CRIMINAL JUSTICE COMMISSION
QUEENSLAND

REPORT OF AN INVESTIGATIVE HEARING INTO ALLEGED JURY INTERFERENCE

MARCH 1991

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1. INTRODUCTION

This report concludes an investigation into approaches made to members of a number of jury panels in Queensland in November 1990.

The Commission was notified by the Special Prosecutor Doug Drummond QC on 14 November 1990 that such approaches had been made. Drummond stated that in his view a direct approach by subterfuge to members of a jury panel in order to ascertain their attitudes to a particular accused person was plainly improper.

He asked the Criminal Justice Commission to investigate the circumstances surrounding this matter.

The Criminal Justice Commission was subsequently advised by the Sheriff of Queensland, through the Attorney-General, that some members of the jury panel for the District Court trial of George Herscu had received telephone calls during the weekend of 10 and 11 November and on the 12 November 1990. The caller/s asked them what political party they belonged to and how they would vote if an election was held "right now".

The Attorney-General told the Criminal Justice Commission he was greatly concerned by such allegations and believed that such actions might constitute offences under the Criminal Code. He said he believed an exploration of these matters by the Criminal Justice Commission would be desirable.

The Criminal Justice Commission subsequently resolved, pursuant to provisions of section 2.10 of the Criminal Justice Act 1989-1990 [the Act], to investigate the matters referred to it by the Attorney-General, the Special Prosecutor and by the Sheriff of Queensland on behalf of the Chairman of the District Courts.

It was also resolved to conduct public hearings into these matters. The hearings, presided over by the Chairman of the Commission, Sir Max Bingham QC, resulted in this report. It is furnished in accordance with section 2.19 of the Act.

Ultimately, the investigation disclosed no grounds for criminal proceedings against any party and no grounds on which to draw adverse inferences against any one concerned with the relevant trials. However, a number of matters of concern did emerge during the investigation and hearings. Not all related to the original allegations.

Wide differences of opinion exist within the legal profession about the permissible extent of inquiries into the beliefs and attitudes of potential jurors. Perceived inequality between the powers of the prosecution and the powers of the defence to influence the selection of jurors also causes concern. It also appears that persons who may not be legally eligible for jury service are nevertheless being admitted to jury panels.

Although these are matters of great significance, they are beyond the scope of an investigation into the background of particular approaches to particular jury panels.

Consequently, the Research and Co-ordination Division of the Commission has prepared a paper which examines the issues and matters to be considered in any review of the jury system and its administration. That issues paper accompanies this report.

2. CONDUCT OF THE INQUIRY

The Commission resolved on 12 December 1990, to conduct an inquiry, including public hearings, into allegations concerning approaches to prospective jurors.

Hearings before the Chairman of the Commission were held on 14, 17 and 21 December 1990 and 8 and 15 January 1991. After submissions from Senior Counsel Assisting the Commission Mr C.E.K. Hampson QC, and other counsel representing witnesses, some of the evidence was received in a closed hearing.

However, on the order of the Chairman, the effect of certain evidence given during these confidential sessions was made known during counsels' closing submissions on 15 January 1991.

The reasons for certain evidence being heard in confidence and for some of that evidence later being made known are set out below.

During the course of the hearing, lawyers involved in the trials of George Herscu and Brian Austin were called to give evidence concerning the inquiries, if any, which they made into the background of prospective jurors in their trials.

One solicitor, Robert Maxwell Lockhart, of the firm Flower & Hart, was represented by senior counsel. Lockhart instructed defence counsel in Herscu's trial. Lockhart's counsel submitted that legal professional privilege attached to any matter which solicitors did on instructions from Herscu. Before ruling on this submission, the Commission decided to find out whether Herscu was going to claim such privilege.

Herscu's counsel advised the hearing that his client was prepared to waive such privilege on the condition that, if a new trial was ordered for Herscu as a result of his appeal against conviction, no evidence obtained during the Commission's hearing was published until the new trial was finished. His apparent concern was that any information disclosed by the Commission's inquiry might prejudice his new trial.

It was then decided to hear the evidence of Lockhart and those acting at his direction in confidence and to publicly report only the balance of the evidence before the Commission. This would have made the drafting of two reports necessary.

However, after examining the private and confidential evidence before it, the Commission found that there was no evidence of any criminal offence or impropriety. Further, there was no evidence which would discredit Herscu or those acting for him.

Since the evidence which had been heard in confidence could not prejudice any future retrial of Herscu, the Commission concluded that final submissions could be made about that evidence. The Commission also decided that only one report, which dealt to some extent with the evidence heard in confidence, would be published.

The Commission also considered that the public interest in having this matter resolved quickly and finally far outweighed any public or individual interest in avoiding such disclosure, particularly since Herscu's appeal had not yet been heard or a new trial ordered.

3. SUMMARY OF EVENTS

As far as the Commission has been able to determine, the sequence of events surrounding the approaches to jurors empanelled for the Herscu trial was as follows.

The relevant sittings of the District Court began on 29 October 1990.

Four jury panels - E, F, G and H - were appointed to hear trials during the course of the sittings. Two trials of some political sensitivity were scheduled for the sittings; that of businessman George Herscu and that of a former Cabinet Minister, Brian Austin. Both trials were originally scheduled to begin on Monday, 12 November 1990.

On Friday, 9 November 1990, the Sheriff's office decided to allocate panel F to hear the Herscu trial and panel G to hear the Austin trial. By the close of business that day, copies of the relevant jury lists had been purchased by Masinello and Associates, acting for Austin, and Flower & Hart, acting for Herscu. Copies of the lists had also been collected from the Sheriff's Office by staff of the Special Prosecutor, who was responsible for both prosecutions.

Subsequent investigations established that on the weekend of 10 and 11 November, nearly half the members of jury panel F or members of their households were contacted by a person purporting to be conducting a survey on political allegiances and voting intentions. Most of the panel members contacted recalled that the contact was by telephone, that the caller was female and that she stated that she was with the "Morgan" group.

Neither trial began on 12 November. Herscu's trial was delayed until 13 November so that panel E could be amalgamated with panel F to accommodate the trial judge's intention to excuse a number of potential jurors from service because of the envisaged length of the trial. Austin's trial was delayed until 14 November because a similar trial involving another former Cabinet minister was not completed by November 12.

Later investigations showed that nearly one third of the members of jury panel E were contacted by a female asking about their political allegiances or voting intentions. Nearly half of these recalled that the contact occurred on Monday, 12 November. The majority recalled the caller's assertion that she was from a university and claimed to be a student of political science.

The jury for the Herscu trial was eventually empanelled on the morning of Tuesday, 13 November 1990. Soon afterwards, one of the empanelled jurors told the bailiff that a number of the jurors had been questioned during the previous three days by a telephone caller who had asked about their political allegiances and voting preferences. Similar telephone calls were reportedly received by jurors on other panels who were not empanelled for Herscu's trial.

The jurors' reports were immediately considered by His Honour Judge Shanahan in chambers. His Honour consequently discharged the jury which had been empanelled to hear Herscu's trial and selected a new jury from panels G and H. Although three members of panel H or members of their families also reported some approach by interviewers purporting to conduct surveys, subsequent investigations could not definitely link these approaches to these jurors' service on their panel. No approaches were made to members of Panel G.

On the afternoon of November 13, it was determined that amalgamated jury panel G and H would also be used for the trial of Austin.

Once a jury was selected for the Herscu trial from Panels G and H, the balance of jurors were used in the Austin trial.

Considerable media publicity about the approaches to jury members followed the completion of the trials. (The Commission takes this opportunity to compliment the media on their responsible stance in refraining from publishing the information which came to their knowledge during the course of the trial.)

This publicity highlighted the assertion that those approaching potential jurors had been able to obtain unlisted telephone numbers.

The Commission delayed its investigations until both trials were completed. Commission staff then interviewed as many members of the four jury panels as possible. These interviews were followed by the Commission's investigative hearings, which were conducted before the Chairman on 14, 17 and 21 December 1990 and 8 and 15 January 1991. During these hearings, the Commission received evidence from court staff, instructing solicitors, and counsel for the prosecution and defence in both trials in an effort to determine exactly what had occurred after the jury lists were distributed.

Two instructing clerks and two counsel from the Special Prosecutor's office told the Commission that they had checked the potential jurors' criminal and traffic histories and inquired whether any had sat on juries in other trials during the sittings. One Counsel stated that he instructed his clerk to ask the Crown Prosecutors involved in the trials whether they believed the verdicts had been reasonable. The Special Prosecutor's staff said they made no other inquiries in respect of the jurors.

Solicitor Nick Masinello and counsel Shane Herbert, acting for Austin, also gave evidence to the hearings. Together with their client, they said they looked up the names of the potential jurors in the telephone directory to try and ascertain their occupations. Masinello said he later borrowed electoral rolls from another solicitor for the same purpose. Finally Masinello gave evidence that, by prior arrangement with Herbert, he and a friend had driven around Brisbane looking at the homes of potential jurors. He said neither he nor his friend had spoken to anyone about the jurors. When the second jury

panel was amalgamated with the first, Masinello took Austin to view the homes of potential jurors.

Solicitor Robert Maxwell Lockhart, of Flower & Hart, was the instructing solicitor in the trial of Herscu. Lockhart gave evidence to the Commission in confidence. In a written statement, he said he had not spoken to any member of any jury panel or given instructions or authorisation to any person to make any approach to any member of any jury panel. However, Lockhart testified that he had directed a clerk in his office, Kylie Wilson, to arrange for an inquiry agent to investigate potential jurors. Lockhart said no specific instructions concerning the type of inquiries to be made or the method of inquiry were given.

Julian Theodore Yates, the principal of Yates Professional Investigations, gave evidence in confidential session that his company did from time to time perform work for Flower & Hart. This work had not previously included any inquiries related to juries. On 9 November, his firm received instructions from Flower & Hart to make certain inquiries relating to jury panel F.

Yates arranged for an associate, James William Doran, to contact Flower & Hart.

Doran gave evidence in confidential session that Flower & Hart gave no instructions concerning the method of the requested inquiries. Doran said he discussed the matter with Yates and then decided to make the inquiries by telephone. He employed a friend, Amanda Tully, for this purpose.

Doran compiled a list of potential jurors and their respective telephone numbers, using information he obtained from Telecom's directory information services. This list, and a list of questions to be asked of each juror, was then handed to Tully, who was told to assume the identity of an employee of Morgan Research.

Tully noted the results of her telephone calls on Doran's list, which was later sent by facsimile to Flower & Hart. Doran stated that he was then instructed, by a person (from Flower & Hart) whose name he could not recall, to extend his inquiries to jury panel E.

He received a list of the names of members of that panel. According to Doran, he only became aware at that point that the lists concerned potential jurors for Herscu's trial.

In her evidence, Tully stated that prior to making her second round of telephone calls to members of panel E, she decided to say she was conducting a political survey for the purpose of a course she was completing at a University.

4. THE EVIDENCE

4.1 The Approaches to Jury Panel Members - Summary of Commission Investigations

At the conclusion of the Herscu and Austin trials, Criminal Justice Commission investigators began contacting jurors on panels E, F, G and H. Investigator Detective Senior Constable Ainsworth tendered the results of these inquiries in the form of schedules to the Commission's hearings. Those schedules became exhibits 95 to 98 respectively.

Detective Ainsworth prepared a table which indicated, in respect of each panel, those who had been contacted by the Commission, those who had not, those who had received a telephone call of the type in question and those who had received a personal visit. The graph also indicated whether the caller stated that she was from "Morgans" or from "the University".

Sixty of the 62 panel E members were contacted by the Commission. Nineteen of those had received a telephone call and none had received a personal visit. Of those 19, 17 jurors stated that the caller had advised them that she was from "the University".

The schedule for panel E [exhibit 95] showed that 10 of the 19 panellists contacted were phoned on Monday, 12 November. All said they believed the caller was female and most recalled being advised by the caller that she was from a University. However, one panellist remembered that the caller said she represented "Morgans". Most panellists also remembered being told by the caller that she was studying political science.

In respect of panel F, 61 persons were contacted by the Criminal Justice Commission and 5 were not. Thirty-one had received telephone calls and 2 claimed to have received personal visits. Of those who had been contacted by phone, 28 stated that the caller had advised that she was from "Morgans Research".

The schedule in respect of panel F [exhibit 96] revealed that of the 27 of those 31 jurors who were contacted were contacted by telephone on either 10 or 11 November 1990. All stated that the caller was female and 25 stated that she identified herself as being from Morgans, and in some cases, identified herself as Amanda or Amanda Wilson.

In respect of panel G, 30 people were contacted by the Criminal Justice Commission and none of those had received any telephone calls or personal visits. Accordingly, the remaining 32 were not contacted by the Commission.

Thirty-two people on panel H were contacted by the Commission. Two said they had received phone calls and one said he/she had received a personal visit. No-one recalled the interviewer saying whom she represented. Fourteen people on this panel were not contacted.

Evidence - Jury Panels G and H

Three members of panel H (or members of their families) were polled during the relevant period. All three; namely, Carol Ann Harris, Fiona Brymner, and a girl whose name has been suppressed because she was only 14 years of age, were called to give evidence to the Commission.

That girl's father was a juror on panel H. She was approached at home in late October or early November by a woman who was about 32 or 33 years old. A description was given of the woman and an identikit photo tendered [exhibit 89]. The caller told the girl that she was conducting a survey. She had a clip board on which she had documents containing a number of questions and boxes, which she ticked when replies were given to her questions. The caller asked questions about the witness' parents' occupations, their motor vehicles and their house. She asked whether the girl's parents voted but not how they voted. She did not ask any questions concerning the parents' political affiliations. The witness stated that she was asked a number of "trick questions", such as whether domestic animals were a problem.

Carol Ann Harris was one of those empanelled on the second jury (which ultimately determined the matter) on the Herscu trial. She stated that about a week after she was empanelled on the jury, she was telephoned at about 6.00 or 7.00 in the evening by a young female with an Australian accent, who stated that she was conducting a survey in the area about money management. Harris indicated that her husband was an accountant and she was not interested. The caller gave her name, but Harris could not recall what it was. Harris formed the view that the caller was not attempting to conduct a survey, but to make an appointment to provide some financial advice as a consultant.

No political or religious questions were asked of Harris.

Harris also said that about a week after this call, she received another call which appeared to her to be a censorship survey.

Finally, Harris said that early in the morning of 24 November 1990, she received what she described as an obscene telephone call. No words, however, were spoken by the person calling her.

Each time Harris was telephoned and questioned, the caller knew both her and her husband's Christian names. Harris did not think that was significant because she had received similar sales calls in the past from callers who had also known her Christian name.

Fiona Allison Brymner was called. Her mother, Wilhelmina Janet Brymner, was juror H5. Fiona Brymner stated that on the evening of Saturday, 10 November 1990, she was telephoned at home. The caller asked to speak to her mother and gave her mother's full name. Fiona thought that this was unusual as her mother never used her name Wilhelmina. Fiona told the caller (falsely) that her mother was not at home. The caller then said that she wished to ask Fiona some questions and began by asking who she voted for in the last election. Fiona told the caller it was none of her business. Whilst the caller stated her name and the organisation she represented, Brymner could not recall either detail.

Certain conclusions can be drawn from both the statistics which have been tendered and the evidence of Harris, Brymner and the witness whose name has been suppressed.

Almost half the jurors from panel G were questioned by the Commission, but none had been contacted by persons purporting to conduct a poll.

More than half of the panel H jurors were questioned by the Commission. Only 3 of these had received any telephone calls or personal visits. Of those 3, 2 were contacted well after the juries were empanelled for the trials of Austin and Herscu. The third juror may well have been the subject of a poll similar to that which was made of the members of panels E and F. However, since only one juror out of 18 had been contacted in this way, the contact was likely to be a mere coincidence and not of any significance.

In conclusion, no evidence to support any contention that jurors on panels G and H were approached for reasons connected with their jury service emerged from the Commission's investigations.

Evidence - Jury Panels E and F

Several jurors from panels E and F were called to give evidence. Juror Maxwell Scott Butson and his wife, Stella Grace Butson, were called. Butson was one of the jurors sworn on the first Herscu jury.

Mrs Butson testified that at approximately 8.00 pm on Monday, 12 November 1990, she was telephoned by a woman who introduced herself as Amanda from Queensland University. The caller said she was conducting a survey and asked how the Butsons would vote if an election was held the next day. Mrs Butson answered for herself and her husband. The caller then asked if they belonged to a political party and for details of their religious affiliations.

Mrs Butson said the caller, who had a young, well educated voice, did not mention Mr Butson's name or mention his membership of the jury panel.

Mrs Butson made notes of her conversation with the woman, which she said was not preceded by STD beeps.

Louise White was also empanelled on the first jury for the Herscu trial on 13 November. She gave evidence to the Commission that on Saturday, 10 November 1990, she received an apparently local telephone call from a young woman who spoke well but without an accent and who asked for her by name. The caller said she was conducting a poll for Morgan Gallop Polls and asked White what party she would vote for if an election was held next week. When White answered, the caller also asked which party her husband would vote for and whether either of them had ever been a member of any political party. No questions were asked about religion.

Juror Patricia Elizabeth Eiszele was also sworn on the first Herscu jury. In evidence she stated that on the morning of Saturday, 10 November 1990, she was contacted by telephone by a young lady who asked whether Eiszele was "Mrs Patricia Eiszele". Eiszele was immediately suspicious because her friends generally called her Betty. The caller asked whether Mrs Eiszele knew of an organisation called Morgan Gallop Poll. When Eiszele said she did the caller said she was conducting a Morgan Gallop Poll and asked whether Eiszele was willing to answer some questions. Eiszele agreed to do so and was asked what political party she would vote for if an election was held the following Monday. Eiszele answered and was then asked what party her husband would vote for in the same circumstances. Next, she was asked whether she belonged to any political party. Finally, Eiszele said that although her husband believed she had also been asked about finances, she did not remember such questions.

She testified, that upon answering the telephone she heard STD beeps. This prompted Eiszele to ask the caller where she was calling from and the woman told her she was calling from Brisbane. Mrs Eiszele also resides in Brisbane.

Eiszele said the caller sounded like a young woman and spoke without an accent.

The schedules in respect of panels E and F reveal that these witnesses - Butson, White, Eiszele - are all listed in the Telecom White Pages.

The next witness to be called was Wilhelmina Irene Barclay. She was juror F5. She has a silent telephone number.

She stated that on the morning of Sunday, 11 November 1990, she received a call from a young woman. On answering the telephone, Barclay identified herself by stating her second Christian name, Irene. The caller said that she was from Morgans Research, *"or words to that effect"*, and asked if Barclay would mind answering a few questions. She agreed to do so and was asked who she would vote for if there was another election and who she had voted for at previous elections. Barclay told the caller she always had been and always would be a Labor voter.

Barclay, who is a widow, recalled being asked something about a spouse but could not remember the exact nature of the question or questions.

On Wednesday, 14 November 1990, Barclay met members of panel F at the District Court and learned through discussions that several of them had recently received telephone calls about political matters. They agreed something should be done about the calls, so one of the jurors went to inform the Sheriff's office.

That juror eventually returned from the Sheriff's office and told the others that he believed nothing was going to be done about the matter.

Consequently Barclay, who was not empanelled on a jury that day, returned home and contacted The Courier Mail. She also contacted the Hinch program.

Some time later, Barclay received what she described as a threatening telephone call early one morning. Four words were used by the caller, two of which were *"Lay off"*. She did not recall the other two.

During her evidence to the Commission, Barclay was shown her original "Notice to A Prospective Juror" which was issued by the Sheriff's office [exhibit 87]. That notice included a section in which the prospective juror had to provide his/her telephone number. Barclay completed the section but stated she gave her telephone number to no other person at the Court House, not even fellow jurors. She had, of course, given her number to family and friends, her university lecturers and the Prince Charles Hospital.

Barclay also initially denied giving her telephone number to either the Courier Mail or the Hinch program. However, later in her evidence, she remembered that she gave her home telephone number to a person named Cathy at the Hinch program.

The next juror to give evidence was John Vivian Frame who was juror F19. He stated that on 12 November 1990, he was visited while working in the garden, by a man who gave his name and stated that he was from a market research group at Milton. The visitor stated that he was conducting an opinion poll and asked if Frame would answer some questions.

Frame gave evidence that the man had been well presented and was the type of person he would expect to be doing that type of work. Frame said the man had a clip board and a number of official-looking forms with questions listed on them.

Frame not only described the visitor but, with the assistance of the police, completed an identikit photo, which is exhibit 91.

On Thursday, 15 November 1990, Frame was empanelled on a jury. During the day he discovered that several of his fellow jurors had also been polled, but by telephone. Frame considered this unusual. Because of his suspicions, he telephoned a number of research groups, including Insight Reporting Services, Market Research and Development and Reark Research Pty Ltd. All of those firms stated that they did not do the type of work he described to them. He approached another company at Toowong, Marketshare, and they advised that they had not conducted any polls in his area for some weeks.

The final juror to be called was John Guevara who was juror E19. Guevara originally advised Commission investigators that he had been contacted on the evening of Monday, 12 November 1990. He said the telephone which was connected to his flat was listed in the name of his step-father, Scott, and not in his own name. The telephone number was, however, supplied to the Sheriff's office on the Notice to Prospective Juror form.

This suggested that a telephone number unlisted in Guevara's name may have been obtained through means unavailable to the public.

However, during the course of his evidence, Guevara retracted his statement and admitted that he had lied when he gave this information. He received no telephone call of the type in question at all.

4.2 Was Roy Morgan Research Centre involved?

At the conclusion of the evidence given by the jurors, evidence was called from Colin Douglas Caust, the Queensland Manager of Roy Morgan Research Centre Pty Ltd.

Caust was asked whether the questionnaire which follows indicated to him that the component questions had been professionally formulated. The questions were:

1. If there was an election going to be held tomorrow, how would you vote?

2. How did you vote last time there was an election?; and

3. Do you belong to any political party and, if so, which one?

Caust believed these questions were not asked by a professional. He stated that the normal question in respect of political polls, was: *"If a State (or local or Federal, as the case may be) election would have been held - on whatever date - which party would have received your first preference?"* The person would also be asked for his second and third preference, and so on.

Caust said that Roy Morgan Research conducted a political survey every weekend but polled only 200 people at a time. These were selected at random.

On the weekend in question, 10 and 11 November 1990, no telephone poll concerning political issues was conducted by Morgans. However, a door to door poll was conducted.

Caust was supplied with the identikit photographs of the pollsters which were compiled from the descriptions of Frame and the young witness whose name has been suppressed.

Caust later advised counsel assisting that he could not establish the identities of those depicted.

When he was referred to the evidence of the girl whose name was suppressed (see p. 9 of this report), Caust said that the questions asked of this witness were the type asked by Morgans in their omnibus survey every weekend.

In summary, there is no evidence that the company Roy Morgan Research Centre Pty Ltd was involved in any improper approaches to jurors. Indeed, as shall be seen, the good name of the company was assumed as a cover by those who did in fact make the approaches.

4.3 Who made the approaches?

On 17 December 1990, Robert Maxwell Lockhart was called to give confidential evidence to the Commission. Lockhart, the instructing solicitor during Herscu's trial, said in a written statement tendered to the inquiry that he did not speak to any member of any jury panel available for selection for Herscu's trial. He said he gave no instruction or authorisation to anyone to make an approach to any member of any jury panel.

However, Lockhart said that a clerk in the office of solicitors Flower & Hart, where he worked, had obtained lists of potential jurors on panels E and F. The clerk, Kylie Wilson, gave the lists to others.

On 9 November 1990, Lockhart directed Wilson to arrange for an inquiry agent to make inquiries about potential jurors on panel F. He gave no specific instructions about the type of inquiries which were to be made or the methods which were to be used to make them. Later that day, a copy of the jury panel list for panel F was forwarded to Yates Professional Investigations by facsimile [exhibit 135].

Lockhart said he saw a second list of potential jurors on 12 November 1990 but could not recall giving any specific instructions to Wilson about that list.

Lockhart said that after Flower & Hart gave instructions to Yates Professional Investigations through Wilson, the firm received a facsimile message back from Yates. Flower & Hart later sent a second list of potential jurors to Yates. That list of names was also eventually faxed back to Flower & Hart with comments written beside each name.

The principal of Yates Professional Investigations, Julian Theodore Yates, also gave evidence in confidential session to the Commission.

He stated that from time to time his firm did work for Flower & Hart. He said his firm had not conducted any inquiries relating to juries or jury panels before 9 November 1990.

On 9 November 1990 his firm received instructions from Flower & Hart to make certain inquiries relating to the jury panel members for panel F. Yates delegated this assignment.

He arranged for an associate, James William Doran, to contact Flower & Hart. Doran telephoned an articled clerk with the firm, Craig Anthony Livermore, who gave evidence in confidential session.

Doran gave evidence in confidential session that Flower & Hart had given no instructions whatsoever as to the manner in which the inquiries were to be made. After discussion with Yates, Doran decided to make inquiries by telephone and employed Amanda Tully for this purpose.

Doran stated that he obtained a list of jurors' telephone numbers from Telecom. Doran then prepared a list which contained jurors' names and their listed telephone numbers.

Not all of the jury panel members were on the list because several had unlisted numbers which Doran was unable to obtain from Telecom.

This list [exhibit 138], together with the questions to be asked of each juror, was then handed to Amanda Tully. No other information was given to her. Doran instructed her to adopt an assumed name and to say that she was from Morgan Research and to ask the following questions:

* If an election was held this weekend, which political party would you vote for;

* Which political party would your partner vote for;

* Are either you or your partner a member of a political party.

Doran made no telephone calls of his own.

He arranged for no inquiries, other than the telephone calls, to be made of jury panel members.

Tully wrote a notation abbreviating the information she obtained [exhibit 138] from each person on the list against their name.

Doran testified that on Monday, 12 November 1990, the first list received by him was sent by facsimile to Flower & Hart. He subsequently received a second list of names by facsimile and was asked to extend his inquiries to include those people, who were members of jury panel E. Doran said he received no instructions about the type of inquiries to be made or the method to be used in making them.

Doran said he then contacted Tully, who began ringing the potential jurors whose names appeared on the second list.

Tully gave evidence which corroborated the evidence of Doran.

She said she had telephoned the people whose names appeared on the lists supplied to her by Doran and questioned them in accordance with Doran's instructions. She said she made no further inquiries of any of the potential jurors.

She stated that prior to calling the people whose names were on the second list, she decided to say that she was conducting a political survey for the purpose of a course she was undertaking at a University.

4.4 Were their actions criminal or improper?

At common law, improper interference with jurors constituted the offence of "embracery". In Archbold (43rd edition at para 24.18) the general principle is stated as follows:

> *Embracery is an offence indictable as common law, punishable by fine and imprisonment, and consists in any attempt to corrupt or influence or instruct a jury, or any attempt to incline them to be more favourable to one side than to the other, by money, promises, letters, threats or persuasions, whether the jurors on whom such attempt is made give any evidence or not, or whether the verdict given be true or false ... This offence has become obsolete. In modern times, the conduct envisaged by the offence has been dealt with in one of two ways. If more than one person is involved, the charge is likely to be conspiracy to pervert the course of justice. If only one person is involved, the charge is likely to be contempt of court."*

The key elements of that offence are an attempt to corrupt or influence or instruct a jury and an attempt to incline them to a view more favourable to one party.

In Queensland, an offence of corrupting or threatening jurors is established by Section 122 of the Queensland Criminal Code. That section reads as follows:

> *Any person who -*
>
> *(1) Attempts by threats or intimidation of any kind, or any benefit of any kind, or by other corrupt means, to influence any person, whether a particular person or not, in his conduct as a juror in any judicial proceeding, whether he has been sworn as a juror or not; or*
>
> *(2) Threatens to do any injury or cause any detriment of any kind to any person on account of anything done by him as a juror in any judicial proceedings; or*
>
> *(3) Accept any benefit or promise of benefit on account of anything to be done by him as a juror in any judicial proceeding, whether he has been sworn as a juror or not, or on account of anything already done by him as a juror in any judicial proceeding; is guilty of a misdemeanour and is liable to imprisonment for 3 years.*

This Section was considered in the Mackay Circuit Court by His Honour Mr Justice Brennan in R -v- Lee (1934) Q W N 28. His Honour said at page 35:

> *"Corrupt means" would in its widest sense involve a threat or suggestion of intimidation or request or suggestion of an offer of assistance, or a benefit or a promise of a benefit of some kind. There must be something in the form of an offer or a suggestion creating a promise of threat or a suggestion of intimidation, or of a benefit or of a promise of a benefit moving from the accused to the person intended to be influenced.*

In the Commission's view the section is concerned with conduct where, by certain means, attempts are made to influence the conduct of a juror in a judicial proceeding. On the evidence, there has been no such conduct. Although the views of jurors were sought, no attempt was made by any means to influence or alter those views, by threats or otherwise.

Indeed, no connection was made between the questions asked of each jury panel member and jury service. Those witnesses called indicated that they made no such connection until they talked to each other during the following days. Even counsel for Austin, Shane Herbert, whose wife was on panel F, failed to connect the telephone poll which he answered with his wife's jury service.

While discussions between the prospective jurors were perhaps inevitable and foreseeable, they do not constitute an offence under Section 122.

The Jury Act 1929-1990 does not create an offence which is relevant to the present circumstances.

Such conduct may, in certain circumstances, constitute a contempt of court. The authority of the court to punish a person summarily for such an offence is preserved by Section 8 of the Criminal Code Act 1899.

The Court of Appeal in R -v- Giscombe (1983) 79 Cr App R 79 held that it was contempt of court if a person knowingly did an act which he intended and was calculated to interfere with the course of justice and which was capable of having that effect. It may be inferred from a person's conduct that he intended to interfere with the course of justice.

In the Victorian case of In Re Dunn and In Re Aspinall (1906) V.L.R. 493, His Honour Mr Justice Cussen stated at page 497 that the essence of contempt was action or inaction amounting to an interference with, or

obstruction to, or having a tendency to interfere with or obstruct the due administration of justice, using that term in a broad sense. His Honour went on to say:

> *"Just as it is a grave contempt of court to communicate with or in any way to influence a Judge upon the subject of any matter he has to determine ... so also it is, in my opinion, to influence, or try to influence, a juror or jurors, who cannot protect themselves. Jurors must, where possible, be protected by the Court from intimidation and insult in the discharge of their duties ..."*

Both of these cases require that there should be some interference or attempted interference with the due administration of justice by making the communication with the juror. On the evidence no such offence has been committed. The conduct which led to the jurors being polled by Tully can be divided into two categories: firstly, that of the solicitors in asking the private investigator to make inquiries; and secondly, the decision and action taken by the private investigators to telephone the jurors. While the solicitors can perhaps be criticised for their failure to anticipate the action of Yates Professional Investigators, it could not be said on the evidence that they knowingly counselled such action. The evidence in this case does not support an inference that they took such steps which were likely to interfere with the due administration of justice.

On his evidence, Doran was only vaguely aware of the reasons for his inquiries. Although he was no doubt aware that such inquiries would help Flower & Hart choose a jury in a criminal trial, he was apparently not aware that the jurors whose names appeared on the lists he received were potential jurors for the trial of Herscu until Monday, 12 November 1990. There is no basis on which to conclude that he calculated his inquiries to interfere with the conduct of that trial. Furthermore, the method Doran told Tully to use to extract information from the potential jurors - to say she was from Morgans - further reduced the likelihood that these inquiries would be connected by the potential jurors with their jury service.

The Commission finds that there is evidence of approaches to prospective jurors by the defence in the Herscu trial.

The Commission also finds that the approaches did not constitute contempt of court or other improper behaviour by members of the solicitors' firm representing Herscu, or by agents engaged by them, or by Herscu himself.

4.5 Was there a leak of confidential information?

A great deal of evidence was led concerning the duties and conduct of officers of the District Court Sheriff's Office. That evidence was led in an effort to determine whether those officers had made any unlawful disclosures of confidential information supplied by potential jurors.

Investigations by the Commission into the District Court Sheriff's Office were made largely on the basis that Barclay had been contacted and, secondly, that Guevara had been contacted. At the time, the fact that these jurors had been contacted tended to indicate that there had been a leak from a public office as their telephone numbers could not be discovered by means available to the general public.

Guevara has now, on oath, admitted that he lied to Commission investigators and has retracted the statement that he was contacted on an unlisted number.

Barclay's evidence that she had been contacted by telephone although she had an unlisted number was not so readily explained. With the exception of Barclay, no potential jurors with silent numbers or numbers listed under different names, as in Guevara's case, were contacted.

The corroborated evidence of those who actually polled the potential jurors and the evidence of the parties to both Herscu's and Austin's trials leads to the conclusion that the telephone calls under investigation were only made by Yates Professional Investigations to those jurors whose numbers were listed by Telecom.

It is difficult to explain Barclay's evidence that she was questioned by telephone in a similar way to the other jurors in the face of such overwhelming evidence.

However, Barclay appeared confused about whether she had given her silent number to others. It may be that she had discussed this matter with the media and other jurors and has now confused those conversations.

Time was spent on this aspect of the inquiry because of the possibility of offences of official misconduct under the Criminal Justice Act 1989-1990.

On the evidence, the Commission finds that there is no indication of unlisted telephone numbers being obtained, save that of Barclay. Her evidence was not such as to raise a reasonable inference that unlisted numbers were obtained by way of unauthorised disclosure of information by any officer of a unit of public administration.

The Commission also finds that there is no evidence of any unauthorised disclosure of information or like impropriety on the part of any officers of the Sheriff's Office of Queensland.

4.6 Other inquiries in respect of jurors

The Commission also called and heard evidence about the inquiries made about jurors by the Special Prosecutor's office in both trials and by the defence in Mr Austin's trial.

The first of these witnesses was Shane Edward Herbert, defence counsel in the Austin trial. He stated that he was provided with a copy of the jury list in respect of panel G. This panel had been allocated to his trial on Friday, 9 November 1990. He advised that he went through the list and looked at the occupations of the jurors. There was a suggestion from his client, Austin, that one could tell whether people were self-employed or not by looking at the way they listed their names in the telephone book. He suggested that it would be appropriate for his solicitor, Masinello, to look at the houses occupied by the jurors. He stated that:

> *The principal thing was that no one was to be contacted or anything of that kind . . . I would regard it as quite wrong for someone to approach neighbours, for example, to ask how the jury - how a prospective juror might be or something.*

Herbert gave no instructions to his solicitor or anyone else to make approaches to members of the panel to ascertain their political affiliations.

On Tuesday, 13 November 1990, Herbert first learnt of the possibility of the amalgamation of two jury panels. Until that time, he believed that only panel G would be used. He was unhappy with the idea of amalgamation for several reasons. The first was that the defence was severely limited in its knowledge of prospective jurors, compared with the Crown. He stated that the Crown received the jury list well before the defence. Herbert said that, for example, he believed that the Special Prosecutor's Office would have had the list naming the potential jurors in Austin's case for more than a fortnight before he received it. (On the evidence, he was incorrect in this opinion.) Mr Herbert said the Crown had a further advantage because it had access to police records and had more resources than any individual defendant. Because of the defence's limited resources, it became more difficult to peruse a jury list if that list was suddenly doubled by the amalgamation of a further panel.

The second reason Herbert was against amalgamation was that inevitably counsel involved in another trial had already picked a jury from a panel. Consequently, counsel for the accused may not know who was picked for the other jury and, in addition to excusals, this meant that several people on the panel were no longer available for duty.

He added that if there was to have been an amalgamation, he did not want panel F because his wife was on that panel. He advised the judge of this view.

The instructing solicitor in the Austin trial, Nicholas Masinello, was then called to give evidence. Masinello is the principal of the firm Masinello and Associates. He advised that, on the afternoon of 9 November 1990, he attended the Sheriff's Office and obtained a copy of the list of names of people in panel G.

Upon obtaining that list, he went immediately to his counsel's chambers and discussed those on the list with him and their client, Austin. A check was made of the names in the telephone book to determine firstly whether anyone on the jury was known to the accused and secondly, whether anything could be gleaned from that information which would give an indication of the business the juror was in.

A further enquiry was made by Masinello. Electoral rolls were borrowed from another firm of solicitors and each juror's name was checked in the roll. Masinello said the purpose of this was to try to ascertain the occupations of jurors' family members. This was useful information because, by way of example, Austin had been Minister for Health and involved in a number of sensitive issues such as a dispute with the Nurses' Union, and did not want anybody on the jury who was related to or living with a nurse.

Finally, Masinello indicated that by prior arrangement with counsel, he travelled throughout Brisbane looking at houses belonging to jurors. A friend went with him. Masinello instructed his friend to have nothing to do with jurors and was very clear that he did not wish him to speak to anyone. At page 106 of the transcript, Masinello stated when asked why he did not want any contact between his assistant and the jurors, *"Well, I did not analyse those reasons, I do not think, other than I would have had a pretty precise idea that to have any contact with jurors before or during or even after a trial would not be the way to proceed about things"*.

When they were advised that panel H would be amalgamated with panel G, the same inquiries were repeated. Austin assisted in viewing homes of prospective jurors.

The next lawyer called was Robert Martin Needham, junior counsel for the prosecution in the Herscu trial. He stated that all instructions to those working on the Herscu prosecution came either directly from him or from Mr Mulholland, senior counsel for the prosecution, and conveyed through him. At no stage did Needham instruct any person to carry out any form of polling of the jury panel. He was able to say definitely that no such polling was carried out by the prosecution. Neither Needham nor Mulholland were supplied with any information concerning the jury panel which could have come from any form of such polling.

Needham advised that the following information was obtained in respect of each member of panels E and F:

* Criminal history and traffic history;

* Information about whether members had served on any trials in the sittings; and

* The view of the Crown Prosecutor in those trials as to whether the verdict was reasonable or unreasonable on the evidence.

He recalled that there were two or three jurors on panel F who had prior convictions for indictable offences and their names were passed to counsel for Herscu. Later, when there were jurors on panel E with prior criminal convictions, their names too were passed to the defence.

At the conclusion of Needham's evidence, Francis Joseph Clair was called to give evidence. Clair was junior counsel for the prosecution in the Austin trial.

Clair stated that he was advised on Friday, 9 November 1990 that panel G was to be used for the Austin trial. Late in the afternoon that day, Judge Boyce decided that the trial would not commence until Wednesday, 14 November 1990.

He instructed his clerk to obtain copies of the jury list from the Director of Prosecutions' Office, because he anticipated that such a list would contain previous traffic and criminal histories of the jurors. In addition, he instructed his clerk to find out whether the Director of Prosecutions had any central list which showed which jurors had already served on juries during the sittings. No such central list existed because, as far as Clair could recall, the list which was returned to him only had information concerning jurors who had served on one trial. Subsequently, information about other members of the jury was obtained.

On the morning of the commencement of Austin's trial, Clair arranged for the jury panel lists to be marked to show both those who had been excused by Judge Shanahan in the Herscu matter and those jurors who

were empanelled. The jury panel lists with all the markings, together with the marking which indicated which jurors were sworn in on the Herscu trial, were tendered [exhibit 102]. The original list held by Griffin and Clair has also been tendered [exhibit 103].

Clair stated that he was unaware that any person sought to survey the voting patterns of prospective jurors. For his part, he stated that he quite consciously took the decision that the only information which should be sought was previous traffic and criminal convictions and whether jurors had served on other trials.

Mr Clair was cross-examined at some length about the statement contained in Drummond's memorandum of 14 November 1990, at paragraph 7, where he writes:

> *"I do not know at the moment whether panel G may also have been the subject of a similar approach, but I have some information given to me on a confidential basis that raises the possibility that this may have occurred as well. I expect the matter will be raised by Judge Boyce this morning in the course of the Austin trial and I will update you on what occurs."*

When questioned about the nature of the confidential information to which Drummond referred, Clair said it could concern a statement contained in a memorandum annexed to Drummond's memorandum. In paragraph 11, Mulholland Q.C. advised that Judge Shanahan expressed an opinion that the inquiries directed at the jurors conducted over the previous weekend were connected with the Austin case.

The nature of the confidential information in question was subsequently revealed on 14 December 1990 in a memorandum from Drummond to a solicitor with the Special Prosecutor's Office, Keith Peebles. The memorandum said, in part, that:

> "The information that John Griffin gave to me on the morning of 14 November 1990 was as follows: in the course of a telephone call he received from Shane Herbert (which I think, but I am not certain, John Griffin said he had had with Herbert the previous afternoon, 13 November 1990), Herbert made a comment to him to the effect that he was keen for the Austin jury to be drawn from panel G or that he did not want any other panel amalgamated with panel G - something to that effect - because he (or "we", i.e. Austin's side) had done our checks on panel G."

This information added nothing to the evidence which was led and, for the purpose of this inquiry, required no further explanation nor for Drummond to be called.

Finally, evidence given by Desiree Weir, the instructing clerk in the Herscu trial, and Neil Laurie, the instructing clerk in the Austin trial, confirmed the evidence given by the prosecutors in these trials concerning those inquiries made by the prosecution in respect of the jurors on all panels.

4.7 Eligibility of jury panel members

Some comment needs to be made on one final matter before moving from the evidence. It arose from consideration of the practices of the prosecution in making inquiries with the Queensland Police Service as to previous traffic and criminal histories of jurors. Evidence was given that such inquiries were made by the office of the Special Prosecutor and the Director of Prosecutions' office.

Checks of criminal histories duplicate checks already performed by the Sheriff's office to determine the eligibility of jurors. Evidence was given that the prosecution also wished to know of traffic convictions and convictions for non-indictable offences. Convictions for such offences are not the subject of the Sheriff's inquiries. The question of whether it is necessary or desirable for the prosecution to make such checks, in part duplicating work already properly performed by the Sheriff's office, is one to be resolved in a further inquiry.

However, the prosecution's inquiries in these two cases did show that some jurors had convictions for offences which should ordinarily have disqualified them.

The Sheriff of the Supreme Court of Queensland, E F Green, stated in evidence that part of the questionnaire forwarded to prospective jurors asked them to indicate whether they have been convicted of offences. Later, once a list has been compiled of those to be summoned, it is forwarded to a police officer attached to the Supreme Court so that he may arrange for searches to be made for the criminal histories of prospective jurors.

When the histories are received, Green or his officers, vet them to see whether people are actually disqualified. Green advised that under the provisions of the Jury Act 1929-1990, a person convicted of a crime is disqualified absolutely from serving on a jury. If convicted on indictment of an offence other than a crime, the person is disqualified for ten years from the date of conviction. If the prospective Juror is convicted summarily of an indictable offence, the period of disqualification is five years. Should the Court make a probation order pursuant to the provisions of section 17 (1) (a) of the Offenders Probation and Parole Act 1980, an absolute or ten year disqualification is reduced to five years and a five year disqualification is reduced to two years.

During his evidence, Green could not offer any comment on the proposition that jurors with criminal convictions for indictable offences remained on the panel during the period under investigation.

On 17 December 1990, Green returned and made a submission in respect of this and other matters. He advised that, in respect of the four jury panels mentioned at this inquiry, four persons were interviewed by Deputy Sheriff Neil Hansen on the first day that they were required to attend and were discharged prior to the jury panels being taken to their respective court rooms. With great respect to Mr Green, this information does not answer the question. At least insofar as the prosecution was concerned, jurors with convictions remained on the panel. This tended to indicate that the panel lists supplied to the prosecution two weeks into this sittings contained, on their face, the names of jurors who should have been disqualified. Perhaps the Sheriff omitted to exclude those names from the lists supplied to the prosecution.

Whatever the answer, the issue is an important one. If, as it is argued by Mr Hams, the Acting Sheriff of Queensland, the only inquiries into criminal histories of prospective jurors are made by the Sheriff's Office, then it must be certain that these inquiries are accurate.

Furthermore, Parliament has legislated as to who should and should not be excluded from jury service. The question which must be asked is whether there is any reason for further disqualifications, provided always that the statutory requirements are accurately met.

5. CONCLUSIONS AND RECOMMENDATIONS

Whilst no offence was committed in these circumstances, it is worth observing that there is a fine line between the conduct revealed by this inquiry and conduct which would amount to contempt. The law at present leaves doubt about the type of conduct which is permissible. This doubt was evidenced by the diversity of opinions expressed before the inquiry, both in evidence and in submissions, about the permissible length to which the parties in criminal trials may go to make inquiries of jurors or prospective jurors.

Uncertainty in this area, which is of great community interest, can only bring the law into disrepute.

Whilst some of the lawyers submitted that inquiries into the jurors' backgrounds and viewpoints were essential if an accused was to obtain a fair and impartial trial, it seemed that neither the Sheriff of this State nor the jurors themselves approved of the methods by which those inquiries were made in the Herscu matter. It is worth noting that this matter first came to the attention of the judiciary after the jurors in the original Herscu jury panel complained to the bailiff. Secondly, according to the bailiff, the jurors seemed concerned about what had happened. Thirdly, Barclay stated that she and others were worried by approaches that had been made to them as jurors on the eve of a criminal trial. Such was their concern that a representative of the jurors complained to the Sheriff and later, when they concluded (incorrectly) that no action was being taken as a result of their complaint, they repeatedly approached sections of the media with a view to attracting attention to the issue.

These actions support the contention that they were concerned that their privacy had been invaded by fraudulent means and for a purpose connected with jury service.

Against this, a submission has been made by Terry O'Gorman on behalf of the Queensland Council for Civil Liberties. He argued *"that the polling of a particular prospective juror is not only not rigging or tampering but is a quite proper and legitimate defence procedure so long as it is carried out with appropriate sensitivity and in a way which does not threaten or intimidate a prospective juror"*. He distinguished between polling a prospective juror, which he argued was acceptable, and approaching an actual juror during a trial which he contended was *"absolutely and totally unacceptable"*.

Both Herbert and Masinello agreed that an approach to a prospective juror was neither desirable or permissible.

Des Sturgess Q.C., a barrister experienced in the criminal law, stated that he knew of no rule of law that directly prohibited an approach to a prospective juror in order to ascertain whether he or she was impartial. Sturgess said, however, that such an approach would be objectionable for a number of

reasons in all but the most unusual cases. He did say, however, that an approach to a prospective juror may in some cases not only be justified but highly desirable. Sturgess stated that there were a number of reasons why prospective jurors should not be approached, but said the first of those was most applicable in this case. In his opinion, if the representatives of a party in a criminal trial were free to approach a prospective juror, it would not be long before one of them would be found to be overstepping the proper bounds. It has already been observed that there is a fine line between this conduct and conduct which would amount to a contempt of court. This tends to support Sturgess' contention that the proper bounds could be overstepped.

His Honour Mr Justice Hodges, in the case of In Re Blomeley, ex parte Ham (1900) 26VLR 15, considered a bill of costs submitted by a solicitor which sought to charge for *"numerous attendances as to jury panel for the purpose of ascertaining whether any of the jury had expressed any opinions adverse to the accused, in order to enable the accused to properly exercise their rights of challenge, and obtaining valuable information as to such opinion having been expressed by several of the jurors"*.

At page 20 of the judgement His Honour stated:

> *"This work, according to the affidavit of the Solicitor, was authorised to be done by the client, so that, if it was proper for the Attorney to do it, he would undoubtedly be entitled to charge for it. In my opinion, however, it is work which he ought not to do. An endeavour to find out whether a jury had expressed any opinions from what they may have seen in the papers or from what they may have heard is an improper thing for an Attorney to do. If it is lawful to find out whether a jury have expressed any opinions, it is lawful to find it out from the very best source, namely, the jury themselves. If it is lawful to ask a juryman's kinsfolk and acquaintances, from whom it may find its way to the juryman, whether he has expressed any opinion, it would be lawful to ask the juryman himself. And if it is lawful to ask the juryman himself whether he has expressed any opinion it would be lawful to ask him whether he had formed one; because it is just as dangerous if he has formed an opinion which he has not expressed as if he had formed one and expressed it to his friends, and I can imagine no practice more likely to interfere with the proper, impartial, independent, and honest administration of justice than that of the several parties to any cause interviewing persons who have been subpoenaed as jurymen for the purpose of finding out what their views may be, what views they may have expressed, and whether, having expressed those views, they intend to stand by them. It would open the door to corruption in very many forms which it might be utterly impossible to prevent. A juryman, in my opinion, ought not be approached on any such question, either by his friends or by the Solicitor, nor are the surroundings of the juryman to be sifted in this kind of way. If this could be done and charged for, it could be carried to lengths that would make trial by jury a corrupt method of disposing of any cause. ... I think that the jury, from the time they are subpoenaed,*

> *should be regarded as sacred from all inquiries, and not only should they themselves be so regarded, but it should not be allowable to go to their wives, sons, daughters, brothers, and sisters, or their very many other relations and intimate friends, to find out what their views are on the matter in question. It is too close an approach, and if you could go to that length it is hard to say whether the whole thing would stop. It would be utterly subversive of the impartial administration of justice".*

In his evidence, the Acting Sheriff of Queensland said he believed that jury lists should not be published but simply handed to counsel in a trial on the morning the trial commenced. He said that the Jury Act provided guidelines for the Sheriff by which he must choose potential jurors. He did not believe that others, such as the parties to a criminal trial, should be allowed to conduct their own searches and go beyond the inquiries made by the Sheriff.

The evidence led in this inquiry revealed that investigations other than the polling of jurors were conducted by all parties to the criminal trials of Herscu and Austin.

On the prosecution side, this consisted mainly of checks being made for prospective jurors' previous criminal and traffic convictions. Advice was also received about the outcome of previous criminal trials on which these jurors had sat.

The prosecution's access to police resources in conducting these inquiries was the subject of criticism by O'Gorman. He stated that *"very strict and statutorily incorporated and enforceable guidelines should be enacted to prevent prosecution jury vetting beyond legitimate criminal conviction inquiries"*. He went on to say that *"with increasingly sophisticated computer technology the position has now been reached in the history of the jury, where the Crown has the facilities to select a jury sanitised towards the predisposition to the Crown position, and to convictions"*.

The defences' inquiries, in addition to the ones which were the subject of this investigation, consisted of a review of the occupations of the jurors and their families, the addresses of the jurors and, in some cases, the house in which they resided.

There have been a number of judicial pronouncements on the practice of jury vetting and, in particular, on the practice of the Crown obtaining the antecedents of a person on a jury panel.

In R -v- Sheffield Crown Court ex parte Brownlow [1980] 71 Cr.App.R.19, the Master of the Rolls, Lord Denning, stated at page 25 that:

> *"To my mind it is unconstitutional for the police authorities to engage in "jury vetting". So long as the person is eligible for jury service, and is not disqualified, I cannot think it right that, behind his back, the police should go through his record so as to enable him to be asked to,*

"stand by for the Crown," or to be challenged by the defence. If this sort of thing is to be allowed, what comes of a man's right of privacy? He is bound to serve on a jury when summonsed".

In a separate judgement Lord Justice Shaw stated at page 28:

"It is obvious that the prosecution which has facilities for access to criminal records may in relation to any trial seek information which will enable him to decide whether to ask for a "stand by" in respect of any one on a jury panel who appears to them to be undesirable or untrustworthy as a juror. This element of undesirability or untrustworthiness would, in the eyes of a prosecuting authority, consist of something which indicated that a prospective juror might be ill disposed to authority or well disposed to criminals. There would thus supervene upon the process of natural selection devised by the Juries Act 1974 and supplemented by the Common Law, a process of artificial selection derived from the special knowledge available to prosecuting authorities. It needs no elaborate argument to demonstrate that this use of such special knowledge would be an abuse as being contrary to the spirit and principal of jury service. It is possible to conceive of very special cases where the protection of the interest of the public at large demands that such knowledge should be sought and used. Even then it should not be sought or used without the sanction of the Attorney-General who is ultimately responsible for the conduct of prosecutions by way of indictment.

Such a procedure should not be adopted merely because it might reinforce a prosecution by excluding from a jury persons who might be anti-authority or pro an accused ... Nor would it be justified in the interest of individual persons accused on indictment. Such persons could not be precluded or prevented from pursuing their own inquiries, as to the antecedence of those whose names appear upon a jury panel. Such inquiries, however, would have to be conducted so as not to harass or intimidate: ...

Finally, Lord Justice Brandon stated at page 29:

I would, however, make two observations of a general character about the practice of "jury vetting". First, I have serious doubt whether there should be any "jury vetting" at all, either by the prosecution or the defence. Secondly, if "jury vetting" is to be permitted to the prosecution in certain categories of cases, however and by whomsoever those categories may be defined, it hardly seems just that it should not be permitted to the defence in any categories of cases at all".

In expressing a view contrary to that of the court in Brownlow's case, Lord Justice Lawton, in giving the judgement of the court in R -v- Mason (1980) 71Cr App R157 stated at pages 164 - 5, that:

> *"In the course of (the police) looking at criminal records, convictions are likely to be revealed which do not amount to disqualifications. We can see no reason why information about such convictions should not be passed on to prosecuting counsel. He may consider that a juror with a conviction for burglary would be unsuitable to sit on a jury trying a burglar; and if he does so he can exercise the Crown's rights. Many persons, but not burglars, would probably think that he should.*
>
> *The practice of supplying prosecuting counsel with information about potential jurors' convictions has been followed during the whole of our professional lives, and almost certainly for generations before us. It is not unlawful, and has not until recently been thought to be unsatisfactory".*

Another view was expressed by the Supreme Court of Victoria in the case of In the Trial of D [1988] V.L.R.937. In that case, the propriety of a practice under which the Chief Commissioner of Police provided to the Director of Public Prosecutions a list containing the names of some persons contained in jury panels which had been provided to him was questioned. The list contained details of any prior criminal history of the prospective jurors. At page 946 His Honour Mr Justice Vincent stated:

> *"The use by the police of a jury panel which has been provided to the Chief Commissioner for the performance of a very limited statutory duty, for unauthorised purposes and the employment of facilities available to them to acquire information on behalf of the Crown which is then denied to the accused, when the precise nature of that information is not clear and depends upon the attitudes, policies and practices adopted by persons who are not even in the court, creates the possibility, and certainly the appearance, of a potential unfairness. There can be no doubt that such a possibility or even appearance in relation to a matter is vital as the selection of the jury in a criminal trial should not be permitted.*
>
> *It must not be forgotten that the prospective jurors about whom such information is provided are not persons who are disqualified from participating as jurors in a criminal trial and it cannot be assumed that only the Crown would have an interest in knowing the situation concerning them. It seems to have been automatically assumed that because an individual may have had some non-disqualifying prior conviction that he or she would be favourable to the accused".*

Page 947 His Honour stated:

> *"Practices adopted by (the Crown) must be beyond reproach and if the trial process is to be respected and the outcomes of trials accepted as just and proper by the community, they must not carry any stigma of possible unfairness".*

The majority of the Victorian Court of Criminal Appeal (O'Bryan and Marks J J) in the case of R -v- Robinson (1988) 38A.Crim.R.1 held:

> *"In our opinion, the long established practice of supplying the Director of Public Prosecutions and Prosecuting Counsel with information about potential juror's convictions is neither unlawful nor unfair. In our opinion, the ruling In the Trial of D should not be followed in Victoria. Should the practice now be regarded as unfair, it is a matter the legislature could easily remedy".*

In expressing the minority view, His Honour Mr Justice Nathan stated at page 19:

> *"I do not consider the preparation of the list by the Police Commissioner, to be of itself, unfair to an accused. It is the use to which it is put by the Director of Public Prosecutions which assails the fundamental principals of random jury selection. The customary procedure is not only unfair to an accused, but just as significantly is unfair to the community, and not just those members of it who are inappropriately rejected for jury service".*

In conclusion, it is the Commission's view that the state of the law and the diversity of opinion concerning the degrees to which it is permissible to make inquiries into the opinions of jurors necessitate a full review of this topic. This inquiry concerned a principle at the very heart of the criminal trial; namely, that the accused is judged by his peers, who hear the evidence fairly and impartially. It is an important issue and should be considered carefully but without undue delay.

Part and parcel of this issue are the following questions:

* Should the prosecution have advance notice of those on the jury panel?;

* To what extent is it proper for the prosecution to make use of public facilities for the benefit of the prosecution case?;

* How may we best deal with the trial of an accused who has received public notoriety or ridicule?;

* What is the best method by which to obtain an impartial jury?;

* Should impartiality be achieved by regulation or left to the parties to decide?; and

* Is it a question of educating juries as to the permissible limits to which parties in the action may go in determining the attitude of potential jurors?

Because of the gravity of the issue, the Research and Co-ordination Division of the Criminal Justice Commission has produced an issues paper on the need for and extent of any reform in the laws concerning the distribution of jury lists and the inquiries which can be made in respect of jurors on those lists.

The Attorney-General has agreed to establish a committee to consider the Commission's issues paper. It is hoped that the committee will be made up of representatives of the community and representatives of at least the following offices and associations:

* Attorney-General's office;
* Director of Prosecutions;
* Public Defender;
* Queensland Law Society;
* Queensland Bar Association;
* Sheriff's Office of Queensland; and
* Queensland Council for Civil Liberties

The Committee's report to the Attorney-General may then form the foundation of any new legislation which may be thought necessary.

There remains a question of whether any action should be taken in the interim period. Comments have already been made in this report that the facts of this case did not fall far short of constituting contempt. Even though such conduct did not constitute contempt, it resulted in a jury being discharged during the course of a criminal trial. Fortuitously, no great harm was done nor time lost, as the court was alerted by the jury on the first day of the trial. The potential for such trials to be aborted and the risk that parties in a criminal trial may overstep the mark remains a real one.

This risk may be reduced by accompanying the jurors' summons with advice that prospective jurors' report any approach made to them. Not only would this go some way to ensuring that the court is alerted at an early stage to any conduct which may jeopardise a trial, but would serve as a warning to practitioners to be careful in the inquiries that they may wish to make of jurors. It must be emphasised that this would be an interim measure only, and should in no way to thought to pre-empt the findings of the Attorney-General's committee.

With respect, the Commission agrees with the present practice of the Sheriff in not publishing the list of juror's names in the precincts of the court although this may require some immediate amendment to Section 23(2) Jury Act 1929-1990.

6. SUMMARY OF FACTUAL FINDINGS

1. There is no evidence that members of any party approached prospective jurors in the Austin trial.

2. There is no evidence that any member of the prosecution approached prospective jurors in the Herscu trial.

3. There is evidence of an approach to prospective jurors by the defence in the Herscu trial.

4. That approach did not constitute contempt of court or other improper behaviour by members of the solicitors' firm representing the defendant Herscu, or by counsel, or by agents engaged by them or by the defendant himself.

5. There is no evidence of unlisted telephone numbers being obtained save that of Mrs Barclay, in respect of whose number no positive findings can be made.

6. There is no evidence of any unauthorised disclosure of information or like impropriety on the part of any officer employed by the Sheriff's office.

7. SUMMARY OF RECOMMENDATIONS

1. That, as an interim measure, a notice is issued by the Sheriff's office with the summons to prospective jurors, warning that if any approach which is made to them causes any concern with respect to the discharge of their duties as members of a jury panel, they should immediately notify the Sheriff of that approach.

2. That the Attorney-General of Queensland establish a committee consisting of members of the legal profession and the community to consider the need for and extent of reform of the law relating to the distribution of jury lists and the inquiries which can be made in respect of prospective jurors.

ANNEXURE A

CRIMINAL JUSTICE COMMISSION

RESOLUTION TO HOLD AN INQUIRY AND CONDUCT PUBLIC HEARINGS

Date...11/11/91

IN THE MATTER OF:-

TOBY TANNERING

EXHIBIT NO. 2/4

.....CLERK

The Criminal Justice Commission (the Commission) constituted under the *Criminal Justice Act 1989-1990* (the Act) in taking such action as the Commission considers to be necessary or desirable in respect of such matters as, in the Commission's opinion, are pertinent to the administration of criminal justice HAS RESOLVED in pursuance of the provisions of Section 2.10 of the Act and all powers thereunto enabling, to undertake the investigation of allegations referred to it by the Honourable the Attorney-General, D. N. Wells M.L.A., the Special Prosecutor, Mr. D. P. Drummond Q.C., and the Sheriff of Queensland on behalf of the Chairman of the District Courts, His Honour Judge J. Helman and to conduct hearings open to the public presided over by the Chairman of the Commission, SIR EARDLEY MAX BINGHAM Q.C. sitting alone and assisted by Mr. C.E.K. Hampson Q.C.

AND TO FURNISH A REPORT of the Commission signed by the Chairman to the Chairman of the Parliamentary Criminal Justice Committee, to the Speaker of the Legislative Assembly and to the Minister, the Honourable the Premier and Minister for Economic and Trade Development and Minister for the Arts pursuant to the provisions of Section 2.18 of the Act.

DATED the 12th day of December, 1990.

SIR EARDLEY MAX BINGHAM Q.C.

JOHN JAMES KELLY

JAMES PATRICK BARBELER

DR. JANET RICKFORD McCALL IRWIN

PROFESSOR JOHN STUART WESTERN

DATED the 12th day of December, 1990.

SIR EARDLEY MAX BINGHAM Q.C.

JOHN JAMES KELLY

JAMES PATRICK BARBELER

DR. JANET RICKFORD McCALL IRWIN

PROFESSOR JOHN STUART WESTERN

CRIMINAL JUSTICE COMMISSION

RESOLUTION TO FURNISH A REPORT

The Criminal Justice Commission (the Commission) constituted under the Criminal Justice Act 1989-1990 (the Act) after due consideration of the evidence given before the Chairman of the Commission, SIR EARDLEY MAX BINGHAM Q.C. *on 14, 17 and 21 December 1990; 8 and 15 January 1991 in the matter of an investigative hearing into allegations of jury interference* HAS RESOLVED *in pursuance of Section 2.19 of the Act* TO FURNISH A REPORT *of the Commission signed by the Chairman to His Honour the Chief Justice of the State of Queensland.*

D A.T.E.D. the 12th day of December, 1990.

SIR EARDLEY MAX BINGHAM Q.C.

JOHN JAMES KELLY

JAMES PATRICK BARBELER

DR. JANET RICKFORD McCALL IRWIN

PROFESSOR JOHN STUART WESTERN

DATED this 15TH day of February 1991.

SIR EARDLEY MAX BINGHAM Q.C.

JOHN JAMES KELLY

JAMES PATRICK BARBELER

DR JANET RICKFORD McCALL IRWIN

PROFESSOR JOHN STUART WESTERN

ANNEXURE B

LIST OF WITNESSES *

(in order of appearance)

Kenneth Kevin Welsh

Alexander Raymond Hams

Gregory James Moran

Stella Grace Butson

Louise White

Patricia Elizabeth Eiszele

Wilhelmina Irene Barclay

John Vivian Frame

Carol Ann Harris

Fiona Alison Brymner

John Guevara

Mark William Ainsworth

Shane Edward Herbert

Nicholas Francis Masinello

Colin Douglas Caust

Robert Martin Needham

Francis Joseph Clair

Desiree Rosemary Weir

Neil William Hansen

Leanne Buckmaster

Danny Cosimo Coppolecchia

Robert Maxwell Lockhart

Craig Robson Moffatt

Jeffrey Allan Hobson

Leanne Teresa Wise

Kerry Ann Attrill

Jennifer Anne Heffernan

Neil John Laurie

Edmond Francis Green

Gordon William Keith Perrett

Ronald Edward Vincent

Margaret Anne Whitney

Desmond Gordon Sturgess

Stephen Anthony Habermann

Lauren Arthur Taylor

Julian Theodore Yates

James William Doran

Amanda Jane Tully

Craig Anthony Livermore

The name of one witness was suppressed by order of the Chairman.

ANNEXURE C

EXHIBIT LIST

EXHIBIT NO.		DESCRIPTION
72	...	Memorandum dated 14 November 1990 from D P Drummond Q.C., to the Chairman of the Criminal Justice Commission
73	...	Letter from The Honourable the Attorney-General of Queensland to the Chairman of the Criminal Justice Commission dated 16 November 1990
74	...	Resolution by Criminal Justice Commission dated 12 December 1990
75	...	Summons - Kenneth Keith Welsh
76	...	Extract of Proceedings of 13 November 1990 before His Honour, Judge Shanahan in the trial of The Queen -v- Herscu
77	...	Summons - Alexander Raymond Hams
78	...	Memorandum - Registry Supreme Court
79	...	Summons - Gregory James Moran
80	...	Photocopy receipt page from District Court Receipt Book dated 9 November 1990
81	...	Faxed copy of letter from Messrs Flower & Hart, dated 13 December 1990 to Criminal Justice Commission
82	...	Summons - Stella Grace Butson
83	...	Notes of telephone conversation from Stella Grace Butson
84	...	Summons - Louise White
85	...	Summons - Patricia Elizabeth Eiszele
86	...	Summons - Wilhelmina Irene Barclay

EXHIBIT NO.		DESCRIPTION
87	...	Notice to prospective juror form - Wilhelmina Irene Barclay
88	...	Summons - name suppressed
89	...	Identikit photo of female person
90	...	Summons - John Vivian Frame
91	...	Identikit photo of male person
92	...	Summons - Carol Ann Harris
93	...	Summons - Fiona Brymner
94	...	Summons - John Guevara
95	...	Panel E Graph
96	...	Panel F Graph
97	...	Panel G Graph
98	...	Panel H Graph
99	...	Combined panels E, F, G & H Graph (single sheet)
100	...	Summons - Colin Douglas Caust
101	...	Statutory Declaration - Robert Martin Needham
102	...	List of jurors - Panels G & H - noted, "Herscu Copy"
103	...	List of jurors - Original - Panels G & H - used by Griffin & Clair
105	...	Memo from D P Drummond Q.C. to K Peebles, dated 14 December 1990
106	...	Panels E & F from Court
107	...	Summons - Neil William Hansen
108	...	Summons - Robyn Anne Wegner
109	...	Summons - Leanne Buckmaster

EXHIBIT NO.		DESCRIPTION
110	...	Summons - Danny Cosimo Coppolecchia
111	...	Statement from Robert Maxwell Lockhart
112	...	Summons - Robert Maxwell Lockhart
113	...	Summons - Craig Robson Moffatt
114	...	Summons - Michelle Vicki McLean
115	...	Summons - Jeffrey Allan Hobson
116	...	Summons - Leanne Teresa Wise
117	...	Summons - Kerrie Ann Attrill
118	...	Summons - Deidre Elaine Daly
119	...	Summons - Jennifer Anne Hefferman
120	...	Update user security - Brisbane- Qld Jury
121	...	Information on ID users from CITEC
129	...	Statement - Desmond Gordon Sturgess
130	...	Facsimile to Kylie Wilson at Flower & Hart from Yates Professional Investigations - dated 13 November 1990
131	...	Facsimile to Kylie Wilson at Flower & Hart from Yates Professional Investigations - dated 12 November 1990
132	...	Statement - Anthony John Glynn
133	...	Media monitors - Queensland Pty Ltd 4QR - transcript of interview between Terry O'Gorman and announcer re civil liberties ; jury tampering
134	...	Schedule relating to jurors empanelled on jury sworn on trial of The Queen -v- Herscu on 13 November 1990
135	...	Fax to Julian Yates of Yates Investigations from Flower & Hart dated 9 November 1990

EXHIBIT NO.		DESCRIPTION
136	...	Fax to Yates Investigations from Flower & Hart dated 13 November 1990
137	...	Summons - Julian Theodore Yates
138	...	List of jurors on Panel F and telephone numbers supplied to Tully by Doran.
139	...	Information supplied by Tully to Doran concerning Panel E.
140	...	Summons - James William Doran.
141	...	Summons - Amanda Jane Tully.
142	...	Summons - Craig Anthony Livermore
143	...	Statement - Craig Anthony Livermore

ANNEXURE C

EXHIBIT LIST

EXHIBIT NO.		DESCRIPTION
72	...	Memorandum dated 14 November 1990 from D P Drummond Q.C., to the Chairman of the Criminal Justice Commission
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78	...	Memorandum - Registry Supreme Court
79	...	Summons - Gregory James Moran
80	...	Photocopy receipt page from District Court Receipt Book dated 9 November 1990
81	...	Faxed copy of letter from Messrs Flower & Hart, dated 13 December 1990 to Criminal Justice Commission
82	...	Summons - Steila Grace Butson
83	...	Notes of telephone conversation from Stella Grace Butson
84	...	Summons - Louise White
85	...	Summons - Patricia Elizabeth Eiszele
86	...	Summons - Wilhelmina Irene Barclay

ANNEXURE D

SUBMISSIONS *

Terry O'Gorman	-	Queensland Council for Civil Liberties
Edmond Francis Green	-	Sheriff of Queensland
Francis Joseph Clair	-	Barrister at Law, Office of the Special Prosecutor
Michael Quinn	-	Solicitor, Vice President, Queensland Law Society

* A Former Director of Prosecutions, Mr Desmond Gordon Sturgess QC, was also called to give evidence before open hearing and his statement has been received by the Commission in the same manner as a submission.