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Production credits

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Internal typesetting:
Lindal Mackie Design

Subscription details

Within Australia—$40.00
Overseas—$60.00

Price quoted for two editions, including GST and postage.
Payment should be made in Australian dollars only.

ISSN 0313–153X
Print Post No PP243459100081

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Comment

Professor David Weisbrot,
President, ALRC

Few western institutions have been as enduring—or more often re-invented—than the system of trial by 'a jury of one's peers'.

Where the *Laws of William the Conqueror* in 1066 called for trial by battle or ordeal to determine a serious charge,[1] by 1164, during the reign of Henry II, the Constitutions of Clarendon provided that

> 'Laymen ought not to be accused unless through reliable and legal accusers and witnesses in the presence of the bishop, in such wise that the archdean do not lose his right, nor any thing which he ought to have from it. And if those who are inculpated are such that no one wishes or dares to accuse them, the sheriff, being requested by the bishop, *shall cause twelve lawful men of the neighbourhood or town to swear in the presence of the bishop that they will make manifest the truth in this matter, according to their conscience.*'[2] [emphasis supplied]

Historians traditionally have traced the foundations of the jury system to the *Magna Carta* in 1215, wherein it was written that

> 'No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, *except by the lawful judgment of his peers* or by the law of the land.'[3] [emphasis supplied]

Although some modern historians strongly question this link,[4] it is uncontroversial that the institution of the jury trial in criminal cases had been operating for some centuries in England before it was 'exported', with the other essentials of the common law, to the Dominions 'on the backs' of English settlers. The English *Bill of Rights* 1689 used language now substantially familiar to us, specifying (among other things):

> 'That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;
>
> That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;
>
> That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.'[5]

Writing in the 18th century, Blackstone noted—in his characteristically elegant way—the critical importance of the jury system as a bulwark of democracy, protecting individuals against the might of the Crown and providing protections for liberty and property against the arbitrary or capricious exercise of power:

> 'Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown;

> who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that … the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.'[6]

The words and sentiments of these old documents are echoed in modern constitutions and international human rights instruments. For example, the Sixth Amendment to the United States *Constitution* (added in 1791) guarantees the right to 'a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed'.

The High Court of Australia noted, in *Cheatle v R*, that by the time of Federation in 1901, 'the common law institution of trial by jury had been adopted in all the Australian Colonies as the method of trial of serious criminal offences'.[7] This involved a political struggle in early New South Wales, given its status as a penal colony under military rule. Emancipated convicts pushed strongly for the introduction of jury trials, as a potent symbol that they had achieved the status of 'respectable citizens', while more conservative elements feared that a jury of emancipists would unduly favour accused persons, or even use their power to exact retribution against free citizens.[8]

Although the Australian *Constitution* (1901) is mainly concerned with the mechanics of federalism, and provides few other express protections for individual rights and liberties, s 80 provides that

> 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.'

In *Cheatle*, the High Court was concerned with issues about (a) 'the minimum requirements which must be observed to ensure that a jury in a criminal trial is adequately representative of the community'; and, especially, (b) with the traditional requirement that jury verdicts be unanimous. While some Australian states and territories have legislated to permit majority verdicts, the High Court interpreted s 80 as codifying the 'common law's insistence'—in cases dating back to 1387—upon unanimity, such that it is now 'an essential feature of the institution that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors'.[9]

As suggested above, the institution of the jury has reinvented itself over the centuries. Jury service in medieval England, and for many centuries thereafter, was limited to men—and landed gentry at that. Now, of course, there is a positive effort to achieve broad social representativeness, and a recent inquiry by the New South Wales Law Reform Commission (discussed in this issue) has considered whether accommodations should be made in order to include persons with significant visual or aural impairment.

In the early days, when accused persons were barred from speaking in their own defence and were unrepresented, jurors were critical to the fact-finding effort because they likely possessed local knowledge about the facts of the case or the character of the people concerned. However, we now require jurors to be completely impartial and disinterested, so that such local knowledge would be the basis for disqualification. Indeed, in most of the common law countries in Australia's region—such as Papua New Guinea, Fiji, Vanuatu, and the Solomon Islands—juries are not used in criminal trials because they are thought to be incompatible with traditional social organisation, which is said to privilege family, clan and tribal solidarity over abstract concepts of impartial justice.

In so many areas of contemporary life, we place a great premium on ease, speed and cost-efficiency. This often means replacing artisanship with mechanisation—replacing the carefully crafted timepiece, say, with the throwaway digital watch—and introducing expert systems, technology and technocrats. The modern imperative for efficiency has made substantial inroads on the availability of jury trials. Civil juries are a vanishing breed in Australia, and over recent years more and more criminal offences are triable summarily before a magistrate or before a judge alone (often requiring a waiver by the accused)—where, of course, the person has not accepted the incentives to plead guilty.

At its heart, however, the jury system is positively *designed* to serve as an obstacle to the smooth exercise of coercive state powers. Before any serious punishment can be imposed, we ask the prosecuting authority to present and explain, in lay terms, sufficient evidence to convince a panel of ordinary people, beyond reasonable doubt, that the accused person is guilty of the offence charged.

There is a countervailing social trend that may explain the extent to which we still cling to the jury trial in criminal cases—the strong desire for openness and accountability in our public institutions, and for opportunities for meaningful public participation. The personal perspectives of trial lawyers—Australian and American—provided in this issue make plain their respect for the ability of ordinary citizens to bring common sense and shared understandings to the proceedings, and ultimately to 'get it right'.

Although a quintessentially common law institution that was hitherto unknown to other justice systems, it is fascinating to observe that some civil law countries—notably Japan and Spain—recently have moved to introduce juries in serious criminal matters. In Spain, this has been part of a conscious effort to build legitimacy and popular support for the legal system in the wake of years of military dictatorship under the Franco regime.

As the articles in this issue of *Reform* highlight, there is still considerable room for debate and discussion about the nature, role and evolution of our own system.

Endnotes

1. Section 6; available at <www.yale.edu/lawweb/avalon/medieval/lawwill.htm>/. This applied where the serious allegation was made by a 'Frenchman' against an 'Englishman'; in the reverse case, the Frenchman could dispose of the matter through an 'informal oath'.
2. Section 6; available at <www.yale.edu/lawweb/avalon/medieval/constcla.htm>.
3. Section 39; available at <www.yale.edu/lawweb/avalon/medieval/magframe.htm>.
4. See, eg, J Thayer, 'The Jury and Its Development', (1892) 5 *Harvard Law Review* 249, 265; F Pollock and F Maitland, *The History of English Law Before the Time of Edward I* (2d ed, 1909), 173, n 3.
5. Available at <www.yale.edu/lawweb/avalon/england.htm>.
6. W Blackstone, *Blackstone's Commentaries on the Laws of England : in four books* (4th ed, 1899) Vol 4, 349.
7. *Cheatle v R* (1993) 177 CLR 541, para 4.
8. See I Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (2003); and D Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991).
9. *Cheatle v R* (1993) 177 CLR 541, para 6.

Commission news

Privacy Inquiry

The legal team working on the ALRC's review of Australia's privacy laws has completed an extensive round of public consultations in the lead-up to the release of a Discussion Paper, which is expected to be available in early September.

The team has held about 180 meetings with stakeholders in Sydney, Perth, Melbourne, Darwin, Adelaide, Brisbane, Canberra, Hobart and Coffs Harbour.

The ALRC also has received about 300 written submissions in response to the release of its issues papers—Issues Paper 31, *Review of Privacy* (released in October 2006); Issues Paper 32, *Review of Privacy: Credit Reporting Provisions* (December 2006) and a summary of both documents, *Reviewing Australia's Privacy Laws: Is Privacy Passé?* (December 2006).

In addition to the ALRC's main Privacy Inquiry Advisory Committee, three specialist sub-committees also have been established to assist the ALRC in developing recommendations for reform in the areas of health privacy, credit reporting and developing technology.

ALRC President, Professor David Weisbrot, attended the First Asia-Pacific Economic Cooperation (APEC) Technical Assistance Seminar on Cross-Border Privacy Rules in Canberra in January 2007 and will be attending a further seminar in Cairns in June.

Privacy public forums

The ALRC has held three public forums to gauge the general community's views about how well Australia's privacy laws are working and where changes are needed.

The first of these forums was held in Melbourne in February, on the theme of 'Consumers and Privacy'. A second public forum was held in the Sydney CBD in March, on the topic 'Is Privacy Good Business?'. The third forum—on the topic of 'Privacy, Health Services and Research'—was held in Coffs Harbour in April 2007.

All forums were well attended and comments and questions from the audience provided valuable input to the ALRC's inquiry.

Young people and privacy

The ALRC is keen to establish whether attitudes to privacy differ across generations, and to that end has held a series of youth workshops. The workshops have been for small groups of up to 12 young people, ranging in age from 15 to 21, and have been held in Perth, Brisbane and Hobart. More workshops will be held following the release of the Discussion Paper.

The 'Talking Privacy' website, specifically aimed at young people, has also been established. Accessible through the front page of the ALRC website, it provides a youth-oriented guide to the ALRC's Privacy Inquiry, links to other relevant sites and resources for legal studies teachers, as well as the opportunity to 'Have Your Say'.

The website received more than 1000 'hits' in its first month of operation.

Client Legal Privilege

Issues Paper 33, *Client Legal Privilege and Federal Investigatory Bodies* was released by the ALRC on 23 April. The team has now begun public consultations on the matters raised in the Issues Paper, meeting with key stakeholders in Sydney, Perth, Melbourne and Canberra.

A more comprehensive Discussion Paper, outlining proposals for reform, will be released in August this year, with a final report due by December.

Kirby Cup

The Kirby Cup Law Reform Competition, initially held every two years in conjunction with the Australasian Law Reform Agencies Conference, has now become an annual event, organised by the ALRC in association with the Australian Law Students' Association (ALSA).

Teams of two students must provide a written submission on a topic of law reform nominated by the ALRC. This year's topic is: 'Would further modification or abrogation of legal professional privilege in some areas be desirable in order to achieve more effective performance of Commonwealth investigatory functions?'

Based on the written submissions, three teams have been selected to participate in the oral advocacy round, which will be held in Canberra on 5 July 2007 during the Annual ALSA Conference. The teams advancing to the oral round are Peter Clay and Vanja Tekic (Murdoch University); Tom Smyth and Christian Strauch (ANU); and Susan Cirillo and Radhika Withana (University of Sydney).

The winners will have their names engraved on the perpetual Kirby Cup, which was donated by the Hon Justice Michael Kirby AC CMG, the Foundation Chairman of the ALRC. In addition, a summary of the winning entry will be published in the Summer 2007/08 edition of this journal.

Internship program

The ALRC's internship program continues to provoke strong interest. Five students were selected for semester one internships in 2007, including two students undertaking the University of NSW Public Interest Internship Program, for which the students obtain academic credit for their ALRC internship. The other students were from Macquarie University, the University of Sydney and the University of Technology, Sydney. All students commenced in March 2007 and continued a one-day per week internship to mid-June.

The ALRC has an ongoing internship arrangement with the University of Maryland and American University in Washington DC as part of their student summer externship programs (coinciding with the Australian winter). The ALRC received eight applications from students at the University of Maryland for the mid-2007 internship. Michael Ostroff, a first-year student at the School of Law in Baltimore, was successful and will commence his six-week internship in late June.

Commonwealth Association of Law Reform Agencies

The second biannual CALRAs conference will be held in conjunction with the Commonwealth Law Conference 2007, in Nairobi, Kenya in September 2007.

The Commonwealth Law Conference 'Governance, Globalisation and the Commonwealth' will be held from 9–13 September. The CALRAs conference 2007 will be a satellite meeting of the main conference, and will be held on 8–9 September.

The CALRAs conference is being organised by the host agency, the Kenya Law Reform Commission.

ALRC President Professor David Weisbrot—the Acting President of CALRAs—will be attending the conference, as will ALRC Commissioner Professor Rosalind Croucher and Executive Director Alan Kirkland.

Papua New Guinea visit

The ALRC takes a lead role in promoting the exchange of information and ideas among members of the international law reform community, and is able to use its staff and research capacity to provide assistance to other law reform agencies from time to time.

In February 2007, ALRC President Professor David Weisbrot and Research Manager Lani Blackman travelled to Port Moresby in Papua New Guinea, to visit the recently reformed PNG Constitutional and Law Reform Commission. They provided seven training sessions to Commissioners and staff of the Commission, covering topics such as research and writing, inquiry planning, consultation and media strategies and general management issues.

While in PNG, the President and Ms Blackman also met with—and attended a dinner at the residence of—the Australian High Commissioner to PNG, His Excellency Chris Moraitis. They also met with other PNG justice officials.

The President presented the First Vice Chancellor's Lecture for 2007 at the University of Papua of Guinea, Port Moresby, on the topic of 'The Challenges of Law Reform in Papua New Guinea'.

The visit concluded with an official dinner hosted by the PNG Constitutional and Law Reform Commission.

Past reports update

ALRC 104—*Fighting Words*

The ALRC's report *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104) was completed in July 2006, and tabled in September. While the 27 recommendations have been the subject of much comment, mostly positive, the Australian Government has not yet indicated whether or not the ALRC's recommendations will be accepted and implemented.

ALRC 102—*Uniform Evidence Law*

The Standing Committee of Attorneys-General (SCAG) is continuing to progress discussion on the implementation of the recommendations of *Uniform Evidence Law* (ALRC 102, 2005). The recommendations of the ALRC, the NSW Law Reform Commission and Victorian Law Reform Commission have received further support with the March 2007 release of a report by the Northern Territory Law Reform Committee giving full support for introduction of the uniform *Evidence Act* in the Territory.

ALRC 95—*Principled Regulation*

On 5 March 2007, the Treasury released a discussion paper entitled *Review of Sanctions in Corporate Law*, which reviews criminal, civil and administrative sanctions in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). The paper draws heavily on the work of the ALRC in *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, 2002), indicating that this report has had influence within government agencies despite the absence of a formal government response to the report.

Australian Government

Attorney-General's Department

Changes to the law affecting separating families and family dispute resolution practitioners

Changes to the *Family Law Act 1975*, which are being phased in from 1 July 2007, provide that a court will not be able to hear an application for a parenting order unless the parties file a certificate from a registered family dispute resolution provider. There are some exceptions to this requirement.

All family dispute resolution practitioners (except those authorised by the courts) are required to be included on the Family Dispute Resolution Register in order to issue valid certificates. Accreditation rules for family dispute resolution practitioners are also being introduced.

Family dispute resolution practitioners, family lawyers and others working in the family law system are encouraged to find out how the new requirements will affect them. For further information about the changes, go to **www.ag.gov.au/fdrproviders**

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TALKING PRIVACY

Have you ever been concerned that your privacy has been compromised?

Ever had problems getting information you need because of privacy laws?

The Australian Law Reform Commission (ALRC) is reviewing Australian privacy laws and will make recommendations to the Australian Government about ways in which they could be improved.

As part of this Privacy Inquiry, the ALRC wants to hear from people about their views and expectations of privacy. We also want to hear stories and experiences that may help us to understand where the law is working well and where it could be improved.

The ALRC is particularly keen to hear from young people on these issues. We are interested to see whether views differ across the generations, and where attitudes are consistent. This will help us formulate privacy laws that will reflect Australia's current and future needs.

Have your Say' go to alrc.gov.au and follow the links to the Talking Privacy website.

Juries reborn

By Mark Findlay

In most states and territories in Australia the impact of the jury on criminal justice is being systematically and radically eroded by the expansion of summary jurisdiction.[1]

Juries are persistently attacked for not understanding complex cases, not returning the appropriate verdicts, wasting resources through hung trials, and expressing the prejudices of a narrow franchise.[2] Why, then, is it that in civil law jurisdictions the role of the jury, particularly in the appeal process, is being expanded,[3] and in Japan much judicial and policy energy is being invested in the introduction of jury trial?

The answer to this question lies in many of the features of the jury that historically have endeared it to common law communities and have—even today—made it the last remaining feature of the criminal justice process in which the public at large has confidence.[4] Unlike police, lawyers, judges and corrective services personnel, jurors retain community respect and regard even in the face of significant political and media criticism. It is as if, despite suggestions that jurors don't comprehend the complexities of the trial and sometimes get it wrong, we would rather have the determination of guilt or innocence in the hands of our 'peers' than the legal professionals. The distrust of judicial discretion in particular—unfair and unfounded as it so often is—has even led to calls by senior judges such as the Chief Justice of NSW, to consider involving juries in the sentencing process.[5]

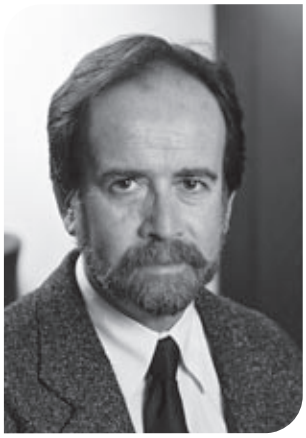
In other legal cultures the jury is either being re-introduced or experiments with jury trial for the first time are well underway. The justification for this trend confirms some of the fundamental reasons why the jury has resisted centuries of prolonged attack, to remain a fundamental indicator of fair trial practice.[6]

Justice legitimacy

Prior to its return to China, Hong Kong was gripped by a debate regarding the nature of its prevailing legal culture. Interestingly when surveyed just prior to 1997, Cantonese speaking citizens in Hong Kong confessed ignorance of what the jury did and had little personal knowledge of jury practice, but overwhelmingly supported its continued operation as a crucial feature of the common law, which they felt ensured good governance.[7]

Following the collapse of the Soviet Union, the Supreme Court of the Russian Federation was anxious to experiment with jury trial, in spite of the significant economic cost and the uncertainty about how members of the Russian public would respond to their responsibilities as jurors. Strong reasons for this were to identify a reformed approach to criminal justice, and to some extent link it back to the pre-soviet traditions, where a version of the jury had limited influence. More than this was the intention to stamp a participatory dimension on Russian criminal trials, which was viewed as profoundly distinct from the justice system that had been overthrown.[8]

More recently in Japan, the criminal courts have come under sustained criticism for their detachment from community values, and their apparent inability in some high profile cases to appear independent from political considerations. In response to this the government has encouraged the courts to support the qualified introduction of jury trial



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in a model that is unfamiliar in the civil law traditions of post-war Japanese justice.

An essential consideration regarding the link between juries and justice legitimacy is community participation. The view prevails that no matter how juries are constructed, and the limited responsibility and influence they have over trial determinations, it is better for democratic governance that jurors sit in the courtroom, rather than it remain the exclusive domain of legal professionals.

Common sense above legalism

Historically, juries have been prized as a mechanism for tempering the hard and inflexible application of the law, and introducing popular wisdom into the assessment of liability, and consequent punishment. In England, during the period where capital punishment was the common outcome of a criminal conviction, juries regularly mitigated the savagery of this sentencing regime either by requesting mercy for the accused, or refusing to convict for more serious offences with which the accused might have been charged.

Today, it is common for judges to instruct juries where appropriate to bring common sense and their life experiences to bear when determining the nature of the facts and their consequences. Juries sometimes take this to the limit by modifying their view of the law as it relates to the facts in order to produce an outcome, which while not strictly 'legal' might accord with contemporary community concerns for justice.

In preparing the legislation to govern the re-introduction of jury trial into Russia, the drafters and their political masters were anxious to specifically provide the opportunity for juries to return verdicts that accorded with their notions of justice rather than legal compliance. The legislators took the view that jurors should be specifically empowered to return verdicts on justice as they saw it, without penalty or prohibition.

Professional accountability

A motivation for the Japanese reform has been to introduce members of the public into the trial process so that they can keep an eye on what the professionals get up to. At the very least it is hoped that by needing to explain what it is that they require of jurors and how the law should be applied to the facts, judges would no longer be removed from the public gaze.

In the Russian experiment (and as is the case with the expansion of the role of lay judges under the new Italian criminal procedure code) jurors were given a limited power to individually ask questions as the trial progressed and to intervene during the examination of witnesses.

For the Russians, the interest in accountability cuts both ways. Prior to delivering the verdict, jurors may be asked a series of questions by the judge which are intended to explain to some extent the process of their reasoning, and their appreciation of the law. Jurors are also specifically questioned on whether there is anything in the interpretation of the case as they see it that would justify mercy in the delivery of sentence.

Ensuring the presumption of innocence

A criticism of civil law criminal justice traditions is that they conventionally have relied at trial more on documentary evidence, and have diminished the significance of oral evidence, which can be challenged by the accused. The *International Covenant on Civil and Political Rights* requires that accused persons be given the opportunity to address their accusers. This has been interpreted as meaning that criminal charges should be tested in open court rather than merely being determined in pre-trial investigations, or through giving the accused the chance to present his or her version of the facts at the trial.

In China, its new criminal procedure law has prescribed specific rights and responsibilities for the legal representative of the accused, in order to test the state's case through challenging witnesses' oral testimony. These provisions have been criticised as failing to significantly influence the practice in Chinese trials. A reason for this has been suggested as the power of the police, the prosecutors and the judge to sideline the defence lawyer and even to persecute those who aggressively attempt to advance their client's interests. If there was some public scrutiny of the court process in a formal sense it is felt by critics that the alienation of the defence would be less easy to achieve and maintain.

The recently revised Italian criminal procedure code has also heightened the potential for

defence lawyers to participate in the trial process. Different from China, however, have been the additional provisions in the Italian reforms to enliven the evaluative role of the lay adjudicators. Added to this, victims in the Italian trial can be legally represented and can ask questions on their own initiative as the examination of witnesses progresses.

Dealing with experts

In several Australian criminal jurisdictions it has been accepted that jurors are unduly confused by expert evidence, and as such may not carry out their fact-finding functions as accurately as they should. Add this to what has become commonly known as the 'CSI factor', where jurors expect to consider forensic evidence in a successful prosecution case, and the prevalence (if not relevance)[9] of expert evidence before juries will become a more significant feature of criminal trial practice in the future. And as a consequence, juries will be more recognised as the appropriate mechanism for evaluating expert evidence.

It is interesting that a recent criticism of juries is their suspected inability to understand complicated expert evidence. However, surveys do not support this and popular culture constantly portrays juries as the decision-making forum for DNA evidence in particular. The challenge, therefore, is for judges and advocates to introduce, question and direct expert evidence so that any committed and concentrating juror can appreciate its meaning and probative value.

In states such as Victoria there has been recent legislation covering complex trials and the manner in which evidence is presented in these circumstances. Pre-trial interrogation of experts—in order to maximise the possibility of agreed facts and to limit the issues in contest that experts present to juries—has been designed to assist juror comprehension in these specialist circumstances.

Conclusion

The jury is a dynamic institution. Its common law manifestations have changed radically from when as 'compurgation' the jury was a group of neighbours who could attest to the character of the accused. Juries have consistently provided the opportunity for community representation within the justice process and that may provide the key to their prevailing popularity.

For justice systems in transition, the jury and the representation they promise are the demonstration of democracy in some form at work. Despite the contraction of the jury as an active influence over courtroom deliberations in Australia, this does not reflect the global trend to rediscover jury decision-making and community involvement in criminal trials.

Endnotes

1. This is where local or magistrates courts, which operate without juries, are being given responsibility to hear more serious offences, at the election of the prosecution or the defence.
2. For a critical evaluation of how this critique is all too often based on popular wisdom rather than empirical understandings see M Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41(1) *British Journal of Criminology 5.*
3. The nature and impact of this development is discussed in B McKillop, 'Review of Convictions after Jury Trials: the New French Jury Court of Appeal' (2006) 28 (2) *Sydney Law Review* 343.
4. Empirical justifications for this are provided in M Findlay, *Jury Management in NSW* (1994).
5. This issue is presently receiving the detailed consideration of the NSW Law Reform Commission.
6. Having said this, it is only at the federal level that limited access to jury trial is a constitutional right in Australia.
7. This survey is examined in detail in P Duff (et al), *Juries: A Hong Kong Perspective* (1992).
8. The nature and extent of this experiment is discussed in M Findlay, 'Juror Comprehension and Complexity: Strategies to Enhance Understanding' (2001) 41(1) *British Journal of Criminology 5*.
9. The disproportionate influence of forensic evidence on jury deliberations is surveyed in M Findlay, *Juror Comprehension and the Hard Case—Making Forensic Evidence Simpler* (2006) Sydney Law School Research Paper 06/59 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928788> at 2 May 2007.

Juries and public confidence in the courts

By Murray Gleeson

The Hon Chief Justice Murray Gleeson AC is the Chief Justice of Australia.

This article is edited from two speeches, 'Public Confidence in the Courts', presented to the National Judicial College of Australia in Canberra on 9 February 2007 and 'The State of the Judicature', presented to the 35th Australian Legal Convention in Sydney on 25 March 2007.

The Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, declare that, in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Competence, independence and impartiality are the basic qualities required of judges as individuals, and of courts as institutions. Fair and public hearings are the required standard of judicial process. Confidence in the courts is a state of reasonable assurance that these qualities and standards are met.

All institutions of government exist to serve the community, and the judicial branch of government, which has no independent force to back up its authority, depends upon public acceptance of its role. That acceptance requires a certain level of faith. What is it that sustains, or threatens, such faith? That is not an easy question to answer. There are some obvious topics of importance, such as a judiciary's reputation for honesty. There are places where judicial corruption is a serious problem. Happily, this has never been an issue in Australia. Other considerations that might affect the public's view of the courts are less easy to identify.

Public participation

Public participation in the administration of justice is a part of our legal tradition. It is important for Parliaments to keep in mind the public interest in involving the community in the administration of justice, especially criminal justice. Through the jury system, members of the public become part of the court itself. This ought to enhance the acceptability of decisions, and contribute to a culture in which the administration of justice is not left to a professional cadre but is understood as a shared community responsibility.

Jury trials continue to be important in criminal justice. They, also, are becoming longer. The increasing complexity of the criminal trial process is of concern within the judiciary and the profession. A topic of special concern is the length and complexity of directions to juries.

Assigning blame for this between trial judges and appeal courts is a popular judicial pastime, but I am not sure that it is fruitful. A summing up to a jury is intended to be a form of communication, not a display of knowledge and certainly not an exercise in reputational self-preservation.

A judge who directs a jury at a murder trial does not set out, and should not be expected by an appeal court to undertake, to deliver a lecture on the law of homicide. The object is to enable the jury to make such decisions about issues of fact as are necessary to pronounce a verdict. The aim should be to tell the jury only as much about the law as they need to know in order to carry out their task. The task of juries is to decide issues of fact and, under the legal guidance of the trial judge, find a verdict. Unnecessarily complex legal directions do not assist. Justice does not require that the criminal law, as enacted by Parliaments, or as formulated by appeal courts, should become more and more complicated.

When I entered the legal profession 45 years ago, juries also played an extensive part in the administration of civil justice. In most state jurisdictions that has changed. In some states,

civil juries are rarely used. Federal courts, which are of relatively recent origin, have never made significant use of juries. There are now many advocates who have never participated in a jury trial, and there are judges who have never presided at such a trial. Whatever we may think of this reduction in the role of civil juries, we ought to be aware that it involves a cost. If the traditional participation of juries in the common law civil process is to be reduced permanently—as seems inevitable—then we should be conscious of the fact that we are cutting ourselves off from the community in one way, and we need to establish other lines of contact.

For example, Australian courts now have Public Information Officers—something that was unheard of 45 years ago. They are not there just to deal with crisis management. They have an educational function that should be used in a conscious effort to replace the information function that once was served by the use of civil juries. Again, before Parliaments are tempted further to reduce the importance of civil juries they ought to reflect on the way they serve to promote public awareness of the court system. Reduced public participation, through trial by jury, in the administration of civil justice has increased the separation between courts and the community, and we need to find ways to compensate.

Identifying error

One aspect of competence is the capacity of the system to identify and correct error. All human systems are fallible, and any justice system can miscarry. The ability of the courts, through the appeal process, to correct error is important to the acceptability of the process. This is an area in which the diminishing role of the jury has mixed effects.

Jury verdicts are given without reasons. The acceptability of the outcome is based on trust in the combined wisdom of a group of citizens, chosen at random, directed by a judge as to their legal obligations, and applying common sense and community standards to the resolution of issues of fact. It is hard to appeal against a jury verdict. The system has the advantage of finality, and the related disadvantage of inscrutability. In the case of a trial by judge alone, the judge must give reasons. The acceptability of the decision is based on the cogency of the reasons of a professional decision-maker. It is easier to appeal against a reasoned decision. It is easier to identify error.

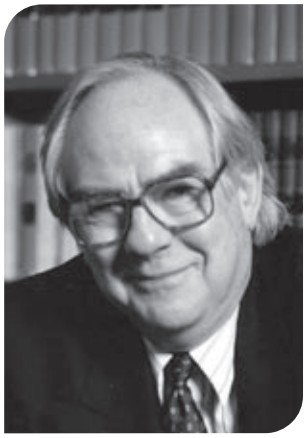
Miscarriages of justice have the capacity to shake confidence in the system, but the capacity of the system to correct itself might be expected to reinforce confidence. It may be that the spirit of our times attaches less importance to finality and more importance to the need to know, and be able to challenge, reasons.

It would be interesting to know what the public think of the comparative merits of trial by jury and trial by judge alone. I wonder how many people have a view on that question? Perhaps, as judges, we overestimate the importance that people attach to our reasons. How many outside the legal profession have ever read reasons for judgment? The fact that juries do not give reasons for their decisions, and that judges give what would be regarded by many people as elaborate—sometimes over-elaborate—reasons is often completely overlooked in commentary about the role of juries. Does that suggest that something we regard as fundamental in the judicial process is something that people outside the process regard as insignificant? That is a sobering thought.

△ There are now many advocates who have never participated in a jury trial, and there are judges who have never presided at such a trial. △

The introduction of juries to the Federal Court of Australia

By Michael Black



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Although the Federal Court of Australia has the power to order that any matter or issue of fact be tried before a jury and although that possibility has been raised from time to time, no order for a jury trial has ever been made in the 30-year history of the Court. That is likely to change very soon.

Bills are expected to be introduced into the Parliament in the winter session for the creation of the new criminal offence of serious cartel behaviour and for the conferral of jurisdiction upon the Federal Court for the trial of the offence. Since the new offence will be a serious one, punishable by a term of imprisonment, the prosecution will have to be commenced by indictment. That will bring into play s 80 of the Constitution, which provides that 'trial on indictment of any offence against any law of the Commonwealth shall be by jury...'.

While trial by jury in the civil cases with which the Federal Court has so far been primarily concerned is not obligatory, s 80 of the Constitution means what it says; in cases to which it applies the trial must be by jury and there is no option for such a case to be heard by a judge sitting alone.[1] The existing provisions of the *Federal Court of Australia Act 1976* that enable jury trials to take place by reference to state law would not be suitable for the new criminal jurisdiction and so comprehensive amendments will need to be made.

Eligibility to serve

One of the issues to be considered is whether a person who has previously been convicted of a serious criminal offence should be eligible to serve as a juror. The issue is important because a jury is 'representative' of society. As so often happens in the development of the law, this issue has an historical aspect.

The right to trial by jury did not come to Australia with the First Fleet in 1788 because the first non-Indigenous settlement here was a penal colony. But the concept did come. It arrived in the minds of the first people—both convicts and free settlers—who came here from the British Isles and the right to trial by jury soon became an important issue in the new colony. The freed convicts (the Emancipists) pressed for the introduction of trial by jury but were opposed in this by the free settlers (the Exclusives) who argued that juries would be tainted by the presence of former convicts who, moreover, would be far too ready to acquit.

When the first civilian juries were established in the 1820s, former convicts were excluded but in the end the Emancipists won the day and as from 1829 they were permitted to serve as jurors. Events moved rapidly and by the end of the 1830s the right to trial by jury was well established in New South Wales. When Victoria became a separate colony in 1851 the right to trial by jury was already well established in that part of the country too and by the time the *Australian Constitution* was being framed in the 1890s, trial by jury was accepted as a right throughout Australia. The framers of the Constitution included as 'a safeguard of individual liberty'[2] the guarantee that a trial on indictment against any law of the Commonwealth shall be by jury.[3]

Why now?

Since there are very many serious offences under the laws of the Commonwealth, why is

it only now that criminal jurisdiction is being conferred upon a Federal Court? What has happened since 1901? The answer is that in 1903, in the exercise of the power conferred upon it by Chapter III of the Constitution, the Parliament invested state courts with federal jurisdiction to try federal offences and they have (nearly) all been tried in state or territory courts.

There have been at least two notable exceptions. *The King v Porter,*[4] a case famous in the criminal law for its statement of principle on the defence of insanity, was a murder trial in the High Court of Australia. The trial judge was Sir Owen Dixon and the famous point of principle emerged from his charge to the jury in that case. The circumstances were, admittedly, very unusual in that the murder was alleged to have taken place in the newly created Australian Capital Territory but before the Supreme Court of the Territory had been established. There was another jury trial in the High Court a few years later: *The King v Brewer*.[5]

The Federal Court, although essentially a trial and appellate court of general jurisdiction in *civil* matters arising under laws made by the Parliament, has always had some criminal jurisdiction in areas related to the Court's civil jurisdiction, such as intellectual property and workplace relations. These offences, being relatively minor in nature and classified as 'summary offences', are not prosecuted by way of indictment and so may be heard by a judge sitting alone. The Federal Court also has jurisdiction to award 'civil penalties' of as much as $10 million for breaches of some of the provisions of the *Trade Practices Act 1954* and the *Corporations Act 2001*.

The proposal to confer criminal jurisdiction on the Federal Court of Australia to try offences of serious cartel behaviour follows the recommendation of the *Review of the Competition Provisions of the Trade Practices Act*, chaired by retired High Court Justice, the Hon Sir Daryl Dawson. However, the amendments to the *Federal Court of Australia Act* could be in general terms, such as might allow for any subsequent further conferral of criminal jurisdiction. This could occur if, for example, the Parliament chose to implement the recommendations of the Australian Law Reform Commission in *Same Time, Same Crime: Sentencing of Federal Offenders*[6] where the Commission recommended that criminal jurisdiction be conferred upon the Federal Court in relation to indictable Commonwealth offences whose subject matter was closely allied to the Court's existing civil jurisdiction—in areas such as taxation, trade practices and corporations law—and that there be future consideration of conferring appellate jurisdiction on the Court in relation to all federal offences (Recommendations 18-2 and 20).

The requirement of s 80 of the Constitution that trials on indictment against a law of the Commonwealth should be by jury necessarily carries with it the protection of the essential features of trial by jury. Thus, contrary to the change in the common law rule brought about by legislation in some of the states, the verdict in a trial to which s 80 of the Constitution applies must be unanimous.[7] In some states an accused may waive the right to a jury trial but this reform is not available where s 80 applies.[8] A trial that begins with a jury of 12 may, however, proceed if the number of jurors is reduced to as few as 10.[9] Section 80 also provides that the trial must be held in the state where the offence was committed or, if the offence was not committed within any state, at any place that the Parliament prescribes. This would present no difficulties for the administration of a criminal jurisdiction in the Federal Court which has registries in each state and territory.

Issues for law reform

Within the framework set by s 80 of the Constitution there are many issues, of particular interest to law reformers, that might be considered. One has already been mentioned—whether or not there should be an exclusion from eligibility for service on the ground of prior criminal conviction. Even this does not admit of a simple answer. What convictions? How long ago? What about a conviction in a foreign jurisdiction? Are there any other relevant matters to be taken into account? There are other possible grounds of exclusion such as disability or lack of fluency in English. Here again there are complex issues: Commonwealth legislative policy stands against discrimination on the ground of disability but are there disabilities that should prevent a person from serving as a juror, and if so which ones? And under all circumstances or only some? Other matters to be considered include ways to assist people who do have disabilities to serve on juries; challenges to jurors; substitute jurors; compensation for jurors; and the finality of jury verdicts.

△ Within the framework set by s 80 of the Constitution there are many issues, of particular interest to law reformers, that might be considered.△

Much has been written about the jury system throughout the common law world and the rules governing juries can vary greatly between jurisdictions. Proposals for reform also vary greatly. For example, should legal practitioners and even judicial officers be excluded from service? Practising lawyers and members of the judiciary are currently ineligible to serve as jurors in all Australian jurisdictions, but in some states in America they have long been eligible to serve. The law in England and Wales, the home of the common law jury, has recently been changed to make lawyers and judicial officers eligible for jury service. If a lawyer or judicial officer feels that it would be inappropriate to serve as a juror in a particular case, they must make an application to be excused or to have service deferred or moved to a different court.[10]

△ As criminal trials are likely to be relatively infrequent in the Federal Court, the aim will be to have a flexible administrative structure, providing for the administrative arrangements to operate as and when needed. △

Because the world in which jurors serve is constantly changing, new issues arise quite frequently. Some are very difficult: what should be done about the possibility of internet access and the improper acquisition of knowledge about the case? There is presently a debate about a less obvious issue—how to accommodate jurors who smoke. Our court buildings are smoke free environments. Should the jury be allowed to separate so that some of them may smoke? It would surely be undesirable for jurors to be suffering from nicotine withdrawal while considering a verdict, but on the other hand being a heavy smoker does not seem like a good reason for being excused from jury service! Pragmatic solutions will be found for these problems but when jury facilities are being constructed in a new building the question arises whether there should be architectural solutions, such as balconies near the jury rooms.

Changes to practice, procedure and policy

The amendments to the *Federal Court of Australia Act* will also need to expand the provisions that regulate and protect the jury system by creating criminal offences and imposing penalties. The amendments will establish a framework for the quite complex matter of summoning jurors and other aspects of administering a jury system. As criminal trials are likely to be relatively infrequent in the Federal Court, the aim will be to have a flexible administrative structure, providing for the administrative arrangements to operate as and when needed. In these and other respects, the experience of the states and territories and the many reports of law reform agencies have, of course, been closely considered.

The Federal Court has also had to address infrastructure and staffing needs in preparing for its first criminal trials. There are now Commonwealth Law Courts buildings in each state and territory capital (except, currently, Darwin) and all have provision for accommodating juries. The existing jury facilities in the Federal Court in Brisbane, Perth and Melbourne are, however, being upgraded and very careful consideration is being given to the provision of appropriate jury facilities in the Law Courts Building in Sydney, in the course of its current refurbishment. In the newest building, the Roma Mitchell Commonwealth Law Courts in Adelaide, the jury facilities have been designed so that they may be used for other purposes—in that case as a mediation suite—when not being used for juries.

The cost of juries is a necessary and integral part of our system of justice. As the experience of the Federal Court in preparing for criminal juries shows, many facets require careful consideration. From a budgetary viewpoint, a significant sum needs to be set aside. The 2006–07 Commonwealth budget, for example, provided $3.9 million over four years to enable the Court to hear trials relating to serious cartel offences.

For the past 12 months, the Federal Court has had a committee of experienced judges, assisted by the Court's Deputy Registrar and the newly-appointed Sheriff, to consider the many questions of practice, procedure and policy that arise in the introduction of criminal juries to a Court that has not previously had jurisdiction to try indictable offences. In accordance with well-established practice when legislation affecting the Court's procedures is to be introduced, the Court has been consulted by the Executive Government about practical and policy aspects of the proposals. The Court's Criminal Practice Committee has provided a forum for these discussions. It may not be widely appreciated that many of the Federal Court's judges have had extensive experience in criminal law and procedure, through practice as trial and appellate advocates when at the Bar and as judges hearing criminal trials and appeals on other courts.

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Majority jury verdicts

By Nicholas Cowdery

For some people there was yet another 'beginning of the end of civilisation as we know it' on 26 May 2006, when the New South Wales *Jury Amendment (Verdicts) Act 2006* became law. It allows for majority jury verdicts (for conviction or acquittal) in NSW criminal trials of offences against NSW law.

In a general way (subject to some differences of detail), NSW then fell into line with South Australia (where majority verdicts have been available since 1927), Tasmania (1936), Western Australia (1960), the Northern Territory (1963), England and Wales (1967), Victoria (1994), Scotland, Ireland and some of the states of the USA. In none of those jurisdictions has there been any outcry over miscarriages of justice or injustice by reason of the provisions; nor have there been any calls for reform. New Zealand is examining the notion.

Juries have been described as

> 'bring[ing] together a small group of lay persons who are assembled on a temporary basis for the purpose of deciding whether an accused person is guilty of a criminal act… The jurors are conscripted and often initially reluctant to serve. They are untutored in the formal discipline of law and its logic. They hear and see confusing and contested evidence and are provided with instructions, most often only in oral form, about arcane legal concepts and sent into a room alone to decide a verdict without further help from the professional persons who developed the evidence and explained their duties.'[1]

Juries of 12 persons are selected almost daily in many courts around the State of NSW and elsewhere. Most trials end with the same 12 making a decision, but in NSW the number can shrink from illness or other reason to 11 or 10, to eight if the trial has been in progress for at least two months, or to any lower number with written approval from the prosecution and defence. An assumption underlying the jury system is that the jury is representative of the community; but that applies only in a limited sense, given the ineligibilities, disqualifications and exemptions that presently apply to jury service. Unlike in the USA, there is no preliminary examination of potential jurors.

The new legislation

Under the new legislation, where the jury at the end of the trial has at least 11 members, a majority verdict of the whole less one (ie 11 out of 12, or 10 out of 11) may be taken if:

- a unanimous verdict has not been reached after at least eight hours' deliberation (which therefore requires an overnight adjournment);
- the court (ie, the judge) considers it reasonable, having regard to the nature and complexity of the proceedings; and
- the court is satisfied, after questioning one or more of the jurors, that it is unlikely that the jurors will reach a unanimous verdict after further deliberation.

Nevertheless, it is accepted that the jury should still endeavour to reach a unanimous verdict in the first instance.

The provisions do not apply to Commonwealth offences. In *Cheatle v The Queen*[2] the High Court held that unanimous verdicts are an essential feature of trial by jury as required by the Constitution (in s 80). The Court referred to the 'fundamental thesis' of our criminal law that an accused person should be given the benefit of any reasonable doubt and held that

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‘a verdict returned by a majority of the jurors over the dissent of others objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict’.

Well, does it?

The NSW Law Reform Commission in its Report 111 tabled in Parliament on 9 November 2005 considered all the arguments for and against majority verdicts (which appeared to be fairly evenly balanced) and recommended against them. Among other reasons, it put forward the proposition that where unanimity is required ‘disagreement among jurors can force the evidence to be viewed from different perspectives and leads to a more thorough investigation of the issues’.

△ Trial by jury is not perfect; but our form of it is the product of principle, experience and necessary compromise, balancing inevitably competing considerations. △

But is that not addressed by requiring at least eight hours of deliberation, directed towards a unanimous verdict, before a majority verdict can even be considered?

The arguments on majority verdicts

Critics of majority verdicts raise a number of matters.

1. The magic of the number 12 (Christian apostles, months in the Julian calendar, signs of the Zodiac—omitting Ophiucus—and so on). But is it really appropriate to acknowledge an element of magic in the criminal justice process? In Scotland, juries are of 15 persons and a simple majority is sufficient for a verdict. (True it is that there is also a verdict there of ‘not proven’ and corroboration of evidence of guilt is required before any conviction; but those features do not alter the process substantially and the fact remains that eight out of 15 can convict.)

2. Unanimity as a virtue in itself, because of its authority and the processes required to reach it. When juries began in England they were more like groups of witnesses who brought with them their own knowledge of the events being litigated. Later they became impartial and objective contributors, representing the community in which the alleged offence had occurred. Unanimity of their verdicts was required from the 14th century and sometimes they would even be deprived of food and heating to encourage them to reach a decision, or transported from town to town with the court until they decided. One can only speculate about the compromise decisions that must have been reached in such conditions.

As with every other aspect of the criminal justice system and its processes, there is a need for balance. Unanimity is probably at least desirable because it can encourage greater deliberation, it can give effect to a dissenting view that may be soundly based, it ensures consistency with the trial of Commonwealth offences and hung juries are said not to be so common as to require change. On the other hand, even if only 10% of juries are hung, that means up to 200 trials in NSW in a year (and often the more lengthy, difficult, expensive and taxing trials) need to be run again. The dissent may not be a reasoned one but the conduct of a ‘rogue juror’ who is unreasonable, perverse or misinformed and obstinate. Compromise verdicts may be reduced where a majority is sufficient; the possibility of corruption or intimidation of a juror is lessened; verdicts are more efficient; and the process is more consistent with general democratic practices.

Enough instances are known of the one juror who cannot be said to be truly representative of the community who, for reasons entirely unconnected with the proper reasoning processes leading to verdicts, refuses to conscientiously participate in the task required and is determined to frustrate it. This tends to happen in trials that are especially difficult for the participants (including victims of crime, witnesses and other jurors) and the trouble and cost of retrials are very significant (with a Supreme Court trial costing about $40,000 per day to run).

Trial by jury is not perfect; but our form of it is the product of principle, experience and necessary compromise, balancing inevitably competing considerations. Appeal courts may correct its failings, as required. Majority verdicts are now a well established feature of trial by jury in similar jurisdictions.

3. Dilution of the presumption of innocence and/or the requirement of proof beyond reasonable doubt. How these leaps of logic persist is a mystery. An accused person, unless and until convicted, retains the presumption of innocence. It can only be displaced by ultimate proof beyond reasonable doubt. Whether 12, 11 or 10 jurors (or any lesser number) ultimately convict, the presumption of innocence remains in place and must continue to operate on their individual minds until conviction.

When decision time comes, those voting for conviction individually must be satisfied beyond reasonable doubt that guilt of the crime charged has been proved. If one juror does not have that satisfaction, it does not mean that the rest do not—and there is no magic in any particular number making the final decision. It means only that a smaller number than the total has that degree of satisfaction. The same standard is applied—it does not change.

The High Court in *Cheatle* thought that majority verdicts objectively suggest the existence of reasonable doubt and carry a greater risk of conviction of the innocent. Those propositions should be examined further. The disagreement of one person out of 11 or 12 temporarily selected from the community may be based on a range of factors not necessarily including a satisfaction or lack of satisfaction of proof beyond reasonable doubt. Indeed, a 'rogue juror' may not even have addressed that issue in any proper fashion. It is suggested that it is not the unanimity of decision *per se* that assures proof beyond reasonable doubt, but the decision to convict being made by an acceptably large and representative absolute (and not comparative) number of decision makers.

Conclusion

Is there a greater risk of conviction of the innocent? Risk is relative; and there are many mechanisms and rules in place throughout the criminal justice process to minimise the risk of conviction of the innocent, from processes that operate throughout investigations and restraints upon investigators, to rules about the admission of evidence, right through to the appeal courts reviewing the soundness of the processes that have occurred. Any increase in risk of conviction of the innocent from majority verdicts must necessarily be infinitesimal. The five-year review of the NSW legislation will no doubt examine that proposition, among others.

So far in NSW it would seem that the floodgates have not opened, nor has the apocalypse drawn nearer. At the time of writing (after 11 months of operation of the legislation), there have been three trials in which majority verdicts of guilty on some charge(s) have been returned and two trials in which majority acquittals have been decided.

A little under 2,000 trials proceed to verdict in a year, being well under 1% of all criminal cases heard by all NSW courts (the rest being decided by magistrates and judges alone or being determined by pleas of guilty). There are no signs that the measure has threatened or diminished public confidence in the criminal justice process and it now exists as a safeguard of the general public interest.

Endnotes

1. N Vidmar, 'A historical and comparative perspective on the common law jury' in N Vidmar (ed) *World Jury Systems* (2000), 1.
2. *Cheatle v The Queen* (1993) 177 CLR 541.

Jury misconduct or irregularity

By Donna Spears

Dr Donna Spears is a Lecturer in Criminal Law at the University of New South Wales and a barrister practising mainly in criminal law. She has a background in institutional research and her current research interests are in the areas of criminal procedure and the role of judicial discretion in sentencing.

The expression 'jury misconduct' is commonplace in American jurisprudence and covers a wide range of conduct from the juries having access to additional materials to the coercion of fellow jurors by violence.

In Australia, courts have proceeded with more caution, avoiding the general term 'misconduct' and instead referring to all such events as 'irregularities' unless the character of the juror conduct is such that the disapprobation 'misconduct' is clearly justified.

A basic principle of the Australian criminal justice system is that no person shall be convicted of a crime except after a fair trial according to law. One touchstone of a fair trial is an impartial trier of fact and, in the context of a trial by jury, that means a jury capable and willing to decide the case solely on the evidence properly before it. A trial is not necessarily unfair because it is less than perfect[1] but it is unfair if it involves a risk of the accused being improperly convicted. The courts have stressed that the evaluation of such irregularities should proceed on the basis that jurors properly perform their tasks, are true to their oaths and comply with the directions of the trial judge, as to do otherwise would mean that there was no point in having criminal trials.[2]

Critics of the jury system point to the potential of jury irregularities and misconduct to allow extraneous considerations to affect the jury's deliberations and thus impinge upon the right of the accused to a fair trial. They suggest that jury trials are inherently tinged with unfairness. This article looks at the types of irregularities that have been identified through the case law and examines the way in which the existing law and processes operate to ensure a fair trial.

Detecting and dealing with irregularity

At the beginning of a criminal trial the jurors are instructed to make their decisions on the basis of the evidence alone and to set aside any prejudices. They are also told to bring to the judge's attention any instances of irregularity. Most documented instances are either observed by third parties to the jury (such as lawyers, the accused or sheriff's officers) or by jurors themselves. Jurors are often in the best position to detect misconduct or irregularity on the part of other jurors or in relation to incidents that affect the jury as a whole. The problem is that jury misconduct is often insidious—if jurors observe or participate in misconduct and then remain silent, such conduct may never come to light. Legal research can tell us much about reported instances of misconduct but it cannot identify individual instances (or the prevalence) of unreported misconduct.

Once an allegation of misconduct is made during the course of a trial, the focus shifts to the conduct of the trial judge. A trial judge has power to take evidence in relation to the allegation (if this is desirable) and then

(a) do nothing—on the basis that further mention of a minor irregularity will give it more significance than it actually warrants and itself may provoke or induce further problems;

(b) give clear and unambiguous directions to the jury to correct or remove the possibility of prejudice to a defendant; or

(c) discharge a juror or the whole jury if such a course is warranted in the interests of justice.

In deciding whether to discharge a juror for bias the test is whether the circumstances of the relevant incident would give a fair-minded observer a reasonable apprehension of a lack of impartiality on the part of the juror.[3] In some jurisdictions, this is also the test for jury irregularity[4] but in others a separate test has developed.[5] Despite the variation in wording and emphasis, these tests appear to operate in much the same fashion with a basic concern as to whether the accused has been deprived of a fair trial resulting in a miscarriage of justice.

Even if jurors do come forward, the identification of misbehaviour can be made more problematic by reason of the rule that courts will refuse to receive evidence from a juror about the course of deliberations in the jury room (sometimes referred to as the 'jury secrecy' rule).[6] This common law rule still exists, albeit in modified form, in many jurisdictions and is based on public policy considerations including the need to promote full and frank discussion among jurors, the need for finality of the verdict, the need to protect jurors from harassment, pressure, censure and reprisal and the need to maintain public confidence in juries.[7] American courts and jurists have also suggested that it reduces incentives for jury tampering.[8] The rule has a limited scope. It has been held to preclude proof of the subject matter of juror deliberations (such as a juror being racially prejudiced)[9] but not proof of irregularity in proceedings extrinsic to the matters being deliberated on (such as material being given to a jury by mistake).[10]

Types of irregularity

In order to understand how courts regulate jury irregularity it is useful to explore some of the actual situations raised in the case law.

1. Juror contact or relationships with witnesses and other persons. Australian courts have taken a fairly robust view about casual or innocent conversations between jurors and other court personnel. A brief conversation between a juror and Crown counsel about the weather did not result in a retrial.[11] Nor did polite conversation between a juror and a judge's associate at a private party.[12] The possession of mobile phones by jurors during deliberation did not justify the discharge of the jury.[13] The giving of flowers to the mother of the deceased by a juror was held not to amount to evidence of either juror bias or misconduct.[14] However a conviction was quashed where a juror during a recess approached a detective and asked him questions about the identity of another detective who was a witness at the trial. The possibility that the juror's question might have reflected an opinion about the reliability of the other detective as a witness based on prior information was enough.[15] Likewise a sheriff's officer expressing his own view to the jury that the accused was guilty led to mistrial.[16]

2. Unauthorised visits to crime scenes. There have been several reported instances of jurors visiting crime scenes outside court hours. A visit by several jurors to the general area of a hotel in Hobart referred to in evidence without any detailed measurements or timings was held not to warrant a new trial.[17] By way of contrast, a new trial was ordered where two jurors conducted their own viewing of an alleged rape scene for the apparent purpose of assessing for themselves the circumstances of complainant's identification of the accused.[18]

3. Unauthorised material or information present in the jury room. The main factor in assessing unauthorised material appears to be whether the irregularity is material, that is, whether it ultimately made a difference to the verdict returned. A book about guns in a murder trial where a gun was used was not held to be material because the information it contained was the same as that which was put in evidence during the trial.[19] A newspaper article about unsworn statements brought into the jury room by a juror in a trial where the two accused had made unsworn statements was held to be slightly material but too remote to justify a retrial.[20] The court suggested that a more appropriate course for the jury would have been to ask for specific directions from the trial judge. On the other hand, when pieces of paper containing extremely prejudicial material were inadvertently tendered inside a handbag owned by the deceased in a murder trial, a retrial was ordered because the material was capable of conveying information to the jury about the propensities of the accused.[21] Likewise, where prejudicial subpoenaed documents were given to the jury by mistake the conviction could not be sustained.[22]

The courts have traditionally frowned on attempts by jurors to solicit information from sources outside the courtroom. The so-called digital age with its almost instantaneous public access to vast amounts of information via devices such as the internet and mobile

△ The courts have traditionally frowned on attempts by jurors to solicit information from sources outside the courtroom. △

phones has provided more scope for such research. Jurors in a trial of an accused for the murder of his first wife discovered via the internet that he had previously been tried and convicted of the murder of the first wife and also that he had been charged and acquitted of the murder of his second wife.[23] The irregularity as to the discovery of the charge of murder of the second wife was held to be potentially prejudicial as it risked the jury engaging in tendency and/or coincidence reasoning or risked raising bad character when that sort of evidence would have otherwise been inadmissible.

Preventative measures

△ Despite clear warnings, jurors do sometimes cross the evidentiary boundaries and go out investigating. Unlike the jurors of the past, jurors today know how to find out more. △

In most jurisdictions the courts and the legislature have taken significant steps to prevent or at least reduce the potential for jury irregularities. Juries are now given strong and comprehensive directions at the commencement of a trial as to their duties and responsibilities. They are also told about safeguards for the jury including the existence of specific offences such as jury tampering and contempt. They are warned not to undertake any independent investigations or use any material or research tool to access legal databases, earlier court decisions, and/or any other material relating to any matter arising in the trial. In two states, jurors are advised that it is an offence for a juror in a criminal trial to conduct independent research.[24] They are also told that the reason that they are not permitted to make such inquiries is that to do so would change their role from that of impartial jurors to investigators, and lead them to take into account material that was not properly placed before them as evidence, of which those representing the Crown and the accused would be unaware and unable to test. They are warned that the consequences of such prohibited conduct may be that the jury is discharged or its verdict later overturned. In addition, most courts now exercise care in deciding which judgments to place on court websites and provide to other legal publishers so as to minimise the opportunity for jurors to obtain information about persons currently facing trial.

Comment

The role of jurors in criminal trials has been traditionally divided into two distinct but overlapping phases: in the first the evidence is adduced before them; and it is only in the second phase that they are asked to act, that is deliberate, and come to a verdict. Of course jurors can and increasingly do ask questions within the framework of the traditional trial but clearly sometimes that is not sufficient. Despite clear warnings, jurors do sometimes cross the evidentiary boundaries and go out investigating. Unlike the jurors of the past, jurors today know how to find out more. One important question that should be asked is why do they do it. Jurors are obviously not satisfied with the state of the evidence and want to know or find out more. There is nothing that can be inferred from any of the Australian cases (in part due to the exclusionary rule) to suggest the wayward jurors were deviating from their sworn task of determining the guilt or innocence of the accused. They all appear to be attempting to do their authorised work, albeit in an unauthorised mode.

Psychologists have suggested that people need to believe the world is a just place in which individuals get what they deserve and so they respond to wrongs by doing everything they can to procure an appropriate remedy.[25] If this is correct, then jurors go out investigating in order to bring perpetrators to justice or equally to ensure that the innocent are not wrongfully convicted. They are sometimes simply not content to stay in the more passive role allocated to them. The other factor that may drive jurors to search for additional evidence, be it by research or other investigation, is a belief in the existence of other physical or scientific evidence capable of resolving particular factual issues. Some commentators have suggested that TV shows like *CSI* have fortified such beliefs, although this effect has been questioned.[26]

Bearing this in mind, the courts themselves may have a role to play in alleviating juror frustration by improving the lines of communication between judge and jury. The stronger directions on irregularity that include reference to the possible prejudice to the parties and procedural consequences have been a move in the right direction. I want to make a more radical suggestion—that judges might admit upfront to juries that sometimes things will be kept from them, not by

incompetence, oversight or error, but because of rules of evidence that are there to ensure that justice is done. It can only further the course of justice for jurors to understand that the search for truth must not be pursued to the exclusion of all else.

Endnotes

1. *Jago v District Court* (NSW) (1989) 168 CLR 23 per Brennan J at 49.
2. *Gilbert v The Queen* (2000) 201 CLR 414 at 425 per McHugh J.
3. *Webb v The Queen* (1994) 181 CLR 41 at 47, recently applied in *I v Western Australia* (2006) 165 A Crim R 420.
4. For Tasmania see, for example, *Fairall v The Queen* (unreported CCA Tas 7 June 1995) and in Queensland eg *R v Martin* [1999] QCA 366.
5. In New South Wales, the test is whether the court could be satisfied that the irregularity had not affected the verdict and that the same verdict would have been returned if the irregularity had not occurred: *R v K* (2003) 59 NSWLR 431. In Victoria, the test for materiality is whether the irregularity was such as to give rise to a reasonable suspicion or concern about the fairness of the trial: *R v Gae* [2000] 1 VR 198.
6. In American jurisdictions, this exclusionary rule is known as the rule against juror impeachment.
7. See *R v Skaf* (2004) 60 NSWLR 86 at 92 [211].
8. See for instance *McDonald v Pless* 238 US 264 (1915).
9. *R v Connor; R v Mirza* [2004] UKHL 2.
10. *R v Rinaldi; R v Kessey* (1993) 30 NSWLR 605.
11. *R v White* [1969] SASR 491.
12. *Duff v R* (1979) 39 FLR 315.
13. *R v Evans* (1995) 79 A Crim R 66.
14. *Webb v The Queen* (1994) 181 CLR 41.
15. *R v Hodgkinson* [1954] VLR 140.
16. *R v Emmett; R v Masland* (1988) 14 NSWLR 327.
17. *Fairall v The Queen* (unreported CCA Tas 7 June 1995).
18. *R v Skaf* (2004) 60 NSWLR 86.
19. *R v Forbes* (2005) 160 A Crim R 1.
20. *R v Minarowska* (1995) 83 A Crim R 78.
21. *R v Rudkowsky* (unreported CCA NSW 15 December 1992).
22. *R v Rinaldi; R v Kessey* (1993) 30 NSWLR 605.
23. *R v K* (2003) 59 NSWLR 431.
24. Section 68C of the *Jury Act 1977* (NSW) and s 69A of the *Jury Act 1995*(Qld).
25. Milton Learner suggests that there is a fundamental human motivation to see justice done which he refers to as 'the belief in a just world'. *The Belief in a Just World* (1980) noted in T Tyler (below).
26. For an excellent discussion of the alleged influences of the *CSI* television show see T Tyler, 'Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction' (2006) 115 *Yale Law Journal* 1050.

Looking and knowing

Jurors and photographic evidence

By Katherine Biber

Dr Katherine Biber is a historian and legal scholar in the Department of Law, Macquarie University.

Her recent book, 'Captive Images: Race, Crime, Photography', is published by Routledge-Cavendish, and explores in detail the problems of using photographic evidence in identification cases.

For a short time, after 2001, juries were left almost to their own devices when considering photographic evidence. Handed surveillance photographs taken at the crime scene, they were simply asked whether or not the person in the photograph was the defendant.

If they were sure, beyond any reasonable doubt, they could find the defendant guilty of the relevant crime. Most juries had a doubt, and so prosecutors needed to deploy new methods to secure convictions based upon photographic identification evidence.

This brief period of uncertainty followed the High Court's decision in *Mundarra Smith v The Queen*.[1] Smith had been convicted of bank robbery. The surveillance camera in the bank captured images of the crime taking place. Two police officers testified that they recognised Smith from the photographs. The jury was shown the photographs. They were not asked the crucial question: 'Is Smith the bandit in the photographs?' Instead, they were asked: 'Do you agree with the police evidence that Smith is the bandit in the photographs?'

Before the High Court handed down the *Smith* judgment, this was a common—and highly effective—method of prosecuting robberies. There was no need to resolve conflicting eyewitness testimony; there was no need to amass corroborative evidence; there was no need to deal with the poor quality of these blurry CCTV images. Furthermore, there was no need to address the complex nature of photography as a way of knowing things about the world.

The High Court held that the jury had been asked the wrong question, as the police recognition evidence was irrelevant. The police were not eyewitnesses to the crime in issue, they were not experts in photographic recognition, and they were no better placed than a juror to look at a photograph and compare it to Smith himself, who was sitting in the dock during his trial. The police recognition evidence could add nothing material to the jury's determination of guilt. If the photograph was of poor quality, as was usually the case, the police testimony could not be used to improve bad evidence.

At Mundarra Smith's re-trial, the jury was simply handed the surveillance photographs and asked to compare them with the man in the dock. They were also given additional warnings about the dangers of cross-racial identifications.[2] The police did not testify. The jury had a reasonable doubt, and Smith was acquitted.

Photographs as truth?

What is a jury to do with these kinds of photographs? They are grainy, often black and white, sometimes stills taken from video footage. It is impossible to know—without being told—what is going on in the photographs. Jurors, like the rest of us, are familiar with photography. We are comfortable with many of its genres: family snapshots, formal portraiture, documentary, history. But the evidentiary capacity of the photograph needs special care. Where, in criminal litigation, the consequences of recognition is a lengthy prison term, jurors want more than an unmediated photograph before making a finding of guilt. While photography has, since its inception, played a role in criminal litigation, the criminal courts have never developed a jurisprudence for images. Courts assume that photographs contain the truth. The jury simply

needs to crack open the image and find it. The jury is not asked to reflect upon the nature of photography, the ubiquity of surveillance, the deceptive power of vision, tricks of the eye, the dangers of suggestion. It is presumed that anyone, any juror, can look at a photograph in order to draw a conclusion.

However, scholars, theorists, artists and scientists have, for over one century, cautioned us against accepting photography as a way of knowing the truth about the world. When we look at photographs, we are implicitly given a caption; we are told what it is that we are supposed to find within them. An uncaptioned photograph cannot be the basis for a conclusion. Further, our capacity to look at a photograph is always dependent upon our having seen photographs before: we are familiar with a particular mode of distortion, of perspective, of flattering angles and candid cameras. Photographs can make us nostalgic, shocked, amazed or disgusted. Each of us believes we are a sophisticated 'reader' of images, and yet when the juror is shown a photograph and asked to exclude all reasonable doubt, they are usually unable to do so, unless they are also given something more; some extra access into the picture, further information, another way of looking.

Juror doubts

The ramifications of the *Smith* decision were revisited in February 2004, when 'riots' erupted in the Sydney suburb of Redfern, following the death of an Aboriginal boy after a police pursuit. Clashes between Indigenous youth and police were captured by police, media and amateur photographers, and these images were later used to identify some of the participants. The NSW Police Minister at the time, John Watkins, issued a media statement confirming that the High Court's decision in *Smith* would not impede the swift and strenuous pursuit of trouble-makers.[3] However, very few convictions were secured after those events.

These cases demonstrate that photographs alone are not enough to prove guilt beyond a reasonable doubt. Jurors do have doubts about photographs, and need something more in order to conclude their deliberations. This void has increasingly been filled by experts. The High Court's decision left open the possibility that, where there was some specialised knowledge to be applied to the photograph, that evidence could be given by the witness with that knowledge.

Use of experts

What makes someone a specialist at making photographic recognitions? The High Court thought that ordinary police officers were not in a better position than a juror to recognise someone with whom they were acquainted from a blurry photograph. Interestingly, the Court wondered why Smith's mother, who was a witness at his trial, was not shown the photographs; this suggested that a mother might be well placed to recognise her son from an unclear photograph.

Criminal courts have accepted that a person might become an expert, through study or experience, in photographic recognitions where the face is distorted (for instance, through wearing a stocking over the head).[4] Courts have accepted that a witness can testify where they have some prior knowledge of a person's features (including distinctive clothing, tattoos, injuries, manner of walking) where these are represented in a photograph.

Moreover, courts are now accepting expert evidence using new technological methods for 'reading' photographs. New technologies produce new ways of seeing. These technologies purport to mediate between the juror and the image, rendering legible, or visible, what was previously unclear. These techniques are supposed to narrow the gap between 'resemblance' and 'recognition'. They are supposed to assist the jury to make a better determination of the facts. To date, however, Australian courts—and jurors—remain ambivalent about these techniques.

Photogrammetry, facial mapping & photo-comparison

Methods such as photogrammetry, facial mapping and photo-comparison have been used, and widely accepted, in the United States and United Kingdom since at least the early 1990s.

Photogrammetry is the process of measuring photographed objects. Using the principles of perspective—wherein three-dimensional objects are represented in two dimensions—and using the measurements of known objects, unknown objects can be

measured in photographs. In the United States, photogrammetry experts from the FBI Special Photographic Unit testify in bank robbery cases: they take measurements of various permanent objects in the bank, and use them to measure the bandits captured by the camera. They can measure—with a high degree of precision—features such as height and shoe size, and jurors are informed of the statistical occurrence of people with those dimensions.[5]

Facial mapping begins with the assumption that no two people share the same facial features. It brings together the techniques of photo-anthropometry (comparing facial dimensions or proportions between two photographs), morphological analysis (a feature-by-feature comparison), and photographic superimposition (using computer software to manipulate images so that one can be laid on top of the other to make a comparison). A recent decision in the NSW Court of Criminal Appeal addressed, in part, the frustration of a jury trying to evaluate this expert evidence.[6]

△ New technologies, while they offer us new ways of looking, also pose new evidentiary problems. △

The jury in that case was asked whether the defendant was represented in the surveillance photographs, and the expert in facial mapping was called by the Crown in order to assist their deliberations. The jury sent a note to the trial judge, seeking to know more from the expert about the reliability of the technique, the error rate, and the number of features that needed to match in order for a recognition to be accurate. The Court of Criminal Appeal held that these were pertinent questions which, when put to the expert, were not satisfactorily resolved. As a result, the evidence of the expert was held to be inadmissible for not meeting the requirements of 'specialised knowledge' under the *Evidence Act*.[7]

The same expert had testified in the prosecution of Bradley John Murdoch, who was subsequently convicted of the murder of Peter Falconio, and associated offences.[8] It was a complex prosecution which relied, in small part, upon CCTV footage taken at a truck stop featuring a man whom the expert identified as Murdoch. A defence expert challenged the reliability—and the originality—of the facial mapping technique used by the Crown's witness. He said that the technique was simply another form of photo-comparison which, prior to the use of DNA evidence, was used in cases of contested or disputed paternity. With the proliferation of CCTV, photo-comparison techniques were given new applications.[9]

New technology/new problems

New technologies, while they offer us new ways of looking, also pose new evidentiary problems. Photographic evidence demands that jurors take care not to conflate 'looking' with 'knowing'. Particularly in our current climate, where surveillance and biometrics proliferate, we have exponentially more ways of visually capturing images. We, therefore, need more ways of looking at them; we need to learn how to read them, understand them, and when to exercise caution.

Law must embrace these technologies, but it must recognise their limits. Photographs do not speak for themselves; they require interpretation and care, and jurors must be assisted in using them. A 'jurisprudence of the visual' needs to be developed, requiring detailed thought, guidance and instruction for jurors, litigants and judicial officers in using photographic evidence and newer visual forms of imaging. Visual images are complex, contingent, unstable and misleading. Without consigning all forms of looking into the realm of experts, we must also concede that it is unsafe and unfair to expect jurors to remain unguided in drawing conclusions from photographs.

Endnotes

1. *Smith v R* (2001) 206 CLR 650.
2. Mundarra Smith is Indigenous. Psychological studies show that people typically make more errors of recognition when they are asked to recognise a person from a racial group different from their own. Cross-racial identification jury instructions are entrenched in United States jurisprudence, and occasionally given in Australia. See *State of New Jersey v Cromedy* (1999) 158 NJ 112; S Johnson, 'Cross-Racial Identification Errors in Criminal Cases' (1984) 69 *Cornell Law Review* 934; K Biber, *Captive Images: Race, Crime, Photography* (2007).
3. J Watkins (NSW Minister for Police), 'Police Power to Prosecute Using Video Footage Confirmed', (Media Release, 26 February 2004).
4. *R v Griffith* (1995) 79 A Crim R 125.
5. See, for example, *United States v David Wayne Johnson* (1997) 114 F.3d 808.
6. *R v Hien Puoc Tang* (2006) 161 A Crim R 377.
7. *Evidence Act 1995 (NSW)*, s 79.
8. See *R v Murdoch (No 4)* (2005) 195 FLR 421; *Murdoch v R* [2007] NTCCA 1.
9. See *Murdoch v R* [2007] NTCCA 1, [265].

Statistics and the law

A minefield for juries

By John Croucher

The subject of statistics strikes terror into the heart of many professionals, whether they be medical practitioners, members of the legal fraternity or any other professional who should know something about how it all works (but probably do not).

Pity, then, the beleaguered juror, who must navigate his or her way through conflicting testimony from those who are supposed to know. And a little knowledge is dangerous, as highlighted by the tragic Sally Clark case in the UK.

By a majority verdict of 10:2,[1] Clark had been convicted in 1999 of murdering her two sons, both of whom had died of apparent sudden infant death syndrome (SIDS). She was sentenced to life imprisonment. As a lawyer, a convicted child-killer and the daughter of a police officer, she did it tough in prison. She served more than three years of her sentence before her conviction was quashed in 2003.[2] She never was able to put it behind her and she was found dead in her home on 16 March 2007. It was described as 'one of the great miscarriages of justice in modern British legal history';[3] and the misuse of statistical evidence played a significant role.

Statistical errors

An eminent paediatrician gave evidence to the jury that the probability of two babies dying of SIDS in Clark's circumstances (affluent, middle-class, non-smoking) was one in 73 million. Putting this into words, rather than numbers, he said that 'one sudden infant death in a family is a tragedy, two is suspicious and three is murder unless proven otherwise'. This figure was outrageously incorrect. Indeed, statisticians commenting on the Clark case had been very disturbed from the outset that such a serious statistical error had been made and one that had no doubt influenced the jury, especially given the comments of the trial judge in his summing up that such evidence was 'compelling'. It even prompted a letter from the President of the Royal Statistical Society, Professor Peter Green, to the Lord Chancellor that outlined the statistical flaws made at the trial and implored him 'to ensure that statistical evidence is presented only by qualified statistical experts, as would be the case for any other form of expert evidence'. Indeed the correct probability of a family that has already had a cot death having a second cot death is more like one in 100—a far cry from one in 73 million.

There has been much written on the statistical errors made in the Clark trial and they serve as an excellent example of just how things can go horribly wrong if they are accepted as fact. They can also have a compelling influence on jurors in their weighing up of evidence. The theory of 'probability' is widely misunderstood by most members of the general public, including jurors, along with those (unfortunate) students forced to study it by compulsion, even on a small scale, as part of their chosen major. Indeed, many sadly try to put it to one side as soon as their degree is over. But invariably statistics manages to intrude into some professional lives such that it can't just be ignored. And so it is with legal practitioners, many of whom find statistics a real challenge. This has led to erroneous conclusions based on the evidence that have become known as a variety of 'fallacies', including those of both the prosecutor and defence. Whether or not the underlying mathematics is fully understood, it is essential that jurors can correctly interpret

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the information provided by witnesses, expert or otherwise. Without an ability to interpret evidence provided in the form of statistical information, seemingly damning figures ('one in 73 million') are left hanging in the air to confound counsel, judge and jury alike. Statistical evidence has to be introduced and evaluated properly if it is to have an effective role in evidence.

Ordinary and conditional probability

△ Without an ability to interpret evidence provided in the form of statistical information, seemingly damning figures ... are left hanging in the air to confound counsel, judge and jury alike. △

Without delving into the deeper intricacies of probability theory, there are a few examples that can always be relied upon to give pause for thought—and to reveal the perils of statistics and surprising results to the uninitiated. There is a vital difference between 'ordinary' (or 'unconditional') probability and 'conditional' probability. To illustrate the former, it is instructive to consider the well known 'birthday problem'. This goes along the lines of: 'how many people do you need in a random sample before the probability of having matching birthdays (same day and month) is at least 50%?' A typical response might be about 183 since there are 365 days in a year. In fact the right answer is only 23, a figure that seems incredible but is nevertheless correct. A variation on this problem is: 'how many people do you need in a random sample before the probability of two people having a match on the last two digits on their home telephone number is at least 50%?' Although there are 100 possible two-digit numbers, only 13 people are required in the sample to achieve this. It is 'unconditional' because there is no other information given. These two gems alone are often enough to convince people that probability theory may well be beyond them.

'Conditional probability' is a probability calculated with the knowledge that some other event has occurred. The information you know alters the probability. For example, in the absence of other facts, the probability of throwing a six on a fair six-sided die is one in six. However, if you were now told that the outcome was an even number, this probability reduces to one in three. That is, this knowledge has changed the answer markedly since the number of possible outcomes has been reduced from six to only three. This is usually expressed in words as 'the conditional probability of throwing a six given that the outcome is even'.

A similar situation often arises in the legal context. If a person is selected at random then, in the absence of other information, the probability that they are male is about one in two (or ½ or 50%). However, if you are now told that the person has a beard, the conditional probability they are male changes to (essentially) one, or 100%. In a trial situation this is to all intents and purposes what a judge and/or jury is trying to do. That is, to find the conditional probability that an accused is guilty or innocent given the evidence. That is why statistical evidence has been introduced in criminal trials—as a pointer to the probability in an evidentiary sense of the particular fact in issue.

As a particular instance, it is often conjectured that juries confuse the direction of conditional probabilities with dire consequences. For example, with DNA testing becoming more widespread at crime scenes, which of the following two conditional probabilities should the court be considering:

A. the probability that the DNA found at the crime scene matches that of the accused if the accused is innocent; or

B. the probability that the accused is innocent if the DNA found at the crime scene matches theirs?

An inexperienced person may well say that these probabilities are really the same thing, but this is far from the case and they can in fact differ to a very large degree. We have already noted that the conditional probability of throwing a six on a fair die given the outcome is even is one in three. However, in the reverse, the conditional probability that the outcome is even given that a six has been thrown is one (a certain event). So which of *A* or *B* in the DNA example is the one that should be of interest? The correct answer is at the end of this article!

Independent events

The issue of *independence* is also one that is often misused and misunderstood in the legal context. Statistically, two 'events' (facts) are said to be 'independent' if the occurrence of one of them is totally unaffected by the occurrence of the other. Although it may be arguable on some occasions whether two events might be really independent, in most cases it seems clear-cut. For example, the outcomes of two tosses of a coin are readily seen to be independent events since a coin

has no memory and cannot remember what it landed on the first toss. On the other hand, the event of a person being pregnant is certainly not independent of the fact that they are female.

Independent events are more straightforward to deal with since various probabilities can be calculated reasonably easily. In particular, the probability of two (or more) independent events occurring is simply the product of the probabilities of each individual event occurring. In the case of the coin, for example, the probability of obtaining a head on a single toss is ½. The probability of obtaining two heads in two tosses is ½ x ½ = ¼, since the events are independent. This can extend to any number of tosses so that the probability of tossing, say, five heads in a row = ½ x ½ x ½ x ½ x ½ = 1/32 or about 3% of the time.

Dangerous mistakes

The danger comes when the events are *not* independent but their probabilities are multiplied by the naïve user anyway. This was one of the major criticisms made of the one in 73 million figure given in the Sally Clark case. The expert provided an estimate that the probability of a randomly chosen baby in the socio-economic circumstances of that of Clark's dying of SIDS was about one in 8500. He, therefore, concluded that the probability of *two* such deaths could be obtained by squaring this value. This yields 1/8500 x 1/8500 or about one in 73 million. This appears to be powerful evidence against the accused. But is the event of a second child dying of SIDS really independent of the event of the first child also dying of SIDS? If they are *not* independent then it is nonsense to multiply the probabilities since the answer can be spectacularly incorrect, as is the case here. There are many elements in calculating what would be the probability of *dependent* events occurring (like two children in the same family dying of the same cause), but it cannot be calculated simply by using the multiply rule that is used for *independent* events.

Let's return to the example about the ½ probability that a random person in the population is male—and add to it. Suppose we estimate that the percentage of people walking down the main street of a city during business hours at any given time have the characteristics listed are as shown in brackets: male (50%); suit coat (10%); suit trousers (10%); black shoes (20%); case (10%); tie (15%); glasses (25%); moustache (10%); beard (15%); dark hair (30%).

There is nothing particularly startling about these figures. But suppose that an eyewitness to a crime stated that the perpetrator had all of these characteristics. In a population of about, say, 60 million people, how many people would we expect would match that description? If we assume that the characteristics are independent, the probability that an individual has *all* of them can be found by multiplying the individual probabilities. This yields 0.50 x 0.10 x 0.10 x 0.20 x 0.10 x 0.15 x 0.25 x 0.10 x 0.15 x 0.30 = 0.000000017. Therefore the 'expected' number of people who have all of these characteristics in a population of 60 million = 0.000000017 x 60,000,000 = 1. That is, just *one* person.

You might therefore conclude that if you could find a person with all of those characteristics somewhere in Australia or even the UK then you would have got your offender! A careful look at the characteristics, however, shows that we are describing a male who is wearing a suit, has dark hair, beard and moustache, wears glasses and is carrying a case. It is obvious that there are probably many thousands of people who match that description, not just one. The problem is of course that the characteristics are far from independent (it is easy to see why) and it is quite ridiculous to multiply them together. Although it may seem obvious, similar erroneous calculations to these have appeared in court proceedings around the world to show that the chance of finding another person with characteristics similar to an accused is extremely low. This naturally has the effect of making the accused look more guilty.

More sophisticated calculations

There are other types of cases involving probability that require more sophisticated calculations. For example, suppose that your child is about to be vaccinated and you ask the medical practitioner about the risk that it will kill him or her. You are told that the risk is one in 200,000 and, it being so low, you agree to go ahead but the child subsequently dies from the vaccination. You are naturally devastated and subsequently discover that of the 800,000 children who received the vaccination there were in fact six who died as a direct result. Your calculations tell you that if the risk of dying had

△ The danger comes when the events are not independent but their probabilities are multiplied by the naïve user anyway. △

been really 1 in 200,000 then there should have been only four deaths in 800,000, not six. This clearly means that the medical practitioner lied about the true risk. Or did they?

To help answer this question, suppose that we take a fair coin and toss it six times. We might anticipate that half of the outcomes would be a head and so we would 'expect' three heads. But suppose we actually obtained four heads in those six tosses. Would that necessarily mean that the coin was not a fair one? Almost certainly not since there is some statistical variation that must be allowed for and we will not always get exactly what we expect, even if the original premise of the coin being fair is true.

This is also the case for the vaccination question where there is some margin of error within which it may be quite likely that the medical practitioner was still correct. Only precise calculations involving the probability of obtaining the given number of deaths or greater, based on the assumption that the information provided was accurate, can answer a problem such as this.

There are many other legal matters in which statistics can play an important role in arriving at the correct conclusion and it is very important for jurors to be aware of some of the more common pitfalls and range of situations to which it applies. In most cases this will still mean enlisting a statistical expert who has done the actual number crunching and analysis but at least they should have some confidence that it has been done in a correct manner.

Finally, as promised, the answer to the question posed earlier about which probability is the one that should be considered in the DNA problem. The correct answer is *B*. As the guilt or innocence of the accused is the relevant question, the probability to consider is the person's innocence, given that their DNA matches the DNA found at the crime scene.

Endnotes

1. See the article by Nicholas Cowdery on the issue of majority verdicts, earlier in this issue of *Reform*.
2. *R v Clark* [2000] EWCA Crim 54; [2003] EWCA Crim 1020.
3. G Wansell, 'Whatever the coroner may say, Sally Clark died of a broken heart', *The Independent* (London), 18 March 2007.

Jury research in New South Wales

By Peter Hennessy

Over the past five years, there has been a significant increase in the amount of jury research being undertaken in Australia, both within academia and within government.

The role, function and selection of juries have become issues of political interest, and this is reflected in the work that has been undertaken within the NSW Law Reform Commission (NSWLRC) since 2003. Since that time, the Commission has been asked to consider the following questions:

- Whether majority verdicts by juries in criminal trials should be introduced in New South Wales?
- Whether people who are blind or deaf should be able to serve on juries?
- Whether juries should have a role in the sentencing of an offender?
- Whether the current eligibility provisions for jury service are inhibiting the representativeness of juries?
- Whether the warnings and directions that a judge is required to give to a jury in a criminal trial have become overly complex?

Majority Verdicts (Report 111)

A report on majority verdicts was completed by the NSWLRC in August 2005. The Commission recommended that the system of unanimity should be retained, primarily on the basis that there was a relatively low incidence of hung juries, and that developing other strategies to reduce the rate of hung juries may be more effective. The Commission, therefore, recommended that 'empirical studies should be conducted into the adequacy, and possible improvement, of strategies designed to assist the process of jury comprehension and deliberation'.[1]

This recommendation was not accepted by the Government, and majority verdicts (11-1) have now been introduced in New South Wales.

Blind or Deaf Jurors (Report 114)

Report 114 was completed in the second half of 2006, and released in May this year.

The *Jury Act 1977* (NSW) does not specifically exclude people who are blind or deaf from serving on a jury. However, it excludes a person who is unable to read or understand English, as well as 'a person who is unable because of sickness, infirmity or disability, to discharge the duties of a juror'.[2] In accordance with this provision, the Sheriff of NSW has determined that people who are blind or deaf are ineligible to serve as jurors. The competing policy issues which arose in this review involve, on the one hand, the question of whether it is discriminatory to exclude people who are blind or deaf from serving on juries and, on the other hand, whether a person who is blind or deaf suffers a disability which will compromise his or her understanding of the evidence, or prevent him or her in some other way from fulfilling the responsibilities of a juror. Would it prejudice an accused's right to a fair trial? The report recommended that the *Jury Act* be amended to reflect that people who are blind or deaf should be qualified to serve on juries, and should not be prevented from doing so on the basis of that physical disability alone.

The NSWLRC recommended the development of guidelines by the Sheriff, for the provision of reasonable adjustments, including sign language interpreters and other aids for use by deaf or blind jurors during trial and deliberations.

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Blind and Deaf Jurors

The New South Wales Law Reform Commission report, *Blind and Deaf Jurors* (Report 114) is available free online at: <www.lawlink.nsw.gov.au/lrc>.

Hard copies of the report can be purchased by contacting the NSWLRC on (02) 9228 8230 or via email at: nsw_lrc@agd.nsw.gov.au.

△ It is possible ... for a jury to return a verdict recommending leniency with respect to a sentence. How this is taken into account is entirely a matter for the judge. △

However, the report recommended that the court should have the power to stand aside a blind or deaf person summoned for jury duty if it appears to the court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge his or her duties effectively, in the circumstances of the case.

Aspects of the work involved in this review are set out in another article in this journal.[3]

Juries and sentencing

In June 2006, the NSWLRC published Issues Paper 27, *Sentencing and Juries*, which sets out the arguments for and against the jury having a role in the sentencing of an offender. The issue of whether juries should have some role in sentencing was raised by the Chief Justice of the Supreme Court of NSW, His Honour James Spigelman AC, in a speech he made in January 2005 entitled 'A New Way to Sentence for Serious Crime'. The NSWLRC was subsequently asked by the Attorney General to consider whether a judge in a criminal trial should consult with the jury on aspects of sentencing, having regard to the secrecy and protection of jury deliberations, as well as public confidence in the administration of justice.

The current practice in Australia is that juries play no direct role in the sentencing of an offender. Determining the appropriate penalty is a matter for the magistrate or judge. It is worth noting that the vast majority of criminal cases heard in New South Wales are finalised in Local Courts before magistrates. In 2004, 3,623 matters were finalised in the District and Supreme Courts of NSW. Only 622 of these involved trials before either a judge and jury or a judge sitting alone. Thus, in terms of the overall number of criminal justice matters heard in the District and Supreme Courts, approximately 16% involve a jury. It is only, therefore, in these matters where the jury could have any role in sentencing at all.

Under the present system, jurors can play only an indirect role in the sentencing process. It is possible, for example, for a jury to return a verdict recommending leniency with respect to a sentence. How this is taken into account is entirely a matter for the judge. Juries may also have an indirect involvement if they deliver a verdict of guilty on an alternative count (eg, manslaughter instead of murder) or they deliver a special verdict.[4]

In contrast to the position in Australia, juries in the United States have a long history of involvement in sentencing. This has predominantly been in determining whether the death penalty should be imposed. However, in non-capital cases, only six states in the United States (Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia) still provide for juries to have direct involvement in sentencing. In its Issues Paper, the Law Reform Commission considered the following key issues:

- public perceptions concerning the current sentencing process, and how these impact on public confidence;
- likely effect that introducing a role for juries in sentencing would have on public confidence levels, sentencing decisions and the jurors themselves;
- the type of input that jurors should have, for example, being asked by the judge to explain why they found the defendant guilty, or giving their views on questions that relate directly to sentencing;
- the practical and procedural questions that would need to be resolved before

any proposal for involving the jury in the sentencing process could be implemented; and

- whether there are any constitutional constraints in relation to any such proposals.[5]

There is no doubt that there are both philosophical and practical issues to be considered in any proposal to involve juries directly in the sentencing process. A primary concern is potential impact on public confidence in the criminal justice system. Groups in favour of greater involvement by juries argue that there would be greater public confidence in sentencing decisions made by judges if the community's expectations could be conveyed to the judge via the jury members. The result of this process, it is argued, is that sentencing decisions would be more consistent with public opinion on crime and the appropriate punishment. On the other hand, members of the legal profession have argued that the practical difficulties involved in providing mechanisms for jurors to have their say on sentences could have a negative impact on public confidence. This would be particularly the case if the jury's consultations on sentence with the judge were conducted in secret. Added to this is a growing body of research which suggests that jurors are more inclined to agree with sentences handed down by a judge when they have heard all the evidence in a case.[6]

Another issue that has arisen for consideration is the potential impact of the opinions of jury members on the sentencing decision itself. On one view, juries may assist the judge in determining an appropriate sentence by offering a broader range of opinions on the gravity of a crime, and perhaps even the chance of the offender re-offending. On the other hand, concerns have been expressed that jurors may take into account irrelevant considerations. It might also lead to a lack of consistency in sentencing, with a consequential loss of public confidence in the criminal justice system. It might also prove difficult to get 12 jurors to agree on what an appropriate sentence should be. This would not be a major hurdle if the role of the jury were limited to providing advice to the judge, with the judge having ultimate responsibility for determining sentence.

A further issue is the potential impact on the jurors themselves if they are required to determine sentences. Not all jurors may feel comfortable in taking on this new responsibility, as they may have had little, if any, experience with the criminal justice system previously, nor have any idea of what an appropriate sentence might be in a particular case. Determining an appropriate sentence is a complex task. Maximum sentences for particular offences are, in most cases, specified in legislation, and other relevant principles have been determined by the courts over periods of time. Jurors may need additional briefings, including written materials, to be made available in order for them to make informed decisions about sentencing.

The NSWLRC has received submissions on the issues set out in Issues Paper 27. It is currently preparing a final Report to the Attorney General, which is expected to be released in mid-2007.

Jury service

In August 2006, the NSWLRC commenced a review of the system for selecting jurors under the *Jury Act*. The Commission was requested to have special regard to the current statutory qualifications for jury service, other options for excusing a person from jury service, and to consider Australian and international developments in relation to the selection of jurors. The Commission published Issues Paper 28 in November 2006, and will be reporting in mid-2007.

The background to the project was an increasing concern that juries had become, or were becoming, less representative of the community, because of the number of people who were automatically disqualified, or were ineligible, or otherwise exercised their right to be excused. For example, judges, lawyers, members of parliament and staff who work in parliament are ineligible for jury service. Clergy, dentists, medical practitioners, pharmacists, mine managers, persons who work for emergency services, persons over 70 years, pregnant women, or persons caring for children under 18 years may seek exemption from jury service. The effect of this is that large sections of the community are never summoned for jury duty, whereas others are summoned more regularly than they should be.

It was an appropriate time for a review in New South Wales as a number of other Australian and overseas jurisdictions had reviewed and made changes to their jury selection system

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in recent years. In most instances, these reviews resulted in a significant reduction in the categories of persons who were exempt from jury duty.

Jury duty is an important civic duty, and one in which all citizens should, as far as possible, participate. Limiting the number of people who are able to serve as jurors has the effect of increasing the burden on those who remain eligible. As the High Court noted in *Cheatle v The Queen* in 1993, 'the relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community'.[7]

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While there is a formal requirement that jurors are randomly selected, the automatic exclusions of certain professions and occupations, or the right to seek exemption, has had impact on the representativeness of a jury. The NSWLRC has received many submissions supporting the simplification of the system for selecting jurors and a reduction in the number of exempt professions.

Jury directions

The final jury project being undertaken by the NSWLRC, which commenced in February 2007, is an examination of the directions and warnings that are required to be given by a judge to a jury in a criminal trial. The Commission is required to have particular regard to:

- the increasing number and complexity of the directions, warnings and comments required to be given by a judge to a jury;
- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
- the ability of jurors to comprehend and apply the instructions given to them by a judge; and
- whether other assistance should be provided to jurors to supplement the oral summing up.

There has been growing concern, particularly by trial judges, that the directions, warnings and comments that are required to be given by a judge to a jury have increased in number and become more complex. For example, there are directions that are required to be given in relation to offences that may have occurred many years previously (Longman direction), in sexual assault cases where the victim has not made a complaint or a timely complaint (Crofts direction), in cases where there is only one witness asserting the commission of a crime (Murray direction), and other directions that arise in particular cases, for example, tendency or coincidence evidence, similar fact evidence, relationship evidence, or evidence in rebuttal of good character. Most of these directions are complex, and the capacity of jurors to comprehend and apply the instructions is difficult to ascertain.

To gain a better understanding of the capacity of jurors to understand and apply instructions given to them, the NSWLRC has examined empirical research that has already been published in this area, but in addition will be undertaking a survey of jurors in New South Wales, with the assistance of the Bureau of Crime Statistics and Research. This empirical research will be conducted in the second half of 2007. The Commission's review will consider not only whether it is possible to simplify the instructions that are given to juries, but also whether the scope for preparing material in plain English or in simplified diagrammatic forms may be appropriate in some jury trials.

The Commission is due to report on this review in mid-2008.

Conclusion

In addition to the jury projects being undertaken by the NSWLRC, a number of empirical studies of juries have been conducted or have been commenced, both in New South Wales and in a number of other states.[8]

The results of these studies will provide significant insights into the way juries operate and will assist in improving both the system for selecting jurors, the resources that jurors need to properly perform their task, as well as improving the quality of the decision-making process.

Endnotes

1. New South Wales Law Reform Commission, *Majority Verdicts*, Report 111, [4.59]–[4.64].
2. *Jury Act 1977* (NSW), sch 2.
3. See the article by Jemina Napier and David Spencer, immediately following this article.
4. See New South Wales Law Reform Commission, *Sentencing and Juries*, Issues Paper 27, Ch 2.

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A sign of the times

Deaf jurors and the potential for pioneering law reform

By Jemina Napier & David Spencer

'The participation in juries by representatives of the community is a fundamental element of the administration of justice, and thus serves the interests of the State. Jury service, like voting, is a right and obligation of citizenship [of Australia]…'[1]

Currently, deaf persons cannot serve as jurors in Australia or in most other countries in the world. Current policy in the majority of countries states that deaf people are not capable of serving as jurors, due to their 'incapacity' or disability, that is, their hearing loss.

The United States has led the way with respect to law reform on this issue, with many states now allowing deaf people to serve as jurors, and with provisions for interpreters for deaf jurors.[2] Deaf people cannot serve as jurors in British or Irish Criminal Courts due to legal issues with having a 13th person (that is, the interpreter) in the jury room;[3] however, a deaf person has served as a juror in a British Coroner's Court[4] and a New Zealand tax fraud case.[5]

Law reform in NSW

Given that the notion of deaf people serving as jurors is obviously on the law reform agenda in some countries, the consideration given in Australia to this issue is timely. Acting at the request of the New South Wales (NSW) Attorney General, the NSW Law Reform Commission (NSWLRC) commenced an inquiry in 2003 to investigate whether deaf and blind persons ought to be able to serve on juries in criminal courts.

Jurors do not just need access to the proceedings in a courtroom, they need to make informed decisions about the status of a person's guilt in committing a crime, and need to be able to participate in jury deliberations. Thus the access needs of a deaf juror would be different to those of a deaf defendant, witness or complainant.[6]

Questions were mooted about whether deaf people can sufficiently comprehend legal proceedings when relying on a sign language interpreter, in order to get full access to the facts of a case, and thus make an informed decision about a person's guilt.

One outcome of the NSWLRC inquiry was to fund this study to investigate whether deaf people can sufficiently access court proceedings to make informed decisions as jurors. This article provides an overview of the research findings and recommendations.

Research questions

The research questions that were investigated that are addressed in this article, include:

- How much do hearing jurors comprehend of a judge's summation?
- How much do deaf jurors comprehend of a judge's summation?
- Is there a significant difference between levels of comprehension between deaf and hearing jurors?
- Are deaf jurors disadvantaged by relying on sign language interpreters to access information?

Jemina Napier has practiced as a sign language interpreter since 1988, and works as a British Sign Language (BSL), Australian Sign Language (Auslan) or International Sign interpreter. She is a senior lecturer in the Department of Linguistics at Macquarie University and coordinates the Department's suite of Translation & Interpreting programs. Jemina is the principal lecturer in all subjects in the Auslan/English Interpreting program.

David Spencer is Senior Lecturer in the Department of Law at Macquarie University. David teaches contract law and dispute resolution, and co-teaches with Jemina on the subject 'Auslan interpreting in legal settings'.

Testing & comparing juror comprehension

The Hon James Wood QC recently expressed concern about how much lay people serving as jurors really understand.[7] Studies have highlighted that even hearing people listening directly to spoken English can experience difficulty in comprehending jury instructions.[8]

Thus a study was designed using experienced NAATI[9] accredited sign language interpreters to develop a video-based comprehension test to assess deaf jurors' comprehension of jury instructions, as compared to hearing jurors' comprehension. Six deaf and six hearing 'jurors', selected to provide a broad representation across recommended variables of age, gender, highest educational attainment, employment category, and first language, were tested on their understanding of two excerpts from a judge's summation taken from a real case.[10] The six hearing jurors watched and listened to a pre-recorded reading of the excerpts from the judge's summation. The six deaf jurors watched a pre-recorded Auslan interpretation of the same reading of the excerpts.

The jurors all were asked 12 questions about the content of the excerpts, using a mixture of open, closed and multiple-choice questions. The hearing jurors were tested in English, and gave their responses orally in English. The deaf jurors were tested in Auslan, and gave their responses in Auslan. The results of the comprehension test were compared to determine the similarities and differences between responses from those who accessed information directly or indirectly via an interpreter. All participants also participated in a post-test interview to elicit data on their perceptions of the test and jury service.

Deaf & hearing juror comprehension

The results of the comprehension test showed that both hearing and deaf 'jurors' misunderstood some concepts. In relation to the closed/ multiple choice questions, approximately 10.5% of the questions were answered incorrectly by all participants. Of the open-ended questions, some responses were problematic from both deaf and hearing participants. Table 1 summarises the correct responses by participants undertaking the comprehension task.

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It can be seen that percentage-wise, there is not a significant difference between the number of correct responses from deaf and hearing participants (2.8% difference). Of all the errors in responses to true/false and multiple-choice questions, almost half (five of nine errors made) related to question five, a multiple choice question which was also the longest of all questions asked.

A number of similarities were found in the responses made by deaf and hearing participants suggesting that some items may have been challenging, regardless of language

Table 1: Summary of correct responses grouped by the format of the question

		Correct reponses		
Questions		Deaf participants (n=6)	Hearing participants (n=6)	TOTAL (n=12)
True/false	Q1	6	6	12
	Q2	6	6	12
	Q3	6	6	12
	Q4	3	5	8
Multiple choice	Q5	3	5	8
	Q6	6	6	12
	Q7	6	5	11
	Q8	6	6	12
Open ended	Q9	6	4	10
	Q10	1	0	1
	Q11	5	6	11
	Q12	0	1	1
TOTAL		54/72 75%	56/72 77.8%	110/144 76.4%

used, or whether the information was received directly or mediated through an interpreter.

An overall pattern seen in the responses to the comprehension test is the difference between responses to questions of fact and questions relating to legal concepts. Overall, most respondents answered questions of fact correctly. In the case of deaf respondents, this means that the facts of the case had been interpreted clearly and correctly and had been understood by deaf participants. When asked to comment on the comprehension test, four participants specifically mentioned the facts of the case as being one of the easier aspects of the activity. When factual errors did arise, they sometimes arose in respondents who otherwise provided correct answers to more complex questions.

Responses to questions related to legal concepts (in particular the concepts of whether the actions that led to the death of the deceased were reasonable and proportionate to the threat made by the accused), however, were more problematic. Overall this may indicate a low level understanding of a basic threshold concept in the trial of criminal law cases. If respondents cannot grasp this basic threshold concept then the rest of the evidence may well be lost or misinterpreted by the jury, whether hearing or deaf, in the jury room. However, the level of misunderstanding is comparable between the two sample groups meaning that the concept or the form of questions were difficult for both groups.

In sum, results show that both the deaf and hearing 'jurors' equally misunderstood some terms and concepts. Nonetheless, all the findings show that legal facts and concepts can be conveyed in sign language effectively enough for deaf people to access court proceedings and to understand the content of legal texts, to the same extent as hearing people.

Regardless of the information provided to participants prior to undertaking the various stages of this study, the source text was still de-contextualised from an actual court case and the gradual introduction of material that would have occurred in a real life case. The material was also challenging as hearing 'jurors' equally misunderstood some aspects of the summation even though they were receiving the information directly in English. In a real life courtroom, jurors would have had time to absorb evidence and arguments before hearing the judge's summation. Even with these limitations, this study has demonstrated that:

- sign language interpreting can provide effective access to court proceedings for a deaf juror;
- hearing people misunderstand court proceedings without being disadvantaged by hearing loss;
- there is no significant difference between levels of comprehension between deaf and hearing jurors;
- deaf jurors are not disadvantaged by relying on sign language interpreters to access information in court.

So what now?

This research can only be considered as a pilot due to the small number of participants. Furthermore, this study has demonstrated that a small number of deaf people can understand excerpts from a judge's summation through English to Auslan interpretation. It does not, however, provide evidence for how deaf people can participate in, and make a significant contribution to, jury deliberations. Neither does it explore the potential impact of deaf jurors on the administration of justice from the perspective of the advocates, the Bench, the accused and witnesses. Therefore further research is needed to test deaf juror comprehension more widely, and investigate deaf juror participation in court proceedings.

Nonetheless, the findings of this study indicate that deaf people could serve as jurors, and a recommendation has accordingly been made by the NSWLRC. It is hoped that the NSW Attorney General will take on this recommendation and pioneer law reform in Australia, and potentially internationally. A full report of the study is to be published jointly as a monograph by the NSWLRC and Macquarie University.

Acknowledgements

This study would not have been possible without our research assistant Joe Sabolcec, or without joint funding from the NSW Law Reform Commission and a Macquarie University External Collaborative Grant.

Endnotes

1. New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004), [1.4].
2. F Ellman, 'Translator Aids Deaf Juror in Negligence Trial' (1992) *New York Law Journal*.
3. S Enright, 'The Deaf Juror and the Thirteenth Man' (1999) *New Law Journal*, 1720.

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The juror support program in NSW

By Lynn Anamourlis

Lynn Anamourlis is the Manager of Jury Services within the Office of the Sheriff in New South Wales.

It has long been accepted that the jury system is an essential aspect in the protection of personal liberties—particularly of accused persons—to ensure they receive a fair trial. Jury service is a chance to represent the community and to bring to the administration of justice community standards and values.

Approximately 10,000 people are selected as jurors each year in NSW. Most jurors walk away from court with a feeling of achievement. However, it is also common for a juror to feel detached or confused after the intensity of the courtroom, the concentration that was required and being closed off from a persons' usual routine with a group of strangers. The experience can also be a distressing one due to frustration with the legal system, the nature of the trial, concern about the verdict or the dynamics of the jury room.

The NSW Attorney General's Department, having made a commitment to address the welfare of jurors, established the Jurors' Support Program in 2001. The need for the program arose through reports from the Sheriff's Office, court staff and jurors, themselves, that discharged jurors who are distressed or traumatised by the experience may benefit from access to professional support and/or counselling.

Previously the Sheriff of NSW provided *ad hoc* support to jurors, with Sheriff's staff—of varying skill levels—providing group debriefings immediately after a jury was discharged. The Salvation Army also played an important role, but this was only available in Sydney and only in identified cases. In exceptional cases, particularly in regional areas, local counsellors provided the service with the Sheriff meeting the cost. Counselling was not available to all discharged jurors and the overall process was inconsistent with no formal ground rules in place.

Confidential counselling

Assumptions were often made that it was trials of a more heinous nature that would lead to a juror needing support and counselling. However, research leading up to the implementation of the program showed that common concerns and reactions of jurors had many causes—with jury room dynamics, the responsibility of reaching a verdict, and anxiety for the victim or accused and their families being the most common.

The aim of the Jurors' Support Program is to provide professional and confidential counselling in a comfortable, neutral and confidential manner. The program offers both telephone and face-to-face counselling. Telephone counselling is available 24 hours per day, seven days per week. This can result in immediate counselling and/or a referral for face-to-face counselling. Up to three, free sessions of face-to-face counselling can be provided by registered psychologists through one of three contracted agencies.

Jurors are advised about the Jurors' Support Program after the jury has been discharged. A court officer reads aloud a statement that validates common reactions and feelings and informs jurors of the Program. Jurors are invited to take a pamphlet outlining the program. It is then their decision whether to contact a counsellor. The supporting material—both spoken and written—is provided in a friendly and easily understood manner.

Currently there are three service providers, one in Wollongong, one in Newcastle and another that provides services to Sydney and elsewhere in the state. However, any provider can be accessed, regardless of where the person attended for jury service. The strict tender process to appoint service providers for the Jurors' Support Program ensures that the program operates in a strictly confidential and non-judgmental way.

Evaluating the service

An independent evaluation of the Program took place in 2002. The major findings from the analysis of the results of the evaluation confirmed that there is very strong support among jurors for the Jurors' Support Program and that a majority of jurors found the experience of being a juror was a satisfying one. For those who found the experience of serving on a jury caused concerns, the majority were effectively processed without resorting to formal counselling. Common practices used by the general public to deal with other worries and concerns seem to work just as well in processing strong feelings arising from the jury experience. These processes include thinking about the case, talking to trusted others and the passage of time. This may indicate that the demand for the Jurors' Support Program may never be high.

Approximately 100 people access the Program each year although this figure varies and there has been a slight increase over the past two years. However, knowing that the Jurors' Support Program is there seems to reassure some jurors. This suggests that the very existence of the Program validates some jurors' worries and concerns as being natural and normal.

The Jurors' Support Program continues to offer access to both telephone and face-to-face counselling for people discharged after jury duty.

Juries—a central pillar or an obstacle to a fair and timely criminal justice system?

A very personal view

By Valerie French

Judge Valerie French is a graduate of the University of Western Australia and has practised law as a solicitor and barrister since 1973. A Judge of the District Court since 1994 and President of the Children's Court from 1999 to 2001. Judge French was formerly a Stipendiary Magistrate and Children's Court Magistrate. She is currently the Chairperson of the Prisoners Review Board, and retains her appointment as a District Court Judge.

To suggest that the system of trial by jury could bear critical scrutiny is seen by some as akin to questioning motherhood.

Accusations of elitism are invited if the suggested alternative is trial by judge alone—an alternative that would exclude community involvement at a time when the justice system is often portrayed as being 'out of touch'. When a jury conviction is overturned on appeal and a defendant's imprisonment is found to have been a miscarriage of justice it is a defect in the trial judge's direction or a dereliction of duty in the part of the prosecution that is the subject of trenchant criticism. There is rarely any suggestion that the jury and the system of trial by jury may be at fault.

I have spent many years presiding over jury trials as a District Court judge and conducting trials as a 'judge alone' while a magistrate and a Children's Court judge. I know what system I would choose if I were charged with a serious offence that put my liberty at risk. Simply put, if I were guilty I would take my chances with a jury as I would have nothing to lose. If I were innocent, I would not put my fate in the hands of a committee of 12 people who do not have to give any reasons for their decision or be in any way accountable for what has happened in the jury room.

I am not suggesting that members of the community serving on a jury are not capable of reaching fair and just decisions based on the evidence presented to them—even in lengthy and complicated cases. Clearly they do. Indeed most judges think they do in most cases. I also agree with the view that if jury decisions are in error they tend to err in favour of acquittal rather than conviction. It is often said that it is preferable for many guilty people to go free than for one innocent person to be wrongly convicted. That may be right, but it is poor comfort for the victims of crime. However, I consider that the role of trial by jury as it presently operates can be a significant impediment to a timely, efficient and effective criminal justice system.

Delay

It is not uncommon for criminal trials to be conducted many years after the offence was alleged to occur and a long time after a person has been charged. This delay affects the quality of evidence and impacts on the both the accused, who may be denied bail, and the victims, who can not attempt to achieve some closure and try to get on with their lives. While some delays are caused by the requirement to gather evidence and prepare a case, the time consuming nature of jury trials and the lengthy court lists that they produce is a significant contributor.

Attempts to 'speed up' the process of a jury trial are hampered by the formalities of the process, the lengthy arguments over the admissibility of evidence and the fragility of the system. A trial can be aborted by an unwise or inadvertent comment in court or some exposure of a sensitive matter through the media. When evidence is completed, there is a prospect that the jury may not be able to reach a verdict. There is then a retrial and the whole process begins again, usually months later when a further listing date has been made available.

Personal experiences as judge alone

As a Children's Court judge and a magistrate I have had the satisfying experience of conducting trials for serious offences that were able to be finalised within a few months of the date of the offence or alleged offence. In one particular case involving a very serious home invasion and sexual assault of an elderly woman, the trial was able to be concluded and the two young offenders sentenced within four months. To answer the question of whether the outcome was just, I can only comment that the matter did not go on appeal. That kind of outcome has advantages not only for the individuals involved, the victims and the victims' families, but also the broader community who are able to see that the criminal justice system can work quickly and effectively. I reflected at the time that if the matter had been referred to trial by jury the delays in obtaining a listing and the time taken to conduct the trial would not have seen a conclusion within a period of 18 months to two years—even with the best efforts being made to expedite the matter.

I have also had the experience of presiding over jury retrials that have produced a second or third hung jury. The stress that causes to the people involved is incalculable. The financial burden to the courts, prisons and prosecution authorities is borne by the community.

While it may be argued that this is the price that has to be paid for a 'Rolls-Royce System' I question that *logic* in the light of the reality and the exigencies of the 21st century.

A jury of whose peers?

It has been said that the combined wisdom of a jury of one's peers is the best method of reaching a fair decision. But if you have taken part in or watched a jury empanelment process that sometimes seems questionable. With generous rights to challenge without cause enjoyed by both prosecution and defence, the end result can be disappointing. Prospective jurors with management experience, small business operators, accountants and teachers are routinely excluded. The perceived wisdom appears to be that they may know too much, be too conservative or too protective of property rights. This can leave a pool of people who appear to be the unemployed, the disinterested or—more dangerously—the very resentful at being press ganged into service.

While most jury members take their roles very seriously and in accordance with their oath, it is becoming more common—in my opinion—that some members of the jury do not seem to want to be there. Although it is not possible to say what goes on behind the closed doors of the jury room, I suspect that in some cases that attitude is reflected in their behaviour and possibly in their approach to the trial and the outcome. Lengthy trials produce particular problems and although jury members are protected from loss of employment, a lengthy absence from a job is never advantageous and, of course, the self-employed are left to their own devices.

Some of these problems could be reduced by curtailing the right to challenge without cause. I understand that this has occurred in the United Kingdom where lawyers and even serving judges are now required to report for jury duty and have their numbers drawn out of the hat without fear of exclusion on the grounds of their occupation and experience.

The length and the nature of jury trials have also changed in the past few decades. Although I am not aware of any research to support this, my own experience and a few forays into older transcripts and appeal court decisions indicates that the length of jury trials has blown out. Trials lasting one or two days are becoming less frequent while criminal trials lasting weeks and even months are no longer rare. There are any number of possible explanations for this. The most obvious are the increased complexity of the judges' directions or charges to the jury, the lengthy arguments about admissibility of evidence and the introduction of scientific and technological evidence through expert witnesses.

It has also been suggested that the modern jury member, informed by ready access to the world wide web, endless television crime scene dramas and the political and media focus on law and order issues may find it difficult to bring an objective mind as well as a willing body to the jury room.

The alternatives

So what is the alternative and would that be any better? I am well aware that many members of the judiciary and the criminal Bar are very sceptical about the prospect of criminal trials by judge alone. However, I consider that that is fuelled by early

experiences with crusty old pro-prosecution magistrates and little experience in the advantages of trial without jury. A criminal trial by judge alone is not only shorter and quicker but is also more amenable to proper appellate scrutiny. An appeal after conviction by a jury is generally confined to trawling over the judge's direction to see if there is some error or omission or some construction that could be said to have possibly had an adverse influence on or misled a jury in some way. If the appellant's arguments are upheld it can only be on the basis that whatever error has been exposed may have affected the jury's determination. This has to be a somewhat unsatisfactory state of affairs. It means that a case can go on appeal, sometimes on a number of occasions, then to a retrial years later, all because some defect in the original trial process *might* have impacted on the original verdict.

△ A criminal trial by judge alone is not only shorter and quicker but is also more amenable to proper appellate scrutiny. △

A trial by judge alone can be subject to appeal by both prosecution and defence. The conviction will be accompanied by reasons for decision including reference to the evidence that was taken into account, the evidence that was considered not to be satisfactory and an explanation of the application of the relevant legal principles to that evidence resulting in the decision. An appeal can focus on what *did* go wrong rather than what might have happened.

I have sometimes heard it said that a judge is not in a good position to make decisions about the credibility of witnesses in a criminal trial. However, the fact finding in a criminal trial is in most cases no different to the decision that has to be made about the credibility of witnesses in civil trials. Our system of civil trials has changed from trial by jury to the almost uniform practice of trial by judge alone since the 19th century, with no suggestion that this has affected its operation.

There are also a number of alternatives that are available. Trial by jury could be retained in certain classes of cases, for example offences at the upper range of seriousness or involving matters that lend themselves more naturally to community adjudication through trial by jury. With the balance of criminal trials conducted by judge alone this would free up the system to be able to conduct those criminal trials by jury in a more timely manner.

Examples of other alternatives to trial by judge alone are seen in some European and other international jurisdictions. I believe that Scandinavian countries have a system of trial with a judicial officer assisted by an appropriate expert and a small number of community representatives.

Courts and the justice system are very slow to accept change. That is an advantage when the subject of change is something as important as our system of trial for criminal offences that affects the rights of accused and the rights of our community to a fair, just and effective system. But that conservative approach should not prevent a rational examination of the obvious problems with the present system and the need to look for solutions. It may also be that, like the abolition of wigs and gowns and the other irrelevant paraphernalia of the legal system, trial by jury can be re-fashioned to suit present day needs.

Getting it right

Juries in criminal trials

By Margaret Cunneen

In the generation or so that I have worked under the scrutiny of jurors in criminal trials, tattoos, body piercing and grunge dressing have become mainstream. What's that in the hand of the guy with vermilion, Araldited hair, fishing tackle through his face and a rodent on his shoulder? Oh, of course—it's *The Financial Review*.

Twenty years ago you could be certain you would not be chosen on a jury if you dressed in jeans. Now the only item of clothing guaranteed to induce the word 'challenge!' from the lips of a barrister in a criminal trial is a T-shirt emblazoned: 'BRING BACK CAPITAL PUNISHMENT'.

This change is largely societal. Dress codes in all areas have relaxed and respect for individuality has eclipsed them. The rise of scientific and technologically based evidence, as opposed to evidence which depends upon the credibility of a witness, also means that it is much less important that the jury members be obviously sympathetic, or obviously antagonistic, as the case may be, to the police whose investigation has led to the criminal trial in which they will deliberate.

Regardless of dress—or, for that matter, race, socio-economic background or educational attainment—juries are, overwhelmingly, getting it right. The huge strength of the jury system is in the random selection of members of the general public who together represent the views, attitudes and beliefs held more widely in the general community. A jury's function is to determine what facts have been established. Its qualifications and capacity for achieving this must, generally speaking, be much greater than it is for a single judge. A legal education is not required in a factual analysis of the evidence in a criminal trial. A joint decision of 12 ordinary people sees through the rhetoric and softens the sharp edges. It gives to the community a confidence in the ultimate decision, guilty or not, which would be less likely to be forthcoming from the decision of a single judicial officer.

Juries are becoming more cohesive. This is partly explicable by a growing tolerance for other human beings that we are enjoying as a civilised society. The generation gap, for example, has largely faded into history. Whether it is because of the shift in the nature of evidence in criminal trials or because of the egalitarianism within our modern communities, it is no longer common to see juries split into two groups.

Generally it is easy to work out what is going on in jury rooms. Similar questions are asked by juries in trial after trial. The diligence of juries and their earnest desire to conform to the directions that are given to them is enormously gratifying. On the first afternoon of a trial some years ago, the judge told the jury not to go home via a particular hotel. At the end of the week, one juror asked whether she was permitted to drink alcohol at her sister's wedding the following day. The judge assured her that that would not be inappropriate and added: 'I only suggested that you by-pass the pub opposite because I thought you'd see the Crown Prosecutor there'.

Sometimes it is impossible to divine the reason for a particular request. About seven years ago I was doing a murder trial in King Street Court 3 in Sydney. The trial had been set down for four weeks and the jury had been told, at the start, that this would be its likely duration. The trial proceeded more quickly than expected with the evidence concluding in two weeks.

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The case was, to my mind, enormously compelling and jury deliberations were expected to be relatively brief.

After the jurors had been out for two days, a most unusual request was received from them. They did not wish to be supplied with any more food or refreshments. At first the judge and counsel thought that this request presaged an imminent verdict. It was not the case. Each day the jury was invited to resume the usual rations but each day declined.

We lawyers were baffled. Although we know that the fare supplied by the state for the consumption of jurors is fairly pedestrian, 2pm is still the most common time to receive a verdict because they invariably want to stay for lunch.

Finally, on the last day of the four week period originally allotted for this trial, but in the morning, a note was received indicating that the jury had agreed upon its verdict. The note went further. It explained that one juror, who happened to be unemployed, had declared at the start of deliberations that she did not wish to rush because she had already determined how she would be spending her four weeks' allowance for jury service. She had also enthusiastically endorsed the quality of the cuisine lovingly provided by the government contractors. This was her mistake. Her fellow jurors thought that if they eschewed the delicacies offered and brought in lunches from home, she might be more amenable to adding her vote to the verdict agreed upon by the other 11 on the first day. It didn't work.

Although it may not seem to follow from that experience, it is undoubtedly desirable that consideration be given to paying jurors fees that are more commensurate with reasonable wages. Serving on a jury always causes disruption to one's life and requires a substantial commitment intellectually, emotionally and in terms of human relations. Trials, unfortunately, are considerably longer than they were a generation ago. While I cannot commend highly enough the quality of the jurors I have worked alongside in the pursuit of justice, the largest possible pool of potential jurors must be encouraged. This is not so much to try to attract people in higher paid work but to share the burden around so that the same people are not returning time after time.

Studies of jury patterns and the experience of individual jurors show that jurors interpret what they see and hear in a trial through the prism of their own knowledge, experiences, attitudes, expectations and, indeed, biases. So, I would suggest, do judges. We are so privileged to have a system that draws from the community a large number of disparate citizens to determine the facts in criminal trials. The natural biases of each individual are diluted and balanced one with the other. The common sense, wisdom and life experience of 12 people independent of the parties or their representatives consolidates in a tribunal upon the judgment of which society can depend.

It is fundamental to the survival of the jury system that appellate courts maintain a healthy respect for the overwhelming sense of responsibility and the meticulous observation of judicial directions of the vast majority of jurors. It is very clear from working closely with juries that they are resolutely determined to apply the law as given to them and to conduct themselves appropriately. It is essential that our legal institutions support and guard against any erosion of the jury system so that our community can continue to participate in—and therefore have confidence in—the administration of the criminal law.

Juries in the US

Not 'Law and Order'

By Allan Blank

After nearly 30 years of trying all manner of cases before juries, I believe that it is still the best method for resolving legal disputes.

Juries get it right most of the time, that is, with whatever testimony, documents, photographs, expert opinion and other type of evidence they are presented with, they usually make the right choices.

I have tried both sides of criminal matters, ranging from drunk driving to murder cases and both sides of civil cases. Most of the civil cases involved representing plaintiffs or defendants in personal injury claims. My law practice now is almost exclusively representing injured plaintiffs in accident and medical malpractice cases in New York City.

As you can imagine, there is a wide variety of the types of jurors one encounters in this city—an enormous variety of people from wildly different economic, social, religious, ethnic, age and educational backgrounds.

These differences do not prevent six or 12 jurors from reasonably and logically analysing evidence and reaching a just verdict. In talking with jurors after they have rendered a verdict, many have expressed to me that it was a rewarding experience to sit on a panel with people they would not ordinarily interact with in their everyday lives.

I always talk to the jurors after a verdict—to the extent that the court allows it. Win or lose, there is something to be learned from hearing how they saw the evidence, the witnesses, the judge, your client, opposing counsel and yourself.

For example, a number of jurors once told me that they knew a witness, who claimed he could no longer work as a city maintenance worker due to injuries, was not being truthful. They came to this conclusion by observing the grit and dirt on his hands and under his fingernails. This was something that they noticed without any prompting from counsel or the court.

Jurors do pay attention to the proceedings, very often in ways we, as lawyers, aren't aware of. Recently, during a closing argument I was giving, a juror spoke up and reminded me of a particular fact when I paused and momentarily seemed to be unable to recall it.

Jurors also bring biases and prejudices to jury service. Sometimes those aspects of a juror's mind-set makes him or her unfit for a particular case. The selection process is intended to weed out the jurors who would better serve on another panel, but sometimes the process fails. The worst example I have ever encountered was a juror who refused to vote guilty or not guilty on a defendant charged with murder. She was waiting for divine guidance, which apparently was not forthcoming. I was a young prosecuting attorney at this time, and perhaps there was something I should have picked up on during jury selection. However, neither the more experienced defence counsel, the judge or myself saw this coming when interviewing this juror. Examples such as this are the exception that proves the rule. Juries generally get the right result with the evidence they are given.

Most prospective jurors I have encountered truly want to be fair. Most believe they can be fair. Lawyers have to make judgments based on small bits of information gleaned during the *voir dire*. This does not always lead to the right conclusion in accepting or excusing a particular juror.

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As a prosecuting attorney in a case involving a robbery, I excused a young woman from the panel, mainly because she was reading a far Left, anti-government, local New York newspaper. The next day she approached me during lunch and asked why she had been excused from the panel. After talking with her for an extended period of time, it became evident she would have made a fair and objective juror, her choice of newspaper notwithstanding.

Recently I had a similar experience with a juror that I excused from a prospective jury panel for a medical malpractice case. My client's claim involved the negligence of an orthopedic surgeon during a routine procedure. The excused juror was a woman married to an orthopedic surgeon who was of a similar age and experience as the doctor being sued. During questioning and in discussion after she was excused, she insisted that she could be fair. Perhaps she was right, she certainly believed so. I did not, so I excused her.

△ Juries as a whole are not as easily swayed by the politics of the moment. Juries haven't 'seen it all' in the manner of most judges. △

There are instances where jurors lie during the *voir dire* process. In the most egregious cases the offending juror can be prosecuted for criminal contempt of court. The extent to which jurors conceal or lie about their backgrounds during the selection process is open to debate. Surely it occurs to some degree. My personal experience with this problem involves only minor, relatively immaterial untruths. For example, a juror lying about his employment status, perhaps embarrassed to admit he was presently unemployed. While this raised questions after the fact, it did not appear to affect the deliberations.

The problem of jurors lying to either get on or off a panel is real and has existed for a long time. In 1933, the United States Supreme Court denied the appeal of a juror convicted of criminal contempt. In that case, the Court said:

> 'A judge who examines on *voir dire* is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talisman, when accepted, is a juror in name only.'[1]

No matter the problems, there are very few—if any—instances where a trial before a single judge is preferable to a jury. Juries as a whole are not as easily swayed by the politics of the moment. Juries haven't 'seen it all' in the manner of most judges. Juries tend to be less cynical about cases. Judges can bring preconceived ideas about certain types of cases which impact adversely on one of the litigants. I have had jurors ask me after a trial why the judge was so biased against one of the parties to the lawsuit. Most of the time the jurors recognise this coming from the Bench, even if the judge attempts to be subtle about his or her own biases. Judges are, after all, only human.

I don't intend to denigrate either the ability or the fairness of judges, but juries are a better route for the resolution of legal disputes. Juries allow judges to do what they do best—mediate between parties and make sure both sides get a fair trial.

This being said, the question must be asked why there is a very strong movement in the US to do away with jury trials in civil cases. This movement is led by large businesses, trade associations and the insurance industry and seeks to make juries a smaller and smaller part of the civil legal system, by: reducing the types of cases one can bring before jurors; changing laws so jurors have less to decide; and restricting the types and amounts of damages jurors can award.

As corny as it may sound to some, in front of a jury is one of the only places that the average citizen really does stand equal with the moneyed, and the privileged. As members of the Bar we must be aware of these encroachments and guard the system that has served our community so well for so long.

Here in New York I find many jurors who, at the beginning of their service, are unhappy with the prospect of sitting on a jury during a trial. Afterwards, most tell me they felt good about their participation in this process. They experienced a sense of contributing something, helping and just learning the way trials really work. Many come to the process with a jaded opinion, formed by watching fictional versions of trials on television and movies. Many leave the experience with a less cynical, perhaps even positive, view of the justice system. Their votes as a juror have far greater immediate impact than their votes on election days—and jurors seem to realise this in discharging their duties.

Endnotes

1. *Clark v United States* 289 US 1 (1933).

Reintroducing a criminal jury in Japan

Reform lessons for us all?

By Mark Nolan & Kent Anderson

Law reformers in Australia and elsewhere continue to attempt refinement of the nature of lay participation in criminal justice.

Law reform interest is mirrored in empirical jury research (eg, mock trials)[1] and other international comparative jury research.[2] In NSW alone, several current or recent inquiries by the NSW Law Reform Commission (NSWLRC) involve an investigation of jury trial procedure.[3] In addition to these current references, the multidisciplinary inquiry by NSWLRC researchers led them to recommend retention of unanimous verdicts in NSW criminal jury trials.[4] However, the NSW legislature did not accept these recommendations, legislating to permit majority verdicts in NSW criminal jury trials.[5]

One of the NSWLRC reviews, the *Role of Juries in Sentencing*, involves similar challenges and controversies to those surrounding current criminal trial reform in Japan. In this new era of Japanese criminal justice, a quasi-jury system, called the *saiban-in seido*, will reintroduce lay participation in serious criminal trials.

Introduction and critique of these Japanese reforms is the primary focus of this article. However, we begin our discussion by emphasising the relevance of the Japanese reforms and the Japanese reform process, for Australian law reformers interested in increasing the level and efficacy of lay participation in criminal justice.

Relevance of Japanese jury reforms for us all?

In a speech to open the Law Term on 31 January 2005, NSW Chief Justice James Spigelman suggested that it may be desirable to increase lay participation in the sentencing process to improve public confidence in the administration of justice, the quality of the (jury's) verdict decision, and the quality of the (judge's) sentencing decision.[6]

Chief Justice Spigelman suggested that low rates of lay participation in justice could mean that:

> 'public respect for the judiciary is diminished by reason of ignorance about what judges actually do, particularly, in terms of criminal sentences that are imposed.'[7]

Chief Justice Spigelman detailed his proposed jury reform:

> 'What I have in mind is the development of a system in which judges consult with juries about sentencing. There was a tradition in the United States that many states had juries which actually imposed sentences. Now, only half a dozen states continue that tradition, although there have been recent calls for its return.[8] I am not suggesting anything of that character here. The scope of relevant considerations is such that sentencing requires the synthesis of a range of incommensurable factors. This cannot be done by a group, without an undesirable process of compromise. Ultimately, an experienced criminal judge must decide, often quite instinctively, where the balance should lie.
>
> 'What I am proposing is an *in camera* consultation process, protected by secrecy provisions, by which the trial judge discusses relevant issues with the jury after evidence and submissions on sentence and prior to determining sentence…

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> 'I put forward this proposal tentatively. It requires detailed working out, perhaps by means of a reference to the Law Reform Commission. It is not possible to predict all the ramifications of such a significant change. Legislation should authorise the adoption of the system at first on a trial basis. This is what occurred a few years ago with a system of Sentence Indication Hearings, which looked good on paper but which was eventually abandoned.'[9]

Chief Justice Spigelman's hope was realised when NSW Attorney-General Bob Debus referred the inquiry *Role of Juries in Sentencing* to the NSWLRC on 25 February 2005. The NSWLRC's Issues Paper 27 was released in June 2006.[10]

△ In contrast to the low rate of criminal jury trials in Australia (around 800 trials per year), the predicted number of Japanese *saiban-in seido* criminal trials is likely to be in the order of 3,700 cases per year. △

At least two questions should be asked about this reform proposal. First, can we really improve civics education via juror participation in sentencing if the prevalence of criminal jury trials in Australia is around 1% of contested jury trials? Second, can the resource and logistical implications be managed? As the Chief Justice himself suggests:

> 'I should note that the proposal has resource implications. It will not work without additional resources. It will require the recall of such proportion of the jury as is able to return to hear the evidence on sentencing. One of the factors which delays the outcome of criminal trials in this state is the fact that the Probation and Parole Service requires a period of six weeks after verdict before it can provide the information about the offender that is required for the sentencing task. Further delays arise because of availability of counsel. It is undesirable for a jury to wait for a long period before being recalled for a process of consultation about sentencing. Additional resources are required to ensure that such a process can be carried into effect in a timely manner.'[11]

Sometime before May 2009, a new criminal law will allow Japanese citizens to deliberate on verdict and sentence in mixed decision-making groups with a professional judge or judges. In contrast to the low rate of criminal jury trials in Australia (around 800 trials per year), the predicted number of Japanese *saiban-in seido* criminal trials is likely to be in the order of 3,700 cases per year.[12] Unless the low rate of Australian jury trials were to increase, perhaps any civic education or public confidence benefit of increasing lay participation in justice will be more discernable in Japan than in Australia as a result of implementing Chief Justice Spigelman's vision.

Chief Justice Spigelman suggested that a pilot period may be advisable before full implementation of his jury trial reform. Such a pilot is not part of the Japanese jury reforms. However, there are lessons to be learned from the nature of the Japanese criminal justice reforms. For example, the Japanese *saiban-in* system will be introduced after a generous five-year preparation period that allows for deep discussion, promotion, and refinement of the skeletal system as described in the enabling law.[13] Reflecting the importance of such a change, the only other time Japan has used such a five-year implementation period was the last time they introduced an (all-citizen or pure) jury trial that was available between 1928 and 1943.[14]

The Japanese reforms

In this section we introduce the basic elements of the enacted *Lay Assessor Act*[15] and all article references are to this enabling law. Many procedural details are awaiting clarification by the Supreme Court Rules expected to be drafted sometime between mid-2007 and mid-2008 as indicated in an internal document.[16] In the preparation period, a number of high-profile marketing and information campaigns have been launched with the following images and text being used.

Figure 1

Promotional advertisement. Text reads *'Watashi no shiten, watashi no kankaku, watashi no kotoba de sanka shimasu'* (I will participate through my own observations, my own perceptions, and my own words).[17]

Figure 2

Logo for the lay assessor system.[18] The logo design involves two circles, representing the judges and lay assessors. The circles are linked to portray the cooperative approach to justice that is to be taken under the new system. The circles are also in the shape of the infinity symbol (∞), representing the immeasurable results to be gained from cooperation between judges, the legal masters, and *saiban-in*, the representatives of the people. They are also in the shape of an 'S' for '*Saiban-in*'. The colours chosen were friendly pastels: a red-coloured circle symbolises liveliness and enthusiasm, while a blue-coloured circle signifies level-headed judgment. Neither colour is assigned to the judges or lay assessors specifically.[19]

Cases heard by lay assessors

Two general categories of serious crimes are covered: those punishable by death or imprisonment for an indefinite period or with hard labour;[20] and those in which the victim has died due to an intentional criminal act.[21] The law does not provide the defendant with the right to waive a lay assessor panel.[22] When a defendant is charged with crimes both within the class of eligible *saiban-in* cases and outside it, the matters may be heard together by a *saiban-in* panel.[23] Thus, lay assessors will occasionally be asked to rule on matters outside the strict definition of applicable crimes.

Selection of lay assessors

Lay assessors are to be randomly selected from those 20 years and older listed on electoral rolls within the municipal jurisdictional divisions.[24] This definition of eligible lay assessors also means that permanent residents in Japan, including the large minorities of Korean and Chinese descendents, will not be eligible to serve.[25]

From those eligible, a number of people are excluded: those who have not completed compulsory education through Year Nine; those who have been subject to imprisonment; those who would be significantly burdened in their execution of lay assessor duties;[26] lawyers and politicians.[27] Also, people aged 70 years or older, currently enrolled students, and people who have served as a lay assessor in the past five years are free to decline service.[28] The court may excuse those suffering from serious illness or injury, or those with family childcare, nursing commitments, important work obligations, or unavoidable social obligations such as attendance at a parent's funeral.

A US-style *voir dire* procedure will also be used for lay assessor selection.[29] A prosecutor, defendant, or defence counsel may request that the court dismiss a lay assessor if he or she fails to respond or responds falsely to selection questions; fails to take the oath; or fails to attend the trial or deliberations.[30] The court may also disqualify persons deemed not able to act fairly in a trial.[31] It is unclear if dismissal based on fears of unfairness will require 'real evidence' in support of the application.

Composition of mixed panels

The *Lay Assessor Act* provides for either panels of three judges and six lay assessors, or panels of one judge and four lay assessors.[32] The full panels are supposed to be the default option, while the smaller panels are to be used where the facts at trial as established by the evidence and the issues identified by pre-trial procedure are undisputed.[33] All involved suggest that particularly when the system is newly introduced most, if not all cases, will be heard by a full panel of nine.[34]

△ The *Lay Assessor Act* provides for either panels of three judges and six lay assessors, or panels of one judge and four lay assessors. △

Powers and duties of lay assessors

Only the empanelled judges are to interpret the law and make decisions on litigation procedure, though lay assessors may comment on such issues.[35] It is notable that lay assessors may question witnesses, victims and the defendant.[36]

Method of deciding verdicts

Unanimous verdicts have been abandoned in the new Japanese system. Decisions are to be by a majority opinion of the panel, but must include both a judge and a lay assessor.[37] Therefore, in small *saiban-in* panels, the professional judge holds a veto. Since matters referred to the small panels will likely cover cases with uncontroversial issues, this power imbalance may not be a concern. In sentencing decisions, if a majority cannot be reached the opinions in favour of the harshest sentence are to be added to those for the next harshest option, until the requisite majority is attained.[38]

One of the major criticisms of a mixed court proposal in Japan was that it would lead to undue deference by lay participants to professional judges during deliberations.[39] The law is silent on strategies to avoid deference levels that render the lay participation redundant. Perhaps the Supreme Court Rules will enlighten. Further promotional material invites citizens to consider the nature of their new duties in any event.

Figure 3

Haiku-like *saiban-in* promotion poster with catchphrase. Japanese calligraphy asks '*Sono toki, jibun naraba, dousuru*' (At that time, if it's you, what will you do?)[40]

Endnotes

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The jury in Canada

By Lee Stuesser

Trial by jury is alive—but not well—in Canada. In most provinces the civil jury is a rarity, if not an oddity, and criminal jury trials are increasingly being reserved for only the most serious of crimes.

There is no constitutional right to a civil jury trial in Canadian law. The use of civil juries is governed by provincial law. In Quebec there are no civil juries. This reflects the Quebec civil code tradition.

Yet, even in the common law provinces where a civil jury is allowed, there are few civil jury trials. Civil juries are most common in Ontario, British Columbia and Nova Scotia, where jury trials are still allowed in personal injury actions. In the remainder of the provinces, jury trials are reserved for actions involving defamation, false imprisonment or malicious prosecution, with the result that in some of the smaller provinces years may go by with no civil jury trials being heard.

Furthermore, by statute the federal and provincial governments prohibit a civil jury trial in actions brought against them.[1] This is somewhat ironic in that one of the key reasons for having trial by jury is that it protects the citizenry against abuse by the state.

The civil jury in Canada, therefore, is in a fragile state.

Criminal jury trials

In criminal cases, the benefit of trial by jury is enshrined in s 11(f) of the *Canadian Charter of Rights and Freedoms*. Persons charged with an offence where the maximum punishment is five years' imprisonment have a constitutional right to have their case heard by a jury.

However, the right of an accused to be tried by a judge and jury is somewhat hollow. The *Charter* provides for minimal and not optimal rights. In reality the vast majority of criminal cases are heard in the lower provincial courts in judge alone trials.

Why this trend away from jury trials? First, there is the matter of time. It takes longer to get to trial with a jury and many accused persons do not want to wait.

Second, for many crimes the law effectively takes away from an accused the jury option. In Canada there are three types of criminal offences: indictable, summary conviction and hybrid. Only for murder is the starting point that the trial will be by judge and jury. For other serious indictable offences an accused has the election as to how to be tried. In comparison, summary conviction offences must be tried by provincial court judges. Hybrid offences are either indictable or summary conviction and the Crown prosecutor has an absolute discretion to decide the path. For hybrid offences, the prosecutor thus chooses the mode of trial and not the accused.

Recent legislation has 'hybridised' a number of criminal offences and made them more attractive to proceed summarily. For example, sexual assault is a hybrid offence and the maximum punishment for a sexual assault by way of summary conviction was increased from six months to 18 months. By increasing the penalty, more prosecutors are opting to proceed by way of summary conviction and fewer accused persons have their right to a jury trial.

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It is fair to say then that Canadian criminal trials are moving increasingly from a jury model to a judge model.

Where are the jury supporters?

Canadians, unlike Americans, do not have an ingrained distrust of authority. Accordingly, the jury system is not seen by most Canadians as a bulwark against tyranny. Juries may be important but not essential. As a result there is no inherent groundswell of support for the institution of the jury.

△ The Canadian legal culture is, if anything, anti-jury. Without a commitment to trial by jury nothing will change. △

In my view there is a measure of 'legal elitism' within the Canadian legal establishment. The 'legal culture' if anything is anti-jury. Judges and lawyers, trained in the law, tend to disparage the notion that those untrained in the law get to decide cases.

Leaving the law to the legal establishment is not healthy. One consequence is that criminal trials are becoming increasing complex, prolix and prolonged. The current trial of Robert Pickton, who is alleged to have confessed to killing up to 49 women in the Vancouver area is an extreme example. Right now Pickton is only on trial for six murders. Yet, the trial is projected to take from one to two years. Where do you get jurors to sit for such a period of time?

The judge is well paid. The lawyers are well paid. The jurors are not. They will receive initially $20 per day and after 50 days of trial this will be increased to $100 per day. During the trial, their lives will be put on hold. Surely such cases ask too much of jurors.

Pickton is an extreme case, but the reality is that criminal trials are becoming longer and longer. The jury pool shrinks as the trials lengthen. Soon only the retired or unemployed are available. This is hardly a jury of one's peers.

A true value of having a jury system is that it forces the law to be clear and understandable to the average person. Leaving the law to lawyers and judges will only encourage it to be more complex and less accessible.

Differences to the US jury system

The Pickton trial also underscores a number of differences between the Canadian jury system and that of the United States.

Canada has avoided a number of the excesses that mar the American jury system.

We do not have lengthy jury *voir dires*, as in the United States, where counsel question would be jurors. Juror consultants are almost unheard of in Canada—perhaps because we do not have multi-million dollar lawsuits being tried before a jury. Our selection of a jury is much simpler and less time consuming. Canadian trial lawyers are provided with minimal information and the judge questions the potential jurors in a very limited manner. Jury selection, even in notorious cases, rarely takes more than a day or two. In the Pickton case it took two days to select a jury.

Nor do we allow the publication of evidence heard on pre-trial motions or at the preliminary inquiry. In the Pickton trial there are a number of publication bans—much to the chagrin of the media. Publication bans, however, are necessary to help preserve an impartial jury pool and ensure a fair trial.

Nor will the Pickton jurors be allowed to 'tell all' about their deliberations. It is a criminal offence for jurors in Canada to disclose any information about the jury deliberations.[2]

Reforms needed

If the jury system is to be strengthened in Canada, reforms are needed.

To a certain extent we take our jurors for granted. Jurors need to be appreciated more. They are summoned to jury duty at a given place and time. Little other information is provided. Jurors deserve better. They deserve to receive a higher daily stipend. They deserve more comfortable surroundings as opposed to the bland and uncomfortable jury deliberation room. Cosmetic changes do make a difference at very little cost.[3]

Jury trials need to be streamlined and shortened. Evidence motions during the trial that create unnecessary delay need to be curtailed. Counsel need to focus the trial and trial judges need to see that the trial stays focused.

Above all, there is one American attribute that we in Canada could use more of—a 'jury culture'. The Canadian legal culture is, if anything, anti-jury. Without a commitment to trial by jury nothing will change.

Jury nullification is alive and well

A jury can be the only means to protect a person against unjust law. It is recognised that juries can and do render verdicts in defiance of the law.

R v Krieger is a recent case decided by the Supreme Court of Canada, which reaffirmed this jury power.[4] Mr Krieger was on trial for unlawfully growing marijuana. He suffered from a debilitating illness and used the marijuana as a medically recognised palliative. He grew the marijuana for his own use and provided it to others for their use. He relied on the defence of necessity. The trial judge found that the defence of necessity did not apply and then directed the jury to convict Mr Krieger. The jury baulked. Two jurors asked to be excused. They did not want to convict Mr Krieger—notwithstanding the law. The trial judge denied their request to be excused and ordered them back to the jury room to do as he had directed. The jury eventually returned a verdict of guilty.

The Supreme Court of Canada overturned the conviction. Although the Court did not endorse jury nullification of the law, neither did they prohibit it. Justice Fish observed, 'juries are not entitled *as a matter of right* to refuse to apply the law—but they do have the power to do so when their consciences permit of no other course'.[5]

What we see in *Krieger* is the power of the citizen to stand up against perceived unjust law. This is the jury system at its best!

Endnotes

1. *Crown Liability and Proceeding Act*, RSC 1985, c C-50, s 26; see also *Crown Proceeding Act*, RSBC, 1996, c 89.
2. *Criminal Code*, RSC 1985, C-46, s 649.
3. A number of these recommendations were included in Ontario Superior Court, *New Approaches To Criminal Trials: The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice* (2006), <www.Ontariocourts.on.ca/superior_court_justice/reports/CTR/CTReport.htm>, at 16 May 2007.
4. *R v Krieger* [2006] 2 SCR 501.
5. Ibid, [27].

Inviting us into the jury box

Juries and movies

By Andrew Buck

Dr AR Buck is an Associate Professor in the Division of Law at Macquarie University in Sydney, and Co-Director of the University's Centre for Comparative Law, History and Governance. He is also a film buff.

The movies have long been fascinated with juries. The reason is fairly easy to identify. A trial can deal with particularly high stakes—murder, life imprisonment, the death penalty.

Dramatically, of course, the higher the stakes, the potentially more riveting the drama. And a jury trial is so obviously complex, in that these extremely high stakes are meant to be resolved—not by trained legal professionals alone—but by a group of anonymous lay people, unskilled in the law. Drama thrives on suspense, and what could be more suspenseful than matters of life and death, of guilt and innocence, of justice, being left in the hands of the untrained everyman, the humble juror.

The movies have given us many classic examples of the courtroom drama: *Witness for the Prosecution* (1957) with Charles Laughton; *To Kill a Mockingbird* (1962) with Gregory Peck; *Inherit the Wind* (1960) with Spencer Tracy and *Twelve Angry Men* (1957) with Henry Fonda, to name but a few. More recently, we have seen *Evil Angels* (1988) with Meryl Streep as Lindy Chamberlain; *Presumed Innocent* (1990) with Harrison Ford; *Philadelphia* (1992) with Tom Hanks; and *Runaway Jury* (2003) with Gene Hackman and Dustin Hoffman. And many others.

Learning from the movies

But what, if anything, can the movies reveal to us about the jury system? Can the movies say anything that is meaningful to our deliberations on law reform? Any lawyer can instantly recognise that few, if any, movies about juries are entirely accurate when it comes to legal procedure. Even *Twelve Angry Men*—arguably the greatest cinematic treatment of the jury system—has Henry Fonda as a juror purchase a knife at a store and dramatically plunge it into the table in the jury room in one scene, and engage in a detailed experiment on the length of time it would take for an old man to move across a room in another, in order the test the credibility of two witnesses. Most lawyers will smile indulgently when witnessing such jury room antics being represented in all seriousness.

Given the almost inevitable fact that in order to increase their dramatic impact, movies will sometimes play fast and loose with legal procedure, can we learn anything about the jury system from the movies? I believe we can.

Movies (and some fine television, like *Rumpole of the Bailey*) can throw into sharp relief the moral and ethical elements of the jury system. Ironically, they can do this precisely because of their dramatic structure. Sitting through an actual three-week trial can result in many people (including jurors) being overwhelmed by technicalities and procedure. The interesting ethical and moral questions that both the trial and the work of the jury raise can be lost behind the bulk of technical information. But movies have the luxury of condensing this experience into two hours, which allows, through various narrative devices including meaningful looks and inner monologues, the audience to reflect on very big issues such as justice, the legal system and the role of juries in both. Let us examine some of those issues as refracted through the movies.

Sometimes, the further the movie is from reality, the more it can reveal. *A Matter of Life and Death* (1946) was a fantastical film about very real contemporary concerns. It opens in the dying days of the Second World War, when bomber pilot David Niven's plane is shot down

over the English Channel. Without a parachute, he knowingly jumps to his certain doom from the burning plane, only to miraculously survive. The movie moves from colour to black and white as it shifts the scene to heaven, where it is discovered that a mistake has been made in stocktaking(!), which has allowed Niven's character to survive. A trial is established in heaven to decide whether Niven's character—who has fallen in love after his fall to earth—deserves to live or die. The jury is comprised of all those who died in the war, from every colour, class and creed. The jury is humanity. Like all juries, they are swayed by the arguments of opposing counsel, but it is their composition that is critical. They are essentially democratic in composition. They represent the new post-war world of democracy that Niven's character has literally fallen into. And they represent to the audience, in a starkly dramatic way, the proposition that justice is impossible unless the people (represented by the jury of all humanity) participate in the legal process. The movie was about post-war Britain and the generation that survived the war, but it had something very profound to say about juries, justice and the law.

Involving the audience

The idea of the jury representing humanity is woven into most courtroom dramas. This is by virtue of the fact that the audience is the surrogate jury in a trial movie. The dramatic device of the cinematic jury that comes to the 'wrong' decision is designed to elicit from the viewer a variation of the response: 'I would have voted differently.' Movies by their very nature invite and expect the viewer to participate in the jury's decision-making process. By so doing, the movies reinforce the importance to the legal process of the participation of each and every citizen. In *Evil Angels* (1988), the Lindy Chamberlain trial is represented in a way that makes it clear that the jury's ability to come to a 'correct' decision was impeded by a range of forces, including the media and the use (and abuse) of expert witnesses. The movie portrayed the trial as flawed justice—not because of the jury system—but because forces both within and outside the legal system were making it impossible for the jury to deliberate effectively. The cutaways throughout the movie to the uninformed pronouncements of everyday Australians were not designed to diminish the importance of the jury system. Rather, the purpose was to reinforce the absolute necessity that the legal system (and the media) allows the jury system to function effectively. The movie dramatically captured both the desire of the population to participate in the decision-making process (albeit in an uninformed way) and the necessity of allowing that to happen (through the jury system) in an informed way.

Similarly, in a movie like *Let Him Have It* (1990), based on the notorious Derek Bentley trial in Britain in the early 1950s, the audience is invited to be a surrogate jury. The moviemakers reveal the fundamental flaws in the trial process and how the disingenuous behaviour of the police and judge perverted the ability of the jury to come to the 'correct' decision. The jury system is not disparaged in the movie; on the contrary, the harshest criticism is levelled at those officers of the court whose actions did not allow the jury to deliberate in an informed and effective manner. What movies like that do is emotionally involve the audience (as the surrogate jury of the defendant's peers) in the legal process. The anger that is evoked by such movies is directed at those who would exclude or pervert the ability of the people (the jury) from participating in the administration of justice.

Miscarriages of justice

The assumption in many trial movies is that justice can only occur if the legal system includes rather than excludes civil society from effective participation. Think of movies such as *Breaker Morant* (1980) with Edward Woodward, *Paths of Glory* (1957) with Kirk Douglas, *King and Country* (1964) with Dirk Bogarde, and, of course, perhaps the greatest movie of all to deal with issues of law, justice and humanity, *Billy Budd* (1962) with Peter Ustinov, Robert Ryan and Terence Stamp. All of these are emotionally wrenching movies about tragic miscarriages of justice. It should come as no surprise that what they all have in common is that they are about military trials where there is no jury of the defendant's peers. Indeed, it is a theme of all those movies that justice is denied—must be denied—when the trial lacks an effective jury. For in that case, these movies argue, there is nothing to counterbalance the power, indeed the tyranny, or even the incompetence, of those who would act simultaneously as judge and jury. Through these movies a powerful case is made for the absolute necessity of juries. These movies

forcefully remind us that without a jury of one's peers, the legal system is incapable of even aspiring to justice. Only through a strong and effective partnership of legal professionals and lay members of civil society (the jury) can the administration of justice even attempt to operate. For those of us interested in law reform on the question of juries, even trial movies that lack juries have something powerful to tell us about the jury system.

Humanity in justice

△ For those of us interested in law reform on the question of juries, even trial movies that lack juries have something powerful to tell us about the jury system. △

Perhaps the best-known movie about juries, *Twelve Angry Men* (1957), is a powerful dramatic meditation on the jury system. The movie is unique among trial movies in that we never see the trial, and barely see the courtroom. In the opening minutes an obviously bored judge directs the jury to deliver their verdict in a case where an 18-year-old Puerto Rican teenager has been accused of killing his father with a knife. From that point on, the entire movie takes place in the jury room. One juror (Henry Fonda) forces the other jurors to confront their fears and prejudices and to come to a reasoned decision over a question of reasonable doubt. As the movie proceeds, each juror in turn is revealed as flawed in some way—one harbours racist feelings towards Puerto Ricans that influences his beliefs, one harbours memories of a scarred relationship with his own son that influences his ability to assess the facts in the case, one is resentful of being forced to do his civic duty and yearns to be at the baseball game, and so on. Initially, all of the jurors but Fonda are convinced of the teenager's guilt. Fonda has reservations. He challenges the others to use reason, rather than emotion, to assess the facts instead of relying on uninformed prejudice. Slowly, each member of the jury acknowledges that his own fears or prejudices have stopped him from thinking seriously about the notion of 'reasonable doubt', and they (and the audience) come to realise that justice is not about certainty but about the importance of 'reasonable doubt' in the administration of justice.

It might seem surprising that a movie which spends so much time revealing how individual jurors are flawed beings— given to ignorance, boredom and prejudice—should nonetheless be a powerful defence of the jury system. But it is not that surprising. The movie captures an essential paradox about the administration of justice: while humanity is flawed, if humanity is taken out of the equation in the administration of justice, and it is left to trained experts alone, then the legal system can never aspire to justice, because justice is only a meaningful concept in relation to humanity.

Conclusion

At the beginning of this article I asked what movies might reveal to those of us interested in law reform in relation to the jury system. Movies, precisely because they represent the questions of law and justice dramatically rather than with exact verisimilitude, have the ability to show to us the democratic and civic character of the legal system that juries represent. Whether a given movie presents the jury as flawed because of the malleability of the jurors, or capable of coming to reasoned decisions in spite of the cunning or ineptitude of counsel, movies demonstrate that juries are an important part of the administration of justice. They also demonstrate that there is an essential 'democracy' to a system of administration of justice that includes juries. As represented in the movies, juries (like democracy) might not be perfect and they might not always result in 'correct' outcomes. But movies have the ability to show what is often lost in discussions about the merits of the jury system—that they represent an important link between civil society and the legal system. As Paul Newman says to the jurors in *The Verdict* (1982): 'Today, you are the law.'

Secrets of the jury room

By George Hampel

***Secrets of the Jury Room*, an SBS project, was an interesting experiment and an important contribution to learning about the dynamics of jury decision making.**

For the first time, to my knowledge, two juries were empanelled to hear and decide the same criminal trial at the same time in a most realistic courtroom setting. The trial was recorded and so were each jury's deliberations. The deliberations were watched on closed circuit television.

The trial scenario was carefully scripted and professionally produced. Witnesses were briefed and exhibits prepared. A young Lebanese man, who was an actor and looked obviously Middle-Eastern, was charged with the murder of his partner, an older, Anglo-Saxon man. The alternative charge to murder was of assisted suicide. The two men had lived in a homosexual relationship. The older man was terminally ill and had discussed and planned taking his own life. The accused stood to gain financially from his partner's death. The accused had purchased the tablets, an overdose of which later caused the older man's death.

The real issue at the trial was whether the accused either administered the drugs which killed the deceased, in which case he would be guilty of murder, or alternatively, whether the accused was guilty of assisting suicide by being present, encouraging and assisting the deceased in taking the overdose.

The accused did not dispute that the subject of suicide was discussed and that he had purchased the drugs, as was his normal practice. However, he denied that he was in the room when the deceased must have taken the drugs or that he assisted him in any way.

A consequential issue in the trial was whether the deceased, because of his disability, was capable of self-administering the drugs without assistance. Expert medical evidence was called by the prosecution that the deceased would not have been able to self-administer. However, in a well-conducted cross-examination, the witness made a number of concessions which opened the possibility of self-administration.

The trial was held in the setting of the New South Wales Supreme Court in Taylor Square, Sydney. Each side was represented by senior counsel and I acted as the judge. In accordance with my brief from the producers, I conducted the trial exactly as a real trial. The two juries were selected from the community so as to be as representative as possible in gender, age, ethnicity and occupation.

The jury

When it came to the election of the foreperson, in one jury, a man with a strong, aggressive personality put himself forward and was chosen. He turned out to be a poor foreman and another foreman was chosen.

At the end of the prosecution case, much to the surprise and concern of the producers, and after a discussion with counsel, I ruled that there was insufficient evidence to support the charge of murder. The juries were directed to acquit of murder and did so. The trial proceeded on the alternative charge of assisted suicide. This made it better, as the issues for the juries became less complicated.

At the conclusion of the evidence, both counsel addressed the juries and I gave the juries a charge, explaining the law and relating the facts to the legal issues. The two juries

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He participated in the SBS documentary project 'Secrets of the Jury Room' as the 'trial judge'.

retired to consider their verdict. No result was reached on that day. The juries were sent to a hotel overnight and returned to deliberate next morning. After a short time, one jury delivered an unanimous verdict of 'not guilty' and later the other jury was finally not able to reach agreement.

Jury deliberations

A number of interesting features emerged during the deliberations.

Despite their knowledge that this was not a real case and that their deliberations were being recorded and watched, both juries approached their tasks very seriously. Their discussions and arguments were forceful, sometimes passionate.

The relationship between the people on each jury and the way they came to their conclusions were very different. In the jury that acquitted the accused, the debate was more orderly and more focused on the facts and the issues. There were a number of irrelevant matters discussed but, ultimately, the jurors returned to the factual and legal issues as directed.

The other jury had more difficulties. The discussion in that jury had many more irrelevancies and they had difficulty focusing on the real issues. There was much more aggression in their discussions and sometimes the argument became personal. There was much less communication between jurors and some found themselves locked into positions and not listening to others. At one stage, when there appeared to be a deadlock, a small group of jurors separated themselves from the others so that they could have a discussion without being overwhelmed by their colleagues.

There was no obvious compromise or giving in to the views of others, despite their being told that they would be kept together overnight. The seriousness of their deliberations showed that they had forgotten that this was not a real trial.

Despite the obvious opportunities for prejudice provided by the scenario and the characters involved, there was no indication that any decisions were made on the basis of prejudice. There were no prejudicial references to the ethnicity of the accused, the homosexual relationship or to mercy killing as an ethical or social issue. Ultimately, both juries grappled with the main issues, that is, whether the accused was present and assisting suicide.

There was repeated and appropriate reference to there having to be proof beyond reasonable doubt.

Feedback from the 'trial'

After the trial, I had a long discussion with the 24 jurors. They asked interesting questions about the trial process, about the role of the judge, and about criminal trials generally. I took the opportunity of asking them what they thought of the process. The overwhelming view was that the process was fair and open. They liked their involvement, although some seemed to be exhausted by it. There was a general view in favour of the jury system.

The jurors were very interested in what I thought and what I would have decided, had I had to make a decision. I was pleased that I had not given away my personal view during the trial or my instruction of the jury. I would have found the accused 'not guilty' on the available evidence.

I was later interviewed about my reaction to the experiment. The interviewer challenged my strong view that the jury system was overall a good one despite some of its problems. I was asked why I still thought so when two juries, hearing the same trial, produced a different result. I said that I was not concerned about the difference, because neither jury came out with what would have been the wrong verdict on the evidence, namely a conviction. I pointed out that the jury that disagreed had a majority in favour of acquittal and that I thought it was unlikely that any jury hearing this trial would have convicted the accused.

This experiment reinforced my strong belief in the jury system as one with the right slant. It is that people charged with criminal offences are unlikely to be wrongly convicted.

The experience was also an interesting one for me, as it gave me another opportunity, after 25 years of trial work as a barrister and 17 as a judge, to preside over a trial after I had left the Bench.

Human right or handbrake on the truth?

Client legal privilege and federal investigatory bodies

By Rosalind Croucher

'Privilege' is a word that smacks of elitism, exclusivity and cliques. Put the word in the same sentence with lawyers (as in 'legal professional privilege') and it is not surprising that you generate a reaction.

But 'legal professional privilege' is not really about lawyers at all, or only consequentially so. It is about *clients* and their right to get advice from a lawyer with some sense of confidence that their communications will be private ones and protected even from being revealed in court. This is why the 'privilege' is better described as 'client legal privilege', which is how it is referred to now in the uniform Evidence Acts and by the ALRC in its Issues Paper 33, released on 23 April, *Client Legal Privilege and Federal Investigatory Bodies*.

Background to the Inquiry

On 29 November last year, the Australian Attorney-General, the Hon Philip Ruddock, asked the ALRC to inquire into privilege in the context of federal investigatory bodies with coercive information-gathering powers, prompted in part by the public furore surrounding the investigation into the Australian Wheat Board and the 'Oil-for-Food' program. Extensive claims to privilege by the Wheat Board delayed the investigation by nearly a year, enraged Royal Commissioner Terence Cole, and led to the amendment of the *Royal Commissions Act 1902* (Cth).

We live in an increasingly regulated environment. There are now over 40 federal bodies that have coercive information-gathering powers. They are involved in a wide range of areas—criminal law enforcement; financial markets; revenue; intelligence and security; public administration; building and construction; social security; health and aged care; human rights; privacy; border control and immigration; communications; environment; energy; transport—and the list goes on. How can one know how to comply with the burgeoning field of regulation *except* by seeking legal advice? Why shouldn't you be able to keep your communications about such things not only confidential, but also 'privileged'?

The legislation that has established each of the federal bodies does not take a simple 'one size fits all' approach to privilege. Client legal privilege *may* be modified or abrogated by legislation, but because it is seen as such an important common law right it can only be taken away by clear words to that effect. Not many federal statutes expressly do so. One example of abrogation is through specific legislation, like the *James Hardie (Investigations and Proceedings) Act 2004* (Cth), where Parliament intervened directly to assist the Australian Securities and Investments Commission (ASIC) in its investigation of the James Hardie group of companies through abrogation of client legal privilege in relation to certain material for the purposes of the investigation and related proceedings.

Why was privilege abrogated in such a case? Because Parliament considered that one 'public interest' outweighed another—the public interest in the effective enforcement of corporate regulation, in the context of the difficulties faced by the victims of asbestos disease as compared with the public interest in the administration of justice reflected by everyone's (and every corporation's) right to seek legal advice and to have certain communications with a lawyer kept confidential.

Professor Rosalind Croucher is a full-time Commissioner of the Australian Law Reform Commission. She leads the current ALRC Inquiry into client legal privilege.

Arguments for and against

There are many issues surrounding client legal privilege. It has been described by the High Court in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) as 'an important common law right'—and some even argue that it is a 'human right'.[1]

> '[Client legal privilege] springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.'[2]

But there are those who see client legal privilege as a handbrake on finding the truth. The great English law reformer Jeremy Bentham (1748–1832) was a staunch critic of privilege (and of lawyers in general). He argued that the happiness of society (the object of utilitarianism, of which he was a proponent) was increased by conviction and punishment, not by the suppression of evidence.

The Client Legal Privilege Inquiry

The ALRC's Inquiry into Client Legal Privilege and Federal Investigatory Bodies has been directed to consider whether it is desirable to:

- modify or abrogate the privilege in order to achieve a more effective performance of Commonwealth investigatory functions;
- clarify all existing federal provisions that modify or remove the privilege, with a view to harmonising them across the Commonwealth statute book; and
- introduce or clarify other statutory safeguards where the privilege has been modified or abrogated, with a view to harmonising them across the Commonwealth statute book.

Issues Paper 33 poses 31 questions, which have formed the basis for discussions with key stakeholders—including members of the judiciary, the legal profession, Commonwealth bodies, individuals and organisations.

Submissions and feedback on the Issues Paper will be fed into a Discussion Paper on the Inquiry, due to be released in late August/early September 2007, which will contain detailed proposals for reform. The release of the Discussion Paper will be followed by a further round of consultation ahead of the drafting of the final report, due to be delivered to the federal Attorney-General in December this year.

If you would like to be notified when the Discussion Paper is released—and receive a free copy on CD or in hard copy—please register your interest online, or contact the ALRC.

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> 'Disclosure of all legally-operative facts, facts investitive or divestitive of right, of all facts on which right depends,—such, without any exception, ought to be, such, with a few inconsistent exceptions, actually is, the object of the law. … If falsehood is not favoured by the law, why should concealment? … Expect the lawyer to be serious in his endeavours to extirpate the breed of dishonest litigants! expect the fox-hunter first to be serious in his wishes to extirpate the breed of foxes.'[3]

There are many themes, such as these, that can be found in the discussions about client legal privilege over time. The pre-eminent theme, or rationale, is that the protection of the confidential communications in the lawyer-client relationship facilitates the administration of justice and the liberty of citizens against the state. As Deane J commented in *Baker v Campbell:*

> '[The principle of client legal privilege] represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathan of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents.'[4]

Questions for discussion

In its Issues Paper, *Client Legal Privilege and Federal Investigatory Bodies* (IP 33), the ALRC poses 31 questions that seek to prompt a wide range of responses on such key matters as how does the privilege serve the administration of justice in today's highly regulated environment? What kind of competing interests are involved? How does it work in practice? What are the best contemporary rationales for it? Should Royal Commissions be in a different position than regulatory bodies like ASIC and the Australian Taxation Office? Should you be able to claim privilege in relation to legal advice given to you by another professional, for example, your accountant? Should privilege be absolute?

The ALRC is seeking wide input in response to these questions as part of its deliberations that will lead up to the report on client legal privilege to the Attorney-General in December 2007. The release of Issues Paper 33 is followed by an intensive round of consultations with a view to releasing the next stage of the ALRC's work as a Discussion Paper in late August.

△ The pre-eminent theme, or rationale, is that the protection of the confidential communications in the lawyer-client relationship facilitates the administration of justice and the liberty of citizens against the state. △

Endnotes

1. *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [86] (Kirby J).
2. *AM & S Europe Ltd v Commission of the European Communities* [1983] QB 878, 913, Advocate-General Slynn.
3. J Bentham, *Rationale of Judicial Evidence* (1827), Book IX, Chap V, 302, at 311, 312.
4. *Baker v Campbell* (1983) 153 CLR 52, 120.

Review of the credit reporting provisions

The ALRC's Privacy Inquiry

By Bruce Alston

Bruce Alston is a Senior Legal Office working for the Australian Law Reform Commission. He is currently assigned to the ALRC's Privacy Inquiry.

A significant focus of the ALRC's review of privacy is on examining options for reform of the credit reporting provisions. The credit reporting provisions are contained in Part IIIA of the *Privacy Act 1988* (Cth) and associated provisions. These provisions commenced operation in September 1991.

The credit reporting provisions were the subject of the Issues Paper *Review of Privacy—Credit Reporting Provisions* (IP 32), released in December 2006. The forthcoming Discussion Paper on the *Review of Privacy* will contain proposals for reform of credit reporting regulation, in the context of the ALRC's overall review of privacy.

Credit reporting involves providing information about an individual's credit worthiness to banks, finance companies and other credit providers such as retail businesses that issue credit cards or allow individuals to have goods or services on credit. Credit reporting is generally conducted by specialised credit reporting agencies that collect and disclose information about potential borrowers, usually in order to assist credit providers to assess applications for credit.

Credit reporting agencies collect information about individuals from credit providers and publicly available information (such as personal insolvency information obtained from the Insolvency and Trustee Service Australia—a federal government agency). This information is stored in central databases for use in generating credit reports for credit providers.

In assessing credit applications, these reports augment information obtained directly from an individual's application form and the credit provider's own records of past transactions involving the individual. In addition, the information contained in credit reporting databases may be used in credit scoring systems. Credit scoring uses mathematical algorithms or statistical programs that determine the probable repayment of debts by consumers, often expressed as a credit 'score' or 'rating'.

Repeal of Part IIIA?

The credit reporting provisions are the only provisions in the *Privacy Act* that deal in detail with the handling of personal information within a particular industry or business sector.

While it may be argued that credit reporting presents a suite of privacy issues that are uniquely deserving of specific regulation, the reasons for this anomaly are to some extent historical in that the credit reporting industry was made subject to privacy regulation before the rest of the private sector.

In 1990, when the credit reporting provisions were inserted into the *Privacy Act*, the Act had very limited application to the private sector.[1] While further privacy regulation was anticipated, comprehensive coverage of the private sector was not implemented until after the *Privacy Amendment (Private Sector) Act* established the National Privacy Principles (NPPs) that apply to the handling of personal information in the private sector.[2]

Submissions and consultations to date have revealed little support for the retention of Part IIIA in its present form. Even those who value the privacy protections provided by Part IIIA generally agree that the provisions should be simplified, while retaining many of the basic rules.

The ALRC is considering whether to propose the repeal the credit reporting provisions and to leave credit reporting to be governed by the general provisions of the Act, supplemented by a code or other legislative instrument (such as regulations)—provided that an equivalent level of privacy protection can be provided to individuals.

Some of the arguments in favour of this approach include that, in dealing in detail with the handling of personal information within a particular industry or business sector, the credit reporting provisions are an unjustified anomaly within the *Privacy Act*. The Act would be significantly simplified by the repeal of Part IIIA.

Further, it has been suggested that the independent operation of the NPPs and Part IIIA results in unnecessary duplication and complexity in the application of privacy principles. The repeal of Part IIIA is consistent with the development of one set of unified privacy principles regulating both the public and private sectors.

Reform of credit reporting rules

Whether or not rules imposing specific obligations on credit reporting agencies and credit providers are promulgated in a code or regulations made under the *Privacy Act*, or remain in Part IIIA, a range of other reforms is being considered.

One central issue is whether new credit reporting rules should permit the collection by credit reporting agencies of additional categories of personal information to those currently permitted under s 18E of the *Privacy Act*. The Act mainly (but not exclusively) permits only the collection and disclosure of personal information that detracts from an individual's credit worthiness—such as the fact that an individual has defaulted on a loan. This is commonly referred to as 'negative' or 'delinquency-based' credit reporting.

There has been a strong push by some stakeholders to expand the types of personal information that may be collected and disclosed in the credit reporting process. While these proposals differ in their detail, the common unifying feature is a system that permits the reporting of personal information relating to an individual's current credit commitments or repayment performance (or both).

Leaving aside the issue of more comprehensive credit reporting, the ALRC will also be considering whether rules should provide for the reporting of information about identity theft; how to deal with the reporting of personal insolvency information such as voluntary debt agreements entered by individuals under Part IX of the *Bankruptcy Act 1966*; and how to deal with information about debts incurred by those under 18 years of age. Other issues that are to be examined include:

- the extent to which an individual's consent should be required for the collection, use and disclosure of credit reporting information about them; or whether new notification provisions are more appropriate (given that consent is rather illusory, where the individual must consent to credit reporting in order to obtain a loan);
- how best to ensure consistency and accuracy in the reporting of overdue payments and other information by credit providers;
- the adequacy of existing prohibitions on the secondary use of credit reporting information, for example in direct marketing (including for the 'pre-screening' of credit offers) and identity verification;
- whether regulations should provide that credit providers may only have access to the credit reporting system where the credit provider is a member of an external dispute resolution scheme, such as the Banking and Finance Industry Ombudsman or Telecommunications Industry Ombudsman;
- whether regulations should provide that the burden of proof in relation to disputed credit reporting information is placed on the credit provider so that, for example, if the information is not verified within 30 days, it must be deleted.

The ALRC has received a large number of informed and detailed submissions on these and other issues concerning the reform of the credit reporting provisions, and has consulted widely. There will be further opportunities for input from stakeholders on the proposals made in the Discussion Paper and before the ALRC reaches its final recommendations in the report due in March 2008.

Progress of the ALRC's Privacy Inquiry

In February 2006 the Australian Law Reform Commission (ALRC) was asked by the Attorney General, to examine Australia's privacy laws and recommend ways in which they could be improved.

To help focus the Inquiry, the ALRC has released two Issues Papers—Review of Privacy (IP 31, October 2006) and *Review of Privacy—Credit Reporting Conditions* (IP 32, December 2006), as well as a summary of both documents, *Reviewing Australia's Privacy Laws: Is Privacy Passé?*

The ALRC has also established a 'Talking Privacy' website—accessible via the front page of the ALRC's website—which provides a youth-orientated guide to the Privacy Inquiry, links to other relevant resources and an opportunity for young people to 'have a say' on privacy issues.

As part of the consultation process following the release of the issues papers, the ALRC's privacy team took to the road, hosting a series of public meetings and private consultations in Adelaide, Brisbane, Canberra, Coffs Harbour, Darwin, Melbourne, Perth and Sydney.

Information and opinions collected from these forums will be included in a Discussion Paper, to be released later this year.

A final report for the Inquiry is due to be delivered to the federal Attorney-General in April 2008.

The ALRC will welcome submissions on privacy issues until late 2007. Submissions need not be formal documents—you can comment on any issue relevant to the Inquiry through the online comment form on our website (**www.alrc.gov.au**), send us an email (**privacy@alrc.gov.au**), or a letter:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Endnotes

1. The *Privacy Ac*t provided guidelines for the collection, handling and use of individual tax file number information in the private, as well as public, sector: *Taxation Laws Amendment (Tax Files Numbers) Act 1988* (Cth).
2. *Privacy Act 1988* (Cth) sch 3.

Facing extinction

Climate change and the threat to Pacific Island countries

By Robert Aisi

Pacific Island countries[1] are already experiencing the effects of climate change, and represent some of the most vulnerable communities in the world.

According to the findings of the Intergovernmental Panel on Climate Change, they are facing extreme risks to their survival as nations. Many islands are not more than a few metres above sea level. As wave actions are exponentially linked to sea level, an increase of half a metre in sea level would completely inundate these island states, putting at risk the survival of their human populations.

Climate change is also expected to increase the intensity of tropical cyclones. While the evidence is not as clear in this case, the pattern of tropical storms seen in the past few years is cause for deep concern. Prior to 1985 for example, the Cook Islands were considered to be out of the main cyclone belt and could expect a serious cyclone approximately every 20 years. This has changed. Most notably, there were five cyclones within one month in February/March 2005, of which three were classified Category 5 as they passed through Cook Islands' waters.

While these recent cyclones caused damage equal to 10% of the government's annual budget, destroyed 75% of homes on the island of Pukapuka, and emotional distress, no lives were lost due to activation of warning systems and preparedness by the general public.

In 2004, the island of Niue was hit by Cyclone Heta, with the ocean rising over the 30 metre high cliffs, causing two deaths, and making 20% of the population homeless. All told, Heta caused economic damages equivalent to 200 years of exports. The country's only museum lost 90% of its collection.

The king tides that have struck Tuvalu and Kiribati in recent years are further dramatic examples of how climate change will affect our communities. Wells and agriculture poisoned by sea water, house foundations undermined and graves exposed are just some impacts that have been observed in our region. These are dramatic events and pose significant risk to peace and security in the Pacific, as the people may have to abandon their traditional lands, their homes, and possibly their nations.

Related impacts

Climate change has had several other related impacts. Vector borne diseases such as malaria and dengue fever are increasing their range upland in Papua New Guinea, and the incidence of dengue fever was especially high this year in the Pacific in general. A World Bank study on climate change and health found that a dengue epidemic in Fiji in 1998 cost the country around US$3–6 million. The World Bank also estimated that the economic costs of a dengue epidemic in Kiribati would be beyond the coping capacity of the country.

Climate change is also going to have an impact on economic activities in the region. The 1997–98 El Niño event saw a significant westward shift of major tuna stocks, making some of our economies and dinner tables suffer. This temporary warming of the western Pacific during the El Niño Southern Oscillation (ENSO) phenomenon is a harbinger of things to come, should the seas permanently rise in surface temperature. The impact of deteriorating coral reefs—the nurseries for certain fish stocks—are being severely damaged by warming waters, coral bleaching, and ocean acidification. We fear that there will be a major decline in the fish stocks as a

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This article is an edited version of his statement to the United Nations General Assembly on behalf of the Pacific Islands Forum Small Island Developing States Group, during the Security Council's Open Debate on Energy, Security and Climate. The statement was delivered in New York on 17 April 2007.

result. We also have to consider the overall issue of sovereignty of our current Exclusive Economic Zones under climate change scenarios, the right to fish in those waters and our ability to patrol and control them.

Climate change, climate variability, and sea-level rise are therefore not just environmental concerns, but also economic, social, and political issues for Pacific Island countries. They strike at the very heart of our existence. The impacts, and in particular the related economic and social shocks, pose serious political and national financial management issues for Pacific Island countries. Climate change, climate variability, and sea-level rise adversely affect gross domestic product, balance of payments, budget deficits, foreign debt, unemployment, and living standards.

Therefore, climate change is undermining the very basis for the existence of 12 independent Pacific Island countries, as well as seven Pacific Island Territories. Climate change is an overarching risk, and all of its impacts are—and will be—detrimental to us. We know and understand many of the impacts, but there is still much more knowledge that is necessary. We also need to ensure that our communities are well briefed on these impacts and that they are empowered with the capacity to plan for mitigation and adaptation. Our governments will establish overall climate change policies, but it is the communities that will have to agree to, and implement, appropriate measures.

Taking action

We in the Pacific Islands are not standing idly by. Together with our development partners some steps are being taken. For example, as a means of adapting to present climate variability and climate change, in 2006 the village of Lateu in Vanuatu was relocated further inland in order to avoid storm surges, frequent inundation, coastal erosion and flooding. The Canadian Government funded the relocation, and the new settlement has been made more resilient through improved water storage, new agricultural practices and better-constructed houses. But many Pacific communities have no higher ground to move to. Moreover, most of our economic activities—such as tourism, shipping and infrastructure—are located in the coastal zone. Even in the higher islands there are limits to what can be physically moved. There are also limits to what our governments can afford.

In some areas of the Cook Islands, such as Manihiki Atoll, where 3% of the island's population was killed by 8m high waves washing over the island during cyclone Martin in 1997, more concrete preparedness or adaptation measures are required. This is sensible from a risk management perspective, and through projects such as the GEF PACC (Global Environment Facility Pacific Adaptation to Climate Change) such things as cyclone shelters and communications equipment, as well as incorporation of 'climate proofing' where possible in infrastructure design, will be implemented in the Pacific in the coming years.

Individuals and communities should be empowered to adapt by ensuring they include a water tank to better deal with drought or floods, and allowing set backs or building on poles if homes are in coastal areas. Risk assessments to see which communities are vulnerable—and taking steps to address those risks—are essential.

Using traditional knowledge

Our Pacific ancestors living on these islands and voyaging across the Pacific dealt with a great deal of climate variability and adapted to new environments. They often did that by learning and understanding the natural system, using existing traditional knowledge, or else by sailing on to new islands.

Traditional knowledge in the region is passed on verbally, and is particularly important for increasing understanding and awareness of climate risks at the community level and in the local language. Traditional knowledge by necessity fills a gap in small islands where pure science data collection is sparse. In terms of managing climate risks, our traditional leaders have clear roles to play in our risk management programs, in mobilising community response, and in increasing ecosystem resilience through indirect methods such as defining traditional marine protected (or no-harvest) areas for reefs that are vulnerable to sea level rise, coral bleaching, and run-off sedimentation.

Many of our island communities have begun strengthening the resilience of natural systems in this manner in order to protect themselves against waves. Coral reefs and mangroves are the first line of defence against storm surges and erosion, and these are being protected through marine parks and coastal zone management. But coral reefs exist within a very narrow band of temperatures and are extremely sensitive to sea temperature increases, as

shown by the numerous bleaching events in past years. Mangroves are very sensitive to sea level changes, and their capacity for inland migration may be obstructed by the settlements they currently protect. Our best protection against extreme climatic events is thus being undermined by climate change.

Priorities

It has been said that for the Pacific Island countries, all areas affected by climate change are priority areas. In order to build a shared and sufficiently robust understanding of what needs to be done, Pacific Island countries see the need for progress in a number of mutually supportive areas.

We need to continue to build a stronger and more comprehensive international climate change regime within the Framework Convention on Climate Change that uses the best scientific knowledge and assesses its implications. The negotiations on future commitments for the international community as a whole should be based on the following priorities:

- To give equal priority to adaptation, as well as mitigation.
- To slow the rate of warming and sea level rise.
- To avoid positive climate feedbacks and their destructive consequences.
- To convince developing countries that industrialised countries are serious about addressing climate change and finding ways to reduce emissions in all countries.
- To maintain public credibility in the climate convention.
- To stop further delays in taking action.
- To minimise the economic costs to developing countries of preventing dangerous climate change.
- To stop investment by the developed world in long-lived carbon intensive capital equipment and infrastructure.
- To promote a massive worldwide expansion of renewable energy.
- To provide greater flexibility to future generations.
- To give strong signals to industry that climate change is a serious issue and that they are needed to find solutions.

Within other multi-lateral processes there is also scope for some of these issues to be addressed to increase international cooperation in finding solutions. All the impacts that have been enumerated above are considered in different forums, such as the United Nations Framework Convention on Climate Change (UNFCCC), Commission on Sustainable Development (CSD), the Intergovernmental Panel on Climate Control (IPCC), the World Meteorological Organization (WMO), the United Nations Convention on the Law of the Sea (UNCLOS), etc.

Security Council action?

Debate in the Security Council suggests that there are additional avenues for discussing one of the most critical issues for the survival of our Pacific Island Countries and communities. The Security Council and the UN General Assembly have accepted the principle of the responsibility to protect.

The dangers that the small islands and their populations face are no less serious than those nations and peoples threatened by guns and bombs. The impacts on our populations are as likely to cause massive dislocations of people as past and present wars. The impacts on social cohesion and identity are as likely to cause resentment, hate and alienation as any current refugee crisis. Pacific peoples have inhabited their islands for thousands of years, and have rich and vibrant cultures. We are likely to become the victims of a phenomenon to which we have contributed very little, and of which we can do very little to halt. We are taking actions on renewable energy, energy efficiency and seeking to avoid deforestation, but our primary focus is on adaptation and preparing for the worst. The Security Council, charged with protecting human rights, the integrity and security of States, is the paramount international forum available to us. We do not expect the Security Council to get involved in the details of UNFCCC discussions. But we do expect the Security Council to keep the matter under continuous review so as to ensure that all countries contribute to solving the climate change problem and that their efforts are commensurate with their resources and capacities. We also expect that the Security Council will review particularly sensitive issues such as implications to sovereignty, and to international legal rights from the loss of land, resources, and people.

Endnotes

1. The countries represented in the Pacific Island Forum Small Island Developing States are Fiji, Nauru, Micronesia, Marshall Islands, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu and Papua New Guinea.

Setting an agenda for the next decade

The Law Reform Commission of Ireland

By Charles O'Mahony

Charles O'Mahony is a Legal Researcher with the Law Reform Commission of Ireland.

The Law Reform Commission of Ireland was established in 1975, and so, like the ALRC, celebrated its 30th Anniversary in 2005.[1]

Our general statutory mandate,[2] like most other law reform agencies, is to keep the law under review with a view to its reform: this includes the development of law, its codification (including simplification and modernisation) and the revision and consolidation of statute law. The Commission carries out this mandate primarily through Programmes of Law Reform, of which there have been two to date;[3] and it also receives requests to examine specific areas from the Attorney General, the Government's principal law officer.[4] Since its establishment, the Commission has published more than 130 documents reviewing different aspects of the law in Ireland (invariably, with a comparative edge to the analysis) and has made significant proposals for law reform.[5] The Commission is coming to the end of its current Programme of Law Reform and is engaged in a public consultation process to develop a *Third Programme of Law Reform*, which will run for seven years from the beginning of 2008.[6]

In 2006, the Commission also agreed to take over responsibility for the development of a Programme of Statute Law Restatement.[7] Statute Law Restatement involves administrative consolidation of legislation, and is similar to a 'Statutes Reprint' policy. This new role for the Commission is fully consistent with our original statutory mandate, and forms part of the Irish Government's commitment to tidy up the Irish Statute Book,[8] which in turn is part if its wider *Better Regulation* policy.[9]

The remainder of this article provides a general overview of some of the Commission's recent and current work.

Reform of the legal system

Two examples from the Commission's current work reflect 'founding principles' of law reform agencies: consolidation of the law on the jurisdiction of the courts and the Commission's new statute law restatement mandate.

The Courts Acts

In October 2005, the Commission began a joint project with the Courts Service and the Department of Justice, Equality and Law Reform to consolidate, with reforms, the jurisdiction of the courts in a single *Courts Act*. Reflecting the wider project to tidy up the Irish Statue Book, this involves combining a large number of pre-1922 Acts in this area with more than 60 Courts Acts passed since the establishment of the state in 1922. Among the pre-1922 Acts that remain in place is the *Supreme Court of Judicature (Ireland) Act 1877*, which was modelled on the *Supreme Court of Judicature Act 1873*. Going a bit further back in history, the project is likely to set out in modern form the *Courts Act 1476*,[10] which requires judges and barons to wear their habits and coifs in term time only! The Commission will publish a consultation paper on this topic in 2007, which will include a draft Consolidated Courts Bill.

Statute Law Restatement

As already mentioned, in 2006 the Commission agreed to take over responsibility for the development of a Programme of Statute Law Restatement. Restatements mirror the idea of reprints and do not, therefore, contain any substantive changes to the law. The Commission will publish a *Consultation Paper on Restatement* in the first half of 2007. This will include an assessment of the various styles and technologies that would enhance the

presentation and accessibility of Restatements. It will also include sample draft Restatements of the Irish *Freedom of Information Acts 1997* and *2003*, using different presentation styles.

Law of evidence

Reflecting a long-standing body of work on the law of evidence, the Commission has continued to review specific and general aspects of the law, both common law and statutory.

DNA database

In 2005, the Commission published a *Report on the Establishment of a DNA Database* (LRC 78, 2005). In making its recommendations, the Commission took account of the broad and complex constitutional and human rights issues that may arise; and secondly, the more specific question of what classes of DNA profiles would make up any database. The report recommended the establishment of a limited DNA database, in which profiles of those reasonably suspected of, and convicted of, serious crimes (including homicides, most offences against the person and burglary) would be retained on the DNA database. The report also recommended that the purposes of the DNA database should be stated in the primary legislation establishing it. The report also addresses the issue of who should regulate and maintain the DNA database, recommending that an independent Forensic Science Agency be established for this purpose. In February 2007, the Government published the General Scheme of a Criminal Justice (Forensic Sampling and Evidence) Bill 2007, which would broadly implement the Commission's recommendation for a limited DNA database.

Other aspects of evidence law

In October 2006, the Commission began a project on the law of evidence in civil and criminal matters. This project will explore options for reform of aspects of the law of evidence, including relevant common law and legislative rules. By the end of 2007, the Commission hopes to publish a consultation paper dealing with documentary evidence and expert evidence.

Criminal law

The overall aim of the Commission's work in this area is to lay the groundwork for eventual codification of criminal law.[11]

Homicide

The Commission has published two consultation papers on homicide, which will form the basis for a final *Report on Murder and Manslaughter*. Most recently, in 2007 the Commission published a *Consultation Paper on Involuntary Manslaughter* (LRC CP 44, 2007). The Commission has provisionally concluded that, in general, the current law of involuntary manslaughter is satisfactory, but that a number of specific amendments should be considered and it invites submissions on these. For example, the Commission suggests that low levels of deliberate violence should be removed from the scope of unlawful and dangerous act manslaughter and be prosecuted as assaults instead. The Commission provisionally recommends that the current test for gross negligence manslaughter be amended so that a person would only be liable for gross negligence if he or she were mentally and physically capable of averting to, and avoiding the risk of substantial personal injury at the time of the fatality. The Commission also provisionally recommends that the specific offence of dangerous driving causing death should continue to exist alongside the more serious offence of manslaughter.

Defences

In 2006, the Commission published a *Consultation Paper on Legitimate Defence* (LRC CP 41, 2006), including self-defence. This was the third in a series of consultation papers on defences in criminal law, following the Commission's *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27, 2003) and the *Consultation Paper on Duress and Necessity* (LRC CP 39, 2006). The Commission intends to publish a report on the three defences in 2007 or 2008.

Land and conveyancing law

In 2003, the Commission launched its eConveyancing Project, which involves a comprehensive review of the substantive law and also embraces the relevant procedural and administrative elements with a view to the eventual introduction of eConveyancing.

△ In the report, the Commission aims to promote the empowerment of vulnerable adults, while also recognising that some protections are still needed. △

Substantive reform

In 2005, the Commission published its *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74, 2005). This included a draft Land and Conveyancing Bill which implemented more than 90 recommendations for reform and modernisation of land law and conveyancing and proposed the repeal, in whole or in part, of more than 130 statutes, commencing with *De Donis Conditionalibus* of 1285. This led to the publication of the Government's Land and Conveyancing Law Reform Bill 2006. The 2006 Bill was passed by Seanad Éireann (the Upper House of the Irish Parliament) in late 2006, where it received all-party approval, and is likely to be enacted later in 2007.

eConveyancing

In 2006, the Commission published its *Report on eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79, 2006). The report sets out the views and recommendations of the Commission on *Modelling of the Irish Conveyancing System*, a report prepared for the Commission by BearingPoint Management and Technology Consultants. The Modelling Report includes the first detailed 'end-to-end' process model of the entire conveyancing transaction. The next stage of the project involves conducting a detailed assessment of the most suitable model for eConveyancing in Ireland, including preparation of proposals for Government as to the design, establishment, operational governance and implementation of the actual model. The Commission intends to have a final report for Government by the end of 2008.

Vulnerable adults, capacity and guardianship

In 2006, the Commission published a *Report on Vulnerable Adults and the Law* (LRC 83, 2006), which brought together material dealt with in two papers, the *Consultation Paper on Law and the Elderly* (LRC CP 23, 2003) and the *Consultation Paper on Vulnerable Adults and the Law: Capacity* (LRC CP 37, 2005). The report dealt with two topics in the Commission's current Programme of Law Reform: the law and older people; and the law concerning adults whose ability to make decisions may be limited, for example, through intellectual disability, dementia or an acquired brain injury. The report is divided into two parts. The first part recommends the enactment of a new mental capacity law to create clear rules on when a person has the legal competence (capacity) to make a wide range of decisions, including commercial and healthcare decisions. The second part recommends that the current Wards of Court system (governed mainly by the *Lunacy Regulation (Ireland) Act 1871*) should be replaced by a new Guardianship system (on which the Commission drew from experience in Australia).

In the report, the Commission aims to promote the empowerment of vulnerable adults, while also recognising that some protections are still needed. In terms of empowerment, the Commission recommends that the proposed law should include a clear presumption that all people over 18 should be presumed to have mental capacity. The Commission also recommends that a modern 'functional' approach to legal capacity should be put in place. The functional approach means assessing a person's decision-making ability in relation to a particular decision at the time the decision is made. The Commission also recognises that vulnerable adults may still need protection against abuse. For example, the Commission has recommended that all types of home 'equity release' schemes—many of which are aimed at older people—should come under the ambit of the Irish Financial Regulator. Some equity release schemes have been designed so that they are not financial products, so that the Financial Regulator cannot currently regulate these types of schemes.

The report recommends that the proposed capacity legislation should contain specific guiding principles, which must always be taken into account. These are: no intervention can take place unless it is necessary for the person, including whether the person might regain their capacity; any intervention should be the least restrictive of the person's freedom; account must be taken of their wishes, past and present; account should be taken of the views of their relatives, carers and those who they live with; and due regard should be given to their rights to dignity, bodily integrity, privacy and autonomy. In February 2007, a Private Members Bill—the Mental Capacity and Guardianship Bill 2007—which sought to implement the Commission's report, was introduced in Seanad Éireann. In the debate that followed, the Government accepted the Bill in principle and it was deemed to have passed Second Stage.

Family law

Two projects in the family law area highlight the international dimension to adoption and the changing nature of family structures in Ireland.

Intercountry adoption

In 2007, the Commission published a *Consultation Paper on Aspects of Intercountry Adoption* (LRC CP 43, 2007). This arose from a request to the Commission by the Attorney General. The request came against the immediate background of *Attorney General v Dowse*,[12] which concerned the adoption of an Indonesian child, and which was recognised and registered in Ireland under the *Adoption Act 1991*, but which the adoptive parents later applied to have revoked. This was an unusual intercountry or foreign adoption because the adoptive parents did not live in Ireland and the child never set foot here. Such adoptions represent approximately 10% of all the intercountry or foreign adoptions recognised and registered by the Irish Adoption Board in its Register of Foreign Adoptions. About 75% of intercountry or foreign adoptions recognised and registered in Ireland involve adoptive parents who live in Ireland and have been assessed before they travel abroad and adopt a child. Once a foreign adoption is recognised and registered by the Adoption Board, the child is entitled to become an Irish citizen provided that at least one of the adoptive parents is an Irish citizen. This is what occurred in the *Dowse* case even though the adoptive parents and child were resident outside the state.

The Commission's research shows that this approach is accepted by a growing number of countries and its provisional recommendation is that this should remain the law on this point. The Commission highlighted the practical difficulties of ensuring the legal and constitutional rights of an Irish citizen child who is resident in another jurisdiction and notes that the Constitution of Ireland states that most rights are subject to a test of how 'practicable' it is to protect them. The Commission provisionally recommended that if a situation like the *Dowse* case arises in future, the Attorney General, in his role as guardian of the public interest, and in conjunction with the diplomatic and consular services of the Government, is the most appropriate officer of the state to protect the rights of the child subject to relevant principles of international law. The Commission also reiterated a previous recommendation made in 1998 that the 1993 *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption* be ratified and incorporated in Irish law. The Commission welcomed the Irish Government's proposal to do so in 2007.

Rights and duties of cohabitants

In 2006, the Commission published a *Report on the Rights and Duties of Cohabitants* (LRC 82, 2006). The report makes substantial recommendations for reform of the law concerning cohabitants (de facto couples); defined as opposite sex or same-sex couples who live together in an intimate relationship and who are not related to each other. It covers cohabitants who do not marry or who have not registered their relationship through, for example, civil partnership. In light of the views of most elected public representatives in Ireland, the report assumes that a form of civil partnership for same-sex couples is likely to be introduced in the near future. The report emphasises that its recommendations are not an alternative to public registration systems —whether marriage or civil partnership—but deal with a different situation, which is the position of cohabitants who do not publicly register their relationship (for whatever reason). The Commission concluded that this group of cohabitants—whether same-sex or opposite-sex—should be considered separately in any reform of the law.

The report deals with the rights and duties of cohabitants under a wide range of topics. It makes recommendations aimed at encouraging cohabitants to make agreements on financial matters (cohabitant agreements), how transactions between 'qualified cohabitants' (discussed below) should be dealt with under tax laws, and what succession entitlements qualified cohabitants should be entitled to apply for. The report also recommends that there should be general recognition of same-sex and opposite-sex cohabitants under, for example, social welfare law, private tenancy law, in the health care and hospital setting, and under domestic violence law. The report also recommends the enactment of a 'safety net' redress system for 'qualified cohabitants', who could apply to court for financial relief at the end of a relationship but only if they can show that they had become 'economically dependent'. The Commission recommends that, in such an application, a court could make any of the following orders: a property adjustment order, a compensatory maintenance order, or (as

△ Two projects in the family law area highlight the international dimension to adoption and the changing nature of family structures in Ireland. △

a last resort) a pension splitting or pension adjustment order.

The report also states that, where cohabitants wish to claim some public benefit (such as tax benefits) or redress through the courts (such as succession rights or a property adjustment order) this will only be available to 'qualified cohabitants', which is defined as cohabitants who have been living together for at least three years (or, if they have had a child, two years). The report emphasises that, in many cases, a much longer period would be required before a cohabitant would obtain any entitlements, because the court would also have to take into account a wide range of factors, including contributions and sacrifices made to the relationship. The report recommends that, for couples who do not register their relationship (whether through marriage or civil partnership), most entitlements will not be automatic and will only apply where various 'qualifying criteria' have been met, and including the requirement that a cohabitant shows he or she is 'economically dependent'.

Contract and tort

Privity and third party rights

In 2006, the Commission published a *Consultation Paper on Privity of Contract: Third Party Rights* (LRC CP 40, 2006). In the paper, the Commission has provisionally recommended that, subject to certain limitations, the privity of contract rule should be changed so that a third party who the contracting parties clearly intended to benefit from their agreement would be able to sue if the agreement is not carried out properly. The Commission's analysis reflected on the changes which have been made in many common law states in this area, largely arising from the recommendations of law reform agencies. The Commission intends to publish its final report on this topic by the end of 2007.

Duty of care of volunteers and 'good Samaritans'

In January 2006 the Attorney General requested the Commission to consider whether:

- the law in relation to those who intervene to assist and help an injured person (good Samaritans) should be altered in relation to the existence of a duty of care by such persons to third parties and/or the standard of care to be imposed on such persons towards third parties;
- the law in relation to the duty of care of voluntary rescuers should be altered, by statute, and if so the nature of such change in that duty and/or standard of care owed by voluntary rescuers to third parties;
- the duty of care and/or the standard of care of those providing voluntary services, for the benefit of society, should be altered by statute and, in particular, whether in what circumstances a duty of care should be owed by such persons to third parties and the standard of such care; and
- the law should be reformed, by statute, so as to impose a duty on citizens and members of the caring professions and members of an Garda Síochána or the Defence Forces (when not engaged in duties in the course of their employment) to intervene for the purposes of assisting an injured person or a person who is at risk of such an injury and the circumstances in which such a duty should arise and the standard of care imposed by virtue of such a duty.

The Commission has begun its examination of this request, which allows an opportunity to explore the foundations of liability in negligence. It also raises wide-ranging policy issues concerning how to ensure active volunteering and active citizenship in Ireland against the background of some concerns about potential civil liability. The Commission intends to publish a consultation paper later this year.

Conclusion

We hope that this overview will give readers a flavour of the Irish Commission's recent and current work. The Commission is conscious that many of these topics have been explored by other law reform agencies: for those who peruse the publications library on our website, it will be obvious that the Commission has benefited greatly from the analysis of other agencies. We are equally aware that any reform proposals that we make must pass the 'will it work' test, and that they will be suitable for Ireland. This is a particularly exciting time for the Commission as we look forward to the preparation of a programme of Statute Law Restatements, which will play a part in the modernisation of the Irish Statute Book, and

to the challenge of preparing our new *Third Programme of Law Reform*, which will set out our reform agenda for well into the next decade.

Endnotes

1. The Commission's 30th anniversary was marked by a lecture delivered in June 2005 by the former President of the Commission (and former Chief Justice of Ireland) Mr Justice Ronan Keane, *Thirty Years of Law Reform*, 1975–2005, <www.lawreform.ie> at 31 May 2007.
2. In accordance with the *Law Reform Commission Act 1975*. The 1975 Act mirrors the provisions of the British *Law Commissions Act 1965*, subject to some important variations in detail. It is worth noting that a Northern Ireland Law Commission was formally established in April 2007 when section 50 of the *Justice (Northern Ireland) Act 2002* (which arose from the 1998 Belfast/Good Friday Agreements setting out the arrangements for devolved government in Northern Ireland) was brought into force. It is expected that the Commission will begin work in late 2007.
3. The Commission has worked under two Programmes to date. The *First Programme of Law Reform* ran from 1977 to 1999. The *Second Programme of Law Reform 2000–2007*, as its title suggests, was time-limited.
4. In recent years, these have been running at a rate of about one annually.
5. All our publications are available at <www.lawreform.ie>. The current implementation rate is about 70%.
6. See *Seminar Paper: Third Programme of Law Reform* (LRC SP3, 2007).
7. See the *Statute Law (Restatement) Act 2002*, available at the website of the Houses of the Oireachtas (the Parliament of Ireland), <www.oireachtas.ie>. Until 2006, responsibility for the preparation of Statute Law Restatements rested with the Office of the Attorney General. The Attorney General will continue to be responsible for the formal certification of the Restatements to be prepared by the Commission.
8. Another significant development in this area is the publication—in the *Statute Law Revision Act 2007*—of the first definitive list of the statutes carried over by the state on independence in 1922, and in particular a 'white list' of 1,364 pre-1922 Acts being retained on the Statute Book. This 'Pre-1922 Project' was carried out over a four-year period by a dedicated team in the Office of the Attorney General.
9. See <www.betterregulation.ie>.
10. 16 & 17 Edw 4, c 22.
11. The Irish Government and Oireachtas have legislated for the preparation of a criminal code under the auspices of a statutory Criminal Law Codification Advisory Committee, established under Part 14 of the *Criminal Justice Act 2006*. For background to the Committee, see the Report of the Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (2004). The report noted that the 'mini-codes', which had been enacted by the Oireachtas in recent years and which derived from, for example, previous work of the Commission, would form essential building blocks for the Code, which might take the form of a Crimes Act.
12. [2006] IEHC 64; [2007] 1 ILRM 81.

Continued from page 16: 'The introduction of juries to the Federal Court of Australia'

Five present members of the Court conducted criminal trials when they were formerly members of State Supreme Courts, one was a member of a Court of Appeal with extensive criminal work and another was the Commonwealth Director of Public Prosecutions. Many of the judges hold secondary commissions as members of courts with trial and appellate criminal jurisdiction: the Supreme Court of the Australian Capital Territory, the Supreme Court of Norfolk Island, and the Supreme Courts of Vanuatu, Tonga and Fiji. This depth and mix of experience has informed the work of the Criminal Practice Committee as the Federal Court moves towards another chapter in its history as a court created under Chapter III of the Constitution.

Endnotes

1. *Brown v R* (1986) 160 CLR 171.
2. J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 806. The statement is attributed to Bernhard Ringrose Wise speaking at the Constitutional Convention in Melbourne in 1898.
3. For a description of the development of criminal jury trials in Australia see M Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62 *Law and Contemporary Problems* 69.
4. *The King v Porter* (1936) 55 CLR 182.
5. *The King v Brewer* (1942) 66 CLR 535.
6. Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, ALRC 103 (2006).
7. *Cheatle v R* (1993) 177 CLR 541.
8. *Brown v R* (1986) 160 CLR 171.
9. *Brownlee v The Queen* (2001) 207 CLR 278.
10. See New South Wales Law Reform Commission, *Jury Service*, Issues Paper 28 (2006), at 57–58. See also New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46 (2004); New Zealand Law Commission: *Report 69: Juries in Criminal Trials*, Report 69 (2001).

Continued from page 34: 'Jury research in New South Wales'

7. *Cheatle v The Queen* (1993) 177 CLR 541, 560.
8. For example, Australian Institute of Criminology, *Jury Satisfaction and Confidence Survey* (2007) (forthcoming); D Boniface et al, *Jury Comprehension and Obedience to Judicial Directions: The Accused's Criminal History and Extra-curial Juror Investigations* (2007) (forthcoming); Bureau of Crime Statistics and Research, *Child Sexual Assault Trials: A Survey of Juror Perceptions* (2006); J Napier, D Spencer and J Sabolcec, *Guilty or Not Guilty? An Investigation of Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting* (2007) (forthcoming).

Continued from page 37: 'A sign of the times'

Endnotes

4. J Barber, 'Account of a Deaf Juror' (2005) July *Sign Matters*, 25–32.
5. S Travaglia, 'Deaf Person to Serve on Jury' (2005) *Resource: The Official Newsletter of the Disability Resource Centre Auckland,* 5.
6. S Mather and R Mather, (2003). 'Court Interpreting for Signing Jurors: Just Transmitting or Interpreting?' in C Lucas (ed), *Language and the Law in Deaf Communities* (2003), 60–81.
7. T Dick, 'Nine Angry Jurors... and a Few Left Confused', *The Sydney Morning Herald* (Sydney) 6–7 January 2007, 16.
8. For example, V Charrow & R Charrow, 'Characteristics of the Language of Jury Instruction' in J Alatis & G Tucker (eds), *Language in Public Life* (1979), 163–185; J Levi, 'Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions' (1993) 68(1) *American Speech*, 20–49.
9. NAATI is the National Accreditation Authority for Translators & Interpreters—the body that establishes and regulates the Australian industry standard for all languages. Any interpreter that works in a NSW court is required to have NAATI Interpreter level accreditation (formerly known as Level 3).
10. The judge's summation was taken from the case of *R v Rodney Ivan Kerr*, which was tried in the Supreme Court of NSW Criminal Division between 27 October–6 November 2003. Kerr was charged with the manslaughter of William Christopher Harris at Redfern station in Sydney. He was also charged with affray and endangering the safety of a person on the railway. Two excerpts, which incorporated sufficient legal terminology and important facts of the case, were selected by the NSWLRC.

Continued from page 50: 'Reintroducing a criminal jury in Japan'

18. Supreme Court of Japan, *Saiban-in seido no Symbol Mark* [Symbol Mark of the Lay Assessor System], <www.saibanin.courts.go.jp/news/symbol.html> (in Japanese), at 16 May 2007.
19. Supreme Court of Japan, *Symbol Mark no imi* [Meaning of the Logo], <www.saibanin.courts.go.jp/topics/symbol_meaning.html> (in Japanese), at 16 May 2007.
20. Art 2(i) [Subject Cases and Composition of a Judicial Panel]. The law covers cases listed in Art 26(2)(ii) of the *Courts Act*, namely crimes punishable by death, indefinite imprisonment, penalties of minimum of one-year imprisonment and above, hard labour. For example, this would cover murder, arson of an inhabited structure, destruction by explosives, etc. See Penal Code, Law No 45 of 1907, Arts 199, 108, 117.
21. For example, this would cover inflicting bodily harm resulting in death, dangerous driving resulting in death, robbery or assault resulting in death. See S Shinomiya, T Nishimura and M Kudo, *Moshimo saiban-in ni erabaretara: Saiban-in Handbook* [What if you were chosen to be a Lay Assessor: The Lay Assessor Handbook] (2005), 30.
22. This is a crucial distinction from the pre-war jury system where it is argued that that system was undermined by the vast majority of defendants currying the favour of the court by exercising their right to waive a jury. See K Anderson and M Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*saiban-in seido*) from Domestic Historical and International Psychological Perspectives' (2004) 37 *Vanderbilt Journal of Transnational Law* 935, 963.
23. Art 4 [Handling of Concurrently Pled Cases]. In addition, if the prosecutors change the charges to a non-*saiban-in* offence after a *saiban-in* panel is underway, the lay assessor panel, at the court's discretion, may still determine the issue. Art 5 [Handling of Cases Following Changes in the Criminal Charges].
24. Arts 20 [Notice and Allocation of the Number of Lay Assessor Candidates]; 21 [Preparation of the Proposed List of Lay Assessor Candidates]; *Kôshoku senkyo hô* [Public Election Act], Law No 100, 1950, Art 9.
25. See M Ito, 'Lay Judgment in Practice', *Japan Times*, 27 February 2005, <http://search.japantimes.co.jp/print/features/life2005/fl20050227x2.htm>, at 16 May 2007.
26. Art 14 [Reasons for Disqualification].
27. Art 15.
28. Art 16 [Reasons to Decline].
29. Art 41 [Dismissal of Lay Assessors upon Request].
30. Arts 41(viii), (i), (ii).
31. It is not fully clear what would satisfy this test, but it is assumed that this is related to individuals with strong personal beliefs that would preclude them from being objective.
32. Art 2(2) [Subject Cases and Composition of a Judicial Panel].
33. Art 2(3) [Subject Cases and Composition of a Judicial Panel].
34. K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (*saiban-in seido*): Interim Report on the Road to Commencement' (2006) 21 *Journal of Japanese Law 55.*
35. Art 6(2) [Powers of Judges and Lay Assessors].
36. Arts 56 [Questioning of Witnesses], 57 [Witness Questioning Outside the Court], 58 [Questioning of Victims], 59 [Questioning of the Defendant].
37. Art 67 [Verdict].
38. Art 67(2) [Verdict].
39. See, eg, L Kiss, 'Reviving the Criminal Jury in Japan' (1999) 62 *Law and Contemporary Problems* 261, 262–266; R Bloom, *Jury Trials in Japan* (2005), Boston College Law School Research Paper No 66, <http://pape rs.ssrn.com/sol3/papers.cfm?abstract_id=688185>, at 16 May 2007.
40. Japanese Ministry of Justice, *Anata mo Saiban-in*!! [You are a Lay Assessor Too!!], <www.moj.go.jp/SAIBANIN/>, at 2 April 2006.

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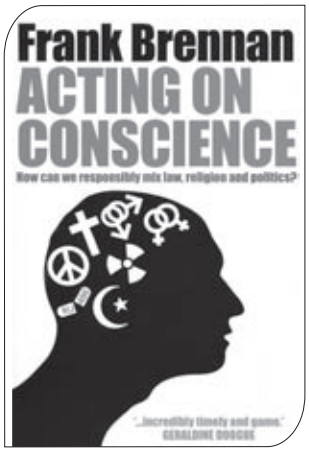
Reviews



Acting on Conscience: How Can We Responsibly Mix Law, Religion and Politics?

By Frank Brennan, University of Queensland Press, 2007; pp267

$34.95

Acting on Conscience: How Can We Responsibly Mix Law, Religion and Politics?

The 'Sydney Morning Herald' recently reported on the Pope's visit to Brazil, where the Pope issued a strong condemnation of abortion and appeared to agree with suggestions that Catholic politicians who legalise abortion should be excommunicated. As the Herald reported:

> 'In Mexico City, politicians who approved the abortion law accused the Pope of interference.
>
> '"I did my duty as a legislator and as a woman," said Leticia Quezada, one of the law's chief backers. "I voted to address a crisis of public health. I will continue to be a believer. The church has no right to interfere in my conscience."'[1]

It is exactly this type of situation that Father Frank Brennan discusses in *Acting on Conscience*. In this insightful and provoking book, the 'meddling priest' searches for the answer to 'the appropriate place of religion in the public forum, investigating its relationship to law and policy and setting appropriate limits on the use to be made of religious ideas and the role of religious authorities participating in public debate about contested issues'.

It is an interesting task, given the general reticence on espousing religious views in Australia's contemporary pluralist society. The Judeo-Christian background of Australia's laws is largely unchallenged but rarely acknowledged; religious views are seen as a private matter, to be kept out of public affairs. While we may be used to seeing church leaders 'making periodic appearances on contested moral questions such as abortion, euthanasia and stem cell research', only on rare occasions can we point to an exchange or debate about religious views between politicians—the debate between the then Opposition Foreign Affairs spokesman Kevin Rudd and Health Minister Tony Abbott on faith in politics being one of the more recent.

So, what role should religion have in law and politics? Brennan suggests that while religious beliefs cannot be trumps in debates about uncontested issues of law, government policy and public administration, neither are they irrelevant. He suggests that:

> 'In our post-11 September world, even the most hardened atheist and even the most intolerant liberal has to admit that religion does have a place in the mix. Keeping religion out of politics is neither a worthy ideal nor a practical objective in robust western democracies, because the subject matter of politics will inevitably include issues about which citizens care passionately and on which they disagree vehemently, some of them drawing their inspiration and vision from a religious tradition.'

However, while religion is guaranteed its place in the public forum of Australia's democracy, Brennan argues that 'its place and role will be circumscribed by legal, moral and prudential considerations relevant to the discharge of any public office'.

Starting with a consideration of religion in contemporary Australia and the importance of protecting and promoting the primacy of conscience, Brennan then goes on to look at particular manifestations of religion in law and politics, including the 2004 presidential election in the United States, the Iraq War,

Work Choices, stem-cell research, and same-sex marriages.

Brennan seeks to assert the valuable role the church can play in participating in the public debate and helping to inform people's consciences. He writes that religious citizens and leaders are 'well placed to contribute to social and political change because their motivations are not purely political and because they see the contemporary political issues in a broader, even transcendental perspective'. He argues that church leaders are allowed to express their views on important moral issues, and when they confine themselves to statements of principle true to their religious traditions, they can be seen as expressing, for example, an Anglican or Catholic view.

However, it is in the application of those principles and in the assessment of the detail of any proposed laws and policy that the primacy of individual conscience must come into play, to guide each public official and private individual to their own conclusion.

Acting on Conscience is an engaging, stimulating and compassionate read. Brennan's central argument around the primacy of the conscience is important and valuable and, as recent events in Mexico City would demonstrate, timely as well. Only by allowing and encouraging both public and private members of our community to be guided by good conscience—whether that conscience is informed in part by religious beliefs or a secular humanist perspective—can we take the first step towards appropriately, properly and responsibly incorporating religion into law, politics, and the political process. The next steps of ensuring that there are adequate checks and balances in place to protect individuals and minorities from populist interferences and upholding the rule of law without 'undue religious influence' will see us, in Brennan's view, well on the way to putting religion and politics in their proper place.

Endnotes

1. T Wilkinson, 'Pope ignites abortion row as he visits Brazil', *Sydney Morning Herald* (online), 11 May 2007, <www.smh.com.au>.

△ Lauren Jamieson

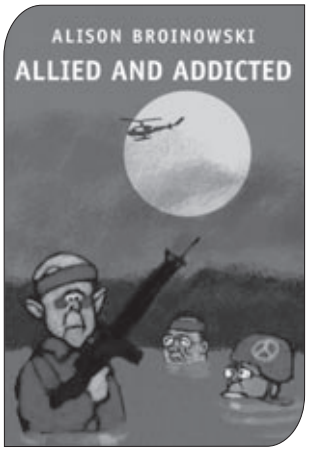
Allied and Addicted

Our alliance with the US is not only about our troop commitments, or Abram tanks, or being close to a warring super-power so that it would come to our aid if we are in need. It does not affect only our foreign and trade policies, isolating us from our neighbours in the region.

One of its effects is that we imitate the Americans culturally, socially and economically. We cannot get enough of American culture, cannot feel safe without an unquestioning alliance and every time someone mentions acting as an equal rather than as a subservient partner, we experience withdrawal pains. Simply stated, we are addicted to the US alliance. And like any addiction, the pill of Americanisation seems vital to our survival. We, the addict, feel good, safe and secure and happy with life when we can take as much of the harmful product as we can. We feel anxious, even frightened and in pain, when we cannot. This is the scenario laid out by Alison Broinowski in *Allied and Addicted*. In the book, she advocates forcefully that it is time to rethink this alliance; it is time to apologise to family and friends, do a few TV interviews, look more closely at where we really are in the world and attend rehab.

Broinowski is unapologetic, direct and hard-hitting. She criticises what she sees as the unquestioning alliance with the US militarily and politically and asks the question, 'what will the Americans do for us?'. She examines our fascination with American culture and society and asks us not to compromise our cultural uniqueness and independence to yet another foreign friend. With Machiavellian foresight she asks the question whether the Americans would come to our aid if we were ever attacked, or needed their protection, and answers it in the negative. When it comes to the crunch, Broinowski argues, a nation that avowedly protects only its own interests will invariably opt not to help a mate; it matters not how close and chummy our leaders are.

The first chapter is dedicated to our adoption and practice of what she calls 'cringe culture'—it is a culture of duplicity, subservience and deceit that she speaks of. It is interlaced with illegality, fear and war. In her opinion, our invasion of Iraq behind or—as sometimes proudly mentioned—ahead of the American war machine was a profoundly illegal. Was a profoundly illegal act. The book argues that



Allied and Addicted

By Alison Broinowski, Scribe Publications, 2007; pp144

$22.00

being one of the standard bearers for this war was, therefore, a curious engagement for a Prime Minister who told Parliament that his government will never breach international law. From our American friends we have learnt to pick and choose our obligations, Broinowski says, even though we have acceded to them all. Ironically, we still consider the Americans and ourselves good international citizens; as nations that play by the rules. The rest of the international community may have other views.

Broinowski moves on to the environment next exposing some frightful, yet unsurprising, facts about our government's approach towards the environment. She examines what she describes as our failure to force our government to try harder and make a constructive move on the issue. She concludes that our government and our industry are contributing to the fouling of our nest by not making any move on climate change; our investment in developing renewable sources of power is abysmally small compared even to developing economies such as China and India, who we normally point a finger at and accuse of polluting the environment even more than we do; and of course, the only solution we can conceive is nuclear power. We make this move almost in tandem with the Americans, while the rest of the world, especially Europe, is slowly moving away from nuclear power as a source of energy.

In the final chapter of her book, Broinowski talks about the role of the 'absolute monarch', the Prime Minister, in bringing us closer to the Americans. Having centralised foreign, trade and defence policy in his own person and office he has swallowed the American pill without considering its side-effects. Our identification as the most blind of America's allies and our invasion of Afghanistan and Iraq have undoubtedly made us more vulnerable to terrorism. Our chumminess with America, moreover, has sidelined us from trade conferences in our own region, to which we do not even get invited. It is rare, Broinowski says, that Australians get elected to judicial positions on international courts and tribunals; even rarer still is the spectacle of an Australian being elected to a high political position in the UN. And is this international isolation worth being in what she calls, the 'axis of the feeble'? Maybe not.

While Broinowski mounts a strong argument for her case that our addiction to America is sickening and is a bad spot for the health of our nation, her point of view seems sometimes to be clouded by an inflexible adherence to this thesis. Sometimes, she has to resort to the most tenuous of connections to make her point good.

Nevertheless, this is a compelling book. It typifies strong advocacy, demonstrates unwavering support for principle in politics, and more than most stands for an independent Australian identity.

△ Pouyan Afshar Mazandaran

Environmental Principles and Policies

Author Sharon Beder originally trained as a civil engineer, went on to complete a Masters of Science and Society degree at the University of New South Wales, followed by a PhD, during which she made discoveries about the contamination and sewerage pollution of Sydney's beaches. In 2001 Beder received a 'World Technology Award in Ethics'.

This book is a well-researched examination of six major principles that relate to the environmental problems facing the world. Three of the principles concern environmental matters—ecological sustainability, the polluter pays principle, and the precautionary principle. The other three—equity, human rights, and public participation—have wider social applications. The principles discussed were chosen because of their broad acceptance around the world and the degree to which they have been incorporated into international treaties and national laws.

These principles are discussed in relation to a set of policies that seeks to utilise economic incentives and market forces in protecting the environment, such as emissions trading schemes, mitigation banks, fishing quotas and tradeable polluting rights. The book is divided into four parts.

Part I looks at the three environmental principles. The first chapter, 'The Sustainability Principle', examines limits to growth and the conflict between economic growth and attempts at achieving environmental sustainability. Chapter 2 examines the principle of 'polluter pays' and looks at how it has been applied, with varying degrees of success, in international conventions and legislation. Chapter 3, 'The Precautionary Principle', considers the idea that it is 'better safe than sorry', especially when scientific uncertainty exists. Different interpretations of the precautionary principle, and how it has been incorporated into legislation around the world, are looked at in some detail.

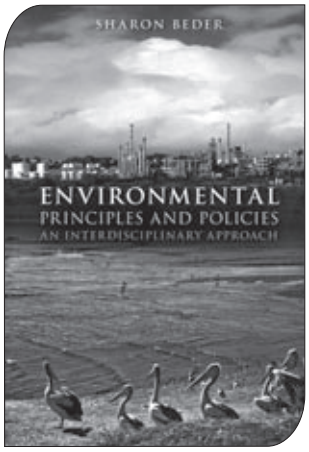
Part II, 'Social Principles and Environmental Protection', begins with a chapter on the equity principle and looks at the basic concepts of fairness and justice. A number of important concepts are looked at in this chapter—the poor, and people in developing countries, often bear the brunt of environmental degradation but receive very few of the economic benefits derived; and the responsibility we owe to future generations—to mention two. Chapter 5, 'Human Rights Principles', looks at the International Bill of Rights (and the various covenants enacted since) and the role of environmental protection in ensuring that these rights are maintained. Chapter 6, 'The Participation Principle', looks at freedom of information legislation and how it applies to the activities of large polluters. The situation in various countries around the world is examined, with particular emphasis placed on people's ability to monitor, or influence, the behaviour of polluters.

Part III, 'Economic Methods of Environmental Valuation', begins with 'measuring environmental value', which looks at the traditional, economists' methods for valuing the natural environment. Cost benefit analysis is looked at in some detail. In chapter 8, 'Is Monetary Valuation Principled', these methods are examined to determine how well they comply with the six principles previously discussed.

The final two sections of this book, Part IV, 'Economic Instruments for Pollution Control' and Part V, 'Markets for Conservation', provide a detailed analysis of the various economic mechanisms available for reducing pollution and environmental degradation. The mechanisms are evaluated using the application of the six environmental principles. Numerous case studies are cited to illustrate the effectiveness, or lack of, these various mechanisms. There are too many different concepts to look at here, but the final sections of this book explore the many possible solutions to the problems that face the world today. The relationships between the six main principles discussed and the economy, environment, standard of living, human rights, scientific uncertainty and political will are portrayed in a non-prescriptive way, leaving the reader better able to make their own critical evaluation of a complex situation.

This book is particularly relevant at present with debate raging about global warming, the introduction of carbon trading and other environmental issues such as drought and the use of nuclear energy. *Environmental Principles and Policies* would be a valuable resource for anyone interested in protecting the environment or involved in the formulation of government or industrial environmental policies.

△ Greg Diggs



Environmental Principles and Policies: An Interdisciplinary Approach

By Sharon Beder, UNSW Press, 2006; pp 336

$54.95

Reform roundup

Articles in Reform Roundup are contributed by the law reform agencies concerned.

Entries to Reform roundup are welcome.

Please contact the Editor at: reform@alrc.gov.au

Contents

Administrative Review Council

30th anniversary

The Administrative Review Council is finalising a special issue of its annual administrative law bulletin, *Admin Review*, to mark the occasion of the Council's 30th anniversary.

The bulletin will include presentations made at a special 30th anniversary seminar in September 2006 by the former Chief Justice of the High Court, Sir Anthony Mason AC KBE; the Secretary of the Attorney-General's Department, Robert Cornall AO; the Chief Executive of the Business Council of Australia, Katie Lahey; CEO of the Australian Consumers' Association, Peter Kell; and the Chairman of the UK Council on Tribunals, Lord Newton of Braintree OBE DL.

The bulletin will also include an article by Dr Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, on 'Future Challenges for Administrative Review'; an article on 'Judicial Review in Western Australia' by the Chief Justice of the Supreme Court of Western Australia, the Hon Wayne Martin; and a brief history of the origins of the Council by its Executive Director.

Please contact the Council Secretariat if you would like a copy of the bulletin when it becomes available.

Government agency coercive information-gathering powers

As noted in the last issue of *Reform*, the ARC has been working on a report on the exercise of coercive information-gathering powers by government agencies. A draft of the report was released for stakeholder comment in December 2006. The draft report is available at: www.ag.gov.au/arc.

Submissions in response to the draft report are presently being considered by the Council. The Council hopes to be able to report to the Attorney-General on this project by mid-2007.

Best practice guides

The Council is working on a series of best practice publications for administrative decision makers. The subject matter of each publication in the series will reflect a key stage in the decision-making process. The guides will provide practical guidance to government decision makers on lawful and procedurally fair decision making, statements of reasons, accountability and fact finding.

The Department of Immigration and Citizenship is working with the Council to annotate the guides specifically for that Department. It is hoped that other departments, in consultation with the Council, will also express an interest in adding agency-specific materials to the guides.

The guides are to be launched at Parliament House in Canberra on 10 August 2007. Please contact the Council Secretariat for further information.

Complex business regulation

The Council is conducting a review of administrative decisions in areas of complex and specific business regulation. This project will consider the special features of business regulation that may impact on the most effective and efficient way in which administrative law rules and principles can be applied.

The Council is seeking input from those interested in the complex business regulation project. Please contact the Council's Secretariat if you would like to make a contribution to this report. The terms of reference for the project are available on the Council's website.

The Administrative Review Council's publications are available online at <www.ag.gov.au/arc>.
For further information on the work of the Council, please contact the Secretariat on (02) 6250 5800 or email: arc.can@ag.gov.au.

Family Law Council

Collaborative law

The Family Law Council completed work on its report *Collaborative Practice in Family Law* in December 2006. The report was prepared in consultation with the Family Law Section of the Law Council of Australia and the National Centre of Collaborative Law. The report received a very warm reception when it was released earlier this year and may be obtained either on request to the Council's Secretariat or from the Council's website.

Statistical snapshot 2003–05

The Council has completed and will shortly be distributing its next bi-annual statistical report on various aspects of the Australian family law system. The report draws on data sourced from the Family Court of Australia, the Family Court of Western Australia, the Federal Magistrates Court and the Australian Bureau of Statistics. In the coming months the Council will be beginning work on the next edition of the snapshot, for the period 2005–07. This report will also be available on the Council's website.

Arbitration of family law property and financial matters

The Council has completed a discussion paper in response to terms of reference on arbitration of family law property and financial matters. The paper is entitled *The Answer from an Oracle: Arbitrating Family Law Property and Financial Matters*. The paper discusses the potential advantages and disadvantages of arbitration and methods by which use of arbitration for appropriate property and financial matters could be encouraged. The Council welcomes comments on the questions raised in the discussion paper. Submissions should be returned to the Council by 13 August 2007. Details about how to make a submission are included in the paper and on the Council's website. Following the consultation period, the Council will be preparing a final report on arbitration in the latter half of this year.

Family violence

The Council is continuing its research on family violence in response to terms of reference on family violence.

Improving post-parenting order processes

The Council is presently preparing a report in response to terms of reference on improving

post-parenting order processes.

Consultation

In the past quarter the Council has consulted with the Government on draft legislation to introduce provisions into the *Family Law Act 1975* governing financial adjustments between parties to de facto relationships following the breakdown of the relationship. The Council has also provided a letter to the Australian Law Reform Commission's Privacy Inquiry, raising some issues surrounding privacy in the family law system.

Further details of the Family Law Council's work program are available on its website: <www.ag.gov.au/flc>.

Law Reform Commission of Western Australia

Homicide

Work on the Commission's review of the law of homicide continues. The Commission released an issues paper in 2006 and has in past months been busy consulting with interested parties, receiving submissions and hosting focus group discussions.

Compensation for injurious affection

The reference on compensation for injurious affection requires the Commission to inquire into and report upon whether the principles, practices and procedures pertaining to the issues of compensation for injurious affection to land in Western Australia require reform. The Commission is in the process of compiling a detailed discussion paper on the area, which is expected to be released shortly. The discussion paper's release will be followed by a three month submissions period and a final report. Those readers who have an interest in this specialised subject area are encouraged to contact the Commission to be included on our discussion paper distribution list. Submissions from jurisdictions other than Western Australia are welcome. The Commission will be hosting public forums to maximise feedback on the proposals for reform.

Problem-oriented courts

The Commission has encountered challenges on its problem-orientated courts reference, not least of which has been the rapid expansion and development of this area of law. This has resulted in the Commission reassessing its project methodology and undertaking a more thorough investigative process across jurisdictions. Work continues on this reference.

New website

The Commission launched its new website in May 2007. The website is user-friendly, informative and has an improved search function. All publications of the Commission are now available for free download from the website immediately upon release. The new website also features an e-news subscription service, which will inform subscribers when reports and papers are released, as well as keeping subscribers up-to-date with the Commission's activities. The Commission invites *Reform* readers to subscribe to this service. Subscription is free and you can unsubscribe at any time—just follow the prompts on the website: <www.lrc.justice.wa.gov.au>.

NSW Law Reform Commission

Role of juries in sentencing

In February 2005, the Commission was asked by the Attorney General to investigate whether current sentencing procedures would be improved by involving juries in sentencing decisions. The Commission was asked to investigate the merits of allowing the presiding judge in a criminal trial to canvass the views of the jury when sentencing an offender. In addition, the Commission was asked to take into account whether allowing jury input in sentencing would enhance the public confidence in the administration of justice. The suggestion for this inquiry was made by the Chief Justice of New South Wales, the Hon James Spigelman AC.

The Commission published Issues Paper 27 in July 2006. The Issues Paper analyses the advantages and disadvantages of jury involvement in sentencing decisions, with particular reference to maintaining public confidence in the criminal justice system. A report was completed in June 2007.

Jury directions in criminal trials

In February 2007, the Attorney General requested that the Commission inquire into the directions and warnings given by a judge to a jury in a criminal trial. The Commission is required to have regard to:

- the increasing number and complexity of the directions, warnings and comments

required to be given by a judge to a jury;

- the timing, manner and methodology adopted by judges in summing up to juries (including the use of model or pattern instructions);
- the ability of jurors to comprehend and apply the instructions given to them by a judge;
- whether other assistance should be provided to jurors to supplement the oral summing up; and
- any other related matter.

The Commission is currently inviting preliminary submissions.

Consent of minors to medical treatment

In June 2004, the Commission published Issues Paper 24, *Minors' Consent to Medical Treatment*, as part of a review that is considering when young people, below the age of 18, should be able to make decisions about their medical care by themselves. The issues paper examines who should be able to make medical decisions for minors on their behalf, and what the legal liability of medical practitioners should be who treat minors without valid legal consent.

The Commission conducted consultations in the second half of 2006, and a full-day seminar in November 2006, jointly organised with the Law School at Macquarie University.

The Commission is planning to publish a final report by mid-2007.

Jury service

Issues Paper 28 *Jury Service* was published in November 2006 in response to a request from the Attorney General in August 2006 to review aspects of the system for selecting jurors in New South Wales. *The Jury Act 1977* (NSW) specifies the current qualifications for jury service, as well as specifying persons who are ineligible to serve as jurors or who may claim exemption.

The Commission has received submissions on Issues Paper 28, many of which have questioned the ongoing justification for the long list of exceptions and exemptions.

The Commission plans to report on this inquiry in 2007.

Privacy

The Commission's review of New South Wales' privacy legislation continues. A Consultation Paper was published in May 2007. It considers whether a new cause of action based on privacy should be developed.

People with cognitive or mental health impairments

The Commission has commenced two projects under its Community Law Reform Program relating to people with cognitive or mental health impairments coming into contact with the criminal justice system. The first is reviewing s 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW). This provision gives a magistrate very broad powers (including diversion from the criminal justice system) when dealing with a defendant who is developmentally disabled, or suffering from a mental illness, or suffering from a mental condition for which treatment is available in a public hospital (but is not mentally ill within the meaning of Chapter 3 of the *Mental Health Act*). The second project is a review of the principles of sentencing offenders with cognitive or mental health impairments.

The projects are important as there are a significant number of offenders with cognitive and mental health impairments coming into contact with the criminal justice system and being sentenced to periods of imprisonment.

The Commission is planning to report on these projects by the end of 2007.

Completed reports

Six reports have been completed, and are awaiting tabling in Parliament at the time of print:

- *Surveillance: Final Report* (Report 108);
- *Young Offenders* (Report 104);
- *Guaranteeing Someone Else's Debts* (Report 107);
- *Relationships* (Report 113);
- *Company Title Home Units* (Report 115); and
- *Uniform Succession Laws: Intestacy* (Report 116).

Report 114, *Blind or Deaf Jurors*, was tabled in the New South Wales Parliament in May 2007. The article 'Jury Research in New South Wales', earlier in this edition of *Reform*, has further information.

Tasmania Law Reform Institute

Criminal liability of organisations

In April 2007, the Institute released Final Report No 9 that makes recommendations concerning the attribution of criminal responsibility to organisations. It was the view of the Institute that the current criminal law does not provide a means to adequately hold organisations criminally liable in the rare case where the organisation itself (rather than the individuals involved) has real culpability for traditional crimes. To address this inadequacy, the Institute recommended introducing specialised principles of criminal responsibility for organisations to address the very serious cases where the conduct of an organisation has been so reprehensible that it should be punished using the criminal law. These reforms are based on the Model Criminal Code position.

The report also makes recommendations concerning the sentencing of organisations. Currently, the type of sentence usually imposed on a corporation is a fine. In many instances a fine may be ill suited to achieving the aims of punishment, such as denunciation and deterrence, particularly in relation to serious breaches of the law that cause death or serious injury. This report makes recommendations to provide a greater range of sentencing options relevant to corporations such as adverse publicity orders and orders disqualifying an organisation from undertaking specific commercial activities.

A Charter of Rights for Tasmania?

The Tasmanian Government has asked the Tasmanian Law Reform Institute to investigate how human rights are currently protected in Tasmania and whether the protection of human rights can be enhanced in any way. The Institute released an issues paper in August 2006 aimed to stimulate thinking and discussion about the protection of human rights and to encourage as many Tasmanians as possible to participate in the consultation process. Widespread community consultation has been undertaken with presentations being made to 70 groups within Tasmania. Almost 400 responses have been received to the issues paper. The final report is currently being prepared, with a view to release in mid-2007.

For more information on the Tasmania Law Reform Institute visit the website: <http://www.law.utas.edu.au/reform/> or email <law.reform@utas.edu.au>.

Victorian Scrutiny of Acts Committee

The Victorian Parliament's Scrutiny of Acts and Regulations Committee is currently reviewing certain Victorian Acts referred to it by the Parliament with the view of making recommendations on whether the referred Acts are unclear or redundant and, if they are, whether they should be amended or repealed.

Following the Victorian Parliament's referral of the corporations powers in 2001 to the Commonwealth Parliament, the Committee now invites written submissions concerning whether certain Victorian corporations and related laws may be repealed. The Acts referred to the Committee are the:

- *Companies Act 1961* (Vic);
- *Companies Act 1975* (Vic);
- *Companies (Application of Laws) Act 1981* (Vic);
- *Securities Industry Act 1975* (Vic);
- *Securities Industry (Application of Laws) Act 1981* (Vic);
- *Marketable Securities Act 1970* (Vic); and
- *Collusive Practices Act 1965* (Vic).

The Committee's senior Legal Adviser, Andrew Homer, is available to provide further information about the inquiry process on (03) 9651 3612.

Alberta Law Reform Institute

Rules of Court Project

The Alberta Law Reform Institute has released two more consultation memoranda as part of its Rules of Court Project.

Consultation Memorandum 12.20 (CM 12.20) addresses the topic of *Criminal Jury Trials: Challenge for Cause Procedures*. Accused people have both statutory and constitutional rights to jury trials. Both the Crown and the accused are entitled to present their cases before fair and impartial jury members. To secure this, the Canadian Criminal Code has established a number of procedures, including challenges for cause on the ground that a prospective juror is not indifferent between the accused and the Queen. To say that a prospective juror is 'not indifferent' is to say that the individual is 'partial'. In Canada, prospective jurors are presumed to be

impartial. This presumption may be rebutted on the balance of probabilities by the party alleging partiality, through the challenge for cause procedure.

The challenge for cause procedure has two stages. First, the party must satisfy the trial judge that there is a realistic possibility that prospective jurors are partial and that they cannot set aside their partiality. The party may establish partiality on the basis of evidence (including expert evidence), judicial notice, or both. The trial judge has the discretion to set the questions to be asked in the challenge for cause and otherwise to manage the challenge process. Second, if the judge finds that there is a realistic possibility of partiality, each prospective juror is questioned before two 'triers'—two prospective jurors or two jurors who have already been sworn. The triers decide, on the balance of probabilities, whether the challenged juror is partial or impartial.

The Criminal Code provides very little guidance for challenge for cause procedures. CM 12.20 offers two main proposals. First, a standard notice of intention to challenge for cause should be developed. This document would be filed and served along with supporting documentation. Second, the notice should be filed and served at least 60 days before the date set for jury selection. CM 12.20 also makes proposals regarding procedures before the judge and before the triers; courtroom bookings; and the establishment of special jury panels if there is challenge for cause.

Consultation Memorandum 12.21 (CM 12.21) addresses the topic of *Civil Appeals*. When Alberta's current rules of court were enacted, appellate powers were exercised by a division of the Supreme Court of Alberta. Although a separate Court of Appeal came into being in 1979, the rules of court have not been revised to reflect the new structure and role of a separate appellate court. Thus, in many areas, current practices lag behind the needs of the court and litigants.

CM 12.21 reviews the progress of an appeal from the date of the trial decision through to the hearing of the appeal and decision. The proposals put forward for consultation reflect the following working principles.

1. An individual who has grounds for dissatisfaction with the outcome of his or her case should generally be able to have the case looked at by a higher court so that it can consider whether there appears to have been an injustice.
2. There is a private and a public purpose of appeals in civil cases. The private purpose is to correct an error, unfairness or wrong exercise of discretion that has led to an unjust result. The public purpose is to ensure public confidence in the administration of justice and, in appropriate cases, to:
   a) clarify and develop the law, practice and procedure; and
   b) help maintain the standards of first instance courts and tribunals.
3. An appeal should not be seen as an automatic further stage in a case. The presumption should be that the trial court got it right.
4. Appeals should be dealt with in ways that are proportionate to the grounds of complaint and the subject matter of the dispute.
5. An appeal process should ensure that, so far as is practical, delay, cost, and uncertainty of process are reduced to a minimum.

These principles are based on the set of principles stated in Sir Jeffery Bowman's *Review of the Court of Appeal* (1997).

CM 12.21 proposes revisions to the main steps of an appeal. Having identified several causes of delay at the outset of an appeal, CM 12.21 includes proposals to reduce both the number of steps in an appeal and the need for court intervention to get or keep an appeal moving:

- The time to appeal should run from the date of the decision rather than the later date of entry of the trial judgment.
- The appellant will be responsible for filing the main documents in the appeal book. The respondent will have the option to file an additional appeal book if required.
- There should be a deadline for the appellant to order the appeal book to ensure that it will be ready for filing.
- There should be a single deadline for filing the appellant's appeal book, factum and authorities rather than the series of deadlines that currently apply; and there should also be a single deadline for filing the respondent's materials.

CM 12.21 also reviews issues relevant to case management and the use of judicial dispute

resolution on appeal. Other topics covered include: applications to the court, leave to appeal, expedited appeals, and court powers.

Both consultation memoranda are available on the Institute's website: <www.law.ualberta.ca/alri>.

British Columbia Law Institute

Privacy Act

In the past two decades, privacy has become a prominent issue in society. As advances in technology have vastly increased the ways in which privacy can be violated, there has been a corresponding growth in the concern over its preservation. The British Columbia Law Institute has commenced a project on one aspect of the vast subject of privacy—civil liability for violation of privacy rights.

British Columbia enacted the *Privacy Act* in 1968, as a response to a controversy over electronic eavesdropping. The legislation was the first of its kind in the Commonwealth. The *Privacy Act* was intended to remedy a deficiency in the common law, which did not recognise a right to privacy. The Act creates a tort, actionable without proof of damage, for violation of the privacy of an individual. This statutory right to privacy is not absolute; it is subject to the limitations and qualifications set out in the Act. The Act has not been amended in the 39 years since its enactment and, as a result, has failed to keep pace with changing social attitudes and the challenges of new technology.

The Law Institute's project will involve a thorough review of the *Privacy Act*. In particular, improvements introduced in other provinces, such as greater specificity of remedies and the inclusion of stalking as a civil wrong, will be considered. The project will include consultations with the public. The final report is expected to be published in July 2007.

Ageing with challenges

The Law Institute's internal division, the Canadian Centre for Elder Law Studies, is nearing completion of a major project based on the theme of ageing with challenges. The goal of the project is to challenge the notion that people age in a homogeneous fashion. The Centre has consulted extensively with the public with the aim of creating a working definition of 'ageing with challenges' and to identify specific legal issues that call for detailed legal analysis and research.

As part of this project, a study paper entitled *A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario* was published in October 2006. The completed project will include the following elements:

- a best practices guide directed to the legal, medical, and care giving professions;
- a seminar for an audience of medical and nursing students, law students, care facility employees, caregivers, support organisations, and other key stakeholders;
- a final report, including outcomes and recommendations; and
- a brochure distilled from the final report.

Society Act

The *Society Act* provides for the incorporation, organisation, governance, and dissolution of not-for-profit bodies. It has been 30 years since the last major revision of this legislation. In that time, British Columbia has enacted a new *Business Corporations Act*, other jurisdictions have begun to reform their not-for-profit incorporation laws, and the not-for-profit sector has expanded and developed in ways unforeseen in 1977.

The Law Institute is in the midst of a project to improve and modernise the *Society Act*. Work is being carried out by a volunteer project committee, made up of lawyers and consultants who are prominent in the not-for-profit field. A consultation paper will be published this year. A final report, with draft legislation, is anticipated in July 2008.

Canadian conference on elder law

The third annual Canadian Conference on Elder Law will be held on 9–10 November 2007. This international conference, held annually in Vancouver, welcomes participants from around the world.

The theme of the conference will be 'Moving Forward, Moving Beyond'. The Right Hon Beverley McLachlin, Chief Justice of the Supreme Court of Canada, will deliver the Conference's keynote address. This year's streamed program will focus on elder justice, including the issues of elder abuse, neglect, self-neglect, and criminal justice.

A number of events will take place in conjunction with the conference. These events include the annual meeting of the World Study Group on Elder Law (8 November 2007), the Simon Fraser University Ting Forum on Social Justice (9–10 November 2007), and the first

Federal/Provincial/Territorial Working Group on Seniors' Issues Forum (8 November 2007). (Attendance at this forum is by invitation only.)

Personnel changes

Jim Emmerton was appointed Executive Director of the Law Institute, effective 1 April 2007. Mr Emmerton has an extensive background in corporate law, having served as a senior executive and corporate counsel with several national and international corporations. He has a broad spectrum of knowledge in the fields of law, finance and corporate development.

The Law Institute wishes to acknowledge the contribution of its retiring Executive Director, Arthur L Close, QC. As a founding member of the Law Institute, and before that as Chair of the Law Reform Commission of British Columbia, Mr Close has been the visible face of law reform in British Columbia for 35 years. Mr Close will continue to be involved with the Law Institute, as a member and director.

Manitoba Law Reform Commission

Private title insurance

On 5 April 2007, the Manitoba Law Reform Commission released its Report *Private Title Insurance* (Report 114, December 2006). The project was the result of a reference from the Minister of Justice and Attorney General, and represents a collaboration between the Manitoba Law Reform Commission and the Law Reform Commission of Saskatchewan. The report is a joint report by the two Commissions.

The report considers the effects of title insurance within the context of residential real property conveyancing and contains 15 recommendations aimed at protecting the interests of residential property owners and purchasers and protecting the public land registration system, while ensuring freedom of choice for consumers.

A title insurance policy insures a purchaser or lender against certain losses relating to an interest in land; generally these are matters that affect the title or the right to use and enjoy the property. It may include coverage for problems that existed at the date the policy was issued but were undiscovered, as well as for future risks related to fraud, forgery and encroachment. Critics of title insurance argue that it is of limited value in a land titles system, as it duplicates the coverage provided through the statutory compensation scheme and 'insures over' survey defects and zoning non-compliance, making it less likely that problems will be corrected. Proponents of title insurance assert that it complements the statutory coverage, insuring for additional off-title matters, for example, and facilitates the early release of mortgage and sale proceeds on closing.

The Commissions reported that, in their view, a ban on the sale of title insurance would be a disproportionate response to the possible harm caused. Instead, the Commissions made several recommendations to address the underlying weaknesses of the real property system to which title insurance has been a response and to close many of the gaps in protection. As well, a more proactive approach by the provinces to the protection of the survey fabric is required. The Commissions also make several consumer protection recommendations, to ensure that information relevant to a consumer's ability to make an informed choice in relation to title insurance is disclosed and to better protect consumers' interests.

Franchise law

The Manitoba Law Reform Commission is engaged in a project on the review of franchise law. Franchise legislation has been enacted or introduced in four other provinces. The Commission is finalising a consultation paper for release in mid-2007. Copies of the paper may be obtained from the Commission's website upon release.

Potential projects

The Commission is reviewing all potential law reform projects that had been deferred in previous years as well as a number of suggestions for new projects. Priorities for upcoming projects will be set during the (northern) spring of 2007.

Information on the Manitoba Law Reform Commission, including the Commission's publications, can be found at <www.gov.mb.ca/justice/mlrc>.

National Conference of Commissioners on Uniform State Laws (United States)

The mission of the National Conference of Commissioners on Uniform State Laws is to promote uniformity of law among the various states and territories of the United States. Now in its 116th year, the Conference comprises more than 350 lawyers, judges and law professors appointed by the states as well as the District of Columbia, Puerto Rico and the US Virgin Islands. These commissioners draft proposals and work toward the enactment in state legislatures of uniform and model laws on subjects where uniformity is practical and desirable. Since its inception in 1892, the Conference has drafted hundreds of uniform laws on numerous subjects and in various fields of law, many of which have been universally or nearly universally enacted by the states.

The Conference is a national organisation since its work extends to all US state and territorial jurisdictions. It is also regional and international, since there is a cooperative relationship with sister organisations in Canada and Mexico. Our work also influences several institutes and law reform organisations in countries such as Australia and Japan. The Conference maintains a Special Committee on International Legal Developments to further its collaboration with international organisations and to promote international harmonisation and comity in a wide variety of fields, including, among other areas, commercial law, dispute resolution and trans-border enforcement of family law orders.

The Conference has a number of current projects dealing with international law. First, the Conference has recently embarked on three projects with its North American counterparts in an effort to harmonise the laws of the United States, Canada and Mexico. The Conference, along with the Uniform Law Conference of Canada and the Mexican Center for Uniform Laws, is working on a joint project to create a 'Harmonized Legal Framework for Unincorporated Nonprofit Associations in North America'. This project should result in three 'national drafts'—one each for the US, Canada, and Mexico—that will contain a common set of basic principles that each country can incorporate into their statutory frameworks concerning unincorporated nonprofit associations.

A Joint Committee to Harmonize North American Law on the Assignment of Receivables in International Trade, with members from the Conference, Canada and Mexico, has been established. This joint committee, instead of working together to draft an Act that will then be enacted in each participating country, is assisting the US State Department in drafting an Act that would implement the United Nations Convention on the Assignment of Receivables in International Trade. The Convention, which came from the United Nations Commission on International Trade Law (UNCITRAL) and was adopted by the United Nations General Assembly in 2001, seeks to eliminate the prevailing uncertainties in the legal effectiveness of international receivables financing transactions through the establishment of a set of uniform rules.

The third project, a Joint Drafting Committee for Implementation of the UN Convention on Independent Guarantees and Standby Letters of Credit, with members from the Conference, the American Law Institute, Canada and Mexico, is working to draft language to implement the UN Convention, and to assist Canada and Mexico in developing letter of credit law consistent with UCC Article 5.

At the request of the US State Department, the Conference's Committee on the Uniform Interstate Family Support Act (UIFSA) is monitoring developments at the Hague Conference on International Private Law with respect to a draft convention in the international recovery of child support and other forms of family maintenance. The Committee will examine whether becoming a party to the Convention is in the best interests of the United States and is expected, if appropriate, to draft amendments to UIFSA, and possibly to draft implementing statutory language that would comply with the new Hague Convention.

The Conference is registered as a non-governmental organisation member of the United Nations Economic and Social Council (ECOSOC). ECOSOC serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to member states and the United Nations system. It is responsible for promoting higher standards of living, full employment, and economic and social progress; and identifying solutions to international economic, social and health problems. It has the power to make or initiate studies and reports on these issues.

The Conference is also a registered civil society organisation with the Organization of American States (OAS). The OAS brings together the nations of the Western Hemisphere to strengthen cooperation on democratic values, defend common interests and debate the major issues facing the region and the world. The OAS is the region's principal multilateral forum for strengthening democracy, promoting human rights, and confronting shared problems such as poverty, terrorism, illegal drugs and corruption.

Lastly, the Conference has recently formed a new Joint Editorial Board (JEB) for International Law. The JEB will consist of members appointed from the Conference and from the American Bar Association Section on International Law. The primary purpose of the JEB is to facilitate the promulgation of uniform state laws consistent with US laws and international obligations dealing with international and transnational legal matters.

The Conference strives to reduce the need for individuals and businesses to be faced with different national laws as they move and conduct business internationally. As the Conference's international program unfolds, it will undoubtedly involve a closer working relationship with the State Department, our counterparts in Canada and Mexico, and such international organisations as UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, and the OAS. Developing these relationships outside the United States and undertaking drafting and implementation of international projects are a logical and necessary extension of the Conference's historical mission.

Scottish Law Commission

Criminal law

During consultation on the Scottish Law Commission's Seventh Programme of Law Reform it was suggested that the law on sexual offences was in need of review. Following public, academic and professional concern about two widely-reported rape cases in Scotland in 2004, the Commission was asked by Scottish Ministers to review the law relating to rape and other sexual offences. The Commission's Discussion Paper, *Rape and Other Sexual Offences*, was published in January, and was followed by a period of public consultation which ended in May 2006.

The issues covered in the paper included the need to define consent; the redefinition of 'rape' to cover a wider range of sexual acts and ensure protection for male and female victims; and enhancing the protection of persons vulnerable to sexual exploitation.

'Rape' is currently defined in Scotland as a man having sexual intercourse with a woman without her consent. However, 'consent' is not defined and juries are expected to apply what they consider to be the ordinary meaning of that word. The discussion paper proposed that the meaning of consent should be defined in statute and that a list of factual situations should be provided to indicate where consent is not present. The list, which would not be exhaustive, would include situations where the victim was subject to violence, including violence against a third party; and where the victim was unconscious or asleep or lacked capacity to consent as a result of drink or drugs.

The discussion paper proposed a redefinition of the physical act constituting the crime of rape to include non-consensual penetration with a penis not only of the vagina but also the anus or mouth of the victim. Other offences proposed included sexual assault by penetration, sexual assault by touching and a new offence of compelling another person to engage in sexual activity.

The Commission also proposed altering the current statutory provisions and common law principles to ensure that protection is given to those who cannot consent to sexual activity (such as young children) and to people with a limited capacity to consent. Such persons include older children, people with a mental disorder and people over whom others hold a position of trust or authority.

The discussion paper emphasised the need for gender equality and proposed that common law and statutory homosexual offences should be replaced by offences that are neutral as to gender and sexual orientation. It also considered arguments for and against the requirement that all the essential facts be proved by corroborated evidence.

The Commission has received a large number of helpful responses to the discussion paper. These have now been analysed and policy is being developed in light of them. A final report, including draft legislation, will be submitted to Scottish Ministers in the (northern) autumn of 2007.

Once the report on rape and other sexual offences has been submitted, we intend to commence a review of the criminal law defences of provocation, self-defence, coercion and necessity. The current law in each of these areas is uncertain and relatively undeveloped, and a review has been motivated by a recent court decision which accepted that reform was desirable and that legislation was the best mechanism for this. The difficulties apply particularly to the defence of provocation where, for example, it is not clear whether a successful defence will result in acquittal or mitigation of sentence. Equally, it is unclear whether a prolonged course of conduct, such as domestic violence, can amount to provocation.

Insurance law

The Commission is working with the Law Commission for England and Wales on this project.

Insurance law in the United Kingdom has been criticised as outdated and unduly harsh to policy holders.

A joint scoping paper was published in January 2006 to seek views on areas of insurance contract law that should be included within the scope of this project. As a result of the comments submitted in response to that paper, the project will include topics such as misrepresentation, non-disclosure, warranties, insurable interest and unjustifiable delay.

To assist in the development of our thinking, the joint team is producing a series of issues papers. These do not represent the policy of either Commission but are intended as a vehicle for sharing initial thinking with interested parties. Issues papers on *Misrepresentation and Non-Disclosure, Warranties and Intermediaries and Pre-contract Information* are available on the Commission's website.

We intend to publish two joint consultation papers, the first of which will be in the (northern) summer of 2007.

Limitation in personal injury actions and extinct claims

At the request of Scottish Ministers, the Commission is undertaking a review of the provisions of the *Prescription and Limitation (Scotland) Act 1973* concerning limitation in personal injury actions. In particular, the Commission is looking at the so-called 'knowledge test' and the judicial discretion to override the limitation period. Concern has been expressed about the way the test operates, particularly in cases involving industrial diseases. The question has been raised whether the 1973 Act should be amended to specify factors to which the court should have regard in exercising its discretion.

Scottish Ministers have also asked the Commission to review the position of claims for damages in respect of personal injury which had expired as a result of the law of prescription prior to September 1984, when a number of amendments to the 1973 Act came into force. One of those amendments removed personal injury actions from the scope of prescription. This change in the law did not affect claims that had already been extinguished by prescription. The Commission was asked to review the position of such claims following concerns about the position of people, particularly those who claim to have suffered childhood abuse many years ago in various institutions in Scotland, whose claims were extinguished under the previous rules of prescription.

A discussion paper (No 132) was published in February 2006, inviting comments by 31 May 2006. The Commission received a number of responses and is now working on a report and draft Bill, which will be published later in 2007.

Damages for wrongful death

We received a reference from Scottish Ministers at the end of September 2006 inviting us to review the provisions of the *Damages (Scotland) Act 1976* relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person.

The Commission is currently working on a discussion paper, which will be published later in 2007.

Property

The Commission's report (No 204) on *Conversion of Long Leases* was published in December 2006. It recommends that tenants of ultra-long leases should be entitled to have their rights converted into ownership. An ultra-long lease is a lease that is granted for more than 175 years and which still has more than 100 years to run. The draft Bill included in the report sets out a scheme for the automatic conversion of such leases into ownership.

The Commission is working on a review of the *Land Registration (Scotland) Act 1979*. This project looks at the difficulties that have arisen in practice with the 1979 Act and considers the need for a conceptual framework to underpin its provisions. A discussion paper (No 125) on void and voidable titles, dealing with the policy objectives of a system of registration of title, was published in February 2004. A second discussion paper (No 128) was published in August 2005. This paper looks at the three core issues of registration, rectification and indemnity against the background of the conceptual framework set out in the first paper. A third discussion paper (No 130) was published in December 2005. It considers various miscellaneous issues such as servitudes, overriding interests and the powers of the Keeper of the Register. The Commission is now working on the report.

The Commission is also engaged in a project concerning protection of purchasers buying property from insolvent sellers. A discussion paper (No 114) on *Sharp v Thomson* (1997 SC (HL) 66), which is the leading case in this area, was published in July 2001. One of the main proposals has largely been superseded by *Burnett's Trustees v Grainger* 2004 SC (HL) 19 where the House of Lords declined to apply *Sharp v Thomson* to ordinary personal insolvency. Section 17 of the *Bankruptcy and Diligence etc (Scotland) Act 2007* has now implemented another of our proposals designed to increase the protection given to bona fide purchasers. Following these developments the Commission hopes to complete its report in 2007.

Succession

A new project has started on the law of succession. The Commission last reviewed this area 15 years ago although its recommendations have not been implemented. In its view the law does not reflect current social attitudes nor does it cater adequately for the range of family relationships that are common today. The project will concentrate on issues relating to intestacy and protection from disinheritance. As a first step a public attitude survey has been commissioned and a report of the results, *Attitudes Towards Succession Law: Finding of a Scottish Omnibus Survey,* was published by the Scottish Executive in July 2005. A discussion paper will be published in the latter half of 2007.

Trusts and judicial factors

The Commission is undertaking a wide-ranging review of the law of trusts. The project is being tackled in two phases. The first concentrates on trustees and their powers and duties. Two discussion papers were published in September 2003 as part of this phase—one on breach of trust (No 123) and one on apportionment of trust receipts and outgoings (No 124). A third paper dealing with the assumption, resignation and removal of trustees, their powers to administer the trust estate and the role of the courts (No 126) was published in December 2004. The final Phase One discussion paper, *The Nature and the Constitution of Trusts* (No 133), was published in October 2006. It considered the dual patrimony theory, the possibility of conferring legal personality on trusts and what juridical acts are required to constitute a trust as between the truster and the trustees/beneficiaries and as between the truster and third parties. It dealt also with latent trusts of heritable property.

The second phase of the project will cover the variation and termination of trusts, the restraints on accumulation of income, and long-term private trusts. It will also look at trustees' liability to third parties and enforcement of beneficiaries' rights. The Commission published a report, *Variation and Termination of Trusts*, in March 2007 following a discussion paper in December 2005. The report makes several recommendations for removing current obstacles to variations of private trusts and for providing a uniform process for reorganising public trusts.

The Commission's recommendations regarding the investment powers of trustees contained in the report on *Trustees' Powers and Duties* (1999, jointly with the Law Commission for England and Wales) have been implemented by the *Charities and Trustee Investment (Scotland) Act 2005*. Trustees can now invest in any kind of property and also buy land for any purpose.

The Commission is also working on a project concerning the law relating to judicial factors. A judicial factor is an officer appointed by the court to collect, hold and administer property in certain circumstances; for example, there may be a dispute regarding the property, there may be no one else to administer it or there may be alleged maladministration of it. The Commission believes that a radical overhaul

of this area of law is necessary because judicial factory is a cumbersome procedure involving disproportionate expense. We have carried out empirical research into the current use of judicial factory and have consulted practitioners experienced in this field. Other work permitting, the Commission aims to publish a discussion paper by the end of 2007.

Further information about the Scottish Law Commission's work and its publications may be found on its website at <www.scotlawcom.gov.uk>.

BACK ISSUES

AVAILABLE

#89: Water
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#85: Media and the Courts
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#82: National and International Security
#81: Older People and the Law
#80: Customary Law
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#78: Federalism and Regionalism

REFORM

Back issues are $10.00 ea (inc GST) plus postage and handling.

Find *Reform* summaries and order forms at <www.alrc.gov.au> or contact the ALRC.

Clearing house

Recent law reform publications and areas of law under review

Administrative Law

ARC

Government Agency Coercive Information-Gathering Powers, late December 2006 (Draft Report).

Administrative review mechanisms in areas of complex and specific business regulation—WIH on inquiry.

NCCUSL

WIH on drafting revision to Model State Administrative Procedures Act—new draft April 2007.

Administrative procedures for interstate compact entities—WIH by study committee.

QLCARC

Accessibility of administrative justice—WIH on report.

Senate LCC

Migration Amendment (Review Provisions) Bill 2006, February 2007 (R).

Adoption

ILRC

Aspects of Intercountry Adoption Law, March 2007 (CP 43).

VLRC

Assisted reproductive technologies and adoption—WIH on final report 2007.

Agriculture

ACIP

A Review of Enforcement of Plant Breeder's Rights, March 2007 (IP).

WALC

Biosecurity and Agriculture Management Bill 2006, April 2007 (IP).

Animals

VLRC

Assistance animals and legislative inconsistency—CP expected May 2007.

Associations

BCLI

Review of Society Act—WIH on inquiry.

NCCUSL

Creation of a harmonised legal framework for unincorporated nonprofit associations in North America—new draft March 2007.

Regulation of charities—WIH by study committee.

WIH on Omnibus Business Organizations Code—first draft March 2007.

WIH on draft Uniform Cooperative Association Act—new draft March 2007.

Clearing house is compiled by the Australian Law Reform Commission.

Entries can be made by emailing details of law under review to reform@alrc.gov.au.

A list of abbreviations starts on page 106.

This edition of Clearing house covers ongoing inquiries and publications released from January 2007 to April 2007.

Banking

HMT(UK)

Implementing the Third Money Laundering Directive: Draft Money Laundering Regulations, January 2007 (CP).

A UK Unclaimed Assets Scheme, March 2007 (CP).

NCCUSL

Payment systems—WIH by study committee.

Bank deposits—WIH by study committee.

Implementation of the UN Convention on Independent Guarantees and Stand-alone Letters of Credit—new committee established.

Sask LRC

Family loans and guarantees—WIH on report.

Bankruptcy & Insolvency

PJCCFS

Corporations Amendment (Insolvency) Bill 2006 [Exposure Draft], March 2007 (R).

Senate LCC

Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006, February 2007 (R).

Carriage of Goods

NCCUSL

Harmonisation of North American law with regard to the assignment of receivables in international trade convention—new draft April 2007.

Children and Young People

ALRC

Review of privacy—DP expected September 2007.

FLC

Improving family law processes for dealing with post-parenting order conflict—report expected 2007.

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

HO(UK)

Possession of Non-Photographic Visual Depictions of Child Sexual Abuse, April 2007 (CP).

ILRC

Aspects of Intercountry Adoption Law, March 2007 (CP 43).

NCCUSL

Draft Relocation of Children Act—WIH by committee.

Hague Convention on the Protection of Children—WIH by study committee.

Amendment to Uniform Child Witness Testimony by Alternative Methods Act—WIH by committee.

NIDSO

Contact with children—WIH on inquiry.

Nova Scotia LRC

Grandparent-Grandchild: Access, January 2007 (DP).

NSWLRC

Sentencing of Young Offenders—report not yet released.

Minors' consent to medical treatment—report expected mid-2007.

VLRC

Assisted reproductive technologies and adoption—WIH on final report for 2007.

Commercial Law

Man LRC

Franchise legislation—CP expected May 2007.

Commissions of Inquiry

ALRC

Client Legal Privilege and Federal Investigatory Bodies, April 2007 (IP 33). DP expected August 2007.

NZLC

The Role of Public Inquiries, January 2007 (IP).

Compensation

Law Com

Remedies against public bodies—CP expected 2007.

LRCWA

Compensation for injurious affection—DP expected 2007.

Construction Law

NCCUSL

Notice and repair of construction defects—WIH by study committee.

Consumer Protection

PC

Consumer policy framework—WIH on new inquiry.

Scot Law Com

Protection of purchasers buying property from insolvent sellers—report expected in 2007.

Contracts

ILRC

Privity of contract and third party rights—report expected 2007.

Corporations Law

CAMAC

Shareholder claims against insolvent companies (review of Sons of Gwalia case)—WIH on new inquiry.

Treatment of future unascertained personal injury claims: long-tail liabilities—WIH on inquiry.

PJCCFS

Corporations Amendment (Takeovers) Bill 2006 [Exposure Draft], February 2007 (R).

Corporations Amendment (Insolvency) Bill 2006 [Exposure Draft], March 2007 (R).

Treasury

Insider Trading: Position and Consultation Paper, March 2007 (CP).

Review of the Operation of the Infringement Notice Provisions of the Corporations Act 2001, March 2007 (CP).

Review of Sanctions in Corporate Law, March 2007 (CP).

Corrections

VSAC

High Risk Offenders: Post-Sentence Supervision and Detention, January 2007 (DP).

Court Rules and Procedures

(see also Evidence, Juries)

ALRI

Draft Rules of Court, version TD3, March 2007.

Criminal Jury Trials: Challenge for Cause Procedures, April 2007 (CM 12.20).

Civil Appeals, April 2007 (CM 12.21).

DCA(UK)

Civil Court Fees, April 2007 (CP 5/07).

Part 46 of the Civil Procedure Rules: Fast Track Trial Costs, April 2007 (CP 6/07).

Cost Recovery in Pro Bono Assisted Cases, April 2007 (CP 7/07).

Case Track Limits and the Claims Process for Personal Injury Claims, April 2007 (CP 8/07).

HKLRC

Class actions—WIH on inquiry.

LRCWA

Problem-oriented courts and judicial case management—WIH on inquiry.

NCCUSL

WIH on drafting Interstate Depositions and Discovery of Documents Act—new draft January 2007.

WIH on drafting Model Discovery of Electronic Records Act—new draft March 2007.

NZLC

Development of comprehensive Criminal Procedures Act—WIH on inquiry.

Scot Law Com

Limitation in personal injury actions—final report expected 2007.

Damages for wrongful death—WIH on inquiry.

TLRI

Contempt of court—WIH on IP.

VLRC

Civil justice review—WIH on inquiry.

Courts

ILRC

Reform and consolidation of the Courts Acts—WIH on inquiry.

LRCWA

Problem-oriented courts and judicial case management—WIH on inquiry.

VLRC

Civil justice review—WIH on inquiry.

VPLRC

Vexatious litigants—WIH on new inquiry.

Criminal Investigation

AGD

Exposure draft Telecommunications (Interception and Access) Bill 2007, February 2007.

ARC

Government Agency Coercive Information-Gathering Powers, late December 2006 (Draft Report).

NCCUSL

DNA evidence—WIH by study committee.

Electronic recording of custodial interrogations—new study committee established.

Draft Regulation of Medical Examiners Act—WIH by committee.

NSW Omb

Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002, April 2007 (IP).

DNA Sampling and Other Forensic Procedures Conducted on Suspects and Volunteers under the Crimes (Forensic Procedures) Act 2000, January 2007 (R).

Senate LCC

Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, February 2007 (R).

Criminal Law

(see also Sentencing; Sexual Offences)

FLRC

Review of the Penal and Criminal Procedure Codes—WIH on inquiry.

HKLRC

Double jeopardy—WIH on inquiry.

Review of sexual offences—WIH on inquiry.

Causing or allowing the death of a child—WIH on inquiry.

HO(UK)

Possession of Non-Photographic Visual Depictions of Child Sexual Abuse, April 2007 (CP).

Banning Offensive Weapons, March 2007 (CP).

ILRC

Involuntary Manslaughter, March 2007 (CP 44).

Defences in criminal law—report expected late 2007 or 2008.

Review of inchoate offences—WIH on inquiry.

Spent conviction laws—report expected 2007.

Law Com

Codification of the criminal law—papers on intoxication, attempt and conspiracy expected 2007.

Participating in crime: secondary liability—report expected May 2007.

LRCWA

Review of the law of homicide—WIH on report.

MCLOC

Drink spiking—WIH on report.

Identity crime, April 2007 (DP).

NSWLRC

Review of Mental Health (Criminal Procedure) Act 1990—WIH on new inquiry.

Jury directions in criminal trials—WIH on new inquiry.

NZLC

Criminal defences, insanity and partial defences—WIH on inquiry.

Development of comprehensive Criminal Procedures Act—WIH on inquiry.

SALRC

WIH on inquiry on trafficking in persons.

TLRI

Criminal Liability of Organizations, April 2007 (R 9).

Driving causing death—WIH on IP.

Contempt of court—WIH on IP.

Treasury

Insider Trading: Position and Consultation Paper, March 2007 (CP).

VLRC

Bail Act—WIH on report.

WACDJC

WIH on inquiry into the prosecution of assaults and sexual offences.

Customary Law

Senate LCC

Native Title Amendment Bill 2006, February 2007 (R).

Customs

Senate LCC

Customs Legislation Amendment (Augmenting Offshore Powers and Other Measures) Bill, February 2007 (R).

De Facto Relationships

Law Com

Cohabitation and the financial consequences of relationship breakdown—report expected August 2007.

NSWLRC

Relationships and the Law—report completed but not yet released.

Death

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

Scot Law Com

Damages for wrongful death—WIH on inquiry.

Debt

ALRC

Review of credit reporting provisions of Privacy Act—DP expected September 2007.

DCA(UK)

Regulation of Enforcement Agents, January 2007 (CP 2/07).

NSWLRC

People Who Guarantee Other People's Debts—report completed but not yet released.

Sask LRC

Family loans and guarantees—WIH on report.

Designs, Patents and Trade Marks

ACIP

Post-Grant Patent Enforcement Strategies, November 2006 (IP).

Dispute Resolution

AGD(NSW)

Review of the Dust Diseases Claims Resolution Process, January 2007 (R).

FLC

Collaborative Practice in Family Law, February 2007 (R).

Arbitration in family law—DP expected May 2007.

NCCUSL

WIH on draft Collaborative Law Act.

NSWLRC

Disputes in company title home units—report completed but not yet released.

VLRC

Civil justice review—WIH on inquiry.

VPLRC

Alternative dispute resolution—WIH on new inquiry.

Domestic Violence

AGD(SAust)

Domestic Violence Laws, February 2007 (DP).

FLC

Family violence—WIH on report.

HKLRC

Causing or allowing the death of a child—WIH on inquiry.

QLRC

Review of the Peace and Good Behaviour Act—report expected October 2007.

Drugs

HO(UK)

Independent Prescribing of Controlled Drugs, March 2007 (CP).

NCCUSL

Insurance coverage for substance abuse-related injuries—WIH by study committee.

Model Drug Dependence Treatment and Rehabilitation Act—new study committee established.

Elder Law

BCLI

Aging with challenges—WIH on report.

HKLRC

Enduring Powers of Attorney, April 2007 (CP).

HoRLCA

Older people and the law—WIH on inquiry.

Sask LRC

Family loans and guarantees—WIH on report.

Electoral System

NCCUSL

WIH on draft Faithless Presidential Electors Act—WIH by study committee.

QLCARC

Electronic voting and other electoral matters—WIH on inquiry.

Senate FPAC

Electoral and Referendum Legislation Amendment Bill 2006, February 2007 (R).

Employment

HREOC

It's About Time: Women, Men, Work and Family, March 2007 (R).

NCCUSL

WIH on drafting of Misuse of Genetic Information in Employment and Insurance Act—new draft March 2007.

SALRC

Protected disclosures—WIH on report.

Environment

NCCUSL

Disposal of electronic products—WIH by study committee.

Environmental controls and hazards notice systems—WIH by study committee.

Evidence

HO(UK)

Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984, March 2007 (CP).

ILRC

Law of evidence in criminal and civil matters—WIH on inquiry.

NCCUSL

DNA evidence—WIH by study committee.

Electronic recording of custodial interrogations—WIH by study committee.

WIH on draft Certification of Unsworn Foreign Declarations Act—new draft April 2007.

Amendment to Uniform Child Witness Testimony by Alternative Methods Act—WIH by committee.

NTLRC

Uniform Evidence Act, September 2006 [released March 2007] (R).

TLRI

Admissibility of tendency and coincidence evidence in sexual assault cases—WIH on IP.

Family Law

BCLI

Parental Support Obligations in Section 90 of the Family Relations Act, March 2007 (R 48).

FLC

Collaborative Practice in Family Law, February 2007 (R).

Arbitration in family law—DP expected May 2007.

Improving family law processes for dealing with post-parenting order conflict—report expected 2007.

Family violence—WIH on report.

NCCUSL

Draft Relocation of Children Act—WIH by committee.

Hague Convention on the Protection of Children—WIH by study committee.

WIH on draft Collaborative Law Act.

WIH on amendment to Uniform Interstate Family Support Act—new committee established.

NIDSO

Contact with children—WIH on inquiry.

Nova Scotia LRC

Grandparent-Grandchild: Access, January 2007 (DP).

VLRC

Assisted reproductive technologies and adoption—WIH on report.

Freedom of Information

QLCARC

Accessibility of administrative justice—WIH on report.

Genetics

NCCUSL

WIH on drafting of Misuse of Genetic Information in Employment and Insurance Act—new draft March 2007.

Government

ARC

Government Agency Coercive Information-Gathering Powers, late December 2006 (Draft Report).

Law Com

Remedies against public bodies—CP expected 2007.

NCCUSL

Administrative procedures for interstate compact entities—WIH by study committee.

Senate FPAC

Transparency and Accountability of Commonwealth Public Funding and Expenditure, March 2007 (R).

Human Services (Enhanced Service Delivery) Bill 2007 [Access Card], March 2007 (R).

Guardianship

BCLI

Aging with challenges—WIH on report.

HKLRC

Enduring Powers of Attorney, April 2007 (CP).

NCCUSL

WIH on draft Uniform Guardianship Interstate Jurisdiction and Enforcement Act—new draft April 2007.

QLRC

Confidentiality in the guardianship system—report expected June 2007.

Health Care

ALRC

Review of privacy—DP expected September 2007.

NCCUSL

WIH on draft Uniform Interstate Emergency Healthcare Services Act—new draft March 2007.

Health care information interoperability—WIH by study committee.

Housing

ILRC

Multi-unit developments—report expected 2007.

Human Rights

SALRC

Trafficking in persons—WIH on report.

TLRI

Charter of rights—report expected mid-2007.

VLRC

Assistance animals and legislative inconsistency—WIH on inquiry.

Immigration

Senate LCC

Migration Amendment (Review Provisions) Bill 2006, February 2007 (R).

Migration Amendment (Maritime Crew) Bill 2006, March 2007 (R).

Indigenous People

QCMC

Inquiry into Policing in Indigenous Communities, April 2007 (IP).

Senate LCC

Native Title Amendment Bill 2006, February 2007 (R).

Insurance

DCA(UK)

Claims Management Regulation: Professional Indemnity Insurance, February 2007 (CP 4/07).

Law Com; Scot Law Com

Insurance Contract Law: Intermediaries and Pre-Contract Information, March 2007 (IP). Consultation paper expected in mid-2007.

Man LRC; Sask LRC

Private Title Insurance, April 2007 (R).

NCCUSL

WIH on drafting of Misuse of Genetic Information in Employment and Insurance Act—new draft March 2007.

Insurance coverage for substance abuse-related injuries—WIH by study committee.

Intellectual Property

ACIP

A Review of Enforcement of Plant Breeder's Rights, March 2007 (IP).

Post-Grant Patent Enforcement Strategies, November 2006 (IP).

International Law

NCCUSL

Harmonisation of North American law with regard to the assignment of receivables in international trade convention—new draft April 2007.

Juries

ALRI

Criminal Jury Trials: Challenge for Cause Procedures, April 2007 (CM 12.20).

NSWLRC

Blind or Deaf Jurors—report completed but not yet released.

Sentencing and juries—report expected June 2007.

Jury service—report expected May 2007.

Jury directions in criminal trials—WIH on new inquiry.

VLRC

Civil justice review—WIH on inquiry.

Justice of the Peace

AGD(NSW)

Review of the Justices of the Peace Act 2002 (NSW)—WIH on inquiry.

NCCUSL

Revisions to the Uniform Law on Notarial Acts—WIH by study committee.

Landlord & Tenant

ILRC

Landlord and tenant law—report expected 2007.

Law Com

Ensuring responsible renting—CP expected May 2007.

Law Enforcement

AGD

Exposure draft Telecommunications (Interception and Access) Bill 2007, February 2007.

ALRC

Client Legal Privilege and Federal Investigatory Bodies, April 2007 (IP 33). DP expected August 2007.

ARC

Government Agency Coercive Information-Gathering Powers, late December 2006 (Draft Report).

HO(UK)

Modernising Police Powers: Review of the Police and Criminal Evidence Act (PACE) 1984, March 2007 (CP).

NCCUSL

DNA evidence—WIH by study committee.

Electronic recording of custodial interrogations—WIH by study committee.

Draft Regulation of Medical Examiners Act—WIH by committee.

NSW Omb

Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002, April 2007 (IP).

DNA Sampling and Other Forensic Procedures Conducted on Suspects and Volunteers under the Crimes (Forensic Procedures) Act 2000, January 2007 (R).

QCMC

Inquiry into Policing in Indigenous Communities, April 2007 (IP).

Senate LCC

Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, February 2007 (R).

TLRI

Consolidating powers of arrest—WIH on report.

Legal Profession

ALRC

Client Legal Privilege and Federal Investigatory Bodies, April 2007 (IP 33). DP expected August 2007.

Legal Services

DCA(UK)

Cost Recovery in Pro Bono Assisted Cases, April 2007 (CP 7/07).

Legislation

NZLC

Accessibility of New Zealand statute law—WIH on inquiry.

SALRC

Review of the Interpretation Act—WIH on inquiry.

Medical Law

ALRC

Review of privacy—DP expected September 2007.

HO(UK)

Independent Prescribing of Controlled Drugs, March 2007 (CP).

NSWLRC

Minors' consent to medical treatment—report expected mid-2007.

Mental Health

FLRC

Mental Health Act review—WIH on inquiry.

NSWLRC

Review of Mental Health (Criminal Procedure) Act 1990—WIH on new inquiry.

Principles of sentencing offenders with cognitive or mental health impairments—WIH on new inquiry.

Native Title

Senate LCC

Native Title Amendment Bill 2006, February 2007 (R).

Negligence and Liability

CAMAC

Treatment of future unascertained personal injury claims: long-tail liabilities—WIH on inquiry.

DCA(UK)

Case Track Limits and the Claims Process for Personal Injury Claims, April 2007 (CP 8/07).

ILRC

Legal duty of care of volunteers and 'good samaritans'—WIH on inquiry.

Law Com

Remedies against public bodies—CP expected 2007.

Scot Law Com

Limitation in personal injury actions—final report expected mid-2007.

Damages for wrongful death—DP expected 2007.

TLRI

Criminal Liability of Organizations, April 2007 (R 9).

Power of Attorney

ALRI; BCLI; Man LRC; Sask LRC

WIH on inquiry into powers of attorney.

HKLRC

Enduring Powers of Attorney, April 2007 (CP).

QLRC

Confidentiality in the guardianship system—report expected June 2007.

Privacy

ALRC

Review of privacy—DP expected September 2007.

BCLI

Review of privacy—report expected July 2007.

NCCUSL

Health care information interoperability—WIH by study committee.

NSWLRC

Surveillance—report completed but not yet released.

Review of New South Wales privacy legislation—DP on statutory cause of action for privacy expected May 2007.

NZLC

Privacy—WIH on inquiry. Issues papers expected late 2007.

Senate FPAC

Human Services (Enhanced Service Delivery) Bill 2007 [Access Card], March 2007 (R).

VLRC

WIH on inquiry into surveillance in public places—CP expected in 2007.

Public Order

NZLC

Reforming the Law of Sedition, April 2007 (R 96).

QLRC

Review of the Peace and Good Behaviour Act—report expected October 2007.

VDOJ

Graffiti Prevention Exposure Draft Bill, February 2007 (DP).

Real Property

HKLRC

Adverse possession—WIH on inquiry.

ILRC

Multi-unit developments—report expected 2007.

Law Com

Easements and covenants—CP expected late 2007.

Man LRC; Sask LRC

Private Title Insurance, April 2007 (R).

NCCUSL

Draft amendments to Uniform Common Interest Ownership Act—new draft April 2007.

Draft Transfer on Death of Real Property Act—WIH by committee.

Draft Partition of Tenancy-in-Common Real Property Act—new committee established.

NIDSO

Land law reform—WIH on inquiry with view to e-registration and e-conveyancing.

Review of the Ground Rents Act 2001 (NI)—WIH on inquiry.

NSWLRC

Disputes in company title home units—report expected 2007.

Scot Law Com

Land registration—WIH on report.

Protection of purchasers buying property from insolvent sellers—report expected in 2007.

VPLRC

Property investment—WIH on new inquiry.

Regulatory law

PC

Consumer policy framework—WIH on new inquiry.

Treasury

Review of the Operation of the Infringement Notice Provisions of the Corporations Act 2001, March 2007 (CP).

Review of Sanctions in Corporate Law, March 2007 (CP).

VPLRC

Property investment—WIH on new inquiry.

Same Sex Relationships

Law Com

Cohabitation and the financial consequences of relationship breakdown—report expected August 2007.

Securities & Exchange

AGD

Personal Property Securities: Extinguishment, Priorities, Conflict of Laws, Enforcement, Insolvency, March 2007 (DP). Further DP on possessory security interests expected May 2007.

NCCUSL

WIH on revised Uniform Federal Lien Registration Act—new committee established.

Security

AGD

Exposure draft Telecommunications (Interception and Access) Bill 2007, February 2007.

NZLC

Reforming the Law of Sedition, April 2007 (R 96).

Senate LCC

Auscheck Bill 2006, March 2007 (R).

WALC

Biosecurity and Agriculture Management Bill 2006, April 2007 (IP).

Sentencing

FLRC

Review of the Penal and Criminal Procedure Codes—WIH on inquiry.

ILRC

Spent conviction laws—report expected 2007.

NCCUSL

WIH on Uniform Collateral Sanctions and Disqualifications Act—new draft March 2007.

NSWLRC

Sentencing of Young Offenders—report completed but not yet released.

Sentencing and juries—report expected June 2007.

Principles of sentencing offenders with cognitive or mental health impairments—WIH on new inquiry.

TLRI

Sentencing—WIH on final report.

VSAC

Part 2 of Suspended Sentences report expected 2007.

Review of Maximum Penalties for Preparatory Offences, January 2007 (R).

Sentence Indication and Specified Sentence Discounts, February 2007 (DP).

Sexual offences

HKLRC

Review of sexual offences—WIH on inquiry.

HO(UK)

Possession of Non-Photographic Visual Depictions of Child Sexual Abuse, April 2007 (CP).

Scot Law Com

Rape and other sexual offences—report expected late 2007.

TLRI

Admissibility of tendency and coincidence evidence in sexual assault cases—WIH on IP.

WACDJC

WIH on inquiry into the prosecution of assaults and sexual offences.

Superannuation

PJCCFS

Structure and operation of the superannuation industry—report expected June 2007.

Senate LCC

Bankruptcy Legislation Amendment (Superannuation Contributions) Bill 2006, February 2007 (R).

Taxation

NCCUSL

Uniform Division of Income for Taxation Purposes—new study committee established.

Telecommunications

AGD

Exposure draft Telecommunications (Interception and Access) Bill 2007, February 2007.

ALRC

Review of privacy—DP expected September 2007.

Terrorism

NSW Omb

Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002, April 2007 (IP).

NZLC

Reforming the Law of Sedition, April 2007 (R 96).

Traffic Law

TLRI

Driving causing death—WIH on IP.

Tribunals

AGD(NSW)

Review of the Dust Diseases Claims Resolution Process, January 2007 (R).

NZLC

Unified tribunal framework—WIH on inquiry.

Senate LCC

Native Title Amendment Bill 2006, February 2007 (R).

Trusts and Trustees

NCCUSL

WIH on drafting Statutory Trust Act—new draft April 2007.

Insurable interests in trusts and related estate planning entities—new committee established.

Scot Law Com

Variation and Termination of Trusts, March 2007 (R 206).

Judicial factors—DP expected late 2007.

Whistleblowing

SALRC

Protected disclosures—WIH on final report.

Wills and Estates

NCCUSL

Draft Transfer on Death of Real Property Act—WIH by committee.

Draft amendments to intestacy provisions of Uniform Probate Code—new draft February 2007.

NSWLRC

Uniform Succession Laws: Intestacy—report completed but not yet released.

QLRC

Administration of estates of deceased persons—report expected 2007.

Scot Law Com

Judicial factors—DP expected late 2007.

Review of the law of succession—DP expected for 2007.

Young Offenders

NSWLRC

Sentencing of Young Offenders—report completed but not yet released.

Abbreviations

ACIP	Australia. Advisory Committee on Intellectual Property
AGD	Australia. Attorney-General's Department
AGD(NSW)	New South Wales. Attorney-General's Department
AGD(SAust)	South Australia. Attorney-General's Department
ALRC	Australian Law Reform Commission
ALRI	Alberta Law Reform Institute
ARC	Australia. Administrative Review Council
BCLI	British Columbia Law Institute
CAMAC	Australia. Corporations and Markets Advisory Committee
CP	Consultation Paper
DCA(UK)	United Kingdom. Department of Constitutional Affairs
DP	Discussion Paper
FLC	Australia. Family Law Council
FLRC	Fiji Law Reform Commission
HKLRC	Law Reform Commission of Hong Kong
HMT(UK)	United Kingdom. Her Majesty's Treasury
HO(UK)	United Kingdom. Home Office
HoRLCA	Australia. House of Representatives Standing Committee on Legal and Constitutional Affairs
HREOC	Australia. Human Rights and Equal Opportunity Commission
ILRC	Ireland. Law Reform Commission
IP	Issues Paper
Law Com	England and Wales. Law Commission
LRCWA	Law Reform Commission of Western Australia
Man LRC	Manitoba Law Reform Commission
MCLOC	Australia. Model Criminal Law Officers' Committee
NCCUSL	United States. National Conference of Commissioners on Uniform State Laws
NIDSO	Northern Ireland. Civil Law Reform Division, Departmental Solicitors Office

Nova Scotia LRC	Nova Scotia Law Reform Commission
NSW Omb	New South Wales Ombudsman
NSWLRC	New South Wales Law Reform Commission
NTLRC	Northern Territory Law Reform Committee
NZLC	New Zealand Law Commission
PC	Australia. Productivity Commission
PJCCFS	Australia. Parliamentary Joint Committee on Corporations and Financial Services
QCMC	Queensland Crime and Misconduct Commission
QLCARC	Queensland. Parliament. Legal, Constitutional and Administrative Review Committee
QLRC	Queensland Law Reform Commission
R	Report
SALRC	South African Law Reform Commission
Sask LRC	Saskatchewan Law Reform Commission
Scot Law Com	Scottish Law Commission
Senate FPAC	Australia. Senate Finance and Public Administration Standing Committee
Senate LCC	Australia. Senate Legal and Constitutional Standing Committee
TLRI	Tasmania Law Reform Institute
Treasury	Australia. The Treasury
VDOJ	Victoria. Department of Justice
VLRC	Victorian Law Reform Commission
VPLRC	Victoria. Parliament. Law Reform Committee
VSAC	Victoria. Sentencing Advisory Council
WACDJC	Western Australia. Legislative Assembly Community Development and Justice Committee
WALC	Western Australia. Legislative Council Legislation Committee
WIH	Work In Hand

Note

The Northern Ireland Office of Law Reform was closed on 2 April 2007, and those functions are now carried out by the Civil Law Reform Division, Departmental Solicitors Office, designated in Clearing house as NIDSO.

Contacts

The Australian Law Reform Commission, Cambridge University and the Alberta Law Reform Institute all maintain links to other law reform agencies on the internet. For quick access to law reform sites try the following addresses:

www.alrc.gov.au

www.law.cam.ac.uk/resources_reform.php

www.law.ualberta.ca/alri

Australia

Federal law reform sources

Attorney-General's Department (Commonwealth)
Robert Garran Offices
National Circuit
BARTON ACT 2600
Ph: (02) 6250 6666
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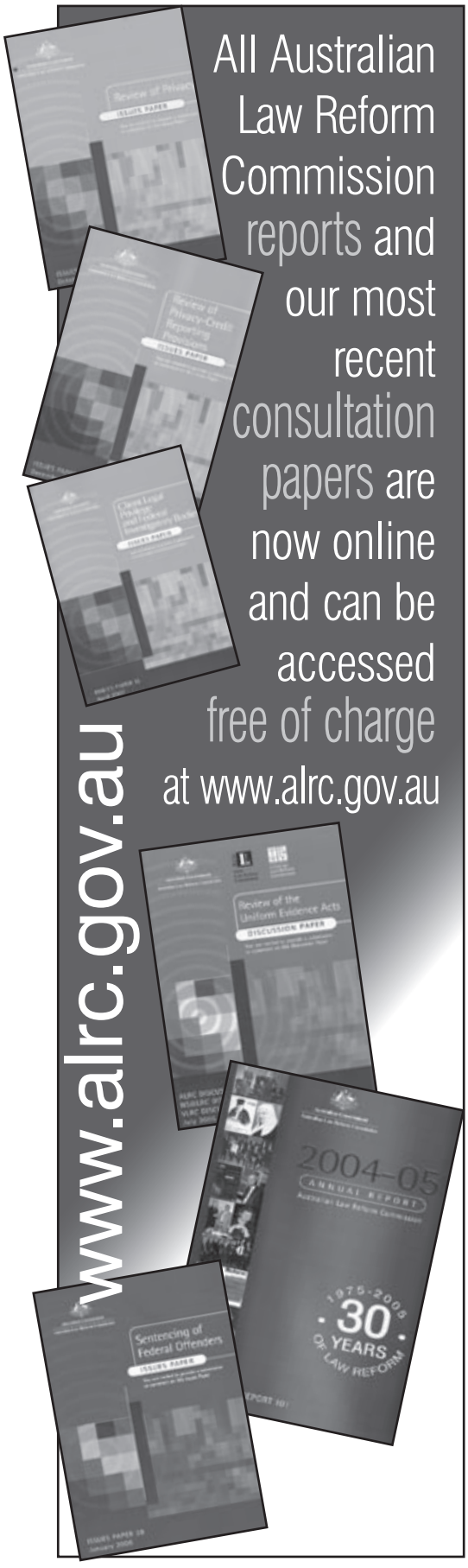

Next issue...

Non-human animals traditionally have been left out of the rights equation. However, many people are now starting to rethink traditional legal concepts and the issue of animal rights is shaping up as one of the next big social justice issues for law reformers.

The next issue of *Reform*, Issue 91, will focus on 'Animals'. Already an established and respected legal discipline in the United States, animal law is gaining momentum in Australia and elsewhere.

Contributors to the next edition will debate the hot issues, including the protection of animal habitat, farm animal welfare and protection, food labelling regulations, research and testing using animals, control of wild and feral animal populations, and the recognition of 'animal rights'.

Reform 91 will also carry in-depth articles on the work of the law reform agencies across Australia and overseas, as well as an update on the progress of the ALRC's own inquiries.

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