated with the case is sufficiently valuable to justify its implementation. Since we consider that the procedure should be universal, we recommend that it be the subject of legislation.

7.27 When advising the judge of the names of witnesses it would be necessary for the Crown to draw a distinction between those whose evidence is in dispute and those whose evidence is of a formal nature or uncontested. This distinction can be made in the course of preparing the case for trial. For example, a doctor who gives evidence of the cause of death, and whose evidence is not disputed by the accused person, may have a number of patients who are potential jurors. This is obviously not a sufficient ground on which to excuse those jurors for potential bias or prejudice. It should only be in those cases where the juror will be called upon to make some assessment of the credibility of the person with whom he or she has a prior association that a real -risk of prejudice or apparent prejudice will exist.

7.28 In principle the same procedure should apply to the accused person's witnesses. However, to require advance disclosure of defence witnesses would be an unfair imposition on the accused person's freedom to conduct the case as he or she thinks fit.

B. The Identification of Specific Sources of Bias

> **Recommendation 60: The Jury Act 1977 should be amended to provide that where the judge is, on application by a party, satisfied that the nature of the issues to be tried is such that people of a nominated occupation, or who live in a nominated area, may be unsuitable as jurors, the judge should ask the jury panel whether any of their number is a member of that group. Any potential juror who answers this question in the affirmative, should be liable to challenge for cause without further proof being required of the grounds for the challenge.**

7.29 We have suggested (Recommendations 18 and 19, para 4.59) that the right of both the Crown and the accused person to make peremptory challenges should be reduced. We make this recommendation on the basis that there are alternative means of eliminating sources of bias and prejudice which are more appropriate than the use of peremptory challenges. The procedure we have in mind can be explained most effectively by way of an example. A man accused of the armed robbery of a bank might have some justification for believing that a person who is a bank teller by occupation may be biased against him. If our recommendation was adopted he would be able to make an application to the judge in the absence of the jury requesting that the jury panel be asked if any of them are bank tellers. If the judge is satisfied that members of the particular class of people nominated would be unsuitable as jurors, the question may be asked of the jury panel.[21] It would then be left to the parties whether those people should be challenged. If the decision is made to challenge them, they could be challenged for cause or by the form of "consent challenge" recommended In Chapter 4 (Recommendation 22, para 476).

IV. PREJUDICE DURING THE TRIAL

7.30 The courts have been quick to remove the influence of prejudice which occurs during the trial. The means by which they have done this have varied from discharging a jury and ordering that a new trial be commenced before another jury, to directing juries that they should disregard prejudicial material for the purpose of their deliberations. In our view, the procedures which have been adopted by courts have not always been adequate. In particular, we are concerned that the judge's instruction to the jury that they should disregard prejudicial information is an insufficient guarantee that the jury will not be influenced. The reality will never be known whilst the secrecy of jurors' deliberations is generally respected. We acknowledge, however, that there must be a distinction drawn between degrees of prejudicial material. Whilst some information, such as wrongful disclosure of a prior criminal record, is so overwhelmingly prejudicial that it must almost inevitably lead to the discharge of a jury who have been exposed to it, there are less obvious examples of prejudicial material being Introduced which do not require such a drastic course to be taken. There are several additional measures which could be implemented to reduce the likelihood of prejudice actually affecting a jury's deliberation and, at the same time, to ensure that the criminal justice process is run more efficiently. In formulating these recommendations we are conscious of the fact that, in the past, juries have often been discharged because of the influence which prejudicial material may be suspected to have had, rather than the impact which it has actually had.

A. Determining the Real Influence of Prejudicial Publicity

> **Recommendation 61: The Jury Act 1977 should be amended to confirm that, where it is alleged that prejudicial material has been published during a trial which may have influenced jurors, the judge has a discretion to question the individual jurors to determine in the first place whether they have seen. read or heard the offending material and in the second place whether It has had any effect upon them. Where the trial judge is satisfied that there is no actual prejudicial influence, the trial should be allowed to continue.**

7.31 Frequently jurors are discharged because newspapers publish offensive material during the course of a trial. It is rare in the experience of members of the Commission for trial judges to seek to discover whether the jury has in fact read the information published or seen an offending television broadcast. This was done in one trial where the criminal record of an accused person who was a notorious escapee was published during the course of a trial. In that case the judge requested a Sheriff's officer to inquire of the jury whether they had seen the offending broadcast. Since none of the jury had, the judge allowed the trial to continue. We consider that this is a sensible

approach but we are concerned that it should be conducted in open court and that the inquiry should be made of the jurors on oath in the presence of the accused and his or her legal representatives. The amount of time saved by avoiding the discharge of a jury who have not in fact been influenced by prejudicial material may be considerable. It is also in the interests of the community and of the accused person that the delay caused by having to commence the trial at a later date, possibly after waiting until such time as the prejudicial impact of the offending material has subsided, should be avoided where possible.

B. Continuation of the Trial in Appropriate Cases

> **Recommendation 62: The Jury Act 1977 should be amended to provide that where a judge is satisfied that the impact of prejudicial information disclosed during a trial is such that the accused person may not have a fair trial, the judge has the power to allow, where the parties consent, the trial to continue after the disclosure of such information on the basis that if the jury returns a verdict of guilty the trial should be regarded as a nullity, the verdict set aside and a retrial ordered. Unless the court orders otherwise, any reporting of the order declaring that this procedure shall apply should be prohibited.**

7.32 Where prejudicial and inadmissible material emerges during a trial, the accused person is sometimes placed in a dilemma. Where the trial has been a long one, or where the trial is apparently proceeding satisfactorily from the point of view of the accused person, there is no means available to remedy the impact of the prejudicial disclosure made during the trial apart from seeking the discharge of the jury. This remedy may not be sought with any enthusiasm. There have been cases where the judge has taken the approach of acknowledging the validity of the application for the jury to be discharged but continued with the trial on the basis that if it were to result in a conviction, the judge would report to the Court of Criminal Appeal[22] that, in his or her view, the conviction was a miscarriage of justice because of the influence of the prejudicial publicity. This is an uncertain procedure since the opinion of the judge, though very persuasive, Is not binding upon a higher court. It is also a costly procedure since it requires an appeal to be conducted. It also requires the judge to go through the difficult process of sentencing a convicted person he or she believes has not had a fair trial. If the judge is satisfied that the prejudice has been of such a nature as to warrant the discharge of the jury a retrial will usually follow. The costs of a retrial are equally burdensome to the Crown and the accused person. The trial judge should be given the power which we suggest in order to avoid unnecessary expenditure. It may be suggested that this represents a significant departure from the current procedure in criminal trials. It is not, however, completely foreign to procedure in civil cases. In defamation cases the trial judge can hear the matter to finality in the sense that the jury delivers its verdict and assesses the quantum of damages. The Judge is naturally bound by that verdict but he or she is in a position to determine later an application that a defence of qualified privilege is available and, if so, order that the verdict of the jury be set aside.[23]

C. The Role of the Sheriffs Officers

> **Recommendation 63: The court officers who are to have jurors in their charge whilst they are absent from the court room should. on commencing their employment, be administered an oath of office undertaking not to discuss with jurors any factual or legal issues relevant to the case which they are trying.**
>
> **Recommendation 64: It would be good practice for the jury to be instructed by the Judge at the commencement of the trial that they are not to discuss any factual or legal Issues relevant to the case with the court officers.**

7.33 The need for this procedure has been underlined by a recent case in New South Wales where one of the Sheriff's officers explained to the jury, in an accurate but nevertheless improper way, the rights of an accused person to give evidence in a criminal trial. This resulted in a jury being discharged when a trial which had taken six weeks was nearing its completion.[24]

7.34 In England the Sheriff's officer in charge of the jury is required to take an oath at the time the jury retires to consider its verdict. The oath is taken by the Sheriff's officer in the presence of the jury and he or she undertakes to prevent the jurors communicating with other people and to refrain from communicating personally with the jurors other than to ask them whether they are agreed upon their verdict.[25] During the retirement of the jury, no

officer of the court may discuss the case with any member of the jury or answer any question asked by a juror.[26] A similar procedure is used in New South Wales when a jury Is taken on a view. The current procedure is to swear the Sheriff's officer to prevent jurors engaging in improper communication with non-jurors. The need for such an undertaking when jurors are taken on a view does not seem to be much greater than the need for it when jurors are taken to lunch by the Sheriff's officer or simply escorted from the court room to the jury room.

7.35 One of the jurors who responded to our Survey of Jurors complained that the Sheriff's officers were rude to the jury on which she served and were unwilling to answer their questions. Criticism of this kind, unfair though it may be, illustrates the difficulties which are caused when the jury misunderstands the nature of the Sheriff's officers' role. There should be a procedure which informs the jury of its obligations and those of the Sheriff's officers in this regard. We consider that it is likely that most of the improper conversations which occur are probably commenced by jurors who, no doubt acting quite innocently, do not realise that their conversation may be seen in some way to jeopardise the fairness of the proceedings.

7.36 This problem can be met by the trial judge directing the jury before the case commences that they should not attempt to discuss matters relevant to the trial with the Sheriff's officers. They could be told that any questions which they want to have answered should be reduced to writing and handed to the Sheriff's officer who should then be required to pass the questions on to the judge. Indeed a number of judges give such a direction already. However, we do not see it as a substitute for the oath being administered to the Sheriff's officers. The prospect of improper influence upon jurors is such a serious matter that both of these procedures should be adopted.

D. Allowing the Jury to Separate

> **Recommendation 65: Section 54 of the Jury Act 1977 should be amended to provide that the judge should have the discretion to permit the jury to separate after they have retired to consider their verdict.**

7.37 In recent times there have been a number of cases in which juries have deliberated upon their verdict for a period well in excess of 24 hours. Before their deliberations begin, the members of the jury will not usually know how long the process will take. During the trial they will have been allowed home each night at the conclusion of proceedings with a firm warning that they should not discuss the trial with people who are not members of the jury. in many cases the detention of the jury overnight may cause hardship. Where, for example, a parent of young children is prevented from going home, there may be disruption to that person's domestic life which may be unnecessary. Preventing jurors from going home does not contribute in any way to quicker or more effective deliberation because the jury does not normally consider their verdict during this period nor continue their deliberations as a group. They are simply isolated in hotel accommodation, at least in theory. It is naturally of concern to the courts that criminal trials are not aborted at this crucial stage because of some improper influence to which a juror may be subjected. We do not consider, however, that the likelihood of improper influence is greatly increased at this stage of the trial. There would naturally be a need for an even firmer judicial warning than is usually given to avoid communication with "outsiders" but we think that, in many cases, this would be sufficient to bring home to the jury that they should not communicate with non-jurors about the case.

7.38 There should be a balance between the needs of the jurors and the need to ensure a fair process of deliberation. The strict necessity for holding the jurors together overnight during prolonged deliberations is inconsistent with the practice which is frequently adopted by trial judges, namely to complete a summing-up at the end of one day and to allow the jurors to go home on the understanding that they will return the next morning to be given very brief formal directions and then consider their verdict. If this practice is acceptable, then it seems to us that jurors should, in such cases as the judge sees fit, be permitted to go home whilst their deliberations are continuing. If necessary, stricter security arrangements may be made for the jurors during this period. We consider that the disruption which this aspect of jury service causes to the small number of people affected would be greatly decreased if the current practice were altered so that, as a matter of discretion, juries could be permitted to separate during their deliberations.

7.39 It should be stressed that the occasions on which it may become necessary for a judge to exercise this discretion will be rare. Most juries In criminal trials reach agreement within a period of six hours from the time they are asked to retire and consider their verdict. In only 11 trials of the 197 surveyed in our Survey of Court Procedures did the jury deliberation take more than six hours. The separation of the jury should not be permitted

as a matter of course. Two of the members of the Commission[27] consider that while this discretion should be available to the judge, it should only be used in exceptional or unusual circumstances.

7.40 It has been suggested that, as the trial draws towards its conclusion, people who wish to influence the jury's verdict become more desperate and are likely to be bolder in attempting to influence the jury. Whilst this is probably true in theory, there is no evidence to suggest that it is a significant problem in New South Wales. Any potential difficulty can be overcome by firmer directions and additional precautions being taken where they are believed necessary. It should be remembered that the accused person is usually held in custody while the jury is deliberating.

> **Recommendation 66: Section 54 of the Jury Act 1977 should be amended to provide that members of the jury should, at the discretion of the judge, be entitled to make personal telephone calls during any period for which they are locked up.**

7.41 We consider that the current practice of preventing jurors from communicating with the outside world should be relaxed so that jurors can telephone their relatives or friends and advise them personally of the reason for their absence from home. At present this task is performed by Sheriff's officers. We regard this as unsatisfactory and as an unnecessary Interference with the jurors' personal obligations. The jurors should be able to convey their messages in person.

V. PROCEDURES AFTER TRIAL

> **Recommendation 67: The Jury Act 1977 should be amended to provide that the jury should be discharged forthwith upon delivering its verdict. It would be good practice for the members of the jury to be informed of the subsequent course of proceedings and advised of their right as individual citizens to remain in court if they wish to do so.**

7.42 Judges vary In their practice after a jury has found an accused person guilty. In some cases the jury is discharged. In other cases the judge takes no steps to discharge the jury whilst the details of the prisoner's background and prior criminal record, if any, are given. In other cases still, the judge informs the jury that they are free to leave but advises them that they are equally free to remain in court if they wish to hear the evidence relevant to sentence.

7.43 This is an issue which has caused considerable debate both among the members of the Commission and in the submissions we have received. Having considered the matter, we believe that the reading of the prisoner's criminal record in the presence of the jury is, for a number of reasons, unnecessary and unfortunate. Firstly, the function of the jury is complete when they return a verdict. Secondly, the practice suggests to the jury that, in the case of a person with a criminal record, there is for that reason alone some justification for their verdict. Thirdly, the practice may lead to dangerously prejudicial and unwarranted speculation about the character of the accused person if the jurors are summoned for jury service again. The Commission received several submissions on this topic including one from the New South Wales Bar Association[28] objecting strongly to the current practice. Whilst the sheer weight of numbers is clearly in favour of discharging the jury after verdict, there are very strongly held opinions in favour of the opposite view.

7.44 The point has been made that many jurors are anxious to leave as soon as their function in the trial is complete. They have a right to leave and they should be informed of that right. It is not difficult to understand why some jurors would not want to hear the sentencing proceedings. The determination of guilt may have been in itself a distressing experience. That distress may be compounded by the procedure which follows. Some jurors may, understandably, not wish to know that the person they have convicted has been sentenced to a term of imprisonment. Others may find some satisfaction In that knowledge or relief at the fact that a custodial sentence is not imposed. Similarly, whilst the prior record of a convicted person may give a sense of relief to some, it may cause distress to others. People should not be subjected to this unless it serves some other legitimate purpose.

7.45 Some members of the Commission consider that a jury which has devoted its time and attention to a case and has brought in a verdict of guilty has the right to know what happens thereafter. In their experience, the jury invariably wants to do so. If the accused person does have a criminal record it could be explained to the jury that it was not revealed during the trial for fear of prejudicing the accused person. They could be told in addition that

the fact that the person they have convicted has a criminal record does not mean that in all, or even most cases, an accused person will have a prior record.

7.46 The majority of the Commission[29] considers that individual jurors should be discharged upon giving their verdict and left free to remain in the court if they wish to do so. There should be no suggestion that they are either compelled to stay or compelled to go. A direction should be given to them which clearly conveys the fact that it is a matter for their own personal decision. The fact that the practice of judges in this regard is not uniform is a matter of some concern when there is such a strong body of opinion which deplores the detention of jurors to hear argument about sentence. There should be some uniformity in the way in which juries are discharged. In our view, the appropriate course is to discharge the jury and leave it to the individual juror to choose whether or not to remain in court.

FOOTNOTES

1. In *R v Munday* (1984) 14 A Crim R 456 the New South Wales Court of Criminal Appeal held that trial judges should not be encouraged to discharge juries merely upon the ground of some prejudicial material having been published if appropriate directions can cover the situation.

2. Since s475A Crimes Act 1900 was introduced, only one trial has been conducted before a single judge: *Attorney General of New South Wales v Chambers* (unreported) Supreme Court of New South Wales, Roden J, 24 June 1983.

3. *Law Society Bulletin* (SA) July 1985 p139.

4. Juries Act 1927 (SA) s7(1)(b).

5. Justices Act 1901 s48D; Justices Act (Use of Written Statements) Regulation 1984.

6. *R v Holden* (1956) 73 WN (NSW) 444.

7. Crimes Act 1900 s577.

8. A Ferber “Beating Bad Press: Protecting the California Criminal Defendant from Adverse Publicity” (1976) 10 *University of San Francisco Law Review* 392 p4O8.

9. For example, a newspaper article published on the occasion of the arrest of E J Smith “The Form of Jockey Smith” *Sydney Morning Herald* 15 September 1977 pp1, 3.

10. *R v McKeon* (1961) 78 WN (NSW) 798 at 799; See also *Ross v The King* (1922) VLR 329 at p337; *R v Scriva (No 2)* (1951) VLR 298 at p303.

11. J A Gobbo, D Byrne and J D Heydon *Cross on Evidence* (2nd Aust ed 1974) para 14.44.

12. *James v Robinson* (1963) 109 CLR 593.

13. *James v Robinson* (1963) 109 CLR 593 at 615-616; *Packer v Peacock* (1912) 13 CLR 577.

14. *R v Parke* [1903] 2 KB 432 at 437; *R v Daily Mirror* [1927]1 KB 845 at 851.

15. See the submission of counsel in *James v Robinson* (1963) 109 CLR 593 at 597.

16. *R v Parke* [1903] 2 KB 432 p438.

17. (1963) 109 CLR 593 at 607. See especially Windeyer J at 618 referring to *R v Sharpe and Stringer* (1938) 26 Cr App R 122.

18. Criminal Code RSC 1970 (Can) Chapter C34 s470(2).

19. J R Harper, Chairman Criminal Law Section, International Bar Association speaking at The International Criminal Law Congress, Adelaide, 9 October 1985.

20. Australian Law Reform Commission *Reform of Contempt Law* (ALRC IP4, 1984).

21. Some people in this category may have already been excused from jury service after the procedure described in Recommendation 57 above.

22. Criminal Appeal Act 1912 s11.

23. Defamation Act.1974 s23; Austin *v Mirror Newspapers* 119821 2 NSWLR 383.

24. *R v Fuller* (Unreported) District Court of New South Wales, Sinclair J, 18 September 1985.

25. Archbold Pleading, *Evidence and Practice in Criminal Cases* (41st ed 1982) para 4-441.

26. *Ibid.* See also *R v* Brandon (1969) 53 Cr App R 466; *R v Lamb* (1974) 59 Cr App R 196 at 198; *R v Brewster* (1980) 71 Cr App R 302; and Submission to the Commission by M A McL MacGregor, QC.

27. Mr James and Mr Justice Roden.

28. 13 February 1986; see also submission from W D Hosking, QC, 6 February 1986; *Bar News,* Summer 1985.

29. Her Honour Judge Mathews does not agree with the terms of this recommendation.

8. Promoting Satisfactory Verdicts

I. INTRODUCTION

8.1 In this chapter we consider a number of proposals which have a particular bearing upon how satisfactory a jury's verdict will be. Whilst any reform should be directed at making verdicts satisfactory in the broad sense of being conducive to the aims of the general principles outlined in Chapter 1, what we have in mind in this chapter is the more specific goal of accuracy in the ultimate verdict. Procedures which assist jurors to address the real issues and to participate as fully as possible in the criminal trial process are to be encouraged. Procedures which create confusion or doubt as to the jury's task, whether for the jurors, the participants in the case or the general public, should be avoided.

8.2 We also consider that practices which lead to unfounded speculation as to whether the jury arrived at the correct verdict should be avoided provided that in so doing there is no interference with the jury's function of being the ultimate arbiter of the factual issues in a criminal case.

II. DELIBERATIONS

A. Separate Deliberations in Joint Trials

> **Recommendation 68: It would be good practice, where there are several counts or several accused people charged in an indictment, If the judge were to consider exercising the discretionary power to require the jury to consider verdicts separately on individual accused people or individual charges or both. The Crimes Act 1900 should be amended to permit separate addresses by counsel where this procedure is followed.**

8.3 A trial may be made complex by the fact that there Is a large number of accused people or that multiple charges are included in the indictment against a single accused person. Complexity may be caused by a combination of both factors. In some cases the avoidance of unnecessary complexity may be best achieved by conducting separate trials. In those cases where this is not done the trial judge may nevertheless instruct the jury as to individual charges or individual accused people or both and then ask the jury to deliberate separately on specific charges or a particular accused person. This practice was recently considered by the Queensland Court of Criminal Appeal[1] in a case involving an indictment which charged 98 counts against one accused person. After summing up to the jury on matters applicable to all counts, the trial judge summed up in detail on a number of separate charges and took verdicts in respect of those. If a verdict was returned late in the day, the jury was allowed to separate until the next morning when the summing-up was resumed in respect of another group of charges. There were, in all, 11 separate retirements by the jury and the summing-up occupied 11 days. The Court of Criminal Appeal referred to a number of cases in which the summing-up in a joint trial of people accused of conspiracy had been split. The jury is by this means required to consider its verdict in the case of one accused person before retiring to consider its verdict in the case of others.[2] Whilst no authorities were cited, where there was a separate summing-up in respect of particular counts against one accused person the Court held that there was no difference in principle and that, in a suitable case, the trial judge could adopt such a procedure. We consider that this power may in some cases be a valuable means of ensuring that a complex case is efficiently presented to a jury.

B. Length of Deliberation: A Minimum

> **Recommendation 69: Section 56 of the Jury Act 1977 should be amended to provide that a jury which is not likely to agree on its verdict may be discharged at any time at the discretion of the judge.**

8.4 Where the jury in criminal proceedings has retired for more than six hours the judge may discharge the jurors if he or she finds, after examination on oath of one or more of them, that they are not likely to agree on their verdict.[3] There is no maximum period of deliberation nor is there any obligation on the judge to inform the jury about the discretion to discharge. The six hour period is quite arbitrary. It has no reference to the complexity of the case. In some cases, it will be too short, in others too long. We have been informed that some judges in fact

take the view that the legislative provision requiring a minimum deliberation period of six hours is not mandatory. They have accordingly discharged a jury within the six hour period in appropriate cases.

8.5 Cases arise from time to time where, in a trial of comparative simplicity, the jury announces shortly after being sent out to consider its verdict that it is irreconcilably deadlocked. Obviously there will be cases where the trial judge should ask the jury to make further attempts to reach a verdict. But equally there will be cases where it would be quite apparent that the rule prescribing a six hour minimum period of deliberation simply operates to oblige the jury to spend a lengthy and fruitless period awaiting the time when they may be discharged. There have been instances where a jury announced its inability to agree late in the day or late in the week, and, when Informed that they had to continue their deliberations, came back shortly after with a verdict.[4] The existing rule, therefore, can exert undue pressure on the jury. This may result in the capitulation of one or more jurors in circumstances which suggest that the ultimate verdict may be unsatisfactory. A judge should be permitted to exercise his or her discretion in the matter without the restriction of a minimum time period. There are a number of factors which need to be taken into account in exercising that discretion. It is necessary that some serious and sustained effort be made to reach agreement. On the other hand, the views expressed by the jury as to the prospects of agreement should be given considerable weight.

C. Length of Deliberation: A Maximum

> **Recommendation 70: The maximum time during which a jury may be required to consider Its verdict should continue to be at the discretion of the judge.**

8.6 The time for which it is reasonable to have a jury consider its verdict will vary according to the length and complexity of the trial itself. In one case the jury deliberated over eleven days before reaching verdicts at a trial of several people accused of conspiracy.[5] The trial had lasted approximately three months. At no stage during the time they were deliberating did the jury indicate or imply that they were having difficulty in reaching a verdict in the sense that it appeared unlikely that they would be able to agree. This was apparently an extraordinarily conscientious jury which regarded the prolonged time as necessary to consider fully the large amount of evidence presented in the case and to complete their deliberations. This case may be contrasted with the jury deliberations in the case of *Gallagher*[6] recently decided in Victoria. In that case the jury indicated at an early stage of their deliberations that they were having difficulty reaching a verdict and that it was indeed likely that they would be unable to agree. The judge kept the jury for eight days before they reached a verdict. The accused person had been charged on an indictment containing 43 counts. He was found guilty of 23 and not guilty of 20. The Full Court, sitting as a Court of Criminal Appeal, quashed the convictions and ordered a retrial on the ground that the length of time during which the jury was required to consider its verdicts was oppressive and the verdicts in consequence unsatisfactory. Despite the occasional occurrence of cases like this, we do not consider that imposing fixed maximum time limits on jury deliberations is justified. The matter is best left to the discretion of the judge, guided and controlled by appellate court rulings.

III. THE VERDICT OF THE JURY

A. Delivery of the Verdict

> **Recommendation 71: The Jury Act 1977 should be amended to provide that the verdict of the jury be verified by each member of the jury signing a document which records the verdict. This document should become part of the official record of the trial.**

> **Recommendation 72: The Jury Act 1977 should be amended to provide that the practice of polling the jury to determine the verdict of each individual juror should not be used unless the trial judge considers it necessary.**

8.7 At present the verdict of the jury is required to be announced in court by the person currently known as the foreman.[7] After he or she announces it, the remainder of the jury is asked the following question.

> Members of the jury, you have found the accused (named) (guilty or not guilty as the case may be). So says your foreman, so say you all?

The jurors are then expected to acknowledge this. While a jury can correct its verdict before being discharged,[8] it cannot later return to court to plead that the verdict was given under a misapprehensions.[9] It is apparently open to counsel to require each juror to be asked individually what his or her verdict was, or whether he or she agreed with the verdict delivered by the foreman. This is known as “polling” the jury.[10] This practice is rare in New South Wales.

8.8 The New South Wales Bar Association has made the following submission to the Attorney General.

> When taking a verdict of guilty the Clerk of Arraigns should question each juror to ensure that there is in fact unanimity. The present perfunctory question addressed to the whole jury (“so says your foreman, so say you all”) is not helpful, and in view of recent events a clear question to each juror would help avoid error, and later speculation.[11]

The topic raised by the Bar Association was referred to in *Milgate’s Case,* In particular in the judgment of the Chief Justice who said:

> . . . the Clerk of Arraigns’ formula on the taking of a verdict should not be expressed in a perfunctory way nor allowed to appear as a mere statement of an assumed or concluded state of affairs, but should be clearly interrogative of the members of the jury. Indeed, some thought might well be given to the modernization of its terms to remove any possibility of misunderstanding or inadvertence.[12]

8.9 The “recent events” to which the Bar Association submission makes reference are three instances where jurors have spoken to representatives of the media concerning the deliberative processes of the jury. In each of these cases there was a guilty verdict following trials that received very considerable publicity. In at least two of the cases the jurors spoke out after there had been public criticism of the verdict and in all three cases the statements made suggested, in part, that the juror involved had not truly or voluntarily acquiesced in the verdict.[13] Claims of this kind would certainly be less likely to be made or, if made, given as wide media publicity if the practice advocated by the Bar Association was mandatory. We return to the topic of disclosure of the jury’s deliberations in Chapter 11.

8.10 In our Discussion Paper (para 9.4) we proposed that each member of a jury in a criminal trial should be polled by the presiding judge to ensure that the verdict is unanimous. Also mentioned was an alternative procedure, namely to require each juror to sign a document which is a formal record of the verdict. The submissions which we received on this issue generally indicated the need to take steps such as these to ensure that the verdict of the jury was that of all its members.

8.11 We believe that there should be a change from the present practice. The procedure requiring the members of the jury to sign a document formally recording the verdict is generally used in criminal trials in the United States. We consider it to be preferable to “polling” the jury. Polling would clearly place a strain on the members of the jury by requiring them to make a personal and public statement of their verdict. For some people, and particularly in some cases, this would be an onerous duty. We consider that the objective of ensuring the verdict is the verdict of the jury can be effectively achieved by the alternative procedure. We would stress that the formal record of the verdict should remain with the court papers and that it should not be supplied as of right to an accused person for the purpose of an appeal. This practice, which is followed in Western Australia, has led to the harassment of jurors after verdict (see para 5.5).

8.12 The recommendation regarding polling follows from our suggestion to require the jury to sign a formal document recording their verdict. If the latter were to be implemented, there would not be any justification for counsel for either party having the right to demand that the jury be polled as to its verdict. There may, however, be circumstances where It is desirable. If, for example, one or more of the jurors appears at the trial to disagree openly with the verdict as announced, polling may be necessary. For this reason we do not consider that the practice of polling the jury should be abolished. The decision as to whether it should be used is best left to the discretion of the judge.

B. The Recommendation for Mercy

Recommendation 73: The right of a jury to add a recommendation for mercy to a verdict of guilty should continue to be available. It should continue to be the practice that the jury should not be informed of this right, either by the judge or counsel, unless the jury asks whether it may qualify its verdict In this way.

8.13 A jury is currently entitled to add a rider recommending mercy to its verdict of guilty. However, a recommendation of this kind is not legally binding on the judge when sentencing.

> The recommendation of a jury for leniency should always be treated with respect and careful attention. It is a recognized feature of our legal system. But a recommendation *simpliciter* is, after all, a recommendation only, and the Judge, on whom falls the sole responsibility of measuring the punishment within the limits assigned, must consider for himself how far it is consistent with the demands of justice that he should accede to the recommendation. But that is all.[14]

It is, however, usually taken into account by judges when determining sentence. Neither counsel nor the judge may expressly invite a jury to add a recommendation for mercy.[15] Any recommendation for mercy is not itself regarded as part of the verdict.[16] Indeed, under the existing law, the finding of facts relevant to the proper exercise of the sentencing discretion falls within the province of the judge, subject only to the qualification that the view he or she adopts must be consistent with the verdict or plea.[17]

8.14 The Law Reform Commission of Canada has proposed that the jury's prerogative to recommend mercy should be abolished and that the jury should be instructed that it has no such prerogative.[18] The reasons for this proposal were, firstly, that a juror reluctant to concur in a guilty verdict might be persuaded by the offer of the majority to recommend mercy; secondly, that It Is not part of the jury's role to influence sentence; and thirdly, that any suggestion from the jury would be made in ignorance of factors relevant to the sentencing process. As we pointed out in our Discussion Paper (para 9.5) it might, on the contrary, be argued that a jury which has heard the evidence and is satisfied beyond reasonable doubt of the guilt of the accused person should be entitled to signal its recognition of mitigating factors. We invited comment as to whether the jury should continue to have the ability to recommend mercy, and, If so, whether it should be so advised in the judge's summing up.

8.15 The response from those who commented on this issue has been overwhelmingly in favour of retaining the right of a jury to make a recommendation for mercy. Although many commentators also thought the jury should be informed of their right to add a recommendation for mercy, we are concerned that the right might well be a temptation to a jury to reach a compromise verdict of guilty. If that were done it would be unfair and the verdict might be considered unsatisfactory. In order to avoid this consequence, we recommend that the jury should not be informed of this right unless it asks. The role of the recommendation for mercy clearly raises the issue of the respective roles of the judge and jury on the question of sentence. The question is whether, and if so to what extent, the judge should be bound to take a recommendation into account. This issue is discussed in paras 8.16-8.20 and will be given further consideration when we examine the subject of sentencing at a later stage of the Criminal Procedure reference.

C. Clarifying the Factual Basis of the Jury's Verdict

8.16 The questions of fact at issue between the parties in a criminal trial often, if not usually, involve matters which are of relevance to the determination of sentence. In some cases the verdict of the jury will not reveal the factual basis on which it reached that verdict. Where the verdict is guilty, the judge is required to determine the appropriate penalty on the basis of his or her own conclusions as to the relevant facts in the case. In the course of its deliberation as to guilt the jury may have reached a concluded view as to the factual basis of its verdict. It has been suggested that jurors should be questioned as to the basis on which a guilty verdict has been returned where it is both ambiguous and relevant to sentence. This is an accepted practice in those cases of murder where there is evidence both of provocation and of diminished responsibility and a verdict of guilty of manslaughter is given. The risks involved in the practice have been adverted to by Mr Justice Stephen.

> Care must no doubt be taken to ensure both that the foreman clearly understands the nature of the question and that he is fully capable of answering it, that is, that he in fact knows what are the grounds which have led his fellow jurors to their verdict. If there has been no unanimity as to grounds or if individual jurors have not disclosed, and may, indeed, not be prepared to disclose, their grounds the foreman cannot of course, supply

> the information sought. It should be made clear to him that his function is only to answer to the best of his ability the question asked, ensuring that, if answered, it does truly reflect the jury's unanimous view. The question should, of course, be so confined as to ensure that it does not invite any spontaneous general disclosure of the jury's deliberation.[19]

8.17 In our Discussion Paper (para 9.17) we tentatively suggested that, where alternative bases for a conviction which have different consequences for sentencing are left to a jury, the judge should endeavour to determine which basis the jury accepted. This would be a departure from the common law principle reaffirmed in *Kingswell v The Queen* where it was said:

> If there is a trial by jury the ordinary incidents of such a trial will apply; the judge will continue to exercise his traditional functions, and, for the purpose of imposing a sentence within the limits fixed by the law, will form his own view of the facts, provided that that view is not in conflict with the verdict of the jury.[20]

8.18 The issue is whether the existence of facts relevant to sentencing but not to conviction should in some circumstances be decided by the jury rather than by the judge. There is strong judicial support for the view that a jury, once it has returned a verdict, has discharged its duties and has no further function to perform.[21] The finding of facts relevant to the proper exercise of the sentencing discretion would then fall within the province of the judge, subject to the qualification that the view he or she adopts must be consistent with the verdict or plea.[22] The responses received by the Commission on this question generally favoured the implementation of the procedure set out in the Discussion Paper.

8.19 Those who support this proposal, or some variant of it, see it as a means of ensuring that the basis for determining the appropriate sentence is not inconsistent with the factual findings made by the jury. Those who oppose it are concerned with the practical difficulties of enquiring into the details of the jury's deliberative process and see it as likely to give rise to mischievous attacks upon the ultimate finding of guilt embodied in the jury's verdict. Whilst the Commission considers that there is merit in the proposition that, since it is the jury's role to determine the facts, its findings should be reflected in the determination of sentence, we are not at present agreed upon the means by which the factual finding of the jury should be ascertained.

8.20 The Commission will examine this topic when it comes to deal with that part of the Criminal Procedure reference concerned with sentencing. Since there is some division of opinion on this question, we have decided to defer making any recommendation until that time. We also leave as a matter for further consideration the general question of the jury's role, if any, in the sentencing function of the criminal courts.

IV. DIRECTED VERDICTS

A. Directed Verdicts of Acquittal

> **Recommendation 74: Legislation should provide that the judge has the power to acquit the accused person and discharge the jury In those cases where the judge would be entitled to direct the jury to find the accused person not guilty.**

8.21 When a judge is satisfied, having considered the evidence presented in the case for the prosecution, that it is not, as a matter of law, a sufficient basis for a conviction, the judge should direct the jury to enter a verdict of not guilty.[23] The current procedure to effect this result involves the judge directing the jury in the following terms "Do you at my direction find (the accused person) not guilty of (the offence charged)?' The foreman of the jury then says "Yes", and the accused person is discharged. In the unlikely event of the jury refusing to follow the judge's direction, the judge has the power to discharge the jury without verdict. We consider that the current rule requiring a judge to direct the jury to acquit is an unnecessary formality.[24] It derives from the fact that at the beginning of the trial, the accused person is placed "in the charge of" the jury. In strict law, he or she cannot be released from their charge until the jury has either been itself discharged or has announced a verdict. When a judge concludes that, as a matter of law, there must be an acquittal, the judge should be empowered to enter that verdict. It should operate in the same manner as an acquittal by a jury. We consider this to be preferable to the artificial procedure of the judge giving the jury directions which it may in some cases resent. To this end, we believe that judges should, as a matter of courtesy, continue to follow the practice of explaining to the jury the meaning of the decision to order that the accused person be acquitted.[25] We should note that the law as to the

circumstances in which it is appropriate for a judge to direct an acquittal is uncertain. This issue will be dealt with at a later stage of the Criminal Procedure reference. The present recommendation is intended to be a purely procedural provision which does not involve a consideration of the questions of general significance raised by this issue.

B. Directions to Convict

> **Recommendation 75: Legislation should provide that the judge should not direct the jury that they must find the accused person guilty.**

8.22 It has been held by a majority of the High Court that it is proper in some circumstances for a judge to direct a jury that its verdict should be guilty. In *Yager v The Queen*[26] Chief Justice Sir Garfield Barwick said:

> It is a misconception, in my opinion, to think that when all the material has established, without dispute as in this case, all the ingredients of an offence, a presiding judge cannot so inform the jury and tell them that it is their duty to return a verdict of guilty.[27]

Mr Justice Mason said:

> The learned judge was therefore in my opinion entitled to direct the jury to return a verdict of guilty; it would not have been proper for him to invite the jury to consider whether they should accept or reject the formal admission; to do so would have been to invite them to deal with a matter which was not an issue at the trial.[28]

Mr Justice Stephen expressly agreed[29] with the judgments of the Chief Justice and Mr Justice Mason. The opposing view was put forward by Mr Justice Gibbs, as he then was, and Mr Justice Murphy[30] in the same case. Mr Justice Gibbs said:

> Since [1670][31] it has been a fundamental principle of our constitutional law that a juror may not be punished for returning a verdict against the direction of the court, and hence may not be intimidated into returning a particular verdict. When the jury are asked to return a general verdict, they have the right and duty to determine, not only the facts of the case, but the guilt or innocence of the accused. There are cases - they are exceptional cases - in which a judge may ask a jury to reconsider their verdict, but if they insist upon their verdict the judge is bound to receive it: *Reg v Meany*.[32] It follows from these principles, in my opinion, that a judge should never go so far as to direct a jury to bring in a verdict of guilty. So to direct them would be to usurp their function and to suggest to them, wrongly, but with all the weight of judicial authority, that the responsibility of returning a verdict is not theirs alone. Directions of that kind would tend to weaken an ancient and valuable safeguard in the criminal law.[33]

This statement is in line with English authority to the effect that it is necessary for the judge to leave it to the jury to bring in a general verdict.[34]

8.23 The judgments of Mr Justice Gibbs and Mr Justice Murphy recognise that the function of the jury transcends the adversary system of trial procedure. It is not for the parties in the trial, nor for the judge, to determine what the facts are. it is a matter for the jury to find the facts and to say whether the accused person is to be convicted of a criminal charge. It may be argued that the jury is not entitled, having found particular facts to be proved beyond reasonable doubt, to bring in a verdict which is inconsistent with those findings. This point has been dealt with by the High Court in another case.[35] The various judgments In that case confirm the power of the jury to return such a verdict. Whilst the Court was unanimous in holding that the jury would be acting improperly if it did so, it was also unanimous in holding that it is within the exclusive province of the jury ultimately to decide what the verdict is.

V. THE JURY IN COMPLEX CASES

A. Evidence of a Complex, Scientific or Technical Nature

Recommendation 76: Where the facts of the case or the charge being tried make it likely that evidence of a complex, scientific or technical nature might be called, the right to trial by jury should not be affected.

8.24 In the United Kingdom the Fraud Trials Committee was established under the chairmanship of Lord Roskill to consider whether changes should be made to the existing law and procedure in cases where the accused person is charged with offences of fraud.[36] That Committee recommended in its final report that, in some complex fraud cases which fall within certain published guidelines, trial by judge and jury should be abolished.[37] It should, the Committee recommended, be replaced by trial before the Fraud Trials Tribunal. This body, it was suggested, should consist of a judge and two lay members selected from a panel of people who have experience of business dealings and the capacity to understand the kind of complex issues which arise in difficult fraud cases.[38] It was proposed that the determination of guilt should be made by a simple majority of the tribunal.[39] If there is a dissenting opinion it should not be disclosed.[40] It was expressly noted that the two lay members would have power to override the opinion of the judge on the question of guilt.[41] The judge alone, however, would be responsible for determining sentence.[42]

8.25 The grounds on which this radical proposal was made may be stated shortly. The Committee concluded that the overwhelming weight of evidence presented to it established that the legal system in England and Wales is incapable of prosecuting the perpetrators of serious frauds expeditiously and effectively.[43] The randomly selected jury was considered to be an inappropriate tribunal for the trial of complex fraud cases as:

> . . . in almost every area of the law, society has accepted that just verdicts are best delivered by persons qualified by training, knowledge, experience, integrity or by a combination of these four qualifications. Only in a minority of cases Is the delivery of a verdict left in the hands of jurors deliberately selected at random without any regard for their qualifications. Thus, those who advocate that complex fraud trials should be conducted before a select, as opposed to a random, tribunal are arguing not that such cases should be treated in any special or unique fashion, but that they should be treated in a manner more akin to the way the vast majority of all other legal cases are treated today.
>
> In our opinion the absence from the jury box in a complex fraud case, except by chance, of persons with the qualities described in the preceding paragraph seriously impairs the prospect of a fair trial.[44]

We consider the reasoning in this passage to be flawed by the failure to distinguish between civil and criminal cases. The issue to be determined in a fraud trial, namely the criminal guilt of the accused person, is quite different to issues which may need to be determined in the resolution of civil litigation. The point is not that a “minority of cases” Is left to be decided by randomly selected and unqualified jurors but that all serious criminal matters are so decided. Furthermore, every case decided by a judge is decided by a person who is, as a rule, “unqualified” with respect to the discipline from which technical, scientific or complex evidence originates. Moves to take complex civil cases away from judges have been strongly resisted.[45]

8.26 The Fraud Trials Committee was unable to conduct any direct research on jurors’ comprehension of actual fraud cases.[46] Many witnesses who gave evidence to the Committee asserted that many jurors are almost certainly out of their depth in trying to comprehend the evidence presented in complex fraud cases.[47] It was noted that the verdict of a jury may rest not upon a firm grasp of the evidence but upon an “overall impression of guilt or innocence in the minds of jurors.[48]

8.27 There was one dissentient in the eight member committee. Mr Walter Merricks, a practising solicitor, felt that the majority of the Committee based its conclusions on inadequate evidence.[49] In his view the evidence available did not point unambiguously to the conclusion that jurors cannot and do not understand fraud cases.[50] Mr Merricks pointed to the Important consequences which flow from the use of a jury In a criminal trial.

> The jury not only represents the public at the trial, its presence ensures a publicly comprehensible exposition of the case. There is the danger in trial by experts that the public dimension will be lost I do not think that the public would or should be satisfied with a criminal justice system where citizens stand at risk of imprisonment for lengthy periods following trials where the state admits that it cannot explain its evidence in terms commonly comprehensible.[51]

8.28 Mr Merricks then raised the issue that concerned many of the organisations and individuals who made submissions to the Committee, namely the appropriate tribunal to determine whether the conduct complained of is dishonest,[52] the essential element of all serious fraud charges. The National Council for Civil Liberties crystallised the issue in its submission.

> The decision to be made in fraud trials is in common sense and common honesty "was it a swindle?" Twelve ordinary citizens using their experience and common sense with guidance on the law are best equipped to answer that question.[53]

In his dissenting opinion Mr Merricks concluded that entrusting the assessment of dishonesty to experts is dangerous. The standards to be applied in assessing honesty are those of ordinary people.[54]

8.29 The recommendation to abolish the jury system in complex fraud cases made by the Fraud Trials Committee is by no means novel. In November 1978 a major report tabled in the New South Wales Parliament[55] recommended that trial by jury no longer be mandatory in relation to certain corporate and "white collar" offences.[56] It was proposed that the Attorney General, or a person nominated by him, might order that the trial of a person charged with such offences be held before a Supreme Court judge sitting without a jury.[57] This proposal was not adopted. However, legislation was passed enabling the summary trial of corporate offences with the consent of the accused person.[58] This legislation was essentially based on the findings made in the report. In 1984 the Attorney General of Hong Kong, Mr Michael Thomas QC, introduced a Bill Into the Parliament which proposed the abolition of trial by jury in complex commercial cases.[59] The jury would be replaced by two "adjudicators", chosen for their expertise in financial affairs, who would sit with a Judge. The primary justification for this legislation was said to be the inability of a lay jury to avoid being confused by the complex evidence presented in cases of this kind. The Bill has not been passed. In 1985 the Law Reform Commission of Queensland suggested the adoption of a system of summary trial of commercial offences similar to that which exists In New South Wales, except that the consent of the accused person to that mode of trial would not be required.[60]

8.30 We consider that the argument which has been put forward in support of the abolition of trial by jury in complex cases, particularly commercial and "white collar" crimes, is not compelling. It is invariably based on the assertion that jurors are incapable of understanding the evidence upon which prosecutions of this kind depend. We question the validity of that assertion. There is in fact very little evidence to show that jurors, or more accurately juries, do not have an adequate grasp of the relevant material on which their verdicts should be based. There is a strong body of opinion which holds that juries generally reach acceptable verdicts in these cases. This was recognised In the minority opinion of Mr Merricks.

> Most judges and lawyers who made submissions to us thought that juries mostly reached the right result, or at least an understandable result.[61]

The majority of the Fraud Trials Committee expressed the orthodox argument about the inability of jurors to understand long and complex cases.

> We have no doubt that most ordinary jurors experience grave difficulties in following the arguments and retaining in their minds all the essential points at issue, particularly in a long hearing of a complex character. This creates the serious risk either that the jury will acquit a defendant because they have not understood the evidence or will convict him because they mistakenly think they have understood it when they have in fact done little moral than applied the maxim 'there's no smoke without fire.[62]

This statement was immediately followed by an acknowledgment that such evidence as is available does not support this proposition.

> There is no accurate evidence which we have been able to obtain to suggest that there has been a higher proportion of acquittals in complex fraud cases than in fraud cases or other criminal cases generally. Nevertheless, we do not find trial by a random jury a satisfactory way of achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth.[63]

8.31 The Fraud Trial Committee's conclusion was apparently based on research intended to discover the comprehension of individual jurors. Research into the effectiveness of juries, however, is unlikely to be of much value unless that research is carried out by questioning the jury as a collective group. It Is not good enough to interview 12 jurors independently and accumulate their individual knowledge and understanding of the case. They should be interviewed as a group so that their combined knowledge and understanding can be put to work in responding to each issue put to them. Research which finds that 12 individual jurors do not retain a thorough understanding of the case is not of itself conclusive of the fact that the same 12 people acting In unison will also lack a thorough understanding of the case. We do not feel that the lack of understanding of jurors has been demonstrated. On the contrary, it appears to us that the collective wisdom and experience of juries has enabled the jury system to adapt and meet the demands placed on it by trials involving complicated evidence.

8.32 The arguments in favour of retaining trial by jury in these cases are based on preserving the traditional role of the jury In the criminal justice system. In our view, the fundamental principles of criminal justice are best served by the jury system.[64] Community participation, the determination of guilt by reference to the standards of the general community, accountability and public acceptance of the criminal justice system are all features which would be lost if the jury were to be abandoned. Accordingly, we are not satisfied that the case against the jury system in complex cases has been made out.

B. The Presentation of Complex Information

8.33 We have suggested (Recommendation 45, para 6.28) that evidence of a scientific and technical nature should be presented to juries in a manner which maximises the prospect that the evidence will be understood by the jury. The problems which are believed to render trial by jury unsuitable in cases where evidence of this kind is prominent can best be met by improving the manner of presenting that evidence.[65] The responsibility is one which must be shared between the witness giving the evidence and the lawyer who is asking the questions. The prosecution case at the trial of Edward Splatt was based on various items of forensic evidence. In the course of his report the Royal Commissioner who inquired into the reliability of Mr Splatt's conviction made the following remark:

> The vital obligation which lies upon the testifying scientists is that they spell out to the jury, in non-ambiguous and precisely clear terms, the degree of weight and substance and significance which is or ought properly to be attached to the scientific tests and analyses and examinations as to which they depose; and specifically the nature and degree of any limitations or provisos which are properly appended thereto.

He went on to say that:

> . . . the critical responsibility which rests upon legal persons is to ask such detailed and probing questions of the scientists as are most likely to elicit the type of evidence just mentioned.[66]

The emphasis in jury trials should be on clarity and on simplification of the evidence presented. The Criminal Bar Association of the United Kingdom has recommended that adequate preparation and effective presentation are the most fruitful way to secure the comprehension of the jury in complex cases.[67]

C. The Use of Specially Qualified Jurors

> **Recommendation 77: The qualifications of Jurors for jury service should not vary according to the subject matter of the trial. In particular, there should be no requirement that a person should have obtained a certain educational standard to qualify as a juror in the trial of a complex case.**

8.34 The claim that a jury of citizens drawn randomly from the general community is probably incapable of understanding and applying the evidence given in a complex criminal trial has been referred to. In order to meet this objection, it has been suggested that the jury in a complex case should be drawn from a group of people who have particular qualifications which will enable them to understand the case. A jury which understands the evidence, so the argument runs. is more likely to bring in a just verdict based on the merits of the case than a jury which cannot follow the evidence. Arguments based on the level of comprehension of Jurors are ultimately speculative because there is no reliable information available regarding the "competence" of the jury system either generally or in particular cases. Since juries are not required to give reasons for their verdicts, and since

the grounds on which they are reached are not usually divulged, there is no reliable way of knowing whether a verdict is rational. Moreover, in most cases the capability or qualifications of the jury to cope with the evidence in the case will never be known.

8.35 The concept of a jury of people with particular qualifications is not new. Special juries, comprised of people of high social rank, were abolished in New South Wales as recently as 1947.[68] The modern proposals for the establishment of special juries are based on different qualifications. A South Australian Committee has proposed that people with certain basic educational qualifications should comprise a special pool of people from whom could be chosen a jury to try cases which require an ability to understand expert evidence.[69]

8.36 Special qualifications for jurors have been suggested as a means of meeting the demands of a complex commercial case. In such a case, It is argued, the sole criterion should be a standard of intelligence or education which demonstrates that the person has the ability to cope with complex evidence.[70] One author in the United States has suggested that special juries should be used in civil trials. The reasons advanced are equally relevant to criminal cases.

> A jury composed of particularly qualified individuals could understand sophisticated concepts that might be beyond the ability of either a judge or a traditional jury. Jury confusion would be less of a problem than It is with jurors who are unfamiliar with the technical, financial and legal issues involved in much of today's complicated litigation. There also would be less likelihood of an irrational verdict because the special jurors would be able to make a reasoned decision based on their understanding of the facts and the law.[71]

8.37 Notwithstanding the arguments in favour of special juries, we do not favour their introduction. The notion of a specially qualified jury is inconsistent with the principle that the jury should be representative of the whole community.[72] There are dangers in creating different classes of jurors. Apart from it being undemocratic[73] there are practical difficulties, as has been pointed out.

> The concept of 'special juries' involves there being a separate panel of jurors which In turn involves difficult questions such as who should be on such a panel and what qualifications and/or expertise would be required of such a potential juror. We consider this to be impractical and are doubtful whether there would be sufficient people with sufficient expertise readily available to make up such a 'special jury' panel. Furthermore, in our opinion, the proper role for such experts is not on a jury trying questions of fact but In the witness box giving evidence and explaining it.[74]

In England the introduction of special juries was rejected by the Morris Committee in 1965[75] and again by the Fraud Trials Committee in 1986.[76]

8.38 The increased educational standard in the general community and the requirement that people must be able to read English to qualify for jury service should not be overlooked in this context. It Is arguable that the combination of these two factors renders it more likely that jurors will be able to understand the evidence in a complex case sufficiently well to be able to make a determination on the issue of guilt. We believe that to be so probable as to render the introduction of special juries unnecessary. It should be said again that the most effective means of increasing juror comprehension is to improve the means by which difficult evidence is presented to juries.

FOOTNOTES

1. *R v* Fong [1981] QdR 90.

2. *Id* at 94.

3. Jury Act 1977 s56.

4. *R v McKenna* [1960] QB 411.

5. District Court of New South Wales, His Honour Judge Thorley, 4 August 1981. The Commission acknowledges the assistance of Mr D R Rofe, QC, Mr N R Cowdery and Ms C Rose. See also *R v Fong* [1981] QdR 90.

6. Unreported, Supreme Court of Victoria, Full Court, 7 October 1985.

7. In Recommendation 41 (para 6.23) we propose that this person should be called the jury's representative.

8. *The Queen v Eyers* (1978) 19 SASR 244; *The Queen v Cefia* (1979) 21 SASR 171; *R v Andrews* (1985) 135 *New Law Journal* 1163.

9. *Palmer v Crowle* (1738) 95 ER 445; *R v Athiajon and Clutten* (1907) 7 SR (NSW) 713; *Boston v W S Bagshaw and Sons* [1966] 1 WLR 1135.

10. A Turner "Polling the Jurors" [1979] *New Zealand Law Journal* 155.

11. Letter from A M Gleeson QC, President, New South Wales Bar Association, 17 September 1985.

12. *Milgate v The Queen* (1964) 38 ALJR 162 per Barwick CJ.

13. A R Blackshield "After the Trial: The Free Speech Verdict" (1985) 59 *Law Institute Journal* (Vic) 1189.

14. *R v Whittaker* (1928) 41 CLR 230 at 240 per Isaacs J.

15. *R v Black* [1963] 1 WLR 1311.

16. *R v Tappy* [1960] VR 137; *R v Wingrove* (1936) 53 WN (NSW) 118.

17. *Kingswell v The Queen* (1986) 60 ALJR 17 at 31 per Gibbs CJ, Wilson and Dawson JJ.

18. Law Reform Commission of Canada *The Jury* (Report 16, 1982) p70.

19. *Veen v The Queen* (1978-79) 143 CLR 458 at 466.

20. (1986) 60 ALJR 17.

21. *R v Larkin* [1943] KB 174 at 176: *R v Warner* [1967] 1 WLR 1209 at 1213-1214; [1967] 3 All ER 93 at 96; *R v Gardiner* [1981] Qd R 394 at 409.

22. *R v Gardiner* [1981] QdR 394 at 400; *R v King* [1979] VR 399 at 407; *R v Harris* [1971] VR 236 at 236-237; *R v Webb* [1971] VR 147 at 152-153; *R v Bedington* [1970] QdR 353 at 364; *R v Hughes* (1983) 49 ALR 110 at 122; *R v Stehbens* (1976) 14 SASR 240 at 245; *R v DeSimoni* (1981) 147 CLR 383 at 392, 396, 399; *R v Laporte* [1970] WAR 87 at 89;*R v Kayal* [1979] 2 NSWLR 117 at 12 1.

23. See generally Watson and Purnell *Criminal Law in New South Wales: Indictable Offences* Vol 1 para 1092. See also *R v Prasad* (1979) 23 SASR 161; *R v Ling* (1981) 6 A Crim R 429. For a related discussion see Mr Justice H H Glass "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 *Australian Law Journal* 842.

24. Law Reform Commission of Canada *The Jury in Criminal Trials* (WP27, 1980) p145.

25. See generally Archbold Pleading, *Evidence and Practice in Criminal Cases* (41st ed 1982) para 4-385; R *v Falconer-Atlee* (1974) 58 Cr App R 348: *R v Galbraith* (1981) 73 Cr App R 124: *R v Young* (1964) 48 Cr App R 292; Law Reform Commission of Canada The Jury (Report 16, 1982) pp58-67.

26. (1976-1977) 139 CLR 28.

27. *Id* at 36.

28. *Id* at 46.

29. *Id* at 40.

30. *Id* at 48. See also *Jackson v The Queen* (1976) 50 ALJR 548.

31. Bushell (1670) 6 State Tr 999.

32. (1862) 169 ER 1368 at 1370.

33. (1976-1977) 139 CLR 28 at 38-39.

34. *R v Farnborough* [1895] 2 QB 484 at 486; *R v Hendrick* (1921) 15 Cr App R 152. See also *R v Brown* [1949] VLR 177 at 179; *R v Tasker* [1934) SASR 95. The only situation in which it is permissible for the judge to direct that a verdict of guilty should be entered is where the jury returns a special verdict finding particular facts and reserving the legal inference to be drawn from them for the judgment of the court. In such a case the judge Is not directing the jury to find the verdict. It has been said that special verdicts ought be found only in the most exceptional circumstances. See *R v Dudley and Stephens* (1884) 14 QBD 273; *R v Bourne* (1952) 36 Cr App R 125 at 127.

35. *Gammage v The Queen* (1969) 122 CLR 444. See also Beavan *v The Queen* (1954) 92 CLR 660.

36. *Fraud Trials Committee Report* (Chairman: Lord Roskill) (HMSO, 1986) p5.

37. *Id* para 8.51, Recommendation 82.

38. *Id* para 8.61, Recommendation 86.

39. *Id* para 8.69, Recommendation 96.

40. *Ibid.*

41. *Id* para 8.69.

42, *Id* para 8.71, Recommendation 97.

43. *Id* p1.

44. *Id* paras 8.23-8.24.

45. See eg Bar News, Summer 1985, p4.

46. See note 36, para 8.10.

47. *Id* para 8.29.

48. *Ibid.*

49. Mr Merricks' note of dissent appears at pp 190-199.

50. See note 36 para C17 p195.

51. *Id* para C20 p 196.

52. See note 36 para C21 p 196.

53. *The Times* 12 December 1984 p2.

54. See note 36, para C21 p 1 96.

55. Department of the Attorney General, Criminal Law Review Division Report on Summary *Prosecution in the Supreme Court of Corporate and "White Collar" Offences of an Economic Nature* (1978).

56. *Id* para 4.2.

57. *Id* paras 9.1-9.2.

58. Crimes Act 1900 s475A. We discuss this provision more fully in para 10.39.

59. N Way "Growing Fracas Over Trial By Jury" *Australian Financial Review* 11 April 1985.

60. Law Reform Commission of Queensland *Legislation to Review the Role of Juries in Criminal Trials* (WP 28, 1985).

61. See note 36 para C18 p195.

62. *Id* para 8.34.

63. *Id* para 8.35.

64. See generally National Council for Civil Liberties (UK) *Evidence to the Roskill Committee on Juries in Fraud Trials* (1984).

65. B Selinger "Science in the Witness Box" *Legal Service Bulletin* June 1984 p108.

66. *Report of the Royal Commission of Inquiry into the Conviction of Edward Charles Splatt* (South Australia, 1984) p52.

67. Criminal Bar Association (UK) "Evidence to the Fraud Trials Committee" August 1984 p405.

68. Jury (Amendment) Act 1947 ss2,3,4. Special Juries were generally abolished in England in 1949. Special Commercial Juries in the City of London were retained until 1971; see *Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602; *Young v Rank* [1950) 2 KB 150.

69. Criminal Law and Penal Methods Reform Committee of South Australia *Court Procedure and Evidence* (Third Report, 1975) pp 101 - 102.

70. J R Sulan "Commercial Crime: Is Our Present Approach Adequate" Paper presented to the International Criminal Law Congress, Adelaide, 8 October 1985.

71. "The Case for Special Juries in Complex Civil Litigation" (1980) 89 *Yale Law Journal* 1155 p 1159.

72. J R Sulan, note 70 above, pp3l,32.

73. J H Phillips "Complex Commercial Prosecutions - Should Juries be Retained?" (1983) 57 *Law Institute Journal* (Vic) 1214.

74. See note 55 above, para 5.2.

75. *Report of the Departmental Committee on Jury Service* (Chairman: Lord Morris of Borth-y-Gest) (Cmnd 2627, 1965) para 243.

76. See note 36 paras 8.43, 8.44.

9. Requiring the Verdict to be Unanimous

I. THE UNANIMITY REQUIREMENT

Recommendation 78: The verdict of a jury in a criminal trial should continue to be the unanimous decision of the individual members of the jury.

9.1 In accordance with the common law rule, criminal verdicts in New South Wales must be unanimous.[1] Unanimity is required in order to convict an accused person and also in order to acquit. The view of four members of the Commission (Mr Byrne, Mr James QC, Mr Mason QC and Her Honour Judge Mathews) is that this rule should be preserved. We consider this to be the only appropriate basis for the determination of guilt by a jury and do not believe that the need to change the existing rule has been demonstrated. Even if such a need did exist, we would not be satisfied that allowing a "majority verdict" of 11 of the 12 jurors would overcome the supposed defects of the present system. Mr Sackville is of the view that the introduction of majority verdicts is not needed because of the low incidence of jury disagreements. He does not have any objections to them in principle. Justice Roden considers that majority verdicts should be introduced at the present time.

A. The Origins and Effect of the Common Law Rule of Unanimity

9.2 Unanimity has long been considered an essential and fundamental part of jury trials. The existing rule Is of ancient origin. It appears to have been settled by the mid-fourteenth century that the verdict must be the unanimous opinion of the whole jury.[2] Hale emphasised the importance of unanimity describing it as 'a basic feature of the common law relating to trial by jury[3] Many other commentators have agreed.[4]

9.3 Whilst the requirement for unanimity is indeed ancient its origin is curious. An eminent legal historian has traced it to the fact that jurors were regarded originally as witnesses in criminal trials.

> Bearing then in mind that the jury system was in its inception nothing but the testimony of witnesses Informing the Court of facts supposed to be within their own knowledge, we see at once that to require the twelve men should be unanimous was simply to fix the amount which the law deemed to be conclusive of a matter in dispute.[5]

9.4 The rule requiring unanimity has not always operated in conjunction with the practice of jury deliberation as we know it today. Harsh methods were applied to produce unanimity. There was at one stage a practice of starving jurors into agreement.[6] The conventional direction given to bailiffs was to take the jury in charge and give them "neither meat, drink nor fire" until they are unanimous in their verdict. Pope summed up the impact of this practice in his couplet:

> The hungry Judges soon the sentence sign and wretches hang that jurymen may dine.[7]

9.5 The common law requirement of unanimity means that neither a conviction nor an acquittal can be secured without the concurrence of the whole jury. The simplicity of this proposition, however, must be understood against the background of what happens in fact. Firstly, a judge may direct a jury that is having difficulty in reaching agreement that it is their duty to agree If they can honestly and conscientiously do so. It has been suggested that this should be done in the following terms:

> [The judge reminds the jurors] that it is most important that they should agree if it is possible to do so: that, with a view to agreeing, they must inevitably take differing views into account; that if any member should find himself in a small minority and disposed to differ from the rest, he should consider the matter carefully, weigh the reasons for and against his view and remember that he may be wrong; that if, on so doing, he can honestly bring himself to come to a different view and thus to concur in the view of the majority, he should do so, but if he cannot do so, consistently with the oath he has taken, and he cannot bring the others round to his point of view, then it is his duty to differ, and for want of agreement, there will be no verdict.

> It is everyday practice for a judge thus to exhort a jury to reach a verdict. There is nothing wrong in it, indeed it may be very proper he should do so, so long as he does not use phrases which import a measure of coercion . . . [8]

Directions of this kind have been approved in New South Wales.[9] They may be given at any time after the jury has indicated that it is having difficulty reaching agreement, and not only after the expiry of the six hour period specified in the Jury Act.[10] The law allows considerable pressure to be placed on juries to encourage them to reach a unanimous verdict. Whilst the practice of starving the jury into agreement no longer applies, the judge may keep the jury deliberating for days if there is any prospect of a verdict being reached.[11]

9.6 Secondly, it should be recognised that reasonable lay people may be expected to exert strong moral pressure on fellow jurors who alone are holding against a result which a large majority clearly favours. It has been said that 'a Ioose acquiescence by the minority in the view of the majority for the sake of conformity would not merely be most undesirable but flagrantly wrong.[12] However, there is in practice a fine line between a dissentient juror who does not assent to a verdict but who agrees to allow u hat is in truth a majority verdict to be announced as if it were a unanimous one, and the position of a juror who is not fully persuaded but who in conscience is prepared to accept, albeit without much enthusiasm, correctness of the views of his or her fellow jurors. As one author put it:

> Anyone who has sat on a committee or a board of directors will know that there are a number of ways in which a decision can be reached. They fall roughly into four groups:
>
> (1) In a few cases the members are all agreed from the first.
>
> (2) In others there may be some dissenters who can be persuaded by reason.
>
> (3) In other cases the few dissenters can be persuaded to swallow their discontent. Outwardly there might appear to be unanimity, but this is only because the would-be dissenters have been talked into a state of acquiescence.
>
> (4) Finally it may not be possible to persuade the dissenters to acquiesce passively. In this case the decision can only be reached by a majority and it is forced on the dissenters.
>
> Now in theory, jury decisions are reached by the first two methods, ie, unanimity which is either shared at the beginning or arrived at by the exercise of reason and powers of persuasion.
>
> . . . it may be noticed that, although in theory the difference between (2) and (3) is considerable, in practice this is not so. A dissenter will probably give in with such an expression as "All right, go ahead then," or "I won't stand in your way." In these cases the decision is reached under (3) and is unopposed but not unanimous, but it could be argued that the committee-man intends to join in the collective decision and therefore it is unanimous. It is properly termed *nemine contradicente*.[13]

9.7 Thirdly, effective policing of the jury's compliance with the obligation to be unanimous is prevented by the rule of evidence which precludes the reception of statements from former jurors as to what happened in the jury room. Claims by former jurors that verdicts were in truth not unanimous will not be received if tendered to challenge verdicts given in open court.[14] There is evidence which suggests that, at least on one occasion, a jury has convicted without each juror being positively satisfied as to guilt-" If this does happen, there is room for debate as to the reasons. It may be done because of ignorance as to the need for unanimity or simply because the jurors honestly regard this as a proper course to take given the pressure from several sources for a small number of dissenters to yield to the views of a large majority of jurors convinced of a particular position.

9.8 These three features have a practical impact upon the theoretical purity of the unanimity rule. Whilst acknowledging their existence, we continue to support the unanimity rule for the reasons developed in this chapter. We consider that in some cases criticism of the unanimity rule has failed to recognise that it is tempered by these practical restraints.

9.9 Most of those who defend the common law rule of unanimity accept, or indeed advance, the proposition that the rule tends to protect the accused person.[16] In other words, it is generally believed that juries which are deadlocked or having difficulty in reaching agreement are more likely than not in that position because a small minority is unwilling to convict on evidence which convinces the majority. The truth of this belief is incapable of proof. We therefore approach the debate acknowledging that the existing rule probably operates and is generally seen to operate as one of the "checks and balances" of the criminal justice system.[17] It serves to protect the innocent from unjust conviction. Of course sometimes the rule operates to deny an accused person an acquittal where a majority of jurors favours that verdict. Whilst It may, at times, allow the guilty to escape conviction, that may only be temporary if a retrial is held. In this, as in other areas, the issue is not whether the principle that the criminal law should seek to minimise the risk of convicting the innocent (cf para 1.20) is Itself desirable, but whether unanimity goes too far in pursuit of that principle.

9.10 As has been mentioned, the verdict of a jury in a criminal case in New South Wales must be unanimous. This Is also the position in Victoria, Queensland and the Australian Capital Territory as well as New Zealand, Canada and several states of the United States of America.[18]

9.11 In New South Wales where a jury is unable to agree after deliberating for a minimum of six hours, the trial judge may discharge the jury.[19] Unless the Crown decides that the accused person should not be retried, the accused person will be put on trial again. There are no reliable statistics available to us which indicate how frequently in New South Wales an accused person is in fact retried after a jury disagreement.[20] We can say, however, that these cases are examined carefully before a decision is made to hold a second trial. Where the jury has been unable to agree in two consecutive trials It is very rare for a third trial to be held.[21]

B. Statutory Abrogation of the Unanimity Rule Elsewhere

9.12 It is now almost 200 years since Bentham suggested an elaborate method of majority verdicts in his draft of a code for the organisation of the judicial establishment in France.

> Three balloting balls should be delivered to each of the twelve jurymen sitting on the trial, three to each, one black one, to denote conviction; one white, to denote acquittal; and one half black and half white to denote uncertainty. To give their votes, each shall secretly deposit, in one common box provided for that purpose, the ball expressive of the state of his opinion, returning the two others, with equal secrecy, into a common box, or bag, in which they were brought.
>
> The defendant shall stand acquitted, if more white balls than one are found in the voting box, or if there be not so many as seven black ones.[22]

Criticism of the rule is not a modern phenomenon.[23]

9.13 A number of jurisdictions (including South Australia, Western Australia, Tasmania, the Northern Territory, England, Scotland and some states of the United States) will accept a majority verdict in a criminal trial where a jury is unable to achieve unanimity after a specified period.[24] The United States Supreme Court originally held that unanimity was an essential feature of trial by jury and was thus guaranteed by the Sixth and Seventh Amendments. This proposition was long regarded as settled law. Recently, however, the Supreme Court has changed its view and now allows each state to decide the matter for itself. The court has held that while unanimity is not essential for 12 member juries,[25] it is where there is a jury of six.[26] The traditional requirement of unanimity is retained in the federal courts of the United States.[27]

C. The Arguments Advanced Against the Unanimity Rule

9.14 The existing rule requiring unanimity has been criticised on one or more of the following grounds:

> that jury disagreements are inherently unsatisfactory because they require a retrial, the cost of which is an unwarranted burden on the State and the accused person;
>
> that it forces juries which are unable to agree to reach verdicts which area compromises;

that it leaves open the possibility of the corruption of a juror, through bribery or intimidation-,

that the rule is undemocratic because it allows a small minority to frustrate the decision of the majority; and

that the rate of acquittals is too high, And that the unanimity rule is a cause of this.

The first three arguments do carry some weight but, as we point out below, the problems referred to are not nearly as serious as is sometimes suggested.[28] The fourth argument does not give sufficient weight to the special nature of the determination of guilt and the desirability of certainty in the criminal process. We deal with each issue before turning to the positive reasons why a change would be detrimental. The fifth argument is, by its very nature, an unprovable assertion. We acknowledge that the unanimity rule probably does prevent some convictions which would occur in a majority verdict system (see para 9.9), but it is completely wrong to say that it results in acquittals in cases where there would be a conviction if majority verdicts were allowed.

1. Jury Disagreements

9.15 It is sometimes contended that jury disagreements are inherently bad because no result is achieved. This contention is based on the premise that it is vital to reach a conclusion in every case. Since this is not a legitimate premise, the argument breaks down. It also overlooks the fact that finality will ultimately be achieved through a retrial or through the decision of the Crown not to prosecute further.

9.16 The existence of a small number of juries which cannot agree is an indication that jurors generally perform their task conscientiously. The Morris Committee said:

> . . . the absence of a certain number of disagreements would itself be disturbing, since in the nature of things 12 individuals chosen at random are unlikely always to take the same view about a particular matter, and the existence of disagreements may, therefore, be evidence that jurors are performing their duties conscientiously.[29]

It is to be expected that there will be a small number of cases in which 12 individuals drawn at random from a heterogeneous community such as that which exists in New South Wales will not be able to agree. It should be recognised that it is not realistically possible to eliminate the incidence of disagreements. Disagreement is endemic in legal matters at the appellate level. The only way to eliminate jury disagreement entirely would be to introduce a rule requiring a simple majority of jurors for a verdict. This would need to be complemented by a rule providing that there should in every case be an uneven number of jurors called upon to consider the verdict. This is generally the practice in Scotland, but the rules relating to juries in Scotland, particularly the availability of a “not proven” verdict and the need for corroborative evidence to support a conviction, are significantly different. For that reason a direct comparison cannot be made with the system in New South Wales.

9.17 A jury disagreement should not be regarded as an inappropriate result in every case. The existence of a disagreement may well reflect the difficulty of the case rather than the perversity of some jurors. It may well be that the evidence presented is capable of persuading some jurors to reach one conclusion. At the same time it may have persuaded other jurors to reach an opposite conclusion. Because the decisions made in a criminal trial depend upon the subjective judgment of the jurors, and because the jury is deliberately constituted by people with different experiences of the world, differing judgments can be expected among the individual members of the jury. In the overwhelming majority of cases there is agreement. Its absence in a small minority need not be attributed to perversity.

9.18 Nevertheless, the critics of the rule requiring unanimity say, the fact of jury disagreement causes unnecessary expense and delay if an accused person is retried. A retrial is not held as a matter of course. It is not unusual for the prosecution to be abandoned after the jury has failed to agree at the first trial. Willis has noted that in Victoria approximately 30% of cases involving a jury disagreement are not retried. He cites possible reasons for the decision not to proceed and concludes:

> It seems not unreasonable to assume that in a substantial number of these cases, the Crown took the view in the light of the trial and the jury disagreement that the chances of a conviction were not sufficient to warrant further action. In these cases, it would appear that the Crown interpreted the jury disagreement, not

as resulting from the obstinacy or corruption of one or two jurors, but as evidence of the weakness of the Crown case.[30]

The cost of retrials following jury disagreement is undoubtedly a problem, but it is one which must be considered in the light of the small number of jury disagreements and the nature of the disagreements which do occur.

The Incidence of Jury Disagreements

9.19 Complete statistics on the incidence of jury disagreements are not available, but there are figures available in respect of four quite lengthy periods during the last fifty years. The first set of figures was reported by Mr Justice Evatt at the 1936 Australian Legal Convention.[31] The second and third surveys were random checks which took place prior to the drafting of the Jury Act 1977. The fourth was conducted by the Commission during 1985. The results of the surveys are reported in Table 9. 1.

Table 9.1

Period	No. of Trials Checked	No. of Disagreements	Percentage of Trials resulting in Disagreement
1932-35	1751	45	2.57
30 July 1971 to 5 November 1971	87	5	5.75
1 January 1975 to 30 June 1075	157	4	2.55
30 September 1985 to 13 December 1985	179	7	3.55

There does not appear from these figures to have been a significant increase In the Incidence of jury disagreements since 1977 when the Idea of majority verdicts was last considered[32] and rejected. In fact, with the exception of the 1971 survey, which was based on a relatively small sample, the figures are remarkably consistent. This accords with the impressions of the members of the Commission and with those of experienced practitioners who have assisted the Commission on this issue.

The Incidence of Mistrials

9.20 The rate of jury disagreements should be contrasted with the rate of Mistrials. A mistrial occurs when the judge discharges the jury without taking its verdict because it may have become prejudiced as a result of contact with inadmissible material, or with a witness in the case, or otherwise. Where a mistrial occurs it is usual for the trial to recommence at a later date. In our survey there were mistrials in over 12% of jury trials. This compares with jury disagreements In less than 4% of cases. It is obvious that successful measures taken to reduce the rate of mistrials would produce far greater cost savings without infringing the fundamental requirement of jury unanimity.

The Incidence of Acquittals by Direction

9.21 The rate of jury disagreement can also be compared to the rate of acquittals by direction. An acquittal by direction occurs when the judge is satisfied that there is insufficient evidence in the case for the prosecution to justify a conviction. Such an acquittal is clearly an indication of a fundamental weakness in the Crowns case. In our Survey of Court Procedures, 23 accused people were acquitted by direction representing over 10% of all accused people. Improvement in the procedures for reviewing the prosecution case before a matter proceeds to trial will save the cost of many of these failed prosecutions, again without interfering with any fundamental safeguards such as jury unanimity. We make some proposals to improve these procedures in our forthcoming Discussion Paper *Procedures Before Trial in Criminal Cases.*

Disagreements in Long Trials

9.22 When a jury is unable to agree on their verdict the costs of the trial are seen to have been expended without any apparent return. “Cost” may be measured in various ways. In monetary terms there Is the cost of providing courtrooms, judges, juries and court staff. The state meets most of the financial cost of the criminal justice system. It also pays the costs of the prosecution and the expenses of witnesses. There is the cost to the legal aid system or the accused person in relation to his or her defence. The “cost” of a trial may also be measured in emotional terms in the strain caused to victims and accused people by delay In the resolution of the charge. There is also the “cost” of the Inconvenience caused to the jurors who have laboured long and hard without result. The introduction of a system whereby a majority verdict could be received would save such costs in those trials where the clear majority reached a particular view.

9.23 The “cost” of a jury disagreement after a very long and complex trial may be enormous. We think it proper to have some regard to this factor, although we would be extremely reluctant to have one rule of criminal procedure for short and, “easy” trials and another for long and “complex” trials. Of course, long trials can abort for a number of reasons totally unconnected with jury disagreement or their verdicts can be overturned on appeal. The proponents of majority verdicts must also acknowledge that a jury which is unable to agree may be evenly divided or at least divided in a proportion which those proponents would not suggest is sufficient to lead to an acceptable verdict. Records kept in the Attorney Generals Department prior to the Introduction of the Jury Act 1977 reveal that up to that time there had not been a single disagreement In a long trial. We have been able to discover only two cases since 1977 which can accurately be described as “long” and where the jury was unable to agree on a verdict. The first was *R v Miller* in which the jury was discharged without verdict after a trial lasting approximately twelve weeks. There was no retrial of those charges. The second was the trial of Alister, Anderson and Dunn on charges of conspiracy to murder where the jury failed to agree following a trial lasting approximately 15 days. Each accused person was found guilty at a second trial but they were subsequently released from the sentences they were serving after a judicial inquiry. As we point out below (para 9.39) a conviction pursuant to a majority verdict would have served to fan rather than quieten the public debate about the correctness of this last mentioned verdict.

The Nature of Disagreements

9.24 There is no reliable evidence to indicate the way juries which cannot agree upon a verdict are divided In their views. This naturally follows from the fact that jurors do not, in the normal course, make such information public at the conclusion of the proceedings. A survey conducted in the United States concluded that juries which start out split 10:2 or 11:1 tend to reach a unanimous decision, whilst a jury initially split 7:5 or 6:6 will not even get to 10:2, let alone unanimity.[33] It can be said without fear of error that not all juries who fall to agree are either 11:1 or 10:2 in favour of a particular verdict. Furthermore, it appears that where there is a minority of only one or two in the early stages of deliberation, the jury normally reaches unanimity.[34] It follows from this that the introduction of majority verdicts will not eliminate the incidence of jury disagreements. It will only serve to reduce the number of disagreements.

2. “Compromise” Verdicts

9.25 The second of the reasons given by those who support majority verdicts, and one particularly relied on by the members of the Commission who favour them, is that the unanimity rule forces compromises amongst the jury which are undesirable. This is especially so, it is argued, where it is only one member of the jury who disagrees with the others. In the view of the majority. this argument tends to overlook the importance of the directions which are usually given to a jury if the jurors have indicated that they are having difficulty reaching agreement. The judge usually explains to the jury that it is their duty to agree if they can honestly and conscientiously do so (see para 9.5).

9.26 The present law is that the judge may not directly encourage the jury to reach a compromise verdict. Each juror Is bound to agree to a verdict only if it is in accordance with his or her view of the case.[35] Because jurors rarely reveal the process of deliberation in the jury room, we simply cannot know how often, if at all, compromises occur. Nevertheless, at present, the judge may and often will stress the desirability of the jury coming to a decision. This exhortation from the judge may result, In

some cases, in the jurors reaching a compromise verdict. It is necessary, for that reason, to ensure that directions of this kind make it perfectly clear that the jury is entitled to disagree and that:

> Jurymen should not be led, from a desire to acquiesce, or to avoid eccentricity, or to save time and trouble, to represent themselves as holding views which they do not hold.[36]

The most telling response to the "compromise" argument is that the introduction of a rule allowing the verdict of 11 or 10 jurors to be taken as the jurys verdict would not eliminate the possibility of the jurys verdict being a compromise. If the requirement that 12 jurors must agree on a verdict encourages compromise, there is nothing to say that a requirement that 11 jurors agree would not also result in compromise.

3. The Corruption of Jurors

9.27 It is sometimes said that the rule requiring unanimity encourages interference with jurors. The reason given for the introduction of majority verdicts in the United Kingdom in 1967 was "to prevent one or two bribed or intimidated jurors from preventing conviction' [37] If one juror can be corrupted, through bribery or intimidation, the remainder of the jury is rendered powerless.[38] Proponents of majority verdicts argue that they will reduce the extent of corruption by ensuring that a person who is minded to interfere with the jury will have to approach more than one juror and thereby run a greater risk that the corruption will be detected. We do not believe that this is a significant factor in resolving the present issue, although it is not one which should be excluded entirely.[39]

9.28 The risk that corruption of jurors may cause Is countered by the power of prosecuting authorities to conduct a retrial after a jury has failed to agree on a verdict. An acquittal cannot be achieved unless the whole jury is corrupted. Nevertheless, it must be acknowledged that a trial that ends injury disagreement is, to an accused person, better than one that concludes with a -guilty verdict, if only because of the possibility that the prosecuting authorities will decline to put the accused person on trial a second time (see para 9.18).

9.29 If the corruption of jurors were a significant cause of juries being unable to agree, one or more of the following could be expected:

> a higher proportion of disagreements in the trial of wealthy or organised criminals who would be more likely to succeed in corrupting a juror;
>
> further disagreement at retrials of cases where the original jury failed to agree. In other words, if corruption does occur, it would usually persist in the same cases; or
>
> a high number of convictions at retrial, indicating that the failure to agree was the result of one juror corruptly holding out for acquittal.[40]

None of these has been demonstrated to be features of the criminal justice system at present. We reiterate the principle stated earlier (para 1.30) that the onus of showing the need for change, particularly to long established rules, is on the proponent of change. There is no evidence to show that corruption of jurors operates as a cause of jury disagreements in New South Wales at present. There is, accordingly, little basis for the argument that abolition of the requirement for ,unanimity will reduce corruption.

4. Perverse Jurors

9.30 Those who support the introduction of some form of majority verdict in criminal cases point to the fact that society accepts majority rule in very many of its institutions. People are frequently prepared to have their views overridden by the contrary views of a larger group, provided they are given a proper opportunity to persuade the majority and provided (usually) that their dissents are recorded.

In legal matters, this is now generally the way of resolving deadlock in civil juries as well as disagreement at the appellate level in civil and criminal cases.

9.31 One of the major arguments in favour of majority verdicts is that they might overcome the “problem” of the perverse juror, that Is to say one who is not prepared to reach a verdict based solely on an impartial assessment of the evidence. The impact of the perverse juror Is blunted by the power to order a retrial in a case where the jury at the first trial has failed to agree. If the jury at the first trial has disagreed because of the actions of a single perverse juror, It is highly unlikely that there will be another perverse juror amongst the 12 chosen for the jury on the second trial.[41]

9.32 The existence of a disagreement is more likely to reflect a difficulty in the case rather than the perversity of jurors. As noted in para 9.24, an experiment conducted in the United States found that disagreements tend to occur more often where there is, In the first place, a relatively large minority. The “perverse juror” is given a great deal of attention as the justification for the introduction of majority verdicts, but there is very little evidence about the true impact of such a juror. There may be many individual jurors who do not agree with the majority, but it does not follow that there is either reason or justification to label them perverse.

D. Reasons for Retaining the Unanimity Rule

9.33 In the view of the majority of the Commission, the case for changing the existing rule has not been demonstrated. The problem of jury disagreement Is a minor one which does not merit solution by the destruction of one of the fundamental features of jury trial. Majority verdicts will not eliminate the already quite small number of retrials which are caused by jury disagreement. The incidence of juror corruption has not been adequately demonstrated. If this is a serious potential problem it can best be met by other measures which do not involve Interference with traditional and fundamental principles of the jury system. We have proposed some measures to this end in Chapter 5 of this Report.

9.34 The two organisations which have examined this subject most recently have also affirmed the importance of preserving the traditional rule. The Victorian Shorter Trials Committee was “strongly opposed” to the concept of majority verdicts in criminal trials.[42] The Canadian Law Reform Commission canvassed the Issue in a Working Paper published In 1980.[43] The arguments both for and against were submitted to the public. Most of the groups and individuals who responded to the Working Paper felt that unanimity should continue to be required. The Commission reported accordingly In 1982.[44]

Community Consultation

9.35 In our Discussion Paper (para 9.10) we raised the question whether the rule requiring the verdict of a jury to be unanimous in criminal cases should be retained. The response we had to this Issue was significant. The overwhelming majority of people who sent us completed comment sheets (more than 80%) were in favour of retaining the rule. Similarly, in written and oral submissions we received, the level of support for the unanimity rule was very strong. The most frequent reasons given for retaining unanimous verdicts were clearly identifiable. Firstly, the concept of majority verdicts cuts across the requirement of proof beyond reasonable doubt and creates uncertainty. Secondly, most of those who made submissions. did not regard jury disagreements as being a significant problem.

II. MAJORITY VERDICTS

A. Disadvantages of Majority Verdicts

9.36 We have indicated in the previous section of this chapter the limited benefits which would be gained by allowing majority verdicts in criminal trials. These benefits would, in our view, be accompanied by a number of serious consequences. These are explained In this section.

1. The Standard of Proof

9.37 The concept of a majority verdict strikes at the root of the hallowed principle that the guilt of the accused person must be proved beyond reasonable doubt.[45] Sir James Fitzjames Stephen has said that the unanimity rule is justified as:

> ......a direct consequence of the principle that no one is to be convicted of a crime unless his guilt is proved beyond all reasonable doubt. How can It be alleged that this condition has been fulfilled so long as some of the judges by whom the matter is to be determined do In fact doubt?. . . There Is a definite meaning in the rule that criminal trials are to be decided by evidence plain enough to satisfy in one direction or the other a certain number of representatives of the average Intelligence and experience of the community at large, but if some of the members of such a group are of one opinion and some of another, the result seems to be that the process has proved abortive and ought to be repeated. If the rule as to unanimity is to be relaxed at all, I would relax It only to the extent of allowing a large majority to acquit after a certain time.[46]

Where there is a majority verdict of guilty, it can clearly be said that, in the absence of corruption(see para 9.27), there exists in the mind of at least one member of the jury a reasonable doubt about the guilt of the accused person. It is simply not valid to say that If a doubt is entertained by only one among 12, then it cannot be a reasonable doubt. We think it inescapable that the existence of a dissenting voice casts a shadow over the validity of the verdict. A person convicted in such circumstances has genuine grounds upon which to base his or her refusal to accept the jury's verdict.

9.38 William Forsyth, who is described by Mr Justice Evatt as "the leading exponent of the history of trial by jury" [47] was a staunch supporter of the rule requiring unanimity. He expressed his view vividly.

> And how must it paralyse the arm of justice, when from the very tribunal appointed by law to try the accused, a voice is heard telling her that she ought not to strike?[48]

2. Acceptability of the Verdict

9.39 We consider that majority verdicts would not command community acceptance in the same way that unanimous verdicts do. The jury system has come under strong attack in recent times (see paras 2.1-2.5). This has been accompanied by, many would say caused by, individual jurors in celebrated trials speaking out after verdict and publicly raising doubts they later entertained about the verdict (an issue which we address in Chapter 11). These events have put considerable pressure on the jury system and the publics acceptance of it. This in turn affects the acceptability of the entire criminal justice system. In the light of this recent phenomenon we are most reluctant to countenance anything that would encourage disaffected jurors speaking out and undermining the finality and essential validity of verdicts. Majority verdicts of themselves create the impression of a level of uncertainty. They also involve a dissident minority being overridden by the majority. The likelihood of those in the minority being the focus of public attention or even leading any campaign designed to challenge a verdict through the media is one which we find distasteful. It would constitute a serious threat to the confidence of the public in the administration of justice.

9.40 Appreciating that one partial solution might be to prohibit any juror speaking out in any circumstances, a possible solution we discuss in Chapter 11, we nevertheless see this scenario as a further ground for retention of the unanimity rule. We accept that sometimes a jurys inability to agree to convict or acquit may itself be the focus for criticism of a particular trial and thereby of the system of criminal justice. It must also be conceded that a majority whose clear belief is frustrated by what they may consider to be an irrational minority could themselves depart the courts frustrated and disaffected by the system. However, we think that the more substantial problem is the threat to certainty and acceptability posed by a majority verdict. It would be interesting to speculate as to the public reaction to the verdicts In the Chamberlain and the Alister, Dunn & Anderson trials if they had not been unanimous. One thing is certain, the verdicts would have been regarded with much greater concern than they are already. Sir Robert Menzies has commented:

> I entirely agree . . . that the jury in criminal cases carries out a function which probably no other system could provide. I have no time for these innovators who want the majority verdict. I remember

> an agitation for a majority verdict when I was Attorney-General of Victoria, and my reason for resisting the agitation was this. When you have a unanimous verdict given by a jury in a proceeding by the Crown against a citizen It Induces in the minds of the ordinary citizens a feeling of confidence in the administration of the law, and that is worth a great deal to society. When you depart from that and 10 people out of 12 find a man guilty or innocent you build up a world of uncertainty and speculation.[49]

3. Participation of all Jurors

9.41 There is a risk that a minority in a criminal jury may cease to be listened to once the availability of majority verdicts becomes well known. This appears to have been realised in the United Kingdom where the rate of non-unanimous jury verdicts has trebled since the introduction of majority verdicts (para 9.45). When jurors become aware that they do not need to be unanimous, they may not try as hard to reach that desirable goal. Once we say that fewer than 12 have to agree, some jurors will have come to a conclusion that does not count. Where a majority verdict is acceptable, the minority can be ignored because the majority knows it has the numbers. Unanimity not only ensures that the minority viewpoint is heard, it gives people in the minority a vote which has a real value. The requirement for unanimity therefore enhances the representative character of the jury by ensuring that participation by individual citizens on the jury Is real rather than illusory. The requirement of unanimity also minimises the effect of racial, social or economic prejudice by giving a right of participation to minority points of view.

4. Distrust of Jurors

9.42 The concept of majority verdicts is in one sense based on a distrust of the people in whom we are placing our faith as competent to serve on juries. It involves a presumption that amongst 12 members of the community there is a definite likelihood that one of them will be either corruptible or incompetent.[50]

5. The Accuracy of the Verdict

9.43 In our system of criminal justice we place tremendous weight on the accuracy of the verdict of a jury. The focus of appeals from criminal trials is on judicial error. A jury is presumed as a matter of law to have acted responsibly and in accordance with the directions they have been given by the trial judge. This is in one sense an irrebuttable presumption because courts of criminal appeal will not admit evidence which deals with the deliberations of the jury.[51] On appeal argument may take place about whether the judge was right to admit or exclude certain evidence or whether the jury was properly instructed on matters of law. Appeals against conviction may also challenge the fairness of the prosecutors presentation of the case. But where both judge and prosecutor have acted fairly and in accordance with law, and where the rules of criminal procedure have been observed, the verdict of the jury may only be overturned if it can be placed in the rare category of cases in which a properly instructed jury§ verdict of guilty can be demonstrated to constitute a miscarriage of justice warranting the interference of an appellate court.[52] Apart from such a case, our system of appeals does not have mechanisms for dealing with errors by juries. This means that we need to be especially careful to ensure that mistakes are not made at the time the jury makes its decision. The requirement that the verdict be a unanimous one is o considerable help in ensuring that sufficient care is taken.

9.44 In the three Australian States in which majority verdicts are permitted, they are not permitted in capital cases.[53] This is a clear acknowledgment that, in serious cases, certainty Is not merely desirable, it Is essential. We consider that all cases which go before a jury are sufficiently serious to warrant certainty, and hence unanimity. Considerations of expedience should not outweigh the importance of preserving one of the fundamental principles of trial by jury.

6. Promoting Satisfactory Verdicts

9.45 The purpose of majority verdicts is to overcome disagreements. Disagreements are regarded as unsatisfactory verdicts because no conclusion is reached. We have already questioned the validity of this view (paras 9.15-9.17). It must also be accepted that majority verdicts represent a conclusion which is at least something less than Ideal. This fact is acknowledged by the rule which is found in all relevant

jurisdictions that there should be a minimum period of deliberation before a majority verdict will be accepted.[54] It is given further and firmer recognition in the rule we have just discussed, namely that in capital cases, a majority verdict will never be accepted.

9.46 The figures that are available from the United Kingdom reveal the net result of implementing majority verdicts. If, for the sake of argument, majority verdicts and disagreements are both regarded as unsatisfactory, there has been a dramatic increase in the overall number of unsatisfactory verdicts in criminal trials. This conclusion requires some explanation. Majority verdicts were introduced in the United Kingdom in 1967.[55] At that time the rate of jury disagreements was in the region of 4 to 5% of all criminal trials.[56] Over the years following the introduction of majority verdicts, the incidence of juries giving majority verdicts gradually increased. In 1968 there were majority verdicts In 7.7% of cases. In 1969 this increased to 8.3% and in 1970 to 9.1%[57]At the time of writing the rate at which majority verdicts are given in criminal trials in England appears to have levelled out at approximately 13%. The important fact in all this should not be overlooked. There are still jury disagreements.

9.47 The reason for the introduction of majority verdicts and Its result can be summarised in the following terms. In order to reduce a small number of unsatisfactory verdicts (in the form of jury disagreements), there has been a massive increase in the number of unsatisfactory verdicts (in the form of majority verdicts). To overcome a 4 to 5% rate of disagreements, the United Kingdom has accepted a 13% rate of majority verdicts. This has not eliminated but merely reduced the 4 to 5% figure for jury disagreements. These figures should clearly demonstrate that majority verdicts are an unacceptable solution to the problem of jury disagreements. The proposed solution creates a monster of greater proportions than the problem it Is designed to solve.

7. Other Issues

9.48 The argument in favour of majority verdicts based on the fact that, “majority rules” in most democratic institutions fails to recognise the very sensitive and special nature of the decision which a jury is called upon to make. A jury is required to make a determination as to guilt. The fact that appeal courts are sometimes divided in their views is put forward as clear evidence of the acceptability of majority decisions within the criminal justice system. Appeal courts, however, make no determination as to guilt. They decide whether trials have been fairly conducted in accordance with the law. They do not usually act as a collective of judges in the same way that a jury is a cohesive group. If an appeal court is divided, it is divided on a matter of law.

B. The Views of Mr Sackville and Mr Justice Roden

9.49 Mr Sackville does not consider a rule permitting a majority verdict of 11-1 to be inconsistent with the general principles and objectives of the jury system in criminal cases. He Is not opposed to majority verdicts as a matter of principle. There is, in his view, nothing sacrosanct about the requirement of unanimity from either a historical perspective or from the standpoint of fundamental principle. He is not persuaded. however, that there is an immediate or urgent need to change the existing rule requiring unanimity. The incidence of disagreement in criminal cases is low. More importantly, it appears to have been consistently low over many years (see para 9.19). If circumstances were to change and there was an increase in the rate of disagreement, or if juries regularly failed to agree on a verdict in long cases, then it would be necessary to review the position. In short, if the requirement of unanimity could be shown to cause difficulties in the administration of justice, then the introduction of majority verdicts would be justifiable. That point has not yet been reached in New South Wales.

9.50 Mr Justice Roden Is of the view that a rule permitting a jury to give a majority verdict of 11-1 should be introduced notwithstanding that the incidence of juries being unable to agree on a verdict is low. In his opinion the criminal law should have a more acceptable means of remedying the injustice done by a single perverse juror who does not agree with the overwhelming majority. Where there is only one juror amongst a group of 12 who does not agree in the verdict, he feels it can be said with some confidence that the view held by that juror is wrong. The current options of either starting the trial again or abandoning the prosecution are inadequate to deal effectively with the problem of jury disagreements, particularly in long trials where the expense and the strain of the proceedings Is substantial.

III. THE DIRECTION TO THE JURY

> **Recommendation 79: The Jury Act 1977 should be amended to provide that the judge is required to direct the jury that their verdict must be unanimous.**

9.51 The rule that a verdict in a criminal trial must be the unanimous verdict of the members of the jury exists in New South Wales, Victoria, Queensland and the Australian Capital Territory, but in other parts of Australia unanimity is not usually required. The movement of people across State and Territorial boundaries is now quite significant. Moreover, many people resident in New South Wales and qualified to serve on a jury come from countries where there is no jury system, or from countries where the majority verdict of a jury Is accepted. It cannot be presumed that jurors in New South Wales are so well acquainted with the unanimity rule that it is not necessary to inform them of this feature of the jury system in criminal trials.

9.52 It has been held, both in England and Australia, that a judge Is not bound to tell the jury that their verdict must be unanimous. In practice most judges do advise juries that their verdict must be unanimous. We consider that this practice should be mandatory. This is consistent with the principle that juries should be informed of the law they are required to apply. The requirement of unanimity is a fundamental feature of trial by jury. The jurys deliberations must be guided by knowledge of its existence.

FOOTNOTES

1. The common law rule applies because it has not been abrogated in the Jury Act 1977. Section 56 of the Act which speaks of the jury agreeing on their verdict recognises the common law position. A majority verdict of three-quarters of the jury is allowed in civil proceedings where the jury has retired for more than four hours and is unable to agree on their verdict: Jury Act 1977 s57.

2. R Moschizer Trial by Jury (1922) p298, referred to in D M Downie “is That the Verdict of You All?” (1970) 44 *Australian Law Journal* 482 p483; Lord Devlin *Trial by Jury* (1966) p48.

3. Sir Mathew Hale *History of the Common Law of England* (1713) p261.

4. For example English Commission of Inquiry Into the Common Law Courts (1830); Forsyth *History of Trial by Jury* (1850) Stephen *History of the Criminal Law* Vol 1 p304; H V Evatt “The Jury System In Australia” (1936) 10 (Supp) *Australian Law Journal* 46. In 1897 the United States Supreme Court held that unanimity was one of the peculiar and essential features of trial by jury at common law: *American Publishing Co v Fisher* (1897) 166 US 464 at 478. (This no longer represents the view of that Court: see para 9.10).

5. Forsyth, note 4 p240; Stephen gives the same explanation, note 4.

6. Evatt, note 4 p55; *R v Lusher* [1976] 1 NSWLR 227 at 229 per Street CJ.

7. Pope *The Rape of the Lock.*

8. *Shoukatallie v The Queen* [1962] AC 81 at p9 1. See also *R v Walheim* (1952) 36 Cr App R 167; *R v Creasey* (1953) 37 Cr App R 179.

9. *R v Lusher* (1976) 1 NSWLR 227.

10. *Id* at 229.

11. There are of course limits: see *R v McKenna* [1960] 1 QB 411; *R v Gallagher* (unreported) Supreme Court of Victoria, Full Court, 7 October 1985.

12. *R v Mills* [1939] 2 KB 90 at 93.

13. J A Andrews "Legal Realism and the Jury" [1961] *Criminal Law Review* 758 pp759-760. Sometimes appellate judges "concur" in cases where there is express disagreement: see, eg, *Buckley v Bennell Design & Construction Pty Ltd* [1977] 1 NSWLR 110 at 125-126 per Mahoney JA: *Attorney-General v Clarke* [1914] VLR 71 at 75 per A'Beckett J.

14. *Ellis v Deheer* [1922] 2 KB 113: *Boston v W S Bagshaw* [1966] 1 WLR 1135; *R v Gallagher* (unreported) Supreme Court of Victoria, Full Court, 7 October 1985. Elsewhere in this Report (para 8.7) we recommend that jurors should each sign a document which records the verdict of the jury.

15. For example. in a letter published in the Sydney Morning Herald on 9 October 1985 the foreman of a jury appeared to refer to a majority verdict being achieved after many hours of debate. The inference is that this was announced to the court as the verdict of the whole jury.

16. J Willis "Jury Disagreements in Criminal Trials: Some Victorian Evidence" (1983) 16 *Australian and New Zealand Journal of Criminology* 20.

17. We believe, however, that sometimes those who urge the introduction of majority verdicts fail to acknowledge the importance of this point and that there is a tendency to cloak their true position by stressing elements of cost and inconvenience.

18. Juries Act 1967 (Vic) s46(1); Criminal Code 1899 (Qld) s628; Juries Ordinance 1967 (ACT) s38. The abrogation of the rule in New Zealand was considered but rejected by a 1978 Royal Commission.

19. Jury Act 1977 s56. We recommend (Recommendation 69, para 8.4) that this section be altered to allow the jury to be discharged whenever the judge is of the view that the jurors are unlikely to agree on a verdict.

20. One Victorian study showed that about 30% of cases in which the jury has failed to agree are no-billed, that is the prosecution is abandoned, often because the prosecution case has proved to be a weak one: Willis, note 16 p24; see further para 9.18.

21. Cf *Craig v The Queen* (1933) 49 CLR 429.

22. *Works* Vol IV, p382, quoted in Evatt, note 4 p55.

23. Sir Patrick Devlin quotes Hallam, a 19th century historian, as describing the rule as "that preposterous relic of barbarism": *Trial by Jury* p49.

24. Juries Act 1927 (SA) s57; Juries Act 1957 (WA) s41; Jury Act 1899 (Tas) s48; Criminal Justice Act 1967 (UK) s13; Administration of Justice (Scotland) Act 1933 (UK) s19.

25. *Johnson v Louisiana* (1972) 406 US 356; *Apodaca v* Oregon (1972) 405 US 404.

26. *Burch v Louisiana* (1979) 441 US 130.

27. *Johnson v Louisiana* (1972) 406 US 356; *Apodaca v Oregon* (1972) 405 US 404.

28. This is also the view of the Law Reform Commission of Canada: *The Jury* (Report 16, 1982) pp77-78.

29. *Report of the Departmental Committee on Jury Service* (Cmnd 2627, 1975) para 357.

30. Willis, note 16 p24.

31. Evatt, note 4 p57.

32. Departmental files obtained from the Research Division of the Attorney Generals Department show that the issue was actively considered when the Jury Act 1977 was being drafted.

33. H Kalven and H Zetsel "The American Jury: Notes for an English Controversy" (1967) 48 *Chicago Bar Record* 195 p200.

34. *Ibid.*

35. *R v Cartledge* (1956) VR 225. Furthermore a compromise verdict which is not consistent with the evidence will not be allowed to stand: *R v Flood* (1914) 10 Cr App R 227; *R v Redgard* [1956] St R Qd 1.

36. *R v Mills* [1939] 2 KB 90 at 93.

37. P Duff and M Findlay "The Jury in England: Practice and Ideology" (1982) 10 *International Journal of the Sociology of Law* p253.

38. The expression "nobbling" is sometimes used to describe corruption of the jury.

39. See Discussion Paper para 9.9.

40. Submission from Mr Tom Molomby, Director, Australian Broadcasting Corporation.

41. See generally Willis, note 16.

42. *Report on Criminal Trials* (September, 1985) para 7.39 pl65; but note the minority view of Deputy Police Commissioner Mudge, paras 7.280-7.289 pp200-201.

43. Law Reform Commission of Canada *The Jury in Criminal Trials* (WP27, 1980).

44. Law Reform Commission of Canada, note 28.

45. *DPP v Woolmington* [1935] AC 462.

46. Stephen, note 4 Vol 1 pp304-5.

47. Evatt, note 4 p49.

48. Forsyth, note 4 pp254-5.

49. Commentary on Evatt, note 4. in (1936) 10 (Supp) *Australian Law Journal* p74.

50. Molomby, note 40.

51. *R v* Gallagher (unreported) Supreme Court of Victoria, Full Court, 7 October 1985. See also A R Blackshield "After the Trial: The Free Speech Verdict" (1985) 59 *Law Institute Journal* (Vic) 1187.

52. *Kingswell v The Queen* (1986) 60 ALJR 17 per Deane J at 32.

53. Juries Act 1957 (WA) s41; Juries Act 1927 (SA) s57; Jury Act 1899 (Tas) s48(3).

54. Two hours in England and Tasmania: Criminal Justice Act 1967 (UK) s13(3): Jury Act 1899 (Tas) s48(2),(5): three hours In Western Australia: Juries Act 1957 (WA) S41; four hours in South Australia: Juries Act 1927 (SA) s57.

55. Criminal Justice Act 1967 (UK) s13.

56. *New Society* 6 July 1972.

57. Ibid. See also A Samuels “The Jury-Any Case for Reform” (1982) 146 *Justice of the Peace* 465 p467.

10. Saving Time and Money

I. INTRODUCTION

10.1 The jury system is expensive. The budget figures for the financial year 1983-1984 reveal that the cost of providing juries in criminal trials was approximately $3.5 million. This is, however, only one side of the equation. It does not take into account the financial and personal costs incurred by individual jurors as a result of their attendance at court in response to a summons for jury service, nor does it include the cost of employing the Sheriffs officers who look after jurors. Our Survey of Jurors revealed the types of financial loss and other inconvenience caused to jurors. Of our sample of 1834 jurors, 411 (22%) suffered financial loss. Nearly two-thirds of these jurors lost between $50 and $500. 6.6% lost more than 8500. The remainder either lost less than $50 or did not quantify their loss. Of those suffering loss, 43% lost wages; 18% mentioned travelling expenses; and 16% mentioned both wages and travelling expenses. Almost 12% sustained losses by virtue of being self-employed. 298 respondents (I 6.2%) said their service as a juror caused other personal problems or inconvenience. Commonly reported problems were difficulties with child care, interference with meetings or work, increased workload, difficulty getting time off and problems with transport.

10.2 We have examined the operation of the jury system in order to discover areas in which these costs can be reduced. The proposals put forward in this chapter will reduce the costs of administering the system and the length of time people are required to serve as jurors. Saving jurors time would generally lead to a reduction in the cost and inconvenience of jury service.

10.3 The threat which long and complex criminal trials poses to the maintenance of the jury system is clear and has been recognised for some time. It is not a threat which is based purely on financial considerations. But, since a large part of the objection to juries in these long cases is their expense, procedures which reduce costs are likely to save the jury system from the threat to which it is currently exposed. The Chief Justice of Australia has acknowledged the problem in the following way:

> For my own part, I would prefer that a determined effort should be made to remould the rules of criminal procedure rather than that there should be further encroachments on the right to trial by jury. It seems particularly necessary to find a way to shorten the length of trials by more clearly defining the real issues, and in some way relieving the prosecution of the necessity to present full and detailed proofs of matters which are not really in dispute.[1]

10.4 We have approached this aspect of our examination of the jury system with one principle firmly in mind. We do not think it legitimate to diminish the effectiveness or the inherent fairness of the jury system for the purpose of saving money or reducing inconvenience to people who serve as jurors. In our view, the maintenance of high standards in the administration of criminal justice is of paramount importance. This necessarily requires the expenditure of financial and human resources in large measure. Where a proposal has been put forward as a means of saving time or money, the test we have applied in assessing the value of that proposal is to ask first whether its implementation might produce unfairness. If the answer is positive and demonstrably so, we have rejected the proposal.

10.5 We believe that the recommendations which follow would not have an adverse effect upon the standard of criminal justice. They are designed to ensure that the resources which must be spent on the jury system are used In the most effective way. We have identified five major areas in which savings can be made. They are:

> reducing the time during which jurors are required to attend at court;
>
> avoiding discharge of the jury during a trial;
>
> avoiding unnecessary attendance at court by prospective jurors;
>
> streamlining procedures for empanelling jurors; and

the option of having a case tried by a single judge sitting without a jury.

II. PRE-TRIAL HEARINGS

Recommendation 80: A system of pre-trial hearings should be implemented for the purpose of resolving matters of law before trial and planning the efficient presentation of the case to the jury.

10.6 The Commission's Survey of Court Procedures revealed that in most trials the jury was absent from the courtroom for substantial periods. This absence was most often required to prevent the jury hearing arguments over the admissibility of evidence. Table 10.1 shows the duration of jury absences in the 197 trials in our survey. Table 10.2 shows the total time the jury was absent as a proportion of trial time. Table 10.3 gives the relative frequency of the various reasons for jury absences. Perhaps the most significant finding is that in eight trials the jury was absent from the court for more than half the total period of the trial prior to the commencement of their deliberations.

Table 10.1: Duration of Jury Absences from Court

Total Duration of Absences	No. Of Trials	%
No absence or no information given	37	18.8
0-30 minutes	54	27.4
30 minutes-1 hour	23	11.7
1-2 hours	40	20.3
2-5 hours	31	15.7
5 hours or more	12	6.0
TOTAL	197	

Table 10.2: Proportion of Time Spent Out of Court

Time absent as a proportion of total trial time	No. of Trials	%
No absences or no information given	38	19.3
Less than 5%	45	22.8
5% - 10%	34	17.3
10% - 20%	37	18.8
20% - 50%	35	17.8
50% +	8	4.0
TOTAL	197	

Table 10.3: Reasons for Jury Absences[(a)]

REASON	No.	%
1. Argument about the Admissibility of Evidence	224	36.0
2. Application by Defence (b)	121	19.4
3. Application by Crown (c)	25	4.0
4. Clarification of Legal Issues (d)	57	9.1
5. Absence for the Benefit of, or Initiated by, the Jury	9	1.4
6. Issues of Prejudice (e)	4	0.6
7. Argument About the Summing-up	25	4.0

prior to Deliberations Commencing		
8. Judge Dealing with a matter not Related to Trial	41	6.6
9. Other (f)	117	18.8
TOTAL	**623**	

(a) This table records figures in respect of 194 trials of our sample of 197. There were 623 jury absences in 160 trials and no absences in the remaining 34 trials.

(b) Including applications to adduce alibi evidence, to recall a witness, to seek instructions, for discharge of the jury, and no case to answer submissions.

(c) Including applications to lead evidence in reply, to recall a witness, to call additional evidence and for the discharge of the jury.

(d) Including whether the transcript was accurate, interpretation of statutory provisions and whether publication should be prohibited, but not including those absences recorded in Category 7.

(e) Excluding issues included in 1, 2 or 3.

(f) Including questionnaires which did not state the reason for the absence of the jury.

10.7 Most disputes regarding the admissibility of evidence and most of the legal issues which arise in a criminal trial before a jury are predictable. A thorough preparation before the trial will usually reveal the items of evidence and the legal issues which are contentious. This is not to suggest that some matters will not arise unexpectedly. The majority of the issues which arise in a trial are, however, capable of being predicted by an examination of the prosecution case presented at the committal proceedings and of what is known of the case for the accused person once the investigation, committal and any informal discussions between the parties have taken place.

10.8 Our suggestion, therefore, is that pre-trial hearings be held to reduce the time taken at trial in the absence of the jury. A primary function of such hearings would be to resolve matters of law which are currently argued and determined in the absence of the jury during the trial. These matters include:

> whether particular items such as confessions, admissions, expert testimony and material which is said to have been illegally or improperly obtained are to be admitted as evidence;
>
> whether a claim of privilege is to be upheld, and
>
> the determination of preliminary matters including arguments over jurisdiction, applications for separate trials, whether the accused person is fit to plead and so on.

10.9 The pre-trial hearing would have other benefits for the jury. The following additional matters could be settled at such a hearing.

> The likely length of the trial so that the judge may inform the jury panel as proposed in Recommendation 36 (para 6.16).
>
> The form and content of any technical or scientific evidence to be presented to the jury In documentary form or presented in any other form as proposed in Recommendation 45 (para 6.28).
>
> The documents which are to be admitted. This would permit sufficient copies to be made in advance so that each juror could be provided with one as proposed in Recommendation 47 (para 6.32).

It is to be expected that, in trials which have been preceded by pre-trial hearings, there will be fewer interruptions and a freer flow of evidence. The possibility of a mistrial caused by the jury hearing inadmissible evidence or prejudicial information or comments might also be reduced.

10.10 Whilst this procedure clearly has potential benefits for the system of trial by jury, the detailed operation of pre-trial hearings is more appropriately dealt with in our forthcoming Discussion Paper Procedures Before Trial in Criminal Cases. The issues which need to be resolved are set out below.

Who decides whether a pre-trial hearing should be conducted?

At what time should it take place? It must naturally precede the trial, but by how far?

Should the proceedings be formal in their nature?

Should the parties be invited or compelled to participate in the pre-trial proceedings?

Should the proceedings be recorded?

Should statements made at the pre-trial hearing be admissible in evidence at the trial?

Should the proceedings be presided over by a judge and, if so, should it be the judge who is to conduct the trial?

10.11 It is impossible to give an accurate estimate of how much time and money will be saved by the implementation of a procedure of this kind. There is, however, no doubt whatsoever that a properly designed and implemented system of pre-trial procedure would reduce the cost of administering the system of trial by jury. There are good reasons for believing that the improved level of preparation in cases where pre-trial hearings have been conducted will also result in greater efficiency in the conduct of criminal trials generally.

III. AVOIDING THE DIMINUTION OF THE JURY

A. Background

10.12 A jury in a criminal trial must commence with 12 people.[2] The historical explanation for the jury of 12 is outlined in our Discussion Paper (paras 1.2-1.4). It has become widely, although not universally, accepted as being the desirable number for criminal juries. With 12 members the jury is large enough to include a cross-section of the community but not so large as to be unmanageable as a decision-making unit. The very size of the jury is also an important safeguard against prejudice as a particular bias or prejudice will have less prominence in a large group. An effort should be made to ensure that when a jury retires to consider its verdict, its deliberations will be undertaken by 12 people.

10.13 The Jury Act provides[3] that, if a juror dies or is discharged in the course of a criminal trial, the trial may continue so long as the number of jury members is not reduced below 10. The decision as to whether the trial is to continue is a matter for the discretion of the judge. If the number is reduced below 10, all parties must consent in writing before the trial may continue. Even if such consent is forthcoming, it remains a matter for the discretion of the judge to decide whether the trial should continue.

10.14 Trials which run for an extended period are becoming more frequent. It is now a real possibility that such a trial will have to be aborted because more than two jurors have died or been discharged due to illness or some other reason, and one or more of the parties is unwilling to continue. In the longest criminal trial held in New South Wales one juror was discharged after several months because of ill health and, towards the end of the trial, another juror was discharged because she became pregnant.[4] The Commission understands that if one more juror had been unable to complete the trial, the consent of each of the accused people to continue with a jury of fewer than 10 would not have been forthcoming. The proceedings would have been abandoned and a decision would need to have been made whether to start the trial afresh with a new jury. Our Survey of Court Procedures covered 197 trials, the longest of which lasted fourteen days. In seven of these trials one juror was discharged during the course of the trial. The reasons for discharge included:

that the juror became ill;

that the juror was seen talking to a prosecution witness, and

that a witness called by the prosecution was known to the juror.

These figures are by no means startling but they illustrate that, even in relatively short trials, jurors are sometimes unable to fulfil their duty. It should be emphasised, and our survey results bear this out, that there is only a small risk of losing more than two jurors in a trial which is even moderately long. We are not aware of a case where the jury has been reduced to nine during the course of the trial. The cases with which we are concerned here are exceptional.

10.15 If a long trial must be abandoned because the number of jurors falls below the statutory minimum, the cost to the State as well as the financial and emotional strain upon the accused person is enormous. The abandonment of the proceedings because of jury wastage is naturally more likely to occur towards the end rather than the beginning of a long trial and therefore after vast amounts of money have been spent in presenting the case to the jury. Rules and procedures which preserve the traditional size of the jury and provide a safeguard against the discharge of the jury for want of sufficient jurors need, therefore, to be considered.

B. A System of Providing Additional Jurors

1. Additional Jurors in Certain Cases

> **Recommendation 81: The Jury Act 1977 should be amended to give the judge the power to empanel up to three additional jurors where the trial is estimated to take in excess of three months. The judge should have regard to the likely wastage of jurors over the expected length of the trial and empanel as many additional jurors as is thought necessary to ensure that there will be 12 jurors ultimately called upon to consider the verdict.**

10.16 One way to avoid the need to abandon a trial because the number of jurors becomes less than the minimum of 10 would be to introduce a system of reserve jurors. Under such a system the base jury of 12 could be augmented. There are two basic systems in operation in various jurisdictions in the common law world. In both the decision whether the reserve juror system is used is dependent upon the discretion of the judge. Under one system the reserve jurors are nominated as such immediately after the base jury of 12 is selected. They attend the trial but are not jurors in the same sense as members of the base jury. If a member of the base jury is discharged during the course of the trial, the first of the reserve jurors takes his or her place upon the base jury immediately. Queensland, Western Australia and the Northern Territory have adopted this system. It appears to have been used in very few cases.[5]

10.17 Another system of reserve jurors is in use in some jurisdictions in the United States. It is known there as the “additional juror” method, The judge decides how many additional jurors are to be sworn. The jury may number 13, 14 or 15. All jurors selected are sworn and all sit as jurors of equal standing throughout the trial. If there are more than 12 remaining when it is time for the jury to consider its verdict, the 12 jurors who are to constitute the final jury are selected by ballot. Those jurors not selected are then discharged from further attendance.

10.18 In our view the “additional juror” method is the more desirable of the two alternatives. The American Bar Association makes this comment on the advantage of the “additional juror” system.

> A preference for the additional juror system has sometimes been stated on the ground that it is undesirable to give a juror who may be involved in deciding the case second class standing during some or all of the trial. That is, one who is labelled an alternate at the outset might not take his job as seriously as the regular jurors as the chances of substitution are not great. On the other hand, where one or two additional jurors are selected each member of the thirteen or fourteen man group knows that even if no juror is excused for cause he nonetheless has a very substantial chance of being involved in the deliberations.[6]

10.19 Whilst it may be generally desirable for the number of jurors in a criminal trial to remain at the traditional 12, it is already provided that, in specified circumstances, this number may be reduced.[7] There is nothing

different in principle about the notion that in specified circumstances it can be increased. Naturally there will be increased costs involved in paying the expenses of additional jurors. That expenditure, however, can properly be regarded as a form of insurance against the risk of incurring the enormous loss of a trial which has to be abandoned after a considerable time for want of the minimum number of jurors required by statute. The number of trials in which additional jurors might be required would be very small indeed. There would not seem to us to be any need to consider empanelling additional jurors unless the trial is estimated to take more than three months. Past experience shows that it is unlikely that there will be more than a single trial that long in any one year.

2. Balloting Additional Jurors

> **Recommendation 82: If the requirement that the verdict be unanimous is retained, as the majority of the Commission recommends, then whenever there remain more than 12 jurors following the judge's summing-up, the extra jurors should be balloted out.**
>
> **Recommendation 83: If the jury's verdict may be less than unanimous, then, whenever there remain more than 12 jurors following the judge's summing-up, they should all participate in the deliberations and the verdict of all but one should be capable of being taken as the verdict of the jury.**

10.20 In our Discussion Paper (para 10.23) we raised the possibility of introducing an additional juror system under which the final 12 jurors would be determined by ballot immediately prior to the jury retiring to consider its verdict. Some of the submissions we received raised the legitimate concern that it was wasteful to allow an individual to participate throughout the trial as a juror only to be excluded in an arbitrary fashion at the eleventh hour without the opportunity of making a contribution to the jury's decision. Others thought that an exception should be made in the case of the person who was the foreman or forewoman of the jury. We agree that it seems wasteful, and unfair to the excluded juror, to dispense with a juror simply because the number of jurors is required by tradition to be 12. The excluded juror will probably have given conscientious attention to the case over a long period and may have been chosen as the jury's representative. The jurors discharged may have a valuable contribution to make. An individual juror could feel justifiably frustrated by his or her chance exclusion without being given the opportunity to make that contribution. An accused person or the Crown who may have come to place some confidence in the care with which that particular juror was performing his or her duties may feel that the exclusion of that juror in an arbitrary manner is unfair.

10.21 Despite these considerations we are concerned that a jury of 13, 14 or 15 would have more difficulty coming to a unanimous verdict than a jury of 12.[8] All Commissioners are of the view that no more than 12 jurors should deliberate on the verdict if the unanimity rule is retained. If more than 12 jurors remain immediately prior to the jury retiring, the 12 jurors who are to deliberate should be chosen by a random ballot. Whilst this proposal has the disadvantages mentioned above, we see no other workable solution. Cases where a ballot such as this is needed would in any case be rare. We have said that the need for additional jurors will arise in exceptional circumstances. It would be even rarer for the estimated wastage on the jury to be so miscalculated as to require balloting some jurors out. One of the problems mentioned, that of the foreman or representative being excluded from deliberations, is not as serious as has been suggested. The foreman does not enjoy any special privilege or ascendancy to justify him or her being treated differently. Our alternative recommendation (Recommendation 83) is designed to make use of the contributions of all jurors if majority verdicts are introduced.

3. Challenging Additional Jurors

> **Recommendation 84: Where a judge has indicated that additional jurors are to be appointed, the number of peremptory challenges available to the Crown and each accused person should be increased by one irrespective of the number of additional jurors to be appointed.**

10.22 This recommendation is made to ensure that the effectiveness of the right of both the Crown and the accused person to make peremptory challenges of potential jurors is not diminished. In Chapter 4 (para 4.59) we recommend by majority that the number of peremptory challenges available to each of the parties be reduced to three in the case of a normal 12 member jury. The effect of the present recommendation would be that where the jury was to consist of 13, 14 or 15 jurors, an accused person would be entitled to four peremptory challenges and the Crown would be entitled to four challenges for each accused person. Mr James and Judge Mathews do not

agree with the terms of this recommendation. They consider that the number of peremptory challenges available should be increased by one for each additional juror to be empanelled.

C. The Minimum Size of the Jury

> **Recommendation 85: The consent of all parties should continue to be required before the judge is entitled to allow a trial to continue with fewer than 10 jurors. It should be provided by legislation, however, that, in a trial which has lasted more than six months, the judge has a discretion to allow the trial to continue with a minimum of eight jurors irrespective of the consent of the parties.**

10.23 A related issue raised in our Discussion Paper (para 10.21) was whether a jury should be able to fall below 10 in number irrespective of the consent of the parties. The current law appears to acknowledge that at least in some circumstances a jury of fewer than 10 is an acceptable tribunal to determine the guilt of an accused person. The question which concerned us at one stage was whether the consent of both parties should be required before this is allowed.

10.24 We have come to the conclusion that, with one exception, there should be no change to the present law. The need for change has not been demonstrated with respect to the vast majority of criminal trials. The recommendations we have made in relation to a system of additional jurors will ensure that, in trials expected to last more than three months, once a jury is empanelled there will be only a minimal risk that its numbers will diminish to the point where the trial cannot be continued without the consent of the parties. However minimal this risk may be, we think it should be guarded against. If a very long trial had to be abandoned because the jury was reduced to nine or eight members it would be little short of catastrophic. The criminal justice system and the participants in the case should not be expected to bear the burden of having to start the proceedings again. Having said that the jury might be reduced below 10 in exceptional circumstances without the consent of the parties, we acknowledge that there must be a level at which a jury has insufficient members to be said to have the essential characteristics of a conventional jury.[9] Mr James and Judge Mathews do not agree with this part of the recommendation. Mr James thinks that a trial should never continue with fewer than 10 jurors without the consent of all parties. Judge Mathews considers that a minimum of nine jurors might be acceptable, but that allowing a jury to fall to eight members is repugnant to the concept of trial by a jury of 12. She notes that, given our recommendation to allow for additional jurors to be used in trials that are likely to be lengthy there is little likelihood of a jury falling below 10 in number.

10.25 The combination of proposals we make is designed in the first place to guarantee that long criminal trials will not need to be abandoned for want of jury numbers. If the trial is estimated to last more than three months the judge would have a discretion to empanel additional jurors. If the trial lasts longer than six months, the judge would have a discretion to allow the trial to continue so long as there were at least eight people remaining on the jury. Where three additional jurors are empanelled and the trial lasts more than six months, then up to seven people could be discharged from the jury without requiring the proceedings to be abandoned. The current law allows for only two such discharges. We have noted that the occasions when additional jurors are needed would be extremely rare. The diminution of the jury to as few as eight members would be even more exceptional.

10.26 Although the Law Reform Commission of Canada did not recommend any change to the law regarding jury size in long trials,[10] the Bill based on its report contained a provision which would enable the size of the jury to be reduced to eight where the trial had continued for more than thirty days.[11] This provision has been criticised as one which “seems to elevate expediency over justice”[12] and also on the ground that the additional or alternate juror procedure would be far preferable.[13] This Bill was introduced in February 1984 but has not yet been enacted.[14] Unlike the Canadian Bill, our proposal is that the additional juror procedure should be used as the first safeguard against diminution of the jury. Reduction of the jury below 10 without the consent of the parties should only be allowed in exceptionally long cases.

10.27 Our recommendations would also have certain consequential advantages. In the first place the likelihood of the verdict in a trial being that of 12 members of the community would be substantially increased. Moreover, it is likely that juries in long trials would be more representative than at present because judges could more easily afford to disallow applications to be excused as there would be little prospect of the number of jurors falling below the statutory minimum. In addition, where an individual juror suffers personal hardship during the course of a long

trial, the judge would be more likely to grant a discharge on such grounds simply because he or she will have greater latitude to do so before the risk of discharging the whole jury becomes real.

10.28 The decision whether a trial which has taken more than six months should continue with fewer than 10 jurors would be a matter for the discretion of the judge. The exercise of that discretion would naturally depend upon the circumstances of the case. At the beginning of a trial which is expected to take longer than three months, the judge should resort in the first instance to the procedure for empanelling additional jurors. The reduced minimum size of the jury should not be relied on by itself to avoid the consequences of a reduction in the size of the jury. These two proposals should be seen as a combination, not as alternative means of overcoming the problem of jury size in long trials.

IV. EFFICIENCY IN EMPANELMENT

10.29 The rate of applications for excusal when a trial is expected to be particularly long has been increasing. This is to be expected since many people who can afford to give up a small amount of time to serve on juries are unwilling or unable to serve for an extended period. In Chapter 6 (para 6.16) we recommend that, where it is known that a particular trial will be long, potential jurors should be notified in advance. The potential juror would be given an opportunity to make a written application to be excused directly to the Sheriff on the ground of the hardship that would be caused to him or her if required to serve in a lengthy trial. This measure would reduce the inconvenience caused to the individual citizen. In addition, the large amounts of money spent on payments to people who attend court to make personal applications to be excused which, if made in respect of a very long trial, will almost certainly be successful, could be saved. Lastly there would be savings in the court time which would have been taken up dealing with these applications.

A. Streamlining Procedures for Empanelling Juries

> **Recommendation 86: Where the panel from which the jury is to be selected is exhausted before the required number of jurors is chosen, the judge should have the power to retain those jurors who have already been empanelled as the core of the jury and order that a fresh panel be called, after a suitable adjournment, so that the balance of the jury can be selected.**

10.30 Section 51 (I) of the Jury Act 1977 provides:

> If there are an insufficient number of jurors summoned pursuant to a general jury precept in attendance at a court or coronial inquest for the purposes of a ballot under section 48, 49 or 50-
>
> (a) the trial or inquest may be adjourned and a further general jury precept issued in respect of the trial or inquest; or
>
> (b) the further number of jurors required to complete the ballot may be required by the sheriff to attend at the court or inquest forthwith for that purpose but only where those persons have been summoned to attend at another court or inquest in the same jury district and are not required at that other court or inquest.

A general jury precept is a document issued by an authorised officer directed to the Sheriff requiring him to summon jurors for a particular trial.[15] The precept specifies the number of people required to be summoned.[16] In the case of criminal trials this number shall not exceed the number of people which, in the estimate of the authorised officer issuing the precept, will ensure the attendance of sufficient prospective jurors to allow full right of challenge to all parties.[17] In addition to allowing for depletion of a panel through rights of challenge, the issuing officer is to have regard to any factors likely to lead to an unusually large number of applications for excusal.

10.31 It is not an easy task to estimate an appropriate number of people to be summoned. The combination of a number of factors will mean that it will often be prudent to summon a very large number of people to form the panel.[18] At the same time, because of the inconvenience to prospective jurors and the cost involved,[19] the authorised officer may reasonably be expected to wish to keep to a minimum the number of people who are summoned. However, it is here that the current form of s51(1) raises a difficulty.

10.32 Section 51(1) deals with what is to happen in the event that an insufficient number of jurors “attend for the purposes of a ballot” to form the jury. The words quoted seem clearly to extend to the situation where a panel which is apparently large enough is summoned but, because an unexpectedly large number of those summoned fail to attend or make successful excusal applications in combination with the exercise of peremptory challenges by the parties, the panel is exhausted before the full jury of 12 is formed. The subsection (for present purposes) provides two solutions:

> adjournment of the trial pending the issue of a further general jury precept; or
>
> supplementing the (incomplete) jury by requiring additional people to attend forthwith, provided that they have already been summoned to attend at a court in the same jury district and are not required at that other court.

10.33 The second solution is unlikely to be available very often. The deficiency of the first is that it seems to contemplate that the process of summoning jurors will start again from the beginning with at least the implication that the jurors already empanelled are to be discharged. Section 51(1) is not clear on this point and, for that reason alone, it should be amended to confirm that the judge may, in his or her discretion, direct that those jurors who have been empanelled pursuant to the first general jury precept should form the core of the jury at the adjourned hearing. Since they are not excused or challenged their participation in the trial would obviously be satisfactory to themselves and the parties. By retaining them as the core of the trial jury the further general jury precept need only summon so many people as the authorised officer estimates will ensure the attendance of sufficient prospective jurors to allow for successful excusals and the remaining rights of challenge of the parties. This reduction in the necessary number will in turn mean that the adjournment can be shorter because of the savings in administrative effort.

V. TRIAL BY JUDGE ALONE

10.34 In Chapter 7 (para 7.3) we suggest that an accused person should be able to make an application to the court that his or her trial be presided over by a judge sitting without a jury where prejudicial pre-trial publicity has made it unlikely that an impartial jury could be empanelled. We discuss the reasons why, and circumstances in which, such an application should be permitted. There are other types of cases in which trial by judge alone can be justified. These matters are included in this chapter because they are essentially grounds based on avoiding costs and delay in the conduct of criminal trials.

A. Issues of Law Only

> **Recommendation 87: An accused person should be entitled to apply for trial by a judge sitting without a jury where the court is satisfied that the only issue in the case is a matter of law. The conditions outlined In Recommendation 56 should apply.**

10.35 It is not uncommon for criminal trials to be contested on legal issues alone. For example, the prosecution evidence against an accused person may be a confession which he or she is alleged to have made. The case for the accused person may be that the confession was made and indeed that It is a true confession but that it was not made voluntarily. An involuntary confession is inadmissible as evidence.[20] The question of voluntariness and the admissibility of the confessional statement is purely a matter of law for the judge to decide. The accused person’s plea of not guilty may be based on his or her contention that the confession is inadmissible as evidence and that there is, therefore, no evidence upon which a conviction could be based. If the alleged confession is indeed the only evidence, and the judge’s decision is to reject the evidence, the judge would then be obliged to direct the jury to find the accused person not guilty. If the judge’s decision is to admit the evidence, it may well be that the accused person would want to change his or her plea from not guilty to guilty.

10.36 One way of avoiding the unnecessary empanelment of a jury in a case such as this would be to require that all foreseeable issues of law should be determined at a pre-trial hearing. Issues such as those raised in the two cases referred to would be dealt with prior to the trial, thereby avoiding the need for a trial before a jury. The use of pre-trial procedures in the United Kingdom has reduced the number of criminal trials by something in the order of 25%. This reduction is made up of pleas of guilty entered once the strength of the prosecution case is known and of prosecutions being abandoned in the light of weaknesses revealed at pre-trial hearings. We have

recommended the introduction of pre-trial hearings (para 10.6) and will deal with them more fully in our forthcoming Discussion Paper Procedures Before Trial In Criminal Cases.

10.37 A less attractive means to achieve the same result would be to introduce trial by judge alone. In our view, It is reasonable, because of the absence of any factual issue for the jury to decide, to allow the accused person to apply for trial by judge alone in circumstances such as these.

B. Other Circumstances

> **Recommendation 88: An accused person should be entitled to apply for trial by a judge sitting without a jury on the ground that, having regard to the interests of the accused person and of the community, it would not be in the interest of justice to conduct the trial with a jury. The conditions outlined in Recommendation 56 should apply.**

10.38 There are additional circumstances in which trial by judge alone may be warranted, such as where the nature of the case is such that it could be presented to a judge in a much shorter time than it would to take to present the same case to a jury. Some cases may involve evidence of a kind which can be quickly assessed by a judge but which Would need to be presented in detail to a jury to ensure that it is understood by them. A judge can speed up the proceedings. The jury does not have the same ability. An accused person who is paying for his or her legal representation may be forced into penury by having to meet the costs of a very long trial. If the trial can be shortened significantly and the accused person wishes to reduce the financial burden of the trial, there does not seem to be any reasonable objection to allowing trial by judge alone on his or her application.

10.39 Legislation in New South Wales already provides for the trial of certain serious offences before a judge sitting without a jury.[21] These are offences commonly referred to as “white collar” crimes.[22] This right to trial by judge alone has been used only rarely in New South Wales. We are aware of only one such trial.[23] In this case, the accused person was not entitled to legal aid. The trial lasted 41 days. It was variously estimated that if it had been heard before a jury it would have been two, three or four times as long.[24] The right to be tried by judge alone has existed in Canada for over 30 years.[25] It is estimated that some 80% of accused people exercise the right. By way of contrast, in South Australia where the right was introduced over a year ago,[26] it was not availed of by any accused person in the first six months.

10.40 The constitutional validity of a general provision allowing an accused person to elect trial by judge alone is in issue. The nature of the right to trial by jury which is guaranteed, in the case of Commonwealth prosecutions on indictment, by s80 of the Constitution was considered by Pannam in 1968.[27] He concluded that s80 is a guarantee which is personal to an accused person and may therefore be waived at his or her election.[28], The issue has now been taken to the High Court by the Commonwealth Director of Public Prosecutions challenging the validity of the recently enacted South Australian legislation giving an accused person the right to elect trial by judge alone. At the time of writing this Report judgment had been reserved in that case.

C. Procedures for Trial by Judge Alone

10.41 In Chapter 7 we outline the procedures which should be followed in respect of applications for trial by judge alone on the basis that prejudicial publicity has made it difficult to select a fair jury. Those procedures should apply equally to applications for trial by judge alone on any other ground. The interests of the accused person must be carefully preserved. The equivalent legislation In South Australia[29] includes a valuable safeguard against the risk that an accused person will be improperly pressured into abandoning the right to trial by jury. It provides that, before the accused person may elect trial by judge alone, a legal practitioner must certify that he or she has advised the accused person about making the election. We consider that the community has an interest in ensuring that criminal trials are conducted in an appropriate forum and that the institution of trial by jury is one which serves the interests of both the accused person and the community. For these reasons the Crown should be heard on an application for trial by judge alone. The decision should be one for the trial judge, rather than the individual parties, to make. This may help to limit the effect of any pressure which may be placed on an accused person to elect this mode of trial.

D. Summary Jurisdiction

Recommendation 89: The District Court of New South Wales should be invested with the jurisdiction to try indictable cases summarily in order to allow trial by judge alone in that Court where an accused persons application for that mode of trial is successful.

10.42 The availability of trial by judge alone as an alternative to trial by jury in certain criminal cases would require the establishment of a summary jurisdiction in the District Court. At present only the Supreme Court amongst the higher courts has a summary jurisdiction. This has led to some rather anomalous results. All criminal offences which carry a monetary penalty higher than the maximum able to be imposed by the Local Courts must be dealt with by the Supreme Court.[30] It has often been felt that cases of this kind would be more suitably dealt with by the District Court. There would not appear to be any major procedural difficulty in vesting the District Court with a summary jurisdiction. The model which already exists in the Supreme Court (Summary Jurisdiction) Act 1967 would appear to be appropriate for and adaptable to the District Court.

VI. RETRIALS

Recommendation 90: The right of the Crown to maintain a prosecution after the jury has failed to reach agreement at two previous trials should continue to be a matter within the discretion of the Crown.

10.43 In our Discussion Paper (para 9.22) we raised the issue whether a prosecution should be competent after the juries at each of two previous trials have failed to agree on a verdict. This question will have to be considered in conjunction with the question whether jury verdicts should be unanimous. If unanimous verdicts are retained, the argument in support of this proposition is less compelling. We acknowledge that there may be circumstances in which the prosecuting authorities have legitimate grounds for departing from the usual practice followed in New South Wales. That practice is that, if there have been two consecutive disagreements, then a third trial will not be held. The submissions we received on this issue were more or less evenly divided. For these reasons we have decided that this should continue to be a matter at the discretion of the prosecution.

VII. COST SAVINGS FROM OTHER PROPOSALS

10.44 In this chapter we have outlined proposals which have the reduction of costs as their primary goal. The following recommendations have been proposed elsewhere in our Report for reasons other than their likely cost savings. They may nevertheless result in substantial savings in time and money for jurors, the State or both.

The reduction in the number of peremptory challenges available to each party (Recommendations 18,19, para 4.59) has been put forward in order to ensure a more representative jury. It would also reduce the number of prospective jurors required to be summoned for any given trial. This would result in a reduced workload for those responsible for providing juries and reduced expenditure on payments to people who do not actually serve.

Supplying prospective jurors with more complete information about, for example, the jurys task, the categories of people who are disqualified, ineligible or may claim exemption as of right and the estimated length of the trial (Recommendations 30-34, paras 6.4-6.12) should lead to a reduction in the inconvenience caused to prospective jurors who attend at court unnecessarily, a reduction in the time spent in determining whether or not people should be excused from jury service and a reduction in the fees and expenses paid to people who do not actually serve on juries.

Increasing the amount of written materials provided to the jury (Recommendations 48-51, paras 6.32-6.37) may result in the jury understanding the issues in the case more quickly, and perhaps lead to consequent reductions in the time taken for the presentation and explanation of evidence.

The measures designed to avoid mistrials occurring as a result of prejudicial publicity (Recommendations 61, 62, paras 7.31, 7.32) should result in substantial savings of court time in any case where the abandonment of a trial is avoided. Bearing in mind that the cost of a criminal trial to the State is estimated to be $10,000 per day, the financial rewards for preventing mistrials assume significant proportions.

FOOTNOTES

1. Rt Hon Sir Harry Gibbs, Chief Justice of Australia, keynote address at the opening ceremony of the Third International Conference of Appellate Judges in New Delhi, 5 March 1984.

2. Jury Act 1977 s19.

3. Section 22.

4. *R v Bebic and Others* (unreported) Supreme Court of New South Wales, Maxwell J, 17 February 1981. In Queensland one trial, the Russell Island case, took 15 months. The jury was discharged without verdict after 13 days deliberation when one juror was unable to continue due to the strain the proceedings had caused.

5. F Gaffy QC, Commissioner, Law Reform Commission of Queensland, personal communication. See Jury Act 1929 (Qld) s17; Juries Act 1957 (WA) sl8; Juries Act 1962 (NT) s37A.

6. American Bar Association Projects on *Minimum Standards for Criminal Justice: Standards Relating to Trial by Jury* (1968) p80.

7. Jury Act 1977 s22.

8. See the research reported by R Hastie et al "What Goes on in a Jury Deliberation" (1983) 69 *American Bar Association Journal* 1848 p1852.

9. Pannam, amongst others, is of the view that only 12 member Juries have the essential characteristics of a jury: See C L Pannam "Trial by Jury and Section 80 of the Australian Constitution" (I 968) 6 *Sydney Law Review* 1.

10. Law Reform Commission of Canada *The Jury* (Report 16, 1982) pp56-57.

11. A D Gold "Juries" (1984) 16 *Ottawa Law Review* 352 p357.

12. *Id* p358.

13. *Ibid.*

14. D R Heather *Snow's Annotated Criminal Code Release* 20 December 1985 p17-39.

15. Jury Act 1977 s24.

16. *Id* s24(1)(c).

17. *Id* s24(3)(a). As to the rights of challenge, see para 4.57 and following.

18. For example the bare minimum required for a trial of three people jointly accused of murder would be 132. This would allow no leeway for excusals, the rate of which would rise steeply if the trial is estimated to be lengthy. If an estimate of an 8 week trial were given for such a matter. the Sheriff would usually be directed to summon about 50 people.

19. Even if a person is not balloted and is sent home on the morning of the first day of the trial, that person is entitled to $23.00.

20. Crimes Act 1900 s409.

21. Crimes Act 1900 475A

22. Department of the Attorney General, Criminal Law Review Division *Summary Prosecution in the Supreme Court of Corporate and "White Collar" Offences of an Economic Nature* (1978).

23. *Attorney General of New South Wales v Chambers*, (unreported) Supreme Court of New South Wales, Roden J, 24 June 1983.

24. Shorter Trials Committee of the Victorian Bar *Report on Criminal Trials* (September 1985) P199.

25. Martins Criminal Code (1984) pp398, 467, 484 ff.

26. Juries Act 1927 (SA) s7.

27. Note 9.

28. *Id* pp22-23.

29. Juries Act (SA) 1927 s7, Juries Rules 19874 rr 1 4-24. See also Powell “The State of the Jury” (1985) *Law Society Bulletin* 139.

30. For example some offences under the Clean Air Act 1961, the Clean Waters Act 1970 and the Noise Control Act 1975.

11. Disclosing the Deliberations of the Jury

I. INTRODUCTION

11.1 This chapter concerns the disclosure by jurors and the publication by others of the deliberations of a jury after it has been discharged, either having delivered a verdict, having been unable to agree or not having had the opportunity to consider a verdict. The disclosure and publication of information revealing the identity of a juror fall into a separate category which we deal with in Chapter 5. The issues discussed in this chapter became highly topical In 1985 due to reports in the media of statements from people claiming to have been jurors in widely publicised trials. These reports contained details of the deliberations of the jury, sometimes in terms which cast doubt on the ultimate verdict.[1] There has since been extensive and intensive public, professional and academic debate over the merits of prohibiting jurors from making such disclosures or the media from reporting them.[2] The introduction of legislation in Victoria specifically addressing this subject has provoked further public comment.[3]

A. The Conventional Rule Regarding Disclosure

11.2 There is a convention that jurors should not divulge what occurs during their deliberations in the jury room.[4] In England there is a notice in the following terms in jury rooms:

> To members of the jury. Her Majesty's judges remind you of the solemn obligation upon you not to reveal, in any circumstances, to any person, either during the trial or after it is over, anything relating to it which has occurred in this room while you have been considering your verdict.[5]

Since this convention, or "rule of conduct",[6] is not a rule of law, a juror who breaches it is not liable to any legal sanction. The courts have, however, repeatedly criticised jurors who have spoken out.[7] Any convention inhibiting jurors from divulging details of their deliberations, and the media from republishing them, appears to be of little current force in Australia. On the contrary, it is apparent from recent experience that the media will generally publish disclosures from the jury room made in relation to trials which attract public interest. It is unclear, however, whether representatives of the media think It proper to seek out former jurors for their views or whether they will only publish those views if offered to them by jurors themselves.[8]

B. Jurors' Disclosures as Contempt of Court

11.3 It is sometimes suggested that, in certain circumstances, disclosure by a juror might amount to a contempt of court,[9] particularly where the judge has given the jury a specific instruction not to discuss the case with outsiders.[10] Nevertheless. we are not aware of any case in which a juror has been prosecuted for contempt of court for revealing information about the deliberations of the jury. The precise boundaries of the law of contempt are uncertain. Contempts of court take a variety of forms but share the common characteristic that they all involve an Interference with the due administration of justice.[11] The view has been expressed that disclosures by a juror of the jury's deliberations may or may not be a criminal contempt of court depending on the circumstances. In the *New Statesman Case* the English Court of Appeal said:

> ...any activity of the kind under consideration in this case which - to use the language of the Attorney-General's statement tends or will tend to imperil the finality of jury verdicts or to affect adversely the attitude of future jurors and the quality of their deliberations is capable of being a contempt. But that is not to say that there would be of necessity a contempt because someone had disclosed the secrets of the jury room.[12]

11.4 Since there is no Australian decision directly on the point,[13] there can be no certainty as to the approach which would be taken by the Austtalian courts to disclosures by jurors. In the most recent case to deal with the issue in Australia, *R v Gallagher*, the Supreme Court of Victoria did not expressly classify disclosure of jury room secrets as a contempt. The Full Court said:

> Any attempt to ascertain [jurors'] views about the trial or anything connected with it is thoroughly mischievous. So is any attempt by a juror to volunteer such views for publication.[14]

The Court went on to say:

> Those who participate in the interviewing of persons said to have been jurors in a particular trial or who report the results of any such Interviewing encourage and compound the mischief.[15]

11.5 The Australian Law Reform Commission in its Discussion Paper on the law of media contempt,[16] has also noted the uncertainty of the law in this area and suggested that one of the goals of reform should be "at the very least"[17] to make the position clear. The Commonwealth Director of Public Prosecutions has said that reform in this area is needed to render the law tolerably satisfactory, which it manifestly Is not at present".[18] Whilst the uncertainty of the law appears to be generally acknowledged, a recent judgment of the New South Wales Court of Appeal[19] has clarified one aspect. The Court reaffirmed that the ordinary principles of criminal liability apply to the law of criminal contempt. The intention of the person who made the disclosure and the intention of the person who published it, are therefore relevant matters to be taken Into account. The Court recognised the need to forsake the use of the law of criminal contempt in inappropriate circumstances.

> [W]here the disclosure is made either fortuitously or in the public interest, it is apparent that the "extraordinary procedures and the serious punishments which are typically involved in the application of the law of contempt" will not be invoked.[20]

In recent instances of former jurors making public statements about their deliberations, such statements have often followed public criticism of their verdicts. Any examination of the law of contempt of court in its application to jurors' disclosures would also need to examine carefully the question whether public criticism of jury verdicts should, in any circumstances, be regarded as contempt.

C. Jurors' Disclosures as Evidence

11.6 It appears to be reasonably settled law that an appellate court will not receive evidence as to irregularities taking place in the jury room where such evidence is advanced as a basis for disturbing the jury's verdict.[21] This has become known as Lord Mansfield's rule. Certain forms of misconduct during the deliberative process, such as communication with outsiders, consideration of prejudicial material not admitted into evidence, or the reaching of a decision by tossing a coin are obviously improper. If that type of misconduct by a jury is proven by evidence other than from the former jurors, it will often lead to the quashing of the conviction.[22] But evidence of such matters will not be received from the former jurors themselves,[23] unless it relates to the conduct of the juror outside the jury room[24] or is given by jurors to contradict allegations of misconduct made against them.[25] The true rationale for this exclusionary rule is somewhat unclear, but it is said to be generally based on grounds of public policy.[26] The justification advanced by the courts for the rule is that:

> . . . the interest of the community in ensuring freedom of debate in the jury room and finality of verdicts outweighs [the interests of the community and of litigants] in seeing that the accepted rules and formalities of a fair trial are maintained and enforced.[27]

11.7 Notwithstanding the decisive reaffirmation of Lord Mansfield's rule prohibiting appellate courts from receiving the evidence of jurors in cases such as *Re Mathews and Ford and Gallagher*, the validity of the rule has continued to be questioned. The editor of the Australian Law Journal queried the merits of the general exclusionary rule some years ago.[28] More recently, in a leading article on the subject, Professor Enid Campbell has suggested that the current law "merits attention by our law reform commissions"[29] Her suggestion has been supported by Mr Justice McHugh of the New South Wales Court of Appeal.[30]

11.8 This Report is not the proper place to examine whether there should be any change to this exclusionary rule or the effect which it has upon the appellate level of the criminal justice process. This will be done later in the course of the Criminal Procedure reference when we deal with the subject of appeals in criminal matters. For the purposes of this Report we proceed on the basis that the exclusionary rule continues to exist. It should be recorded, however, that we see considerable merit in the proposal that the application of the rule should be distinguished as to subjective and objective events.[31]

II. THE CURRENT LAW REGARDING DISCLOSURES BY JURORS

A. The Law in New South Wales

11.9 In New South Wales the Jury Act 1977 expressly prohibits the publication during a trial of information which may be used to identify a person as a juror.[32] We have made recommendations above (para 5.13) which expand the ambit of the relevant provision to include any disclosure Identifying a juror made during a trial and public disclosure made after the trial without the consent of the juror in question. It would probably be a contempt of court for a juror to make a deliberate disclosure breaching the secrecy of the jury room during the course of a trial. This is because jurors are invariably told by the judge during the trial that they should not discuss the case with anyone but their fellow jurors and only then in the privacy of the jury room. This direction does not customarily prohibit, nor even advise against, discussion of the case with others once it has been completed.[33] Apart from this reasonably clear rule, the law in New South Wales as to jury disclosure is uncertain and, we believe, unsatisfactory.

B. The Law in the United Kingdom

11.10 In 1968 the United Kingdom Criminal Law Revision Committee recommended that, although the convention of keeping jury room deliberations confidential should continue to be observed, legislation to protect the secrecy of the jury room was not desirable.[34] In June 1979 Jeremy Thorpe, a prominent political figure, was tried with three others on a charge of conspiracy to murder a former male model who claimed to have had a homosexual relationship with him. The trial lasted six weeks. After deliberating for 52 hours, the jury acquitted each of the four accused men.[35] About one month later, the *New* Statesman magazine published an account of the jury's deliberations in the case based on information given to journalists by one of the jurors.[36] The information had been volunteered by the juror who felt that some aspects of the trial should be made public. The Attorney-General applied to the Divisional Court for an order that the publishers of the magazine were in contempt of court on the ground that the article interfered with the due administration of justice because it tended to imperil the finality of jury verdicts and thereby to diminish public confidence in the general correctness and propriety of such verdicts and to affect adversely the attitude of future jurors and the quality of their deliberations. The court held that mere disclosure of the secrets of the jury room was not necessarily a contempt although It was capable of being a contempt.[37] Whether a disclosure was in fact a contempt had to be judged in the light of the circumstances in which the publication took place. The court regarded it as relevant in this case that the decision to publish was made with the best intentions (following legal advice) and that the trial was over. No special circumstances warranting the condemnation of the publication as contempt of court had been made out.[38]

11.11 In the *New Statesman* Case, the court observed that the Attorney General was fully justified in invoking the law of contempt

> . . . in view of the apparently diminishing respect for the convention of observance of jury secrecy and the risk of escalation in the frequency and degree of the disclosures.[39]

Following this decision, the government moved quickly to introduce legislation to preserve the confidentiality of jury deliberations under threat of gaol sentences of up to two years' duration.[40] This legislation provides that it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations. However, it is not a contempt for a juror to disclose such particulars in the course of the trial itself for the purpose of enabling the jury to arrive at their verdict, or in any subsequent proceedings for an offence alleged to have been committed in relation to the jury. The legislation is alarmingly broad in Its terms and has been criticised as a Draconian provision.[41] The form In which the legislation is expressed would even allow the prosecution of a juror for discussing the jury's deliberations with his or her spouse. It also prevents research into the workings of the jury system. This feature of the legislation has already had its shortcomings revealed. It apparently frustrated the work of the Fraud Trials Committee chaired by Lord Roskill.[42]

C. The Law in Canada

11.12 The Canadian Criminal Code provides that it is an offence for a juror to disclose any information relating to the "proceedings" of the jury when it is absent from the courtroom.[43] It is said that the enactment of this provision

was prompted by the publication in the press of an article based on interviews with jurors who had been discharged after they had failed to agree upon a verdict.[44] There is only a limited exception to the general rule. This exception permits disclosure for the purpose of investigating an alleged offence by a juror. The Canadian Law Reform Commission has proposed that the strictness of this provision be relaxed so that, among other things, effective research into the operation of the jury system may be carried out.[45]

D. The Law in the United States

11.13 The rule of law established by Lord Mansfield's judgment in *Vaise v Delaval*[46] was distinguished by the Iowa Supreme Court when it considered this issue in 1866.[47] In that case the court determined that the evidence of jurors may be admitted where the evidence is tendered to prove a matter "which does not essentially inhere in the verdict itself"[48] According to this rule, evidence of undue influence by jurors on their fellows, mistaken interpretations of evidence and the process of reasoning would not be admitted. But evidence of improper influences by people outside the jury or of observable impropriety within the jury would be admitted. The distinction, for the purposes of the rule of evidence, between external and internal influences in the jury's deliberative process was later endorsed by the United States Supreme Court.[49] It has since been incorporated in the federal rules of evidence.[50] It can be seen that the traditional rule which preserves the secrecy of jury deliberations has been applied less strictly in the United States. The same liberal approach is evident in the United States law and practice regarding jury disclosures generally.

11.14 We refer below (para 11.28) to a number of examples In the United States where former jurors have made public disclosures of the jury's deliberations.[51] These examples show that there is no restriction in the United States on the right of a juror to divulge the secrets of the jury room. There are certain restrictions placed on the right of the media to obtain information from jurors but these are limited by reason of the First Amendment to the United States Constitution. A law or rule of court denying the media the right to interview jurors Is unconstitutional.[52] Interviewing of jurors after the verdict is a common practice. At least 26 federal districts have made rules of court which give the court the right to supervise juror interviews.[53] In order to avoid threats to the administration of justice, judges are entitled to restrict the time and place of juror interviews. They cannot, however, forbid them.

E. The Law in Victoria

11.15 In the same way that particular cases In England and Canada inspired legislation regarding jury disclosures, the Victorian Government reacted to the *Gallagher* case by enacting new rules designed to prevent disclosures by jurors after a trial has finished. In that case the jury had been asked to consider its verdict on an indictment charging a prominent member of the community with 43 offences. The trial had lasted some months. After eight days deliberation the accused person was convicted of 23 offences and acquitted of the other 20. A national newspaper published a story based on disclosures said to have been made by one member of the jury.[54] In it she claimed to have been forced to reach a verdict with which she did not agree. The Victorian Parliament moved quickly to implement legislation to restrict such disclosures in future.[55]

11.16 Three specific offences were created. Section 69A(1) of the Juries Act 1967 (Vic) now makes it an offence for a person to "publish to the public any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of a jury"[56] Section 69A(2) makes it an offence for a person to solicit or obtain such information. Section 69A(3) prohibits a former member of a jury from disclosing such information if that person has reason to believe that "it is likely to be or will be published to the public" It is expressly provided that the publication of any information about the deliberations of a jury which does not identify a juror or the relevant legal proceedings is not prohibited.[57]

III. JURY SECRECY: THE ARGUMENTS FOR AND AGAINST

A. Arguments in Favour of Jury Secrecy

11.17 Mr Justice McHugh of the New South Wales Court of Appeal summarised the relevant arguments in a comprehensive paper recently delivered to a seminar attended by lawyers and journalists. He cited the following as being the grounds for preserving the traditional rule of jury secrecy first put forward by Lord Mansfield.

Without the exclusionary rule there would be serious inroads into the freedom of speech of jurors in the jury room and their candid discussion of the issues would be discouraged.

Secrecy facilitates decision making because it protects jurors from outside influences.

The exposure of jurors' deliberations would undermine public confidence in the system and bring about the end of trial by jury.

Unless jurors are shielded from unwanted scrutiny, people will be reluctant to serve on juries.

The secrecy rule is necessary to ensure the finality of the verdict, whether that be a verdict of guilty or not guilty.

The secrecy rule protects the community satisfaction which flows from a unanimous verdict. Jurors would hesitate to reach unanimity if their compromises may be publicly exposed.

Secrecy enables juries to bring in verdicts without fear of community reaction against an unpopular verdict. Where the reasons for a decision are not known, unpopular verdicts cannot be effectively challenged.

Disclosure by jurors may be unreliable and lead to a misunderstanding of the verdict. Human recollection of what was said or discussed in situations of drama, conflict or emotion is always suspect.

Secrecy protects the privacy of the individual jurors and prevents their harassment.

The secrecy rule protects jurors from pressure to explain the reasons for their verdict.

The secrecy rule prevents vendettas against jurors and their families by accused people and their relatives and associates.

The rule preserving secrecy reduces the strain on jurors whose work may be subjected to intense public scrutiny In cases involving important issues or public figures.

B. Arguments Against the Secrecy Rule

11.18 In the same paper Mr Justice McHugh set out some of the arguments in favour of lifting the veil of secrecy. Three of these arguments should be emphasised. Firstly, disclosure may allow the general public, legal researchers or law reform agencies to see how the jury really functions. This will give greater understanding of the way in which the system of criminal justice works and, more importantly, reveal its strengths and weaknesses. For example, the survey which we conducted by inviting jurors who had actually participated in trials to complete a questionnaire have enabled us to draw a number of conclusions about the effectiveness of the jury system in New South Wales. These have allowed us to identify certain areas appropriate for reform and to formulate our recommendations accordingly.

11.19 Secondly, it may be through such means that specific injustices are brought to light. Whilst evidence from this source may be inadmissible in an appellate court asked to overturn a conviction, it may be relevant to the question of executive clemency with regard to sentence or to a governmental decision whether or not to initiate an inquiry.[58] In the same way, disclosures of this kind may generate such public pressure as to induce otherwise reluctant governments to take steps to reconsider verdicts.[59]

11.20 Thirdly, a juror who speaks out about his or her experiences (whether to report on a favourable personal experience or to bring to light a perceived injustice) is simply exercising his or her right to freedom of speech. The existence of such a right of itself requires no justification, although it may be liable to eclipse In the face of other values or principles if they are of sufficient weight and cogency to prevail.

11.21 Other arguments in favour of permitting jurors' disclosures cited by Mr Justice McHugh were:

Disclosure will make juries more accountable by making the jury system subject to reasonable scrutiny. The public is entitled to have the jury know that the public is watching its performance.

Disclosure of the workings of the jury system may reveal inadequacies about that system which can lead to worthwhile reforms.

The publication of a juror's experience through disclosure may have a valuable educative effect on the general public.

11.22 We recognise that the arguments for and against disclosure must be weighed in the balance. The juror who speaks out will almost certainly disclose information which, whether accurate or not, may be embarrassing to other jurors who spoke or acted in a manner which excited the criticism of the vocal juror. In this sense the exercise by one juror of the right to speak will involve the infringement of the right to privacy of another juror. One can infer from the silence of the majority of jurors, at least at the public level, that they wish to keep details of this experience private. Insofar as the jurors who speak out are likely to reflect criticism of the attitude if not the verdict of the jury as a collective body, the likelihood of this intrusion being hurtful is increased.

11.23 In the immediate aftermath of the publicity given to statements made about the jury in the Murphy trial and statements made by the jurors themselves, applications by prospective jurors to be excused trebled.[60] We can safely conclude that, to many jurors. the fear of others publicly discussing what might be said and done would be a disincentive to jury service. More significantly, it could be a disincentive to speak with frankness and candour in the jury room. This factor is important but must not be exaggerated, because the very threat of publicity may itself be an incentive to act responsibly.

IV. SPECIFIC RECOMMENDATIONS

A. Soliciting Information and Harassment of Jurors

Recommendation 91: The Jury Act 1977 should be amended to provide that it is an offence to solicit or harass a juror or former juror for the purpose of obtaining for publication Information regarding statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of a jury.

11.24 The recent Victorian legislation has identified soliciting of Information from jurors as being a particular activity which should be prohibited.[61] This practice has been frowned upon by the courts.[62] We consider that the legitimate interests of the public in obtaining information about the conduct of criminal cases and the workings of the criminal justice system generally should not prevail over the right to privacy and freedom from harassment which should be enjoyed by individual jurors. Once a juror has completed his or her task in a trial, the juror should be able to resume a normal life free from further interference. We do not regard this recommendation as being a restriction on the freedom of the press to publish information which it considers is in the public interest. There is nothing in this rule which prohibits publication of material which is given to the press by a juror on a voluntary basis. A juror who is anxious to make public an issue which he or she in conscience regards as important, would not be prevented from doing so.

B. Research on the Jury System

Recommendation 92: Any amendments to the Jury Act 1977 which have the effect of placing any restriction upon former jurors disclosing information should expressly reserve to the Attorney General the power to authorise the conduct of research projects involving the questioning of former jurors about their jury room experiences.

11.25 Several commentators have noted that legislative restrictions on jury disclosures prevent legitimate researchers discovering the way In which juries operate. The English legislation, as has been noted, is in such broad terms as to prevent scientific research. The Fraud Trials Committee, under the chairmanship of Lord Roskill, published Its final report in January 1986.[63] making several references to the fact that the work of the Committee was hampered by the provisions of the Contempt of Court Act 1981.[64] The Committee had been

anxious to discover whether juries had the ability to understand fraud cases involving complex issues and technical evidence.

> The ideal method of attempting to address the issue would be to question jurors on actual cases. However, research of this kind is effectively ruled out by the Contempt of Court Act 1981. Even though the restrictions in that Act designed to preserve the confidentiality of juries' deliberations are arguably not so all-embracing as to rule out all communications with jurors on certain aspects of their task, the Committee did not wish to countenance any research in this field which would be against the spirit of the law. It was necessary therefore to consider other, less than ideal, options.[65]

11.26 In Canada the Law Reform Commission has suggested that similar provisions in the Canadian Criminal Code [66] be amended so as to allow juries to disclose information for the purpose of furthering scientific research about juries.[67] Professor Glanville Williams has expressed the hope that if it were found necessary to make disclosures of jury deliberations a criminal offence, then disclosures for the purpose of legitimate research should be exempt.[68]

C. The Sale of Jury Secrets

> **Recommendation 93: The Jury Act 1977 should be amended to provide that it is an offence for a person who is serving or has served on a jury to seek or obtain a financial advantage by disclosing information regarding the jury's deliberations in a manner which identifies the particular trial.**

11.27 This proposal is designed to overcome some of the dangerous and undignified practices which are apparently allowed to flourish in the United States. A few examples will illustrate the kind of conduct we are seeking to prevent.[69]

> Claus von Bulow was tried in Rhode Island on a charge of attempting to murder his wife by administering an overdose of drugs to her. He was convicted at his first trial but appealed and was retried. The retrial received nationwide media coverage. Some television networks used jurors from the first trial to give commentaries on the decisions of the court in the second trial.
>
> A large manufacturer of tobacco products has been sued on a number of occasions by the families of people who claim to have contracted lung cancer by smoking cigarettes. Only one of these actions has so far been heard by a jury but it is expected that many will follow. Some of the jurors in the first trial have been hired as consultants for subsequent cases.
>
> In December 1985 litigation which followed a take over agreement between two large oil companies concluded when a Texas jury awarded one of the companies over $A15 billion In damages. The case has naturally caused widespread interest, particularly within the business community. Jurors have been appearing on television and radio programs to discuss the case and one has plans underway to write a book entitled "The $10 Billion Jury".
>
> In the trial of the well known car maker, JohnDe Lorean, on drug charges, one of the jurors appeared on a morning television program during the trial to discuss the progress made In the trial so far. As it happened, nothing was said which amounted to grounds for discharging the jury and declaring a mistrial. The same juror has apparently appeared on the same program since to publicize the book he is writing about the case.

11.28 We are unaware of any case of a juror in New South Wales or elsewhere in Australia having been paid to disclose information regarding the jury's deliberations although we would not be surprised if this had occurred. There have been examples of former jurors discussing cases in which they participated. These have usually involved uncontroversial issues or statements of conscience by the individuals involved. We consider that the kind of conduct which is apparently tolerated in the United States is, apart from being undignified, highly dangerous and likely to bring the system of trial by jury into disrepute. It is also likely to have a seriously damaging effect on both the quality and the integrity of the decision making processes of juries. We note, moreover, that it has been suggested that a juror who sells jury secrets, as opposed to one who merely discloses them, may be guilty of a criminal contempt at common law.[70]

11.29 When ever jurors are offered payment for material which has traditionally been regarded as confidential information, there is a risk that they will tailor the information to suit the perceived interests of the purchaser. If, for example, there is media interest in a particular trial, a juror may deliberately sensationalise the information provided in order to make a better and thus more lucrative story. Offering money to a juror in advance for Information to be provided after the trial is very likely to affect adversely the quality of that juror's participation in the trial and the deliberations.

D. Jury Disclosures During Trial

> **Recommendation 94: The Jury Act 1977 should be amended to provide that it is an offence for a person who is a member of a jury in a criminal trial to disclose during the trial any information regarding the deliberations of the jury unless that disclosure is made for the purpose of reporting to the judge an irregularity affecting that particular jury or in answer to a question asked by the judge.**

11.30 Indiscussionsonthesubjectofjurydisclosure,thequestionofdisclosures made during the trial is largely ignored. This can be explained by the fact that it has been presumed that disclosures of this kind would amount to contempt of court. This presumption is probably correct, particularly In the light of the conventional practice of judges in New South Wales to direct juries at the end of each day and before their ultimate discharge that they should not discuss the case with any person who is not a member of the jury. A disclosure is clearly a breach of that order and for that reason is probably a contempt of court. Having said that, it should also be said that we know of no case in which a juror has been charged with contempt of court in these circumstances. The current law was stated with firm conviction by the Director of Public Prosecutions, Mr I Temby QC.

> During the course of a trial the jury generally, and individual jurors, must be considered sacrosanct. It would be a grave abuse for any person-whether from the prosecution, the defence, a witness, or a journalist - to do anything while a trial is pending which could have any effect upon the jury verdict. For present purposes appearances matter almost as much as actuality does, and any journalist who had any dealings, direct or indirect, with a juror between arraignment and discharge of the jury could expect to be met with severe consequences. To say this is to state the obvious.[71]

Mr Temby went on to note that conduct of this kind could involve the commission of the offences of embracery, attempting to pervert the course of justice or contempt of court.[72] The Commission considers that, notwithstanding the range of offences which appears to be available to meet this type of conduct at present, it should be made clear that it is expressly prohibited. Whilst we share Mr Temby's view as to the current law, we consider that there is a benefit to be obtained in the present climate by removing any doubts there may be about the law in this area.

E. Jurors' Disclosures in Other Contexts

> **Recommendation 95: Apart from the changes to the law proposed in Recommendations 91, 92, 93 and 94, there should be no immediate action taken relating to the disclosure by Jurors of information about their deliberations.**

11.31 One issue which our recommendations on Jurors' disclosures have not addressed is that of post-trial voluntary disclosures by Jurors where there is no question of financial advantage. Should these types of disclosures be prohibited, either totally or in certain circumstances? In the short time available to the Commission for consideration of this aspect of the jury system, the members of the Commission have discussed the matters summarised In this chapter at considerable length. However, we have decided not to come to a conclusion on this final question at this stage of the Criminal Procedure reference. This question has really only become a real issue in the past few months. It was so recent at the time our Discussion Paper was published that it was not canvassed at any length there. Accordingly, we have not had the benefit of full community consultation on the question. The complexity of the matter and the public policy issues which it involves lead us to conclude that we would benefit from the opportunity to consult further on this issue. We hope that the analysis contained in this chapter will itself prompt further dispassionate discussion.

11.32 We are satisfied that the values and interests identified as arguments in favour of more strictly controlling Jurors' disclosures are significant. Some of us, as presently advised, believe that they outweigh those values

cited in support of the status quo. We are, however, unanimous in our opinion that there should not be an urgent and ill-considered response to this subject. Law reform agencies have been criticised in the past for not giving full consideration to each other's views and for overlapping of endeavours. The Australian Law Reform Commission has been giving the issues discussed in this chapter its detailed attention for almost 3 years as an aspect of its reference on contempt. We think it appropriate that this Commission should await the publication of that Commission's report before expressing our own views on these subjects. Our future recommendations will also be informed by the experience in Victoria with its recently enacted legislation.

FOOTNOTES

1. The *Chamberlain, Gallagher, Maher* and *Murphy* trials have all received publicity of this kind in New South Wales. In addition, in Western Australia the case of Michael comes into the same category.

2. A R Blackshield "After the Trial: The Free Speech Verdict" 59 *Law Institute Journal* (Vic) 1187; Mr Justice J H Phillips "Jury Room Disclosures Erode The System" 59 *Law Institute Journal* (Vic) 1330; "Journalists and Jurors: Contempt of Court" seminar conducted by the Media Law Association of Australia, Sydney, 12 February 1986; J G Starke gC "The Confidentiality and Sanctity of Jury-Room Deliberations" (1986) 60 *Australian Law Journal* 56.

3. Juries (Amendment) Act 1985 (Vic).

4. E Campbell "Jury Secrecy and Impeachment of Jury Verdicts" (1985) 9 *Criminal Law Journal* 132 and 187.

5. *Halsbury's Laws of England* (4th ed) Vol 26 para 647.

6. *Ellis v Deheer* [1922] 2 KB 113 at 118.

7. *Re Mathews and Ford* [1973] VR 199 at 213; *R v Armstrong* [1922] 2 KB 555 at 569; *Burnside v R* [1963] Tas SR 174 at 175; *R v Gallagher* (unreported) Supreme Court of Victoria, Full Court, 7 October 1985.

8. In "Journalists and Jurors: A View from the Gallery" a paper delivered to a seminar conducted by the Media Law Association of Australia, Sydney, 12 February 1986, Mr Dan O'Sullivan, Editor-in-Chief, West Australian Newspapers Ltd., expressed the view that harassment of Jurors should "certainly [be] an offence" but that there should be a defence of public interest.

9. For example *Ellis v Deheer* [1922] 2 KB 113; Attorney-Generat *v New* Statesman and Nation Publishing Company Ltd [1981] 1 QB 1 at 11; United Kingdom Departmental Committee on Jury Service Report (Cmnd 2627 1965) para 355; *R v Dyson* [1972] OR 744 at 751, 753; Re Donovan's Application [1957] VR 333 at 337.

10. *Re* Donovan's Application [1957] VR 333 at 336, 337; *Ellis v Deheer* [1922] 1 KB 113 at 118.

11. *Attorney General v Leveller Magazine* (1979) AC 440 at 449 per Lord Diplock.

12. *Attorney General v New Statesman and Nation Publishing Co Ltd* [1981] 1 QB 1 at 10.

13. Mr Justice M H McHugh "Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt", paper delivered to a seminar conducted by the Media Law Association of Australia, Sydney, 12 February 1986.

14. *R v Gallagher* (unreported) Supreme Court of Victoria, Full Court, 7 October 1985.

15. *Ibid.*

16. Draft 10 February 1986 to be published in March 1986.

17. Id p49.

18. I Temby QC “Journalists and Jurors: Contempt of Court”, paper delivered to a seminar conducted by the Media Law Association of Australia, Sydney, 12 February 1986.

19. *Registrar of the Court of Appeal v Willesee and Others* (unreported) Supreme Court of New South Wales, Court of Appeal, 20 December 1985.

20. *Id* at 32 per Hope JA.

21. The rule has its origin in the judgment of Lord Mansfield in *Vaise v Delaval* [1785] 1 TR 11.

22. For example *R v Neal* [1949] 2 KB 590 at 594.

23. *Shoukatallie v The Queen* [1962] AC 81; *Re Mathews and Ford* [1973] VR 199: *R v Gallagher* (unreported) Supreme Court of Victoria, Full Court, 7 October 1985.

24. *Perdriau v Moore* (1888) 9 LR (NSW) 143.

25. See cases noted in Campbell “Jury Secrecy and Impeachment of Jury Verdicts” (1985) 9 *Criminal Law Journal* 132 p 148 n96.

26. Phillips, note 2 p1330.

27. *Re Mathews and* Ford [1973] VR 199 at 211.

28. (1972) 46 *Australian Law Journal* 369.

29. Note 4 p201.

30. Note 13 p19.

31. Canadian Law Reform Commission *The Jury in Criminal Trials* (WP27, 1980) pp149-150.

32. Jury Act 1977 s68.

33. It has only very recently become the practice of some judges to advise Jurors against revealing any part of the jury’s deliberations after they have been discharged. Mr Justice McHugh, note 13, note 38 to his paper.

34. Criminal Law Revision Committee Tenth Report *Secrecy of the Jury Room* (1968 Cmnd 3750).

35. A Waugh *The Last Word* (1980) pp236-237.

36. P Chippindale and D Leigh *New Statesman* 27 July 1979.

37. *Attorney General v New Statesman* [1981] 1 QB 1.

38. Campbell, note 4 p135.

39. *Attorney-General v New Statesman* [1981] 1 QB 1 at 7.

40. Contempt of Court Act 1981 (UK) s8.

41. Temby, note 18. See also Campbell, note 4 p136; McHugh, note 13.

42. *Fraud Trials Committee Report* (HMSO, 1986) para 8.10.

43. Criminal Code 1970 (Canada) s576.2.

44. Campbell, note 4 p136.

45. Law Reform Commission of Canada, *The Jury* (Report 16, 1982) recommendation 37.1.

46. (1785) 1 TR 11.

47. *Wright v Illinios and Mississippi Telegraph* Co 20 *Iowa* 195 (1866).

48. 20 Iowa 195 at 210, noted in Campbell, note 4 p187.

49. *Mattox v United* States 146 US 140 (1892).

50. Federal Rules of Evidence, Rule 660(b) provides:

> Upon any inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

51. See generally J Perrett "Jurors Find Fame and Fortune in US" *Weekend Australian* 4-5 January 1981 pl3.

52. Note 13; *In Re the Express and News Corporation and Clift* (1982) (5th Ctrc) 695 F2d 807 at 808, 809.

53. "Post Trial Juror Interviews by the Press: The Fifth Circuits Approach" 62 *Washington University Law Quarterly* 783 p786.

54. G Brooks "A Gallagher Juror's Story" *National Times* 9 August 1985.

55. Juries (Amendment) Act 1985, assented to on 10 December 1985.

56. The words are the same as those used in the Contempt of Court Act 1981 (UK).

57. Juries Act 1967 (Vic) s69A(4).

58. Crimes Act 1900 s475; Criminal Appeal Act 1912 s26.

59. *Royal Commission Report Concerning the Conviction of Edward Charles Splatt* (South Australia, 1984).

60. Personal communications with judges and representatives of the Office of the Sheriff.

61. Juries Act 1967 (Vic) s69A(2).

62. *Prothonotary v Jackson* [1976] 2 NSWLR 457.

63. Fraud Trials Committee Report (HMSO, 1986).

64. Appendix A para 7 pp201-202; see also para 8.10 p135 and a separate publication of the Fraud Trials Committee "Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies". In the Foreword Lord Roskill notes the restrictions placed upon the work of the Committee by the Contempt of Court Act.

65. Appendix A para 7 pp201-202.

66. Criminal Code 1970 (Canada) s576.2.

67. Law Reform Commission of Canada *The Jury in a Criminal Trial* (WP 27, 1980) p42.

68. *The Proof of Guilt* (3rd ed 1963) p270.

69. All examples are taken from J Perrett note 51.

70. McHugh, note 13 p9.

71. Temby, note 18.

72. *Ibid.*

Appendix A - People who have Assisted the Commission

J Ackery, Justice of the Peace.
P Adey, Legal Aid Commission of NSW.

I B Barnett, NSW Attorney General's Department.

P Barnett, Office of the Solicitor for Public Prosecutions. M Bersten, Lecturer, Faculty of Law, University of NSW. R 0 Blanch QC, Crown Advocate for NSW.

D Brown, Senior Lecturer, Faculty of Law, University of NSW.

L C Brown, Orange, NSW.

M Buegge, Bruce Rock, WA.

P Burgess, Faculty of Law, University of NSW.

T Cashin, Office of the Sheriff of NSW.

M Chesterman, Commissioner, Australian Law Reform Commission.

D Colagiuri, NSW Parliamentary Counsel's Office.

N R Cowdery, Sydney Bar.

C B Craigie, Sydney Bar.

Criminal Law Committee, NSW Bar Association.

G Cusack, Public Defender.

B M Dalley, Associate to Mr Justice Maxwell.

E Davidson, Associate to Judge Mathews.

B H K Donovan, Sydney Bar.

J R Dunford QC, Sydney Bar.

M Findlay, Bureau of Crime Statistics and Research.

S Findlay, Jannali, NSW.

S Flood, Public Defender.

F Gaffy QC, Queensland Law Reform Commission.

M G Gaudron gC. Solicitor General for NSW.

A J B George, Research Division, NSW Attorney General's Department.

J L Glissan QC, Sydney Bar.

F J Gormly QC, Sydney Bar.

B J Gross QC, Sydney Bar.

T Guzzo, Lindfield, NSW.

J B Haigh, Hunters Hill, NSW.

Professor R Harding, Director, Australian Institute of Criminology.

N Harrison, Office of the Solicitor for Public Prosecutions.

B Hart, Panania, NSW.

R Heazlewood, Legal Aid Commission of NSW.

P J Hidden QC, Deputy Senior Public Defender.

K Horler, NSW Council for Civil Liberties.

W D Hosking QC, Public Defender.

R N Howie, Director, Criminal Law Review Division.

T R Hoyle, Crown Prosecutor.

J Hunter, Lecturer, Faculty of Law, University of NSW.

M L Hunter MP.

P A Johnson, Sydney Bar.

T Katsigiannis, Secretary, Free Speech Committee.

T J Keady, Research Division, NSW Attorney General's Department.

T Kelly, Deputy Director, Legal Aid Commission of NSW.

Dr M I Large, Astrophysics Dept, Sydney University.

Law Society of NSW.

Legal Aid Commission of NSW.

Mr Justice Lee, Supreme Court of New South Wales.

D M Lennon, Sheriff of NSW.

S Littlemore, Sydney Bar.

G Lowe, West Monash, Tasmania.

C A Luland QC, Deputy Senior Public Defender.

C J Lyons, Public Defender.

M E McEwen, Toorak, Victoria.

I McClintock, Criminal Law Review Division.

M A McL MacGregor QC, Solicitor General's Chambers.

M W McMahon, Oatley, NSW.

J Marsden, Marsdens, Solicitors and Attorneys.

G Masters, Office of the Sheriff of NSW.

Mr Justice Maxwell, Supreme Court of NSW.

D Melham, Legal Aid Commission of NSW.

T Molomby, Director, Australian Broadcasting Corporation.

M S Moon, Associate to Mr Justice Hunt.

His Honour Judge J A Moore, District Court of NSW.

M Motza, Department of Justice, Colorado, United States.

D Neal, Senior Lecturer, Faculty of Law, University of NSW.

C R Newham, Legal Aid Commission of NSW.

S R Norrish, Public Defender.

NSW Bar Association.

NSW Council for Civil Liberties.

NSW Society of Labor Lawyers.

T Nyman, Chairman, Criminal Law Committee, NSW Bar Association.

H F Purnell AM QC, Sydney Bar.

M Richardson, Assistant Director, Legal Aid Commission of NSW.

B L Roach, Office of the Solicitor for Public Prosecutions.

Mr Justice Andrew Rogers, Supreme Court of New South Wales.

D F Rofe QC, Sydney Bar.

C Rose, Associate to His Honour Judge Thorley.

E J Shields QC, Senior Public Defender.

M F Sides, Public Defender.

C Simpson, NSW Council for Civil Liberties.

His Honour Judge Staunton CBE, QC, Chief Judge, District Court of New South Wales.

Justice Paul Stein, NSW Land and Environment Court.

Sir Laurence Whistler Street KCMG, Chief Justice of NSW.

J R Sulan, Deputy Crown Prosecutor, Hong Kong.

B G Tennant CD, Subiaco, WA.

His Honour Judge B R Thorley, District Court of NSW.

Dr D Wetherburn, Bureau of Crime Statistics and Research.

P J Webb, Deputy Secretary, NSW Attorney General's Department.

D Weisbrot, Senior Lecturer, Faculty of Law, University of NSW.

Dr D J Wheeler, Cronulla, NSW.

D Williams, Office of the Commissioner for Public Complaints.

J Willis, Senior Lecturer, Faculty of Legal Studies, La Trobe University.

G D Woods QC, Sydney Bar.

Mr Justice Yeldham, Supreme Court of NSW.

G Zdenkowski, Commissioner, Australian Law Reform Commission.

Appendix B - Costing of Proposal to Increase Jury Fees After First Week of Service

From 1 June 1984 to 31 May 1985, 142,471 people were summoned for jury service. As records are not kept of the numbers of panels cancelled, of people excused or of the proportion of people attending court who actually serve on juries, assumptions have been made based on the limited information which is available on juries in the outer metropolitan courts. These assumptions have been checked against even more limited information available on juries in Sydney and have been found to correlate well.
On the assumption that about 40% of persons summoned are advised in advance not to attend (their panels are cancelled) (1): 85,483 are required to attend.

On the assumption that 25% of people summoned are excused by the Sheriff or simply fail to attend (2): 64,112 actually attend.

On the assumption that 20% of people who attend court are not used to form jury panels (3): 51,290 attend and are formed into jury panels. Those 12,822 people who attend but are not required are paid, in most cases, only $23.00 each: cost = $294,906.00. As the Commission does not propose to increase the half day fee this cost will remain constant.

On the assumption that only 30% of people forming jury panels actually serve on juries (4): 15,388 people actually serve on juries. The remaining 35,902 people either submit successful personal applications to the judge to be excused, are balloted and challenged or are not balloted for a jury. They are, In most cases, paid for only a half days attendance. Again this cost will remain a constant. The cost of paying those 35,903 people $23.00 each would be $825,769.00.

Table A. 1 shows the proportions of total serving jurors who serve in trials of various lengths (5).

Trial Length (Days)	% of Jurors	Total Jurors	Juror Days
1	20.0	3077	3077
2	37.0	5693	11386
3	23.0	3539	10617
4	10.0	1539	6156
5	2.0	308	1540
6	2.0	308	1848
7	2.0	308	2156
8	1.0	154	1232
9	0.5	77	693
10	1.0	154	1540

11	0.5	77	847
12	0.5		924
14	0.5	77	1078
Totals	**100%**	**15,388**	**43,094**

Total juror days on these figures would be 43,094 days-excluding days spent on trials longer than 14 days. If all Jurors were to be paid $87. 10 per day, as proposed in our Discussion Paper (para 5.22), the cost of paying serving Jurors would be $3,753,487.00.

However, our recommendation is that the jury fee should be $46.00 per day for the first five days of service and $87.10 for each day of service thereafter. The comparative costs on the 1984-1985 total of Jurors summoned and the assumptions stated are set out in Table A.2.

Table A.2

Trial Length (Days)	Juror Days	Total Cost Current Fees $	Total costs Proposed $
1	3077	141,542	141,542
2	11386	523,756	523,756
3	10617	488,382	488,382
4	6456	284,715	283,176
5	1540	71,456	70,840
6	1848	86,548	97,667
7	2156	101,640	124,494
8	1232	58,366	75,660
9	693	32,956	44,537
10	1540	73,458	102,487
11	847	40,887	57,950
12	924	45,045	64,657
13	-	-	-
14	1078	53,361	78,070
Total	**43,094**	**2,002,112**	**2,153,218**

The cost of the Commission's recommended fee increase would add just under 8% on top of the current cost.

FOOTNOTES

1. Figures for Outer Metropolitan Courts supplied by the Sheriff's Office and published in *Review of the Allocation, Utilisation and Funding of Juries* (NSW Attorney General's Department August 1985) Annexure 2.

2. *Ibid.*

3. *Ibid.*

4. *Ibid.*

5. NSW Law Reform Commission *Survey of Court Procedures* 30 September 1985 to 13 December 1985.