CRIMINAL JUSTICE COMMISSION
QUEENSLAND

THE JURY SYSTEM IN CRIMINAL TRIALS IN QUEENSLAND

AN ISSUES PAPER

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1. THE ORIGINS AND SCOPE OF THE ISSUES PAPER

This issues paper arises from an inquiry by the Criminal Justice Commission into allegations of jury interference.

In November 1990, allegations concerning approaches to prospective jurors were brought to the attention of the Criminal Justice Commission, firstly by the Special Prosecutor and secondly by the Attorney-General.

The Sheriff of Queensland advised the Commission that some members of the jury panel for the trial of prominent businessman, George Herscu, had received telephone calls during the weekend of 10 and 11 November 1990 and on Monday, 12 November 1990. The prospective jurors were asked what political parties they belonged to and what party they would vote for if there was an election "right now".

On 12 December 1990 the Criminal Justice Commission, pursuant to the provisions of s. 2.10 of the Criminal Justice Act 1989-1990, resolved to investigate these allegations of jury interference.

During its subsequent public hearing on 14, 17, and 21 December 1990 and 8 and 15 January 1991, the Commission heard evidence of approaches which had been made to a number of jurors on several panels for District Court criminal trials in Brisbane.

During final submissions on 15 January 1991, counsel assisting the inquiry, Mr Cedric Hampson QC, recommended the preparation of an issues paper. Mr Hampson said the paper should canvass the need for and the extent of any necessary reform in the laws concerning the distribution of jury lists and the inquiries which could be made in respect of those on such lists.

The Criminal Justice Commission, in its report on the allegations of jury interference, agreed that such an issues paper should be prepared. The Commission believed that the current state of the law and the diversity of opinion about the extent of permissible inquiries into the opinions of jurors necessitated a full review of this topic.

The inquiry considered a central principle of criminal trials: that the accused should be judged by peers who hear the evidence fairly and impartially. It is an important issue which should be considered carefully but without undue delay.

The Commission also found that the following questions required consideration:

* 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?

While this paper concentrates on the question of jury vetting, broader issues relating to the protection and privacy of jurors, majority verdicts, special juries, education of juries and improvement of trial procedures are also examined.

The Research and Co-ordination Division of the Criminal Justice Commission has produced this issues paper in an effort to stimulate public discussion and to encourage the receipt of submissions on the above questions. The views contained in it do not necessarily represent the current or final views of the Commission, but are included simply as springboards for community response.

Community reaction to the questions outlined above is essential to the law reform process surrounding the institution of the jury, particularly since concern has emerged in recent years that legislative action based on little community consultation has caused a serious erosion of the jury system in Australia. One commentator wrote in 1986 that:

> "Many of the changes which have diminished the jury's role have occurred with little or no fuss and virtually no public discussion."[1]

The Attorney-General has agreed to establish a committee to consider the issues raised in this paper. It is expected that this committee will consist of community representatives and representatives of at least the following offices and associations:

* the Attorney-General's Office;
* the Director of Prosecutions;
* the Public Defender;

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1 J. Willis, *Paying Lip Service to Juries* in The Jury (ed.) D. Challinger, Australian Institute of Criminology, Canberra, 1986, p. 29

* the Queensland Law Society;
* the Queensland Bar Association;
* the Sheriff's Office of Queensland; and
* the Queensland Council for Civil Liberties.

The Attorney-General may formulate any new legislation in accordance with the committee's recommendations.

2. CAUTION IN REFORM OF THE JURY

The touchstone of any civilised society is the administration of its criminal justice system. At the heart of the Anglo–Australian system of criminal justice is the jury. The jury is regarded by many as fundamental to the freedom that is so essential to our way of life.

In our community, the State imposes an obligation upon its citizens to perform jury service. This duty is a important facet of democracy, because it gives the people a direct involvement in the decision-making processes of the State and complements our representative Parliamentary system.[2]

> "Trial by jury is only an instrument of getting at the truth. It is a process designed to make it as sure as possible that no innocent man is convicted."[3]

In Australia, juries for criminal trials comprise 12 ordinary people[4] selected at random from the community to determine the guilt or innocence of the accused person. Ideally, jurors remain anonymous and mute about their deliberations. After they have delivered their verdict, they disperse.

The measure of the jury's success is continued public confidence in its role in criminal trials. As with any democratic institution, the maintenance of public confidence is dependent upon the extent of accountability and public scrutiny of it.

Publicity accorded the recent allegations of interference with the jury panels for the trials of former Cabinet Minister Brian Austin and businessman George Herscu gave rise to concerns that public confidence in the jury system may have been undermined. In any event, they have prompted a review of the role of the jury in criminal trials in Queensland.

According to eminent English jurists, any proposals for changes to the jury system which result from this process of review should be considered cautiously. Blackstone warned over two centuries ago:

> "... inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."[5]

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2 N. Blake, *The Case for the Jury,* in The Jury Under Attack. (ed.) M. Findlay & P. Duff, Butterworths, 1988, p. 142

3 Lord Devlin in a speech delivered at Chicago University in 1960 QLRC WP p. 4

4 s. 17 Jury Act 1929-1990 Qld

5 Blackstone's Commentaries (1769), Book IV p. 344 referred to by Brennan J. in *Kingswell v. The Queen* (1985) 159 CLR 264 at 296

More recently, English judge Lord Devlin also advised reformers to hasten slowly:

> "Since no one really knows how the jury works or, indeed, can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming."[6]

Contemporary law reformers are less cautious. In 1979, the Queensland Law Reform Commission concluded that:

> "... it is time for uncritical veneration of the jury to end. Juries and other tribunals, including magistrates, ought to be opened up to more rigourous scrutiny. The interests of justice demand that the mystery that surrounds such institutions be finally swept away and that they be exposed to rational inquiry in which ancient shibboleths have no place."[7]

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6 P. Devlin, Trial by Jury Stephens & Funds, 1966, p. 57

7 Research and the Jury, a Paper published in Justices of the Peace 10 March 1979 cited by Queensland Law Reform Commission. *Working paper on Legislation to Review the Role of Juries in Criminal Trials;* QLRC WP 28, 1984, p. 4

3. THE ANCIENT ORIGINS OF THE JURY

The institution of the jury is deeply entrenched in Anglo-Australian history. The origins of the jury can be traced to Roman, Frankish, Saxon and Norman times.[8] The Magna Carta of 1215 enshrined the jury system in our common law by providing that:

> "No free man shall be seized, or imprisoned, or dispossessed or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, except by the legal judgment of his peers, or by the law of the land."

Although Australia's early European settlers brought the common law of England with them, they did not initially have the right to trial by jury.

In the first convict settlement, which had many of the characteristics of a brutal military dictatorship[9], criminal trials were presided over by the Deputy Judge Advocate. He sat with six naval or military officers nominated by the Governor.

However, by 1832, settlers in New South Wales accused of criminal offences had a modified right to a trial by jury. Accused persons who could demonstrate that any members of the military panel had a personal interest in their case could apply for a court order that the trial be heard by a jury of 12 civilian residents. These jurors were selected from a list of property owners.

By 1833, free settlers and convicts charged before the Supreme Court with criminal offences could request a civilian jury. In the lower courts, convicts were still tried summarily but free settlers were entitled to a jury. With the abolition of the military tribunal in 1838, all free settlers and freed convicts were entitled to be tried by a jury in the Supreme Court and the Courts of General and Quarter Sessions.[10]

By 1859, when Queensland separated from New South Wales, trial by jury was well established. The first general enactment concerning juries and their composition in Queensland was the *Jury Act of 1867*.[11] This statute was twice amended before being repealed and replaced by the *Jury Act of 1929*. This Act, as amended, is still the principal statute governing juries in Queensland.

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8 T. Plucknett, A Concise History of the Common Law, 5th ed. Butterworths, London, 1956 p. 106–137

9 J.M. Bennett *The Establishment of Jury Trial in New South Wales* (1959 – 1961) 3 Sydney Law Review, p. 436

10 3 Vic., No. 11

11 31 Vic in No. 34

4. THE GENIUS OF THE JURY

Although the dynamics of human decision making within the jury remain mysterious[12], the rationale for the jury system is clear.

The High Court of Australia recently reiterated that rationale in *Brown v The Queen*. Deane J. said that:[13]

> "... regardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representatives of the general community, at whose hands neither the powerful nor the weak should expect or fear special discriminatory treatment. The essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached."

In a lengthier analysis by the High Court in *Kingswell v The Queen*[14] it was said:

> "Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a "fair go" tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases." cf. Knittel and Seiler, "*The Merits of Trial by Jury*", Cambridge Law Journal, vol.30 (1972), pp. 320-321.
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> "The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's

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12 See Z. Bankowski *The Jury and Reality in* The Jury Under Attack op cit (see footnote 2), P.W. Sheehan *Some psychological aspects relevant to the jury* in The Jury op cit. (see footnote 1)

13 *Brown v The Queen* (1986) 160 CLR 171 at 202

14 (1985) 159 CLR 264 at 301–2

> deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob."

Most recently the High Court observed:

> "... the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters."[15]

15 *Doney v. The Queen* (1990) Vol. 65 ALJR 45 at 47

5. THE COMPOSITION AND SELECTION OF THE JURY PANEL

Few criminal law practitioners deny the obvious conscientiousness and care that juries of ordinary people bring to their difficult and often complex task. One legal commentator wrote:

> "... juries are not fools; they are the conscience of the community and a cross-section of it drawn by lot. They represent its sense of justice and its wisdom, they rarely get it wrong in the conviction of an innocent person. The jury system is healthy and the fact that the jury cannot be swayed by rhetoric alone indicates they deal with the real merits of the case."[16]

The jury's ability to make accurate and reliable findings of fact is often attributed to its generally diverse composition:

> "It is the mix of different persons with different backgrounds and psychological traits in the jury room that produces the desired results. There is both interaction among jurors and counteraction of their biases and prejudices."[17]

Ideally, such diversity brings a wealth of experience, a collective wisdom and the practical advantage of collective recall to bear on the issues under scrutiny:[18]

> "...among the twelve jurors there should be a cross-section of the community, certainly not usually accustomed to evaluating evidence, but more varied in experiences of life and of behaviour of people."[19]

In Queensland, as in other Australian states, citizens called to serve on jury panels are selected at random. This means of selection is designed to produce juries which will be not only socially and ethnically diverse, but truly representative of the community they serve.

Jurors in Queensland must be summoned in accordance with the law.[20] They must also be:

(a) resident in Queensland;[21]

(b) entitled to vote as an elector in the State election;[22] and

(c) be under seventy years of age.[23]

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16 W.D. Hosking QC *Jury Persuasion* in The Jury op cit (see footnote 1) p. 99

17 R. Janata, *The Pros and Cons of Jury Trials* 1976, 11, The Forum 590 at 595 – 596

18 Law Reform Commission of Canada *The Jury in Criminal Trials* working paper 27 1980 at p. 6: see also Law Society UK; *Another chance for the jury?* Evidence to the Roskill Committee on fraud trials. (1984) The Law Society's Gazette 3574.

19 Criminal Law and Penal Methods Reform Committee of South Australia, Court Procedure and Evidence further report 1975 at p. 84

20 s. 25 of the *Supreme Court Act of 1867* (Qld)

21 s. 6(1)(a) *Jury Act of 1929-1990* (Qld)

22 s. 6(1)(c) *Jury Act*

23 s. 6(1)(b) *Jury Act*

In theory, this would mean that all Queenslanders between 18 and 70 years of age were potential jury members. However, in practice, citizens with specific characteristics are disqualified or exempted from jury service, while others are excused by the courts. Consequently, juries are not always completely representative of the community from which they are chosen.

The names of potential jurors are recorded on jury rolls prepared by the Sheriff of Queensland for both the Supreme and District Courts.[24]

These jury rolls are created by initially listing all the people between 18 and 70 years of age who live within particular districts[25]; within a 16 kilometre radius of the Supreme Court in Brisbane and Cairns, and within a 10 kilometre radius of every other court house in Queensland.[26]

The Principal Electoral Officer then checks the electoral rolls to determine which of those people are eligible to serve as jurors and sends the list of names to the Sheriff.[27]

Specified numbers of names are randomly selected from the Principal Electoral Officer's list during a computer operated ballot process,[28] which ensures absolute impartiality by the Sheriff and his officers.

Approximately six weeks before the court sittings for which jurors will be required, questionnaires are posted to those whose names appear on the list.[29] These questionnaires are used to determine whether the recipients are disqualified or exempt from jury service.

Those who are neither disqualified nor exempt may be excused from service by the Sheriff on the grounds of ill health, family responsibility, economic hardship, business commitments, inadequate knowledge of the English language or for other good reasons.[30]

Finally, the names of the people who will comprise the jury panel are randomly selected by computer. The Sheriff prepares individual cards bearing the names of these potential jurors.[31] Less than a third will ultimately be sworn as jurors.

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24 QLRC WP 28 1984 op cit: (see footnote 7), pp. 22 – 23

25 QLRC ibid p. 22

26 These have been created for each of the respective towns of:
Brisbane, Bowen, Bundaberg, Cairns, Charleville, Charters Towers, Clermont, Cloncurry, Cunnamulla, Dalby, Gladstone, Goondiwindi, Gympie, Hughenden, Innisfail, Ipswich, Kingaroy, Longreach, Mackay, Maryborough, Mount Isa, Rockhampton, Roma, Toowoomba, Stanthorpe, Townsville and Warwick.

27 s. 12

28 s. 13

29 Ss. 24 and 24A

30 s. 26

31 s. 13

6. DISQUALIFICATIONS, EXEMPTIONS AND EXCUSALS

A large number of potential jurors in Queensland are disqualified, exempted or excused from service.[32]

Those disqualified from service include:

* any person who is not a natural-born or naturalised subject of Her Majesty;

* anyone convicted (unless he has received a free pardon) of an *indictable offence;*

* anyone who is an undischarged insolvent or bankrupt;

* anyone who is not able to read and write the English language;

* anyone who is of bad fame or repute.[33]

A person convicted of a crime is disqualified from jury service absolutely.

A person convicted of an indictable offence on indictment is disqualified from jury service for 10 years. If probation is granted, the disqualification period is reduced to five years.

A person convicted of an indictable offence summarily is disqualified from jury service for five years. If probation is granted, the disqualification period is reduced to two years.

The rationale for this disqualification is that a person convicted of criminal offences may be biased, presumably because s/he is a criminal, dishonest or resentful of authority. However, given the emphasis of modern penological theory on rehabilitation and recent legislation which provides that criminal records shall be expunged after a certain time, it may be that people who have served their sentence or paid their fine should not now have their right to serve on a jury taken away from them altogether. The disqualification from jury service of people who have committed only minor criminal offences which have resulted in non- custodial penalties may now be particularly harsh. In England people who have received a suspended sentence or been subject to a community service order are only disqualified for ten years. Those who have been sentenced to imprisonment for more than five years are disqualified for life.[34]

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32 by virtue of the provisions of the *Jury Act of 1929-1990.*

33 s. 7 *Jury Act* 1929–1990.

34 The Juries (Disqualification) Act 1984 (UK)

At present, people who are disqualified from jury service are identified in two ways. Firstly, potential jurors are sent a questionnaire by the Sheriff of Queensland and asked to indicate on it whether or not they have been convicted of offences. Secondly, a search of police records is made to see whether any of the potential jurors to be summoned have criminal records. The Queensland Police Service has a computer which can readily extract the criminal records of particular offenders. The Sheriff or his officers check the criminal histories supplied by the police to determine whether the persons concerned are disqualified or not.

Despite such checks, the Criminal Justice Commission heard evidence during its recent inquiry into alleged interference with jury panels that some members of the panels concerned had convictions for offences which should ordinarily have disqualified them. The Sheriff could not comment on this evidence.

The existence of flaws in the checking procedure raises the possibility of bias by jurors. Jurors who have been convicted of serious criminal offences, who have disdain for the authority of the law or who dishonestly swear to reach a verdict based solely on the evidence may taint their jury's finding. Despite this, the verdict of a jury is not vitiated because a juror is not qualified or is ineligible.[35]

In Queensland, a great number of people are exempted from jury service. They are:

* members of the Executive Council;

* members of Parliament;

* judges; members of the Land Court;

* ministers of religion; officers of the Salvation Army who are lawfully authorised to celebrate marriages; monks, nuns and other members under vows of any religious community which requires its members to be under vows and postulants for membership of such a community;

* barristers-at-law, solicitors, and conveyancers and their clerks;

* officers of His Majesty's navy or army or of the defence force of Australia on full pay;

* medical practitioners, dentists, pharmaceutical chemists, nurses, nursing aides and physiotherapists, all being duly registered or enroled and in actual practice and members of any Ambulance Transport Brigade within the meaning of the Ambulance Services Act 1967–1975;

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35 s. 73 *Jury Act 1977* (NSW); s. 6 *Juries Act 1967* (Vic); s. 9 *Jury Act 1929 - 90* (Qld); s. 15 *Juries Act 1927* (SA); s. 8 *Juries Act 1957* (WA); s. 56 *Jury Act 1899* (Tas); s. 18 *Juries Ordinance 1967* (ACT); s. 13 *Juries Act 1980* (NT).

* university professors and lecturers, registrars of universities, inspectors of schools, schoolmasters and school teachers actually employed as such, directors, principals, registrars and academic staff of colleges of advanced education, and principals, secretaries and instructional staff of rural training schools;

* permanent heads and any other persons who hold an office or a position in the public service of Queensland that is equal to or higher than such a permanent head;

* persons employed in the Department of Justice;

* commissioners, officers and employees of The Queensland Corrective Services Commission and persons appointed (otherwise than as volunteers) under the Corrective Services Act 1988;

* persons employed in the Police Department;

* masters and crews of vessels actually trading, and pilots duly licensed;

* mining managers and engine-drivers, all being actually employed as such;

* officers of Parliament, household officers and servants of the Governor, the Chairman and other members of The Totalisator Administration Board of Queensland, any officers of the Parliamentary Commission for Administrative Investigations;

* members of local authorities;

* commercial travellers actually employed as such, and journalists bona fide actually employed in court reporting, and buyers, managers, and other persons who by reason of their employment in a primary industry are frequently required to travel outside the relevant jury district to remote places;

* persons who are otherwise incapacitated by disease or infirmity;

* male persons between 65 and 70 years of age who have informed the sheriff, as prescribed by this Act, that they desire to be exempt from serving on any jury and whose exemption thus obtained continues in force as prescribed by this Act;

* aircraft pilots regularly employed as such on Australian aircraft used in a public aerial transport service;

* members of a Fire Brigade provided and maintained pursuant to Section 9 of the Fire Brigades Act 1964–2973;

* such other persons as are exempted from service on juries by the Governor in Council by Order in Council published in the Gazette.

In addition, Commonwealth law exempts the Governor General, members of the Federal Executive Council, Justices of the High Court and courts created by Parliament, senators, members of the House of Representatives, members of the Commonwealth Conciliation and Arbitration Commission, members of the Tariff Board, Commonwealth police officers and special Commonwealth police officers, members of the defence forces other than the Regular Army Reserve and the Citizens Forces, and members of the Regular Army Reserve or of the Citizens Force who are rendering continuous service.

Importantly, the *Jury Exemptions Act 1965 (Cwlth)* also exempts all Commonwealth employees from jury service. This is such an extraordinarily large cross section of the community that one commentator has observed that:

> "In any review of (jury) selection procedures, the *Jury Exemption Act* should be accorded a top priority".[36]

Potential jurors with the occupations listed above are exempted from service automatically by the Sheriffs in Queensland[37], South Australia[38], Tasmania, the Northern Territory[39], and the Australian Capital Territory.

However, in New South Wales, Victoria,[40] and Western Australia,[41] eligible people must claim their exemption. This allows those people who would otherwise be exempt to serve as jurors if they so desire. Should those in exempted occupations be given the option to serve in Queensland?

Of all the Australian States, only Queensland and Tasmania retain the discriminatory provision that a woman may write to the Sheriff at any time to inform him/her that she desires to be exempt from service on any jury.[42] Additionally, all female potential jurors in Queensland may apply to the court to be excused from jury service during a particular trial because of the issues to be tried or the nature of the evidence likely to be given.[43] Only senior males may seek such an exemption.[44] In South Australia, if the evidence to be given or the issues to be tried make it appropriate, the court may order that the jury consist of men or women only. Is it time to end such discrimination in Queensland?

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36 A. Freiberg, *Jury selections in trials of Commonwealth offences* in The Jury Under Attack; op cit (see footnote 2), p. 120

37 s. 28 (Qld)

38 ss. 12 and 13 and schedule 3 (SA)

39 s. 10 (e), 11 and schedule 7 (NT)

40 s. 4 (Vic) and schedules 2,3 and 4

41 s. 5 and 6 and schedule 2 (WA)

42 s. 8 (3)

43 s. 10 (2)

44 Jury Act Amendment Act 1983 (Qld)

In addition to those people who never become part of a jury panel because they are disqualified or exempted from service are those who are excused from such service by a court. Potential jurors may be excused if they can satisfy the trial judge that they have a good reason for such excusal.[45]

Many questions need to be considered in a review of the laws surrounding our jury system. Some not already outlined above are:

* Are too many people disqualified, exempted or excused from jury service?

* Do the wide categories of exempt people rob the selection process of its randomness and reduce the chance that the jurors who are eventually chosen will be representative of the community they serve?

* Are more intelligent, better educated people effectively excluded from jury service?

Some commentators believe so. One has suggested that:

> "The jury is not really representative of the nation as a whole. It is predominantly male, middle-aged, middle-minded, and middle-class."[46]

Of course, to be truly representative of the community, juries would need to contain numbers of men and women in equal proportion to their representation in the community, people of all ages, intellectual abilities and classes.

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45 s. 26(4) *Jury Act 1929-1990* (Qld)

46 P. Devlin, *op cit.* 1966, p. 20

7. THE FORMATION OF THE JURY

7.1 How Jurors are Chosen

Once the members of a jury panel attend the court on the required day, a jury of 12 is chosen from their number . Reserve jurors may also be sworn. If some jurors are discharged because of illness or other incapacity during a trial, the jury can continue to hear evidence as long as its numbers do not drop below 10.

By law, jury panels must contain at least 36 members for each accused person to be tried.[47] However, the Criminal Justice Commission received evidence during its hearing into alleged jury interference that some jury panels comprised as few as 28 prospective jurors.[48] In trials where accused people are tried simultaneously with others, the jury panel can be quite large.

Both the prosecution and defence counsel participate in the selection of the jury by scrutinising both the panel as a whole and the individuals who comprise the panel. Counsel may challenge either the right to serve of the whole panel (a challenge to the array) or individual panellists (challenges to the polls).

In a challenge to the array, the accused person may object to the whole panel. However, such a challenge must be issued before any juror is sworn for the trial.

There are two types of challenges to the polls: challenges for cause and peremptory challenges. In peremptory challenges, prosecuting counsel may ask jurors to stand by while defence counsel may challenge prospective jurors, usually as they walk to the front of the court in answer to their name. Any member of the panel who is objected to by the parties is not likely to be sworn as a juror.

Pursuant to the provisions of s. 610 of the *Criminal Code (Qld)*, prosecution or defence counsel may challenge a particular juror for cause on the grounds that:

* the juror is not qualified by law to act as a juror; or

* the juror is not indifferent as between the Crown and the accused person.

When a challenge for cause is issued, two panellists are chosen and sworn to determine the issue.

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47 s. 17 *Jury Act 1929-1990* (Qld)

48 T. 23 ("T" refers to transcript of evidence given at the Criminal Justice Commission hearing into jury interference).

Although a challenge for cause may be made at any time, it is usually made when a juror is called.

Challenges to the array and for cause are now rare features of trials in Queensland. Challenges for cause are rarely made because the short time between the publication of the panellists' names and the commencement of the trial rarely allows time for the collection of sufficient information on which to build a case for bias. Such challenges may also have been largely discontinued because it is now possible to change a trial's venue when the notoriety of the alleged offence may mitigate against a fair trial in a particular district. For example, a change in a trial's venue could now be ordered when an alleged offence had occurred in a small country town, where the parties were well known. In such a case, the whole community may have already formed strong views on the guilt or innocence of the accused.

Whilst this may be an appropriate solution in the case of a notorious offence committed in a small country town, the change of venue cannot overcome the bias in cases where the publicity and notoriety has extended state wide. Most people in Queensland will remember the Whiskey-Au-Go-Go nightclub fire which was the subject of a great deal of publicity throughout the state. It is unlikely that a change of venue, even if it were practicable, would have resulted in finding a jury who had not been exposed to some of the publicity surrounding the case.

Perhaps challenges for cause could be used more extensively in Queensland to ensure an indifferent jury in cases where the accused had been subjected to public notoriety or ridicule. In the United States, challenges for cause are commonplace, if not standard, features of criminal trials. The trial of Oliver North which resulted from the so-called Irangate Scandal featured many such challenges. Finally, a jury whose members claimed not to have known of the scandal despite the saturation media coverage of it was assembled and sworn for that trial.

While it is recognised that the United States system involves a lengthy process of questioning of potential jurors, perhaps some sort of modified system could be considered for Queensland in exceptional cases. For example, in a case of great notoriety such as the Whiskey-Au-Go-Go counsel for the defence may not have specific evidence of bias on the part of any one juror but the attendant publicity may make it unlikely that the jury have not heard something about the case. In such a case, upon the request of counsel, the judge in his discretion could question jurors in order to ascertain whether any one of them is biased or affected by such notoriety or whether there is in fact any basis for a challenge. This questioning would not be as time consuming as the US process, because it is the judge who is performing the function.

While a challenge for cause is specifically designed to eliminate jurors known to be biased, a peremptory challenge is used to eliminate jurors who may be merely suspected of bias.

Queensland has a unique system of peremptory challenges. Both sides initially have the opportunity to use such challenges against all members of the jury panel without restriction. If a jury is not sworn on the first call, then the number of challenges is restricted.

In Queensland, the number of peremptory challenges varies according to the offence. A person accused of treason is entitled to 23 peremptory challenges.[49] Those accused of murder are allowed 14 peremptory challenges.[50] For all other offences, the accused has 8 peremptory challenges.[51] The numbers of peremptory challenges in other jurisdictions vary, from 20[52] to 12[53] to eight[54] to six[55] to three[56].

The prosecution can ask equivalent numbers of panellists to stand by.[57]

The mode of choosing and challenging jurors is regulated in part by the Jury Act[58] and by long standing practice. This practice was outlined by Chief Justice Cooper in 1907:[59]

> "The names of the jurors summonsed are put into a box and are taken out therefrom by chance. As the names are called the prisoner may challenge any number he wishes, and the Crown Prosecutor may order any of those called to stand aside. It might happen that a jury is obtained on the first calling of the names. Very frequently, however, this is not done and in that case the names are called over again in the same order as they were originally drawn from the box, and the prisoner is then confined to his proper number of peremptory challenges which is never less than twelve; and the Crown has still the right to stand aside those jurors not indifferent on the matter. If, on the second calling of the jurors, twelve jurymen are not empaneled, the names of the jurors are called again in the same order, and then it can be seen whether a jury can be formed or not. The trial must take place at that session, and the jury must be formed; and if it is seen that a jury cannot be got together in consequence of the

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49 s. 35 (2) *Jury Act 1929* (Qld)

50 s. 35 (3) *Jury Act 1929* (Qld)

51 s. 35 (3) *Jury Act 1929* (Qld)

52 "Murder" (NSW s. 42 *Jury Act 1977(NSW));* but now reduced to three; "Capital offences" *(now abolished)* ACT s. 34 (2) (a). *Juries Ordinance 1967 (ACT)*

53 "Capital Offences", Northern Territory, s. 44 *Juries Act 1980 (NT)*

54 "Other offences", Victoria s. 34(1) *Juries Act 1967 (Vic);* NSW s. 42 *Jury Act 1977 (NSW);* but now reduced to three; Queensland s. 35(3) *Jury Act 1929 (Qld);* Western Australia s. 38 (1) *Juries Act 1957 (Western Australia);* ACT s. 34 (2)(b) *Juries Ordinance 1967 (ACT)*

55 "Any crime" Tasmania s. 54 one plus one challenge in respect of a reserve juror, *Jury Act 1899* (Tas); "other offences", Northern Territory s. 44 *Juries Act 1980 (NT);* where two or more offenders charged, Western Australia, s. 38(1) *Juries Act 1957 (WA)*

56 "Any offence", South Australia s. 61 *Jurors Act 1927* (SA), and now for all offences in New South Wales; s. 42 *Jury Act 1977-1990 (NSW)*

57 s. 32 *Jury Act 1929*

58 s. 32

59 *R v. Johnstone [1907] St. Reps Qld 155*

> objections by the Crown Prosecutor, he must eventually be called upon to show cause for his challenges."[60]

Opponents of this practice argue that:

> "... there seems no logical reason why the present Queensland practice of the double opportunity to challenge should be persisted with. It can only waste time and be a possible cause of unnecessary affront to members of the jury panel if they are challenged or stood aside in considerable numbers."[61]

Such opponents believe the existence of the unlimited right to challenge practically compels counsel to make use of it, whether such use is warranted or not, since the failure of one party to do so would enable the other to select all 12 jurors.[62]

Another argument against such a large number of challenges is that their use causes the jurors who are eventually chosen to be less representative of the population than those who would have been selected if such a number of challenges was not allowed:

> "The object of the process of jury selection should be to pick twelve people who can be fair. It should not be a tactical manoeuvre by which each side tries to secure the twelve most sympathetic jurors from their particular point of view. The number of challenges available to the parties determines the extent to which they can mould the jury and either exclude important classes of the population ... or cause them to be disproportionately represented."[63]

Conversely, in practice, the number of challenges normally made by counsel at the beginning of a trial usually takes no more than 10 or 15 minutes. There is no evidence to suggest that prospective jurors suffer any indignity when they are challenged. Indeed, despite the right of counsel to make unlimited challenges, juries are often empanelled before the name of every panellist is even called.

In determining whether the unlimited right of challenge on the first call of the panel is still warranted in Queensland, it is necessary to decide whether its abolition would seriously impinge on the rights of an accused? Further, would a reduction in the number of peremptory challenges allowed cause counsel to revert to the time-consuming and costly challenge for cause procedure?

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60 per Cooper CJ at 160

61 QLRC WP28 1984, op cit. (see footnote 7), p. 127

62 Evidence of Mr D. Sturgess QC to Criminal Justice Commission; Ex 129 ("Ex" refers to an exhibit in the C.J.C's inquiry into alleged interference).

63 New South Wales Law Reform Commission, *The Jury in a Criminal Trial, LRC 48*, 1986, para. 4.61

7.2 The Duties of Counsel

Theoretically, a prosecutor must exercise the right of peremptory challenge in a distinctly different way from a defence counsel:

> "Prosecutors act in the public interest. Defence lawyers care, first and foremost, about the accused. Generally speaking, it will be appropriate for those on the prosecution side to exercise more restraint in jury selection than is incumbent upon defence lawyers."[64]

In practice, however, prosecutors have been accused of using their right to peremptory challenge to mould a jury which was likely to be sympathetic to their case. They have been accused of challenging cheaply-dressed people with working class addresses and unskilled occupations more often than those who do not exhibit such characteristics. Evidence from the Queensland Council for Civil Liberties to the Criminal Justice Commission's hearing into allegations of jury interference sought to show that such an approach produced a prosecution-minded jury simply because it tended to result in the selection of people who were pre-disposed to the prosecution view.[65] This was said to offend against public policy, which demands that the prosecution should fairly and objectively present the evidence and not strive to secure a conviction at all costs.[66]

Prosecutors with the office of the Federal Director of Public Prosecutions, who deal with variations in the practices and procedures of all Australian jurisdictions, are issued with guidelines on how to exercise their right to challenge jurors:[67]

> "The function of the prosecutor in the selection process is to ensure, as far as possible, that the jury selected is impartial, balanced and generally representative of the community. The extent to which he or she can do so is dependent on the information available, the number of potential jurors who may be challenged, or stood aside, and the number of people on the jury panel. Generally the prosecutor's function can only be performed imperfectly.
>
> It is not the function of the prosecutor to seek to achieve a jury that will favour the prosecution. The primary duty of the prosecutor, as at all stages of the prosecution process, is to be fair."

In light of the evidence received by the Commission from the Queensland Council for Civil Liberties, such an approach may not be followed by all prosecutors in Queensland.

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64 Federal D.P.P. guidelines.

65 QCCCL President, T. O'Gorman: Radio 4QR 17 December 1990; Exhibit 133

66 T. O'Gorman, Radio 4QR 17 December 1990

67 Guidelines of Federal Director of Prosecution for assistance of prosecution lawyers on jury selection. 33/1988 p. 11

The guidelines also provide that:

> "The decision whether to challenge, or stand aside, a potential juror depends on the professional judgment of the individual prosecutor.
>
> If a prosecutor has information concerning a potential juror which is not available to the defence and which gives reasonable grounds for believing that the potential juror may unduly favour the prosecution, he or she should either challenge, or stand aside, the potential juror or make the relevant information available to the defence. (Note that there is no corresponding obligation on the defence).
>
> No potential juror should be challenged, or stood aside, on grounds of sex, race, religion or, unless it has a bearing on fitness for jury service, age."

Notwithstanding their duty to try to ensure the selection of a representative, impartial and balanced panel, prosecutors are further advised that:

> "Any *previous conviction(s)* recorded against a potential juror, although not such as to disqualify that person from participation as a juror, may give rise to a reasonable apprehension that the person might not be an indifferent juror in the trial of a particular case. ... it is not inconsistent with the ideals of a representative jury that is randomly selected for the prosecution to have regard to information provided to it concerning any non-disqualifying conviction(s) recorded against a potential juror in assessing the suitability of that person to try a particular case."
>
> "A proper exercise of the discretion to challenge, or stand aside, a potential juror on account of information disclosing non-disqualifying conviction(s) recorded against that person requires that the suitability of that person as a juror be assessed having regard to the information provided in the light of the facts of the matter about to be tried. Accordingly, a prosecutor would not be justified in exercising his or her rights where the information provided is merely to the effect that the potential juror has been previously convicted of some offence, but no details are provided setting out the nature of that conviction."

One legal commentator believes that prosecutors may reject panellists with beards, leather jackets, or worse still, no ties.[68]

On the other hand, no defence counsel would want a bank manager or bank officer in a case involving armed holdup of a bank. The wife of a police officer would invariably be challenged. A shopkeeper would probably be challenged by the defence in a shop lifting case or an employer in a case of stealing by an employee.

However, in the absence of any biographical details, defence counsel must rely on first impressions and instinct as a basis for the peremptory challenge. Apart from the names, addresses and occupations of panellists, counsel have only the information they can glean in a few seconds as they watch potential jurors walk the length of

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68 W. D. Hosking QC; op cit. (see footnote 1) p. 97

the court room after their names are called. Defence counsel may challenge potential jurors for such things as RSL badges or expensive briefcases.[69]

In centres with large populations, knowledge about panel members is often restricted to the information on the jury list. However in country centres, where the proclivities of panellists are more likely to be known, counsel, instructing solicitors and clients often benefit from extensive discussions about the choice of jurors.

The challenge is used as much to select jurors whom counsel believe will understand the case to be put and to whom they can comfortably speak as it is to eliminate persons suspected of prejudice or to empanel people who may be favourably predisposed to the accused.

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69 W. D. Hosking QC; ibid.

8. THE PUBLICATION OF THE JURY LIST

Before exercising their right to challenge a member of the panel, prosecutors and defence counsel may refer to the jury list drawn up and made available to them by the Sheriff.

The list contains the full names, occupations, addresses, and allocated number of the prospective jurors.

Any member of the public may purchase this list from the court's Registry. Therefore, the identity of prospective jurors may be widely known before a trial begins.

The publication of such a list appears inconsistent with the right of a juror to remain anonymous. Such anonymity may be desirable for reasons of security or a more general wish for privacy. Other Australian states prohibit at least the publication, if not the disclosure, of jurors' names both during the trial and afterwards.[70]

In New South Wales, the jury panel list cannot be inspected or made available before or during the trial unless the Court or the Coroner otherwise orders.[71] Only the presiding Judge and the Sheriff have access to the list. The name and number of each juror is called only once. Thereafter, jurors are referred to by number only.

In Victoria, only the police receive a copy of the jury panel list,[72] except in cases of treason where the list must be provided to the accused 10 days before arraignment.[73] Although the jury list is produced to the court, counsel are not given a copy.

In South Australia, the jury panel list is handed to counsel immediately before the trial begins and collected as soon as the jury is empanelled.

In Western Australia, a copy of the jury panel list is handed to counsel a few days before the trial. Counsel must undertake to return the list.

In Tasmania, a copy of the panel list is available only two days before the precept is returnable.[74] Copies are supplied to counsel and no attempt is made to retrieve them.

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70 Michael Chesterman in *A Reformer's View of Jury Secrecy* in The Jury, op cit. (see footnote 1) p. 129 referring to s. 68 *Jury Act 1977 (NSW); s. 69 Juries Act 1967 (Vic); s. 57 Juries Act 1957 9 (WA)*

71 s. 40 *Jury Act 1977 NSW R v. Cripps [1885] 1 WN NSW 112; R v. Baum (1927) 44 WN NSW (136)*

72 *Juries Act 1967*, s. 21

73 s. 22

74 *Jury Act 1889 (Tas)* s. 30

In the Australian Capital Territory, the prosecution and defence may inspect or obtain a copy of the panel list only on the day of the trial. However, one may be made available at another time by leave of the judge.[75]

In the Northern Territory, the accused person is given a copy of the list on application two days before trial.

One attempt to protect the privacy of prospective jurors in Queensland was made by section 23 of the *Jury Act*.

This section prohibits notice of the day or time when the Sheriff draws the names of prospective jurors (s. 23(1)(a)) or when the Sheriff will proceed to compile a panel of jurors intended to be summoned (s. 23(1)(b)).

The section also prohibits the publication of any information concerning the names or their order on a prospective jury list (s. 23(1)(b)).

Notwithstanding these restrictions, the *Jury Act* provides for the publication of the panel list "in some conspicuous place in the court house where the jurors summoned are thereby required to appear" (s. 23(2)). Indeed, a copy of the list is available from the Registry for a prescribed fee.

Despite this requirement, the present practice of the Sheriff is not to publish the list of potential jurors' names in the precincts of the court. Instead, the list is published on a notice board in the Sheriff's office.[76] The Criminal Justice Commission supports this approach but recognises that it may require some immediate amendment to s. 23(2) of the *Jury Act*.

The Acting Sheriff for Queensland told the Commission he believed the list should be handed to counsel in the court-room on the first morning of the trial, but not otherwise published. He believed the list should be returned to the Sheriff's Office once the jury was empanelled.[77]

Some panel lists have been retained in solicitors' files. These files have been obtained by convicted persons who have improperly used the lists to contact jurors; in one instance, by sending Christmas cards. The Acting Sheriff said a jailed prisoner had also telephoned and harassed a juror who was on his trial.[78]

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75 *Jury Ordinances 1967 (ACT)* s. 29 (1) and (2)

76 T. 13

77 T. 20-21

78 T. 21

The Queensland Sheriff told the 1989 Sheriffs' Conference that:

> "Perhaps this is an area that should be looked at with a view to tightening security. It would possibly give jurors a greater sense of well-being if they were aware that their names, addresses and occupations are not being made available for public scrutiny by any person who enters the Sheriff's Office."[79]

In its paper *Contempt and the Media,*[80] the Australian Law Reform Commission recommended controlling the disclosure of jury deliberations. The Commission also said that the identity of jurors for a particular trial should not be published or disclosed except by jurors, who could only identify themselves.

While the issue of the publication of the panel list is important, the matter must be considered in perspective. Most accused in Queensland are represented by counsel for, or briefed by, the Public Defender. These counsel do in fact receive the panel list only on the morning of the trial. Owing to a paucity of resources, low staffing levels, and a high volume of work, the Office of the Public Defender makes no investigations into the backgrounds of individual jurors. The only extra information provided to counsel is written on the list of a panel which has already had juries selected from it. In those cases, the previous verdicts of the juries of which individual panellists were members are frequently recorded. Accused persons are shown the list in an effort to determine whether any juror is personally known. Apart from a brief discussion on the morning of the trial, no great study is made of the jury list.

In Queensland, prosecution counsel are also usually supplied with jury lists on the morning of the trial. The prosecution's list always notes any convictions, including summary and traffic offences, recorded against a member of the panel. The list may be shown to the complainant or other important witnesses to determine whether they know anything about any person on it and, if so, what.[81]

Should the practice in Queensland be changed in any way? If so what measures should be introduced?

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79 Exhibit 78

80 1986, ALRC DP26, para 105-11,

81 Exhibit 129

9. JURY VETTING

Jury vetting is checking on potential jurors before a trial. Both prosecutors and defence counsel do it so they can exercise a more informed right of challenge and thereby help select a jury which may be disposed to their case.[82]

Jury vetting is not unlawful or improper. However, it can be a serious invasion of privacy. Also, there is a risk that prospective jurors may be influenced or intimidated if they are somehow alerted to the inquiries made about them. On the other hand, prosecution and defence counsel are *entitled* to exclude persons who may be biased, prejudiced, perverse or even corrupt.

Jury vetting is a private process. Is it therefore contrary to the requirements of openness and accountability in criminal trials?

Accusations of jury vetting by the prosecution often arise because of the disqualification provisions of the *Jury Act*, which are designed to eliminate people with criminal convictions and people of bad fame and repute,[83] and because police provide information about prospective jurors to the Sheriff.

The Sheriff in Queensland, as in most Australian jurisdictions, has power to call upon the police to assist him in selecting duly qualified jurors.

In Victoria the Chief Commissioner of Police receives a copy of the panel list, which is forwarded to him to make "such inquiries as he sees fit as to whether a person is disqualified under s. 4 from serving as a juror".[84]

The Victorian Police Manual[85] outlines the police procedure for checking whether potential jurors are disqualified. The manual appears to go beyond the statutory requirement and sets out procedures for vetting "unsuitable jurors".[86] A check for previous convictions is carried out at the information bureau record section. In addition, "special circumstances" procedures for dealing with "persons adversely known to the police" are set out. The lists can be sent to the local police station in the jury district for "close" checking. "Persons with known antagonism to police or those associating with undesirable persons" are listed as "unsuitable jurors". In addition to supplying the list to the sheriff, the police also send the prosecutor details of any person considered unsuitable for jury service.

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82 see R.J. East *Jury Picking: A thing of the past;* MLR 1985 pp. 519–538

83 s. 7 Jury Act 1929-1990 (Qld)

84 A. Freiberg, op cit. (see footnote 2), p. 117

85 Chapter 31

86 A. Freiberg, supra, p. 119

In Tasmania, the Sheriff may request the Commissioner of Police to furnish him with whatever information is available for the purposes of determining disqualification.[87] The police note the information against the names of persons on the list, which is then made available to prosecutors before the trial.

In Western Australia the police are required to render assistance in the compilation of the jury list.[88]

In the Australian Capital Territory, a member of the Australian Federal Police is empowered to make "such inquiries as he thinks fit" to determine whether a person is disqualified. He may only pass this information to the Sheriff, who is expressly prohibited from passing it to anyone else.[89]

Members of the Queensland Police Service have a duty to render every assistance in the making of the panel lists and to undertake any inquiries that the Sheriff or the Principal Electoral Officer may require in the administration of the *Jury Act*. [90]

The Sheriff and the Principal Electoral Officer give the Queensland Police Service any information in their possession which they consider will assist the police in their inquiries.[91]

As a result of their inquiries, the police gather information about the criminal histories of members of the panel. If a prospective juror's criminal convictions are not serious enough to disqualify him or her, then a note of the conviction may be made on the panel list supplied to the prosecuting counsel.

Potential jurors may also be disqualified if they are people "of bad fame or repute".[92] Police supply information to the Sheriff about the "bad fame and repute" of any prospective juror.

"Bad fame and repute" is a dangerously vague description which may be based on a subjective assessment. Such a system of classifying people is open for abuse. Indeed, suspicion naturally arises that the information furnished by the police to the Sheriff may not be impartial, since police are in the business of prosecuting offenders. Commentators have remarked that "such broad and indefinite terms are out of place in the modern criminal justice system and ought not to be incorporated by default into a Commonwealth system".[93]

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87 *Jury Act 1899 (Tas) (s. 9)1*

88 Juries Act 1957 (W.A. s. 17)

89 *Juries Ordinance 1967* (ACT s. 24(4) and (5)

90 s. 14(1) *Jury Act 1929-1990 (Qld)*

91 s. 14(2)

92 s. 7(e)

93 A. Freiberg, op cit. (see footnote 2), p. 119

In 1959,[94] an accused person sought to challenge the array because the Sheriff had in effect abrogated his duty of selecting jurors by delegating his power to the police. He argued that the Sheriff went further than merely obtaining the assistance of the police as authorised by s. 14 of the *Jury Act* and had, in effect, delegated his powers to the police and accepted their decisions as final without knowledge of the facts concerning any person involved. The result was the police settled the jury book or list. The Sheriff had adopted a practice followed in North Queensland for at least the previous 30 years. He had received an electoral roll from the Principal Electoral Registrar marked in accordance with s. 13 of the *Jury Act*. He forwarded this marked roll to the police showing the names of those apparently eligible to serve on the jury. Following their own inquiries, the police marked off the names of such persons they thought should not act as jurors and returned the roll to the Sheriff. The Sheriff accepted the police markings and did not ask why certain people had been struck off.[95] In answer to questions by counsel, the Sheriff agreed that it would appear to be the case that the police had the right of veto. The roll was returned with the names of the persons not eligible for jury service marked; such people may have been exempt, or have left the district, or be not of good repute. The Sheriff told counsel he did not ask the police to make specific investigations about any person marked on the roll. The accused argued that since the police were concerned with the prosecution of offenders, their apparent right of veto must arouse suspicion of partiality.
It was said in that case:

> "No one could assist the court in the reason why in the list of disqualifications in section 7(e), the words used are 'of bad fame or repute'. In my opinion the words 'bad fame or repute' must refer to the general reputation. The police are not at liberty to mark adversely the name of any person merely because of the dislike or suspicion entertained of him by individual members of the Police Force."[96]

Until late 1970, police in Queensland would visit the neighbourhood of each prospective juror and ask neighbours about the panellist's character and background.[97] Such questioning by a police officer could leave the panellist concerned with the impression that he or she would incur police displeasure if he or she eventually helped to acquit an accused person.[98] This practice of police questioning ceased when the police made inquiries at the home of a prospective juror.

Nevertheless, the former Director of Prosecutions advised the Commission that it was still common for prosecutors outside Brisbane to receive police briefings about prospective jurors' characters and backgrounds.[99]

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94 *R v. Ilic (1959) Qd.R 228*
95 at 229 -30.
96 at 233
97 Exhibit 129
98 Exhibit 129
99 Exhibit 129

During the late 1970s and early 1980s, police marked the names of panellists known adversely to the now disbanded Special Branch of the Queensland Police. These lists were then supplied to prosecutors. However, following protests by Crown prosecutors, this practice ceased.[100]

In the United Kingdom, the Attorney General has approved of the checks conducted by prosecutors:

> "I consider that it is in the public interest that the prosecution should continue to make use of its right to make inquiries about a jury panel with a view to exercising its right to stand by a potential juror."[101]

Guidelines amended in the United Kingdom in 1986 provide that:

> "There are, however certain exceptional types of cases of public importance for which the provisions as to majority verdicts and the disqualification of jurors may not be sufficient to ensure the proper administration of justice. In such cases it is in the interests both of justice and the public that there should be further safeguards against the possibility of bias and in such cases checks which go beyond the investigation of criminal records may be necessary.
>
> These classes of case may be defined broadly as (a) cases in which national security is involved and part of the evidence is likely to be heard in camera, and (b) terrorist cases.
>
> The particular aspects of these cases which may make it desirable to seek extra precautions are (a) in security cases a danger that a juror, either voluntarily or under pressure, may make an improper use of evidence which, because of its sensitivity, has been given in camera, (b) in both security and terrorist cases the danger that a juror's political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community to reflect the extreme views of sectarian interest or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors."

In the United Kingdom, Special Branch checks must be made only on the application of the Director of Public Prosecutions and cannot be made without the approval of the Attorney-General.

Controversy about jury vetting by police is not new. It has been the subject of much debate over the last 20 years in the United Kingdom, particularly during the so-called security trials.

It was argued that these security checks were necessary to eliminate prospective jurors with extreme political beliefs and those who might later divulge sensitive information which was heard by the court in camera.[102]

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100 Exhibit 132 - Evidence of Mr A. Glynn

101 [1980] All ER 785 at 786

102 P. Duff and M. Findlay, *The Politics of jury reform* in The Jury Under Attack, op cit. (see footnote 2) p. 222

Before a trial of IRA bomb suspects in the United Kingdom in 1972, potential jurors were stood down as a result of information supplied by the Special Branch. Checks were also made on the records of potential jurors in cases of terrorism, official secrets, serious gang crimes and international fraud. Before an anarchy trial of 1979, 93 potential jurors were investigated.

The civil and criminal divisions of the English Court of Appeal have stated two diametrically opposed views on the appropriateness of jury vetting. In 1980, Lord Justice Denning said:[103]

> "To my mind it is unconstitutional for the police authorities to engage in 'jury vetting'. So long as a 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 records 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. Is he thereby liable to have his past record raked up against him and presented on a plate to prosecuting and defending lawyers who may use it to keep him out of the jury, and, who knows, it may become known to his neighbours and those about him?
>
> Furthermore, as a matter of practical politics, even if jury vetting were allowed, the chances are 1000 to one against any juror being found unsuitable; and, if he should be, the chances of him being on any particular jury of twelve, so as to influence the result, are minimal, especially in these days of majority verdicts.
>
> Counsel for the respondents this morning reminded us that a trial judge often himself makes a few inquiries of a juryman. I agree. I've done it myself. If a juryman, when he comes to take the oath, cannot read the words on the card, or cannot hear what is being said, I've invited him to stand down. That is perfectly legitimate. The judge is in charge of the trial, and is there to see fair play. But that is altogether different from anything in the nature of jury vetting."

Lord Justice Shaw stated in a separate judgement that:[104]

> "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 user of such special knowledge would be an abuse as being contrary to the spirit and principle 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

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103 *R v. Sheffield Crown Court; ex parte Brownlow* [1980] 71 Cr App R 19 at 25

104 ibid, p. 28

> would it be justified in the interests of individual persons accused on indictment. Such persons could not be precluded or prevented from pursuing their own inquiries, as to the antecedents 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:[105]

> "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."

Lord Justice Lawton, in giving the judgement of the court in *R v. Mason*,[106] declined to follow the view of the court in Brownlow's case. He said:

> "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.* [107] In that case the propriety of a practice, whereby the Chief Commissioner of Police gave the Director of Public Prosecutions details of prospective jurors' criminal histories, was examined. 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 as 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

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105 ibid, p. 29

106 *R v. Mason* [1980] 71 Cr. App R 157 at 164

107 [1988] VR 937 at 946

> 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."...
>
> "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 court in the case of *R v. Robinson*[108] held:

> "In our opinion, the long established practice of supplying the Director of Public Prosecutions and Prosecuting Counsel with information about potential jurors' convictions is neither unlawful or 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, Mr Justice Nathan said:[109]

> "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 principles of random jury selection. The customary procedure is not only unfair to the community, and not just those members of it who are inappropriately rejected for jury service."

Recognizing that the material obtained by the police was for the prosecutors' benefit, and that defence counsel had no real access to it, the Attorney-General in the United Kingdom stated in his guidelines for jury checks that:

> "I have recognised that the defence may have a particular reason to wish to have the panel checked for disqualified persons or to seek assistance in obtaining information relative to its right of peremptory challenge but has no access to the information available to the Crown. It is also my view that the courts have no jurisdiction to order the police to reveal information on their records relating to jurors. Accordingly, in cases which would fall within my guidelines I will be prepared to consider a request made by defence counsel through the Director for assistance in obtaining information. I understand that chief constables, on the general recommendation of their association will be prepared to consider a request relating to checks on criminal records if approved by the Director. In both cases the results of any check undertaken will be sent to the Director of Public Prosecutions who will treat them in accordance with my guidelines. The intention of this proposal is merely to assist the defence and not in any way to restrict the right of the defendant to inspect the panel and to take such action as is lawful."[110]

Prosecutors in Queensland also benefit from the advance notice given to the police of the identities of panellists. Police receive such advance notice because they also perform criminal history checks for the Sheriff. Therefore, when they receive requests from prosecutors for similar checks, the police work is already done and prosecutors receive such information almost immediately. Should the results of the work done by police for the Sheriff also be available for the prosecution? Should the police working for the

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108 (1988) 38A Crim R.1

109 ibid. p. 19

110 Statement by the Attorney-General [1980] 3 All ER 785 at 786

Sheriff be independent from the police working for the prosecution or would this create unnecessary duplication? Alternatively, should the defence be supplied with the same information that the police supply to the prosecution?

Mr Des Sturgess QC told the Criminal Justice Commission that:

> "Extensive challenging and standing by is therefore a feature of the Queensland criminal trial which results in the Queensland practitioner being more concerned to obtain information regarding the persons on the jury list than his counterpart in other jurisdictions where the process of selection is more random."[111]

However, as already explained above, defence counsel usually have little opportunity for jury vetting in criminal trials in Queensland. Such practices appear to be the preserve of a small minority of wealthy accused who have the resources to pay their legal advisers to do it. In such cases, defence counsel may make inquiries about jurors to try and determine their predispositions. Such inquiries are necessary because defence counsel, no matter how rich their clients, do not have access to a data bank of information on prospective jurors in the way that prosecutors, who utilise the resources of the police, do. Accordingly, they have to make original inquiries for themselves, except perhaps in country towns where most people know each other and some solicitors have been known to keep records of those who have been on juries and the verdicts they returned.[112]

According to the experienced Mr Sturgess QC, the extent of the defence's investigations may vary according to the nature of the case, the public's interest in it, the position in the community of the accused and the accused's financial capacity to pay.[113] Mr Sturgess QC said he believed such vetting was a necessary part of the criminal trial process and, in certain circumstances, those who did not engage in it were neglectful of their duties.[114]

In many cases, defence counsel may glean information from the electoral rolls, which show the number of adult family members living at the same premises and their ages and occupations. This information can be of invaluable assistance. For example, the electoral rolls would show counsel for a person accused of rape which prospective jurors had daughters the same age as the victim. Defence counsel can also ascertain from the rolls whether prospective jurors are related to and/or living with a police officer.

Mr Sturgess told the Criminal Justice Commission that, upon his recommendation, private investigation agents had been employed to check panel lists in cases where bias against the accused by a significant section of the community was suspected. Generally, the agent was required to perform

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111 Exhibit 129

112 Exhibit 129

113 Exhibit 129; *Johns v R.* (1979) 141 CLR 409

114 Exhibit 129

electoral searches, interview persons who might know prospective jurors, and inspect the neighbourhood of each prospective juror and report about the circumstances of his or her home so far as that could be discovered from the street.

There is no rule of law that directly prohibits an approach to a prospective juror in order to ascertain whether he or she is impartial. Should such a law be introduced?

While such an approach would be objectionable in all but the most unusual circumstances, Mr Sturgess QC considered that there may be cases where an approach to a prospective juror may be not only justified but highly desirable. He recalled that during his involvement in a much publicised trial he received information that a particular juror was publicly bragging in a hotel that he was not going to put up with any lawyers' tricks. The matter was raised with the prosecutor and the judge and the juror was ultimately discharged. Mr Sturgess said that if a juror made public statements about his attitude to an accused, for example, that he or she would never acquit, then he would not hesitate to send a private investigator with a tape recorder to strike up a conversation with that juror so he or she could be challenged for cause.[115]

However, if the practice of approaching jurors became widespread or was sanctioned by counsel, Mr Sturgess warned that:

> "... it could be guaranteed it would not be long before one of them would be found to be overstepping the proper bounds."[116]

An approach could easily be misinterpreted or misunderstood:

> "A direct approach might cause prejudice against the accused where none had previously existed or more prejudice than had previously existed. It is not possible to dispose of [this] reason by arguing it would not be difficult to construct a subterfuge to conceal the real reason for the approach. Lawyers are not justified in telling lies because it gets their work done."[117]

Perhaps the spread of such a practice, with all its inherent risks for the system of impartial trial by jury, could be averted if potential jurors were advised to report any such approaches made to them. Would such advice ensure that the court was alerted at an early stage to any conduct which may jeopardise a trial? Would it warn counsel to be careful about the type of inquiries they made of jurors? Perhaps any direct approach to a juror or a prospective juror, or their relatives, neighbours, employers or friends should be made an offence?

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115 T. 710

116 Exhibit 129

117 Exhibit 129 Mr Sturgess QC

10. SECRECY OF THE JURY'S DELIBERATIONS AND PROHIBITIONS AGAINST DISCLOSURE

In the past, a perceived need for the deliberations of jurors to remain secret has ensured their anonymity. However, the need to protect jurors' identities and maintain the secrecy of their deliberations has been widely debated during the last five years because of media reports and interviews with jurors in some highly publicised trials.

Few conventions or rules regulate the jury's deliberations.[118] Jurors are simply required to reach their verdict honestly.[119]

The conventional rule of conduct (but not of law)[120] is that jurors should not divulge the nature or content of their deliberations in the jury room.[121]

In England there is a notice in the jury rooms reminding jurors of this important rule of conduct.[122]

In the United Kingdom, the *Contempt of Court Act 1981 (UK)*[123] provides that it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.

The Canadian Criminal Code makes it an offence for a juror to disclose any information concerning their deliberations except for the purposes of an investigation into allegations that an offence was committed by a juror.[124]

In the United States, there is no restriction on jurors divulging the secrets of the jury room.[125]

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118 NSW Law Reform Commission; *The Jury in a Criminal Trial*; Discussion paper. para. 8.6 p. 188

119 *Vase v. Delavel* (1785) 99 E.R.944. For example, making a decision on the toss of a coin would be grossly improper or where "a loose acquiescence by a minority for the sake of conformity and avoiding inconvenience" occurred. Halsbury's Laws of England, 4th ed. 1975, vol. 11, para. 323

120 *Ellis v. Deheer* [1922] 2 KB 113 at 118: There is uncertainty in the law as to whether or not a juror's disclosure is a contempt of court. Attorney General v New Statesman and Nation Publishing Company Limited [1981] 1 QB 1 at 10; *R v. Gallagher* (Unreported Supreme Court of Victoria, Full Court 7 October 1985; Mr Justice M.H. McHugh *Jurors' deliberations, jury secrecy, public policy and the law of contempt.* Paper delivered to a seminar conducted by the Media Law Association of Australia, Sydney 12 February 1986.

121 E. Campbell, *Jury Secrecy and Impeachment in Jury Trials*; 1985 9 Crim Law Journal 132 at 187

122 Halsbury's *Laws of England* 4th ed. Vol. 26, para. 647

123 s. 8

124 s. 576.2 *Criminal Code 1970 (Canada)*

125 New South Wales Law Reform Commission *The Jury in a Criminal Trial*; report LRC 48 1986 para. 11.14; p. 186

In Victoria, it is an offence for a person to publish to the public any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of the jury.[126] Similarly, it is an offence for a person to solicit or obtain such information.[127]

In New South Wales, publication of information which may be used to identify a juror is expressly prohibited.[128]

In Queensland, there are no legislative sanctions against the disclosure of the jury's deliberations.

The arguments against prohibiting the publication of juries' deliberations are based on the public's perceived interest in knowing how the jury system really functions. Legal researchers and law reform agencies also have an arguable interest in knowing what occurs in jury rooms. Such a prohibition may also prevent the exposure of specific injustices, malpractices or irregularities. Disclosure may in fact have a valuable moral and educational effect[129] and ensure that the jury is accountable as an institution.[130]

Support for the prohibition is based on the perceived need to ensure that jurors can deliberate freely and with candour.[131] One proponent of prohibition argued that:

> "For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just desserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience."[132]

As the former Director of Public Prosecutions for Queensland pointed out, nothing would be "... more destructive of trial by jury than if a juror were to proceed with one part of his mind on the evidence and the other on how his treatment of it will be received in the media, even to the extent of thinking about what money might be in it for him by the telling of it all."[133]

Some commentators believe that jurors would be reluctant to serve if they knew that they could subsequently be exposed to detailed investigations concerning the way they went about their business.[134]

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126 s. 69A (1) *Juries Act 1967 (Victoria)*

127 s. 69A (2)

128 s. 68 *Jury Act 1977 (NSW)*

129 *A-G v. New Statesman and Nation Publishers Company Ltd* [1981] 1 QB 1 at 11

130 Barrie and Lowe; The Law of Contempt, ed. Butterworths, London 1983, p. 249.

131 J. Phillip *"Jury Room Disclosures Erode the System"* 59 Law Institute Journal 1330

132 *"Post Trial Juror Interviews by the Press: The Fifth Circuit's Approach"* 62 Washington University LQ 783 at 788 where the writer says that the notion of a thorough and relentless exchange of ideas lies at the heart of the jury system and that exposure strikes at the roots of the system.

133 See D. Sturgess, *The Trials of Trial by Jury*, Qld Law Society Journal, 1984, p. 219

134 Mr Justice McHugh, *Juror's Deliberations Jury Secret, Public Policy and the Law of Contempt*, in Jury under Attack, op cit. (see footnote 2) p. 64

Generally, even appellate courts will not receive evidence about irregularities in jurors' deliberations.[135] This is to ensure that debate in the jury room remains free and the verdict reached as a result of it remains unimpeached by the nature of the deliberations.[136] One Australian judge has observed that:

> "Once the deliberations of a jury become public, the verdict is no stronger than the reasoning upon which it is based."[137]

Secrecy ensures that the members of a jury are relieved of anticipated social pressure to explain their verdict at a later stage. Such pressure could be intense, particularly after an unpopular verdict, especially in small communities. The New South Wales Law Reform Commission found that:

> "The rule preserving secrecy reduces the strain on jurors whose work may be subject to intense public scrutiny in cases involving important issues or public figures."[138]

In 1976, a court in New South Wales held that an approach to a juror would constitute an "... intrusion upon the anonymity which jurors are entitled to assume once the task for which they have been randomly selected, is concluded."[139] Further, the court found that:

> "... the privacy of those who have served as jurors must be respected, and that, once their public service in the court is at an end, they must be protected from attempts to involve them further in the affairs of the litigants whose disputes they were called to try."[140]

Continued secrecy for jurors' deliberations ensures their privacy and prevents harassment of them and their families.

One judge has found that overall:

> "The weight of opinion appears to be clearly in favour of legislation which will prevent jurors from disclosing information concerning jury deliberations for the purpose of publication. Soundings of a number of judges and lawyers in Sydney suggest that a large majority are of the same opinion."[141]

The leaking of the deliberations of just one or two jurors on a jury may undermine public confidence in the jury system as a whole, because it could give rise to public misunderstanding about the overall approach taken by jurors or the way the verdict was reached. The Australian Law Reform

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135 Known as the Lord Mansfield rule in *Vase v. Delaval* (1785) 1 TR 11

136 Re: *Mathews and Ford* (1973) VR 199 at 211

137 McHugh, supra, p. 62

138 New South Wales Law Reform Commission *The Jury in a Criminal Trial* LRC48 1986 report para. 11.17, p. 188

139 *Prothonotary v. Jackson* [1976] 2 NSWLR 457 at 461

140 ibid at 462

141 McHugh, supra, p. 69

Commission has recommended that no person should solicit, harass or seek to induce a juror to disclose or publish his or her identity, or any particulars of the deliberations of the jury on which they served. The Commission said that:

> "The task of jurors is difficult and demanding enough without their having to face the prospect of being badgered to relate their jury room experiences. At worst, this prospect might have a direct influence upon their deliberations. They may feel that, if they deliver what is likely to be an unpopular verdict in a highly publicised and controversial case, they will have to account for it publicly in front of microphones, television cameras, reporters' notebooks etc."[142]

In Queensland, a police officer is rostered on duty to guard juries which are locked up overnight.[143] Queensland is the only state which uses police officers for this purpose.

Although police officers assist juries in other appropriate circumstances, should police officers and jurors be kept separate when a jury is locked up overnight in Queensland? Would such a separation help to avoid any adverse inferences which may be drawn from the contact between police officers and jurors?

Would it be more desirable if juries were protected by the State Government Protective Security Services, some other independent body, or even special officers of the court or Sheriff?

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142 M. Chesterman, op cit, p. 131

143 Exhibit 78, p. 5; Report by Sheriff of Queensland on 1989 National Sheriffs' Conference

11. THE VERDICT OF THE JURY

In Queensland the jury's verdict must be unanimous. No time limit is fixed for the deliberations of jurors in criminal trials, although the deliberations of jurors in civil cases are limited to six hours.[144] If jurors cannot agree at all, the judge may then discharge the jury and direct that a fresh jury be sworn or that the trial be adjourned.[145] Such a decision by the trial judge cannot be reviewed.

In criminal trials the verdict must generally be either that the accused is "not guilty" or "guilty" of the offence charged or some other alternative offence open by law. Rarely, a judge may require a jury to reach a special verdict; that is, if conviction or penalty depends on some specific finding of fact, the trial judge may require the jury to make a finding one way or the other.[146] Notwithstanding these exceptional cases,[147] a jury's verdict is a general one for which no supporting reasons are required. A recommendation of mercy is not part of any verdict.

The Criminal Justice Commission's inquiry into jury interference was told that consideration should be given to allowing juries to reach majority verdicts. Mr Sturgess QC said that:

> "...trial by jury has been universally regarded as a fundamental right of the subject and unanimity in criminal issues had been regarded as an essential and inseparable part of the right, not a subordinate or merely procedural aspect of it."[148]

Other jurisdictions provide for majority verdicts in criminal trials when the jury is unable to achieve unanimity within a specified period of time.[149]

In the United Kingdom, juries must try to reach a unanimous verdict for at least two hours. Until then, jurors are not even told of their right to bring in a majority verdict.[150] As a result, between nine and 12 per cent of trial verdicts in the United Kingdom are by majority.[151]

It is argued that the unanimity requirement is necessary to ensure that the guilt of the accused person is proved by the prosecution beyond reasonable doubt.[152] Such a requirement also arguably reduces greatly the possibility that an innocent person will be wrongly convicted. It also enables the public more readily to accept the verdicts of juries.

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144 s. 42 of the *Jury Act* 1929-90 (Qld)
145 s. 626 of the *Criminal Code* (Qld)
146 s. 624 of the *Criminal Code* (Qld)
147 *R. v. Bourne* (1952) 36 Cr. App Rep 125 at p. 127
148 Evidence of Mr Sturgess QC; T 712
149 s. 57 *Juries Act* 1927 (SA); s. 41 *Juries Act* 1957 (WA); s. 48 *Jury Act* 1899 (Tas);
150 s. 13(3) *Criminal Justice Act* 1967 (UK)
151 A. Samuels, *"The Jury - Any Case for reform?"* (1982) 146 Justice of the Peace 465, at p. 467
152 *DPP v. Woolmington* [1935] AC 462

The introduction of majority verdicts has been recommended by the Queensland Law Reform Commission on previous occasions[153], even though the unanimity rule has been an ingredient of the common law for over 600 years.[154]

Arguments for the retention of unanimous verdicts stress that unanimity is "a basic feature of the common law relating to trial by jury".[155] For example:

> "... [it is] a direct consequence of the principle that no one is to be convicted of a crime unless his guilt is proved beyond all reasonable doubt. How can it be alleged that this condition has been fulfilled so long as some of the judges by whom the matter is to be determined do in fact doubt? ... There is a definite meaning in the rule that criminal trials are to be decided be evidence plain enough to satisfy in one direction or the other a certain number of representatives of the average intelligence and experience of the community at large, but if some of the members of such a group are of one opinion and some of another, the result seems to be that the process has proved abortive and ought to be repeated. If the rule as to unanimity is to be relaxed at all, I would relax it only to extent of allowing a large majority to *acquit* after a certain time."[156]

Unanimous verdicts, by their nature, may increase the accuracy of the findings of fact by the jury. The need for a unanimous verdict means that all 12 jurors must participate in the decision-making process. Minority views are more likely to be expressed and considered, ensuring a give and take by all parties without the exclusion of one or other of the jurors.

Unanimous verdicts are more likely to be publicly accepted than majority verdicts. Public confidence in the jury system may also be eroded by the introduction of majority verdicts, since some members of the public would side with the jurors in the minority and question the wisdom of the verdict. Where an accused person was convicted by a majority, it might be said that the verdict could not have been one beyond all reasonable doubt since the minority obviously entertained a reasonable doubt.

Unanimous verdicts reinforce the public perception that justice has been done. It can be more readily accepted that all possible safeguards have been taken to prevent an innocent person from being wrongly convicted. It has been observed that:

> "The sense of satisfaction, obtainable from complete unanimity, is itself a valuable thing."[157]

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153 In 1984 QLRC WP 28 op cit. (see footnote 7) and 1977 QLRC WP19

154 QLRC WP 28 ibid, p. 140

155 See Matthew Hale History of the Common Law of England 1713, p. 261

156 J. Stephen, A History of Criminal Law in England Vol. 1 W.S. Hein, New York, pp. 304-5 (1883)

157 P. Devlin, op cit. (see footnote 6), p. 57

Similarly, a convicted person would be more willing to accept a unanimous verdict. Indeed:

> "A loose acquiescence by the minority in the view of the majority for the sake of conformity would not merely be most undesirable but flagrantly wrong."[158]

Conversely, majority verdicts would result in fewer hung juries. This would save the expense and time of re-trials. However, the numbers of hung juries are quite small when compared to the number who reach unanimity. On this point, American researchers concluded that:

> "Overseas experience has shown that jurisdictions that allowed majority verdicts had only 45 per cent fewer hung juries than those that required unanimity."[159]

> "The University of Chicago Jury Project found that in jurisdictions where a unanimous verdict was required, a hung jury occurred in 5.6 per cent of jury cases. Where a majority verdict was permitted a hung jury occurred in 3.1 per cent of the cases."[160]

Although little expense or work load relief for the criminal courts would be afforded by the introduction of majority verdicts, they would overcome the problem of the corrupt or unreasonable juror who holds out against the others. Such jurors do cause hung juries, which result in the unnecessary expense of a retrial or the release of guilty persons.

Again, owing to the absence of any information about how juries deliberate, it is impossible to say to what extent obstinate or dishonest individuals who deliberately thwart the possibility of verdicts threaten the criminal justice system. However, it has been said that the limited research that has been done indicates that the evidence of influencing or intimidating jurors is "infinitesimal".[161] Even if corrupt jurors could be shown to exist, would this alone be a sound reason for the abolition of unanimous verdicts? The corrupt juror could not secure the acquittal of a guilty person. At worst, by causing an unresolvable disagreement, such a juror could cause a retrial.

Another argument against unanimity is that since most other decisions by our democratic institutions; for example, the legislature and the executive; are made by the majority, such a system of majority decisions should apply to juries.

Those in favour of majority verdicts also argue that the reality of jury decision making is such that unanimity is never really achieved. They argue that verdicts are always really compromises, which result from negotiations between 12 jurors interacting to produce a satisfactory result. They believe that those in the minority in a jury now simply agree to bring the deliberations to an end.

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158 *R v Mills* [1939] 2 KB 90 at p. 93

159 M. Kalven and H. Zeisel *The American Jury* 4 (1966) at p. 461

160 ibid

161 Samuels, *Criminal Justice Act 31*, Mod. Law Review 16, 25 1968; W R Cornish, The Jury, op cit. (see footnote 1), p. 162-185.

12. TRIAL WITHOUT JURIES, SPECIAL JURIES AND ASSESSORS

The Criminal Justice Commission's inquiry into allegations of jury interference was told that accused people should have a right to trial simply by a judge. It was argued that all juries were affected to some extent by any pre-trial publicity.[162]

The adverse effect of pre-trial publicity is hard to assess. The influence of the mass media can unwittingly have a subversive effect on public perceptions. While juries may be unable to resist its hidden persuasions, judges have the training and intellectual discipline to exclude the irrelevant and the prejudicial.

The New South Wales Law Reform Commission on the jury observed:

> "The ability of jurors to put inadmissible and prejudicial material aside when considering the case against an accused person has always been a matter of concern for the administration of criminal justice. Traditionally, elaborate steps have been taken to ensure that juries are not exposed to prejudicial material during the trial. In those cases where these measures have not been effective, the courts have discharged the jury unless satisfied that any prejudice can be overcome by appropriate directions. This is usually done on the basis that the proceedings cannot be continued with any confidence that the jurors will ignore the prejudicial material when considering the case against the accused person. An important factor to be taken into account in deciding whether to discharge the jury in these circumstances is that justice should not only be done, it should also be seen to be done. The principles which apply when considering prejudicial material during the trial apply equally to prejudicial material published before the trial. The traditional view appears to be that juries are incapable of disregarding seriously prejudicial evidence.
>
> Judges, on the other hand, have been regarded as capable, by virtue of their qualifications, training and experience, of disregarding prejudicial material to which they are exposed and deciding the case strictly on the admissible evidence. We consider that a judge will normally be better equipped than a jury to disregard prejudicial material so that it does not affect the determination of guilt. There will be cases in which the publicity has been so extensive that the conduct of a fair trial may only be possible if it is by judge alone. For these reasons, we consider that an accused person should have the right, where legitimate grounds are shown, to make an application to be tried by judge alone."[163]

Naturally, trial by judge without a jury is not the only way to deal with pre-trial publicity problems. The New South Wales Law Reform Commission recommended that where it is alleged that prejudicial material which may have influenced jurors has been published during a trial, the judge should have a discretion to question the individual jurors to determine in the first place whether they have seen, read or heard the offending material. Secondly, the judge should determine whether it has had any effect upon them. Where

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162 T. 712

163 New South Wales Law Reform Commission, *The Jury in a Criminal Trial LRC48 1986*, Par. 7.5, 7.6, pp. 100-101

the trial judge is satisfied that *there is no* actual prejudicial influence, the trial should be allowed to continue.

The Law Reform Commission also recommended that where a judge is satisfied that the impact of prejudicial information disclosed during a trial is such that the accused person may not have a fair trial, the judge should have power to allow the trial to continue with the parties' consent. This should only occur on the basis that if the jury returns a verdict of guilty, the trial should be regarded as a nullity, the verdict set aside and a retrial ordered. Unless the court orders otherwise, any reporting of the order declaring that this procedure shall apply, should be prohibited.

A criminal trial without a jury would not be a new feature of the law. Trial by a judge alone for S.P. bookmaking and other like offences has been possible under Queensland law for some years.[164] In New South Wales, summary trial by judge alone for a range of corporate crimes has been available for over 10 years, although it is rarely if ever used.[165] Trial without a jury is available and has been used in South Australia in recent years.[166]

The great majority of criminal prosecutions in Queensland are heard summarily by magistrates. While an accused who is judged by a magistrate loses the many advantages of a jury trial, he or she is told the reasons for the decision of a magistrate. In respect of a simple offence he or she has a right to an automatic stay of the results, pending an appeal by way of rehearing before the District Court or the option of an order to review to the Supreme Court.[167] In respect of an indictable offence dealt with summarily, he or she has a right of appeal to the Court of Criminal Appeal.[168] Commentators have observed that:

> "The first thing to be said about the great jury debate is that it has a whiff of hypocrisy about it. Those who assert the sacrosanctity of jury trial ought to be called to account for the fact that, in terms of its frequency, jury trial is very nearly extinct. In New South Wales, for example, only 0.9 percent of"major" criminal cases are decided by juries. In more than eight out of ten potential jury cases the defendant pleads guilty. The vast majority of criminal cases never concern a jury at all; they are dealt with by magistrates in the lower courts. This is why we refer to Chamberlain et. al. as show trials."[169]

Judges have considerable experience in trying civil cases of substantial complexity and sometimes lengthy duration without the benefit of a jury. In Queensland most civil disputes are tried without a jury. Nevertheless civil

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164 s. 218 (2) *Racing and Betting Act* 1980-1983; *R v. Caldwell and Kinross, Ex parte Makin (1986)* 2 *QdR 397*

165 *Crimes (Amendment) Act* 1979. (NSW)

166 s. 7 *Juries Act* 1922 - 1984 (SA)

167 s. 202 and 207 of the *Justice Act 1866* as amended

168 s. 673 Criminal Code (Qld)

169 D Brown & D Neal Show Trials: *The media and the gang of twelve.*, in The Jury Under Attack, op cit. (see footnote 2) p. 127

proceedings do not usually raise fundamental issues concerning the liberty of the individual.[170]

There is risk that if judges continually hear cases without juries they will be hardened by it. Additionally, they suffer the loss of the fresh outlook of ordinary people who are representative of the community. While hearing cases alone would be an unenviable task for judges, the loss of community input and anonymity of the jury could threaten a loss of public confidence in the administration of the criminal law.

Another option considered by law reformers is trial by a bench of judges. A number of judges sitting together would reduce the strain on a single judge and the decision would have greater credibility than one judge sitting alone.[171]

Yet another proposal is to form composite tribunals consisting of lawyers and lay persons similar to the administrative bodies such as the Trade Practices Tribunal, the Copyright Tribunal and various parole bodies.[172] One author has suggested that this would allow:

> "... greater control over the way in which the lay members conducted their deliberations and much of the aura of uncertainty that presently surrounds juries in this regard would be lifted. With the judge actually sitting with the lay members as the chairman, discussion would be kept relevant. There would be little risk of the applicable legal principles being overlooked or forgotten, as must frequently happen in a jury trial where jurors are locked away after a long summing up and given directions by the judge."[173]

The sophisticated nature of modern offences of commercial fraud, potentially beyond the comprehension of even the well-educated lay man, gives rise to considering the proposition of re-introducing special juries.

At common law there were two classes of juries; common juries and special juries. Special juries consisted of persons of a particular trade or technical qualification who were suitable to deal with the issues under review. In London in the middle ages, juries of cooks and fishmongers were summoned to try persons accused of selling bad food. Juries of merchants were used to settle commercial disputes. Where aliens were being tried, half the jury could be composed of aliens. A jury of matrons were empanelled to determine if a female prisoner sentenced to death was pregnant.

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170 Cornish. W.R. The Jury, rev. ed Penguin, Harmondsworth, 1971 pp. 285-288 in Ricketson, S. Trial by Jury: paper on trial by jury and section 80 of the Commonwealth Constitution, given at Australian Constitutional Convention, March 1983.

171 Ricketson, ibid, p. 28

172 Ricketson, ibid, p. 29

173 Ricketson, ibid, p. 29

Applications for special juries were seldom made in Queensland[174] before they were abolished in 1923. The right to such a jury lingered in the United Kingdom until 1949.[175] In most other jurisdictions, provisions for special juries were abolished by the twentieth century. However, the Tasmanian Jury Act[176] provides for the preparation of a special jury list. In some cases, the Chief Justice may make inquiries regarding the character, education and intelligence of any person whose name is on the jury list.

Does the increasing incidence of white collar crime often involving complicated commercial transactions, the nature of which would be unfamiliar to even experienced businessmen, revive the need for the empanelling of special juries? It has been explained that:

> "Under this procedure trial by jury would in the usual run of cases remain but in cases of particular complexity trials would be conducted with special juries drawn from panels of persons with appropriate specialist qualifications. Thus in a case involving detailed accounting evidence, a jury of accountants or financial managers could be used: again, in cases under securities legislation, the jury could consist of share brokers or merchant bankers."[177]

There are problems in determining the specific qualifications required of special jurors. Although trial by special jury is a form of trial by one's peers, the special jury is not really representative of the community. There may therefore be a public apprehension of bias by special jurors, or even a real tendency for the specialists to be more sympathetic to the accused, since they came from the same metaphorical club.

Another way experts could participate in the determination of facts about an accused would be as assessors. Assessors could be introduced to assist the jury or to sit with a judge without a jury. Assessors are available in civil trials and other bodies sitting in an advisory capacity.[178] Perhaps they should be also available for certain criminal trials?

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174 *R v. Connolly and Sleeman* (1922) St Rep Qld (1922)

175 N. Blake, The Jury Under Attack, op cit. (see footnote 2) p. 142

176 s. 10(3))

177 Ricketson, op cit. (see footnote 169) p. 30

178 For example s. 167 *Patents Act* 1952 (Cwlth)

13. EDUCATING JURORS AND IMPROVING TRIAL PROCEDURES

Most jurors are unfamiliar with court rooms. Their knowledge of court procedures may be limited to television dramas, which may have imparted dangerous misconceptions.

There is a strong case for the proposition that prospective jurors should receive an orientation which thoroughly acquaints them with the nature of their duties, trial procedure and legal terminology. An American judge has recommended that jurors should be acquainted:

> "... with his duties and responsibilities in a new environment and to increase his understanding of the process of a trial can hardly be objectionable."[179]

In Queensland, a small 13 page handbook is provided to jurors. This explains some basic court expressions and procedures, the court lay out, and other essential information about attendance, dress requirements and compensation.

Should this document be expanded to cover other vital topics on the conduct of a criminal trial and the juror's role and duty in it? Should it be supplemented by a suitable audio-visual presentation?

Oral instructions by the judge at the beginning of the trial also assist the jury. It has been recommended elsewhere that such preliminary instructions should cover such matters as:

* the function of the indictments;
* the function of the jury as the sole judge of the facts;
* the restriction of the jury's consideration to the evidence presented before them;
* the presumption of the accused's innocence;
* the benefit of reasonable doubt;
* matters concerning credibility;
* the function of the court and counsel;
* the elements of the crime charged;
* a glossary of some of the terms used;

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179 *People v Izzo* 14 111 (2d) 203, p. 209; J.J. De Sarto *Improving the Trial Process* (1984) Illinois Bar Journal 166 p. 167

* admonition as to outside conversations, newspaper accounts, etc;

* explanation of the procedure to be followed, including the order of presenting proof and the examination of witnesses;

* the importance of cross examination;

* the right of the accused to remain silent;

* the need occasionally to send the jury out of the room while matters relating to the admissibility of evidence are raised;

* whether the taking of notes is permitted; the explanation of the verdict and how it is reached;

* the obligation to keep secret their deliberations.[180]

Should the general directions of the judge to the jury be taken down and given to the jury to take with them into the jury room? Should there be a standard direction, either in plain English or in the language of the ordinary person?

As Mr Justice Roden said on "the law and gobbledegook":

> "One of the keys to effective communication is to use the language of the person to receive the message, rather than that of the person delivering it."[181]

> "In every trial thousands of words are poured into the jury's ears. The amount they carry into the jury room with them when they retire can only be a minute fraction of the whole."[182]

Even conscientious jurors would probably have difficulty remembering all the evidence presented during a trial.

Therefore, consideration could be given to ensuring that jurors can make notes and take them into the jury room, notwithstanding the danger that note-taking will distract them or exert too great an influence on their deliberations.

All other parties to a criminal trial; judges, counsel, instructing solicitors and policemen; may take notes for the purposes of the trial.

Should jurors be informed of their right to ask questions, cause inquiries to be made or request a view?

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180 Law Reform Commission of Canada; Working paper 27: *The jury in criminal trials* 1980, pp. 71-72

181 University of Sydney, Institute of Criminology, Criminal Evidence Law Reform, Proceedings No. 48, 1981, Sydney, pp. 28-29

182 Du Cann *The art of the advocate* in 1980 p. 135, cited in D. Challinger *Juror's reminiscences* in The Jury, op cit. (see footnote 1), p. 207

Should jurors be permitted to take a copy of the transcripts, with legal argument and inadmissible material deleted, into the jury room?

Should the name "foreman" be changed to "jury representative" to ensure that he or she is not regarded as a leader or boss by the other 11, but as an equal? This step was recommended by the New South Wales Law Reform Commission.[183]

Perhaps better case management, including legal argument before the empanelling of the jury and pre-trial hearings to conduct the sometimes lengthy voir dires, could be encouraged as a means of avoiding the lengthy inconvenience and expense of having jurors waiting before the evidence of the trial commences.[184]

Some changes in trial procedures may also assist jurors. For example, it is the practice in the United States for the defence to open immediately after the Crown opening.[185] Should the defence, immediately after the prosecution's opening address, announce any matters of fact which are not in issue and outline briefly the issues in dispute?

Jurors may also be assisted by a brief introduction by counsel to each witness, stating the issues to which each witness' evidence relates.

These and many other proposals to help juries have been the subject of much discussion by law reform bodies in other jurisdictions.

Is it time to undertake such a review in Queensland?

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183 NSW LRC48 1986,*The Jury in a Criminal Trial*, par. 6.23; 6.24, p. 84

184 see also Victoria Report on Criminal Trials AIJA 1985 chap. 4

185 NSW LRC par. 6.26, p. 86