

Sustainable juries: Thinking outside peer jury criminal trials

Juries and the Concept of Sustainability

For centuries many countries have persisted with the peer jury criminal trials; inherited or adopted from common law. Many regard this feature of the criminal justice system as sacrosanct; the purpose of the paper is to consider its sustainability.

Increased criminal governance and population growth, accompanied by a pro rata increase in crime and perceived increase per se, has resulted in increased pressure on the criminal judicial system. Pressure has also been added by the ever increasing complexities of modern society and its effects on the modern criminal trial; they exist in tandem and are in a constant state of evolution; as society changes and advances, laws and infrastructure are created, modified and refined to ensure governance. Is the current jury system sustainable?

Sustainability is a relatively new concept,¹ although originally created in a natural environment context, it is a concept that has broadened and applies across all societal institutions; public and private. Arguably, it should be considered across all aspects of our society. Sustainability is a self maintaining balance of and between society, and all it entails, and the natural environment, so that the longevity of both is assured. The United Nations believes it is in the 'common interest of all countries to pursue policies aimed at sustainable and environmentally sound development'.²

The Brundtland Report agreed that the future development of society should be aligned to sustainability taking into account social and environmental considerations,³ and has become the basis for significant research, discourse and action in sustainability issues including corporate and institutional sustainability. Whilst we can get bogged down in definitions and appropriate sustainability indicators, theoretical and practical frameworks and key concepts have been developed, and are increasingly utilised in organisation policy and practice. A concept used in the private sector is that of the triple bottom line 'people, planet, profit', which might be modified for the public sector to be: 'planet, people, governance, services and administration'.⁴

Government institutions must foster sustainability. They must be balanced from a cost benefit perspective as institutions in themselves, so that they are socially and financially sustainable, and as against environmental responsibilities. Sustainable institutions benefit the environment, directly for example through the minimisation of waste of resources, and indirectly for example through savings that can then be redirected back into environment

¹ The phrase typically concerns sustainable economic development, and in the law context, how law can help protect the environment. Some literature calls for consideration of sustainable development of social institutions, directly or inferentially: Joan Hoffmann 'Sustainable Economic Development: A Criminal Justice Challenge for the 21st Century' (2000) 34 *Crime, Law and Social Change* 275.

² United Nations, Resolution on the Report of the World Commission on Environment and Development, United Nations General Assembly, 96th Plenary Meeting, 11/12/87), A/Res/42/187.

³ World Commission on Environment and Development, *Our Common Future* (Brundtland Report) (1987) Center for a World in Balance, <http://www.worldinbalance.net/intagreements/1987-brundtland.php> at 12th December, 2009.

⁴ John Elkington 'Towards the Sustainable Corporation' (1994) 36(2) *California Management Review* 90.

through education and rectification, or to other areas of our society in need of funding. Government institution streamlining⁵ means greater sustainability for the institution itself and for the environment. Such streamlining will necessarily involve thinking about how they are meeting societal needs, balanced with the environment. It will also involve the reconsideration of its values spectrum, for example individual rights as against societal and environmental responsibilities.

How is sustainability related to legal systems, specifically peer criminal juries? It is argued legal systems, and juries as an apparatus of legal systems, need to be reconsidered, reformed and or developed in a sustainability context. The central issues are viability and efficacy; it is argued that in order that a system of civil and criminal justice be sustainable, due regard must be paid to the requirements of economy and effectiveness,⁶ issues which have dogged peer criminal jury systems for some time. Whilst justice is a non-negotiable concept integral to our legal system and business models are not necessarily applicable, justice as a concept can be redefined and the processes leading to the attainment of justice can and must be reconsidered, and altered if necessary, in the context of sustainability. This implies reconsideration of what justice means in a modern context, challenging the perpetuation of existing systems on historical theory and principle, and at all costs.⁷

The authors of this article are not alone in questioning the viability or efficacy of current peer criminal jury systems. Judge French considers 'the role of trial by jury as it presently operates can be a significant impediment to a timely, efficient and effective criminal justice system'.⁸ Murray Gleeson AC, former Chief Justice of the High Court of Australia, has stated

In the administration of civil and criminal justice, Australian courts, like most courts throughout the world, suffer from the twin problems of cost and delay.⁹

The article questions whether, according to traditional theory and principle, current peer criminal juries are functional,¹⁰ and whether modifications would make the system more sustainable. One can also question whether in the light of statistics on the number of

⁵ This includes the maximization of utility in anything society does. Streamlining can involve alteration.

⁶ Murray Gleeson AC, Chief Justice High Court of Australia, 'Current issues for the Australian judiciary', (Speech delivered to the Supreme Court of Japan Tokyo – 17th January 2000).
http://www.hcourt.gov.au/speeches/cj/cj_japan.htm at 21st December, 2009.

⁷ The Attorney-General (NSW), when introducing reforms to that State's jury system, stated that the Government 'has a strong commitment to the jury system and recognises its role as the cornerstone of the criminal justice system.': New South Wales Parliamentary Debates – Jury System Reform, Legislative Assembly 6/5/08, 6948 (John Hatzistergos).

⁸ Judge Valarie French, 'Juries – a central pillar or an obstacle to a fair and timely criminal justice system' (2007) 90 *Reform* 40.

⁹ Murray Gleeson AC, Chief Justice High Court of Australia, 'Current issues for the Australian judiciary', (Speech delivered at the Supreme Court of Japan, Tokyo, 17th January 2000)
http://www.hcourt.gov.au/speeches/cj/cj_japan.htm at 21st December, 2009.

¹⁰ The problems canvassed in this article are identified in authoritative literature. However empirical research is almost nonexistent due to jury confidentiality issues, with much of the research being based on simulated, or shadow, jury research which is often criticised as unreliable due to lack of authenticity. As such commentary tends to be anecdotal or based on observation. Refer to Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[2.14] and [7.10]-[7.15].

criminal trials that do go before a peer jury determination, the weight placed on the concept of jury trials is being given disproportionate weight to the costs of retaining the system.

The purpose of the article is to encourage thinking beyond traditional arguments, with a view to refocusing direction on sustainability. As we will see, there are a number of strengths and advantages of a peer jury system;¹¹ on the other hand, there are many deficiencies in the way the jury system currently operates. It suggests an alternative; better 'quality' criminal juries. The precise meaning of this concept will be explained later. Such a jury has the potential to alleviate and or overcome existing peer criminal jury problems, and in doing so increase criminal jury sustainability. It will be argued that such juries do not necessarily abrogate the constitutional protection afforded an accused to the right to a trial by a jury or fair trial,¹² but do impinge on some traditional theories about that right.

Arguments in Favour of Juries

Many eminent jurists have referred to the fundamental nature of jury trials to the criminal justice system. Lord Atkin described the right as 'ingrained ... in the British constitution and in the British idea of justice'.¹³ Lord John Russell held it was to trial by jury that the British Government owed the attachment of its people to the laws.¹⁴ Blackstone called it the 'grand bulwark of English liberties, which cannot but subsist so long as this palladium remains sacred and inviolate'.¹⁵ Deane J referred to the jury system as a

Deep seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment.¹⁶

The United States Supreme Court noted that country's protection of the right in these terms:

Those who wrote our constitutions knew from our history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the

¹¹ One of the authors of this article has advocated that the right to trial by jury must be protected and enhanced, and does not resile from these views here: Anthony Gray 'Mockery and the Right to Trial by Jury' (2006) 6(1) QUT Law and Justice Journal 66-88; 'A Right to Trial by Jury at State Level?' (2009) 15(1) Australian Journal of Human Rights 99

¹² *Constitution* s 80, and note s604 (1) CC (Qld).

¹³ Lords Debates, 5th series, Vol 87, 1054; in *Ford v Blurton* 38 TLR 80 (finding trial by jury to be 'an essential element of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful. Anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries'; Lord Devlin in *Trial by Jury* (1966) declared trial by jury as the 'lamp that shows that freedom lives ... the first object of any tyrant ... would be to make Parliament subservient to his will, and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen (164).

¹⁴ English Government, 394; see also Blackstone's *Commentaries on the Laws of England* (1st ed, 1966 rep) Book III, 379-381, Book IV 342-344. William Forsyth in *History of Trial by Jury* (1875) claims the 'whole establishment of Kings, Lords and Commons and all the laws and statutes of the realm have only one great object, and that is to bring twelve men into a jury box' (449).

¹⁵ *Commentaries on the Laws of England* (1876 ed, vol 4), p342-343.

¹⁶ *Kingswell v R* (1985) 159 CLR 264; see also Brennan J who referred to the jury system as 'the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice' (*Brown v The Queen* (1986) 160 CLR 171, 197; Murphy J in *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 198 and Gaudron J in *Cheng v The Queen* (2000) 203 CLR 248, 277.

voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant or biased or eccentric judge.¹⁷

Another argument in favour of the use of juries is the role they play in securing and maintaining public confidence in the justice system. This was the fact that led the High Court to deny that an accused could waive the right to trial by jury referred to in respect of Commonwealth offences in s80 of the Constitution – on the basis that the reasons for the use of the jury system were based on higher principles than what the accused wanted in a particular case.¹⁸

Nemeth argued in the context of the unanimous vs majority verdict issue that

The considerations involved in unanimity versus non-unanimity in jury deliberations are not simply whether or not the actual verdicts are significantly altered ... What may well be altered is the belief on the part of the jurors that they have deliberated until all persons have agreed, that they feel the verdict was appropriate; and that they have a sense that justice has been administered. If the jurors themselves feel that these values have not been implemented, the very important symbolic function of the trial by jury may suffer, not only for the jurors themselves, but for the community at large.¹⁹

Large scale research projects have quantified the effect on perceptions of the criminal justice system that can occur through participation in the system. For example, Matthews, Hancock and Briggs found that of those surveyed who had performed jury service for the first time, 43% had a higher degree of confidence in the justice system than before. They found that, of those who participated on a jury, 58% reported an improved understanding of the criminal justice system, which leads to greater confidence in the criminal justice system.²⁰ Another Australian study involving 1700 jurors found that, on several indicia, those who had acted as empanelled jurors reported substantially greater confidence in the criminal justice system than those who had not. Of empanelled jurors, 45% were more confident about the system after service. Those who expressed confidence in the capacity of judges totalled 85% of those surveyed, compared with 45% in the general community.

¹⁷ *Duncan v Louisiana* (1968) 391 US 145, 156; see also Professor Story in his Commentaries on the Constitution of the United States (1833: 1970 rep Vol III 653), 'the great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people'; and Alexis de Tocqueville in *Democracy in America* noted 'the institution of the jury ... places the real direction of society in the hands of the governed, and not in the hands of the government ... He who punishes the criminal is ... the real master of society ... all the sovereigns who had chosen to govern by their own authority, and to direct society instead of obeying its direction, have destroyed or enfeebled the institution of the jury (282-283); *Apprendi v New Jersey* (2000) 530 US 466 for a recent affirmation of the fundamental importance of jury trial.

¹⁸ *Brown v The Queen* (1986) 160 CLR 171, per Deane J (201) and Dawson J (208).

¹⁹ Nemeth, C 'Interactions Between Jurors as a Function of Majority v Unanimity Decision Rules' (1977) 7 *Journal of Applied Social Psychology* 38.

²⁰ Matthews, R, Hancock, L and Briggs, D *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts*, Home Office (2004); Kritzner, H M and Voelker, J 'Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts' (1998) 82 *Judicature* 59; Cutler, B L and Hughes, D M 'Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey' (2001) 19 *Behavioural Sciences and the Law* 305.

About 60% of those who participated on a jury believed the criminal justice system was efficient and fair, compared with 20% of those who did not participate in a jury. The confidence level in the criminal justice system was 70% for those who had served on juries, and 25% for those who had not.²¹

Gleeson argues that disappearance of civil jury means that

we [the judiciary] are cutting ourselves off from the community ...reduced public participation, through trial by jury, in the administration of civil justice has increased the separation between courts and the community.²²

Arguments Against the Use of Juries in their Current Format

(1) Complexity of Trials – Evidence and Directions

We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve people every day who don't know anything and can't read.²³

Juries are not legally trained and yet apply the facts of a case, based on the evidence, to the law in order to determine guilt. Yet, the modern day criminal trial is becoming increasingly more complex, a fact acknowledged by judges²⁴ as well as the government,²⁵ caused by a range of factors, including the law itself becoming more complex, evidence and evidentiary rules, trial procedure and the factual circumstances of cases. The facts and evidence in many instances are becoming more complicated due to factors such as technological advances, which have produced new and increasingly complicated crimes; challenges in evidence including the use of DNA evidence, the corporate being and criminal responsibility,²⁶ and particularly in the context of criminal trials, mental health issues.

The laws created to take into account these factual complexities are drafted in increasingly technical language. Judges themselves can struggle to make sense of legislation. As former High Court Justice Ian Callinan stated

²¹ Goodman-Delahunty, J, Brewer, N, Clough, J, Horan, J, Ogloff, J, Tait, D and Pratley, J Research and Public Policy Series No 87, Australian Institute of Criminology (2007); Findlay also advocates the use of juries on the basis of public confidence in the system: 'Juries Reborn' (2007) 90 *Reform* 9, 10.

²² Hon Murray Gleeson AC CJ HCT, 'Juries and Public Confidence in the Courts' (2007) 90 *Reform* 12, 13.

²³ Mark Twain, Text of Undelivered Speech, 4/7/1872), reprinted in Svend Peterson ed *Mark Twain and the Government* (1960) p55.

²⁴ Murray Gleeson, former Chief Justice of the High Court of Australia, in 'Juries and Public Confidence in the Courts' (2007) 90 *Reform* 12. Gleeson commented that 'Justice does not require that the criminal law, as enacted by Parliament, or as formulated by appeal courts, should become more and more complicated.' This raises the fundamental question whether our criminal laws are in themselves becoming over complicated and are in need of reconsideration. See also Judge Valarie French, 'Juries – a central pillar or an obstacle to a fair and timely criminal justice system' (2007) 90 *Reform* 40 and Justice Roslyn Atkinson 'Juries in the 21st Century: Making the bulwark better' (2009) May *Proctor* 23.

²⁵ Note *above n 46 and 47* regarding judge only trials in circumstances where if the trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury.

²⁶ Refer to for example the difficulties associated with prosecuting a corporation for manslaughter.

It may come as no surprise to you that Judges, even highly experienced(d) judges, sometimes find it difficult to penetrate the mysteries of the ever expanding statute books. For citizens without legal training and involved in their daily activities the magnitude of the task must be almost beyond comprehension.²⁷

These comments can feed into another debate about the extent to which we should have specialist judges as opposed to generalist judges,²⁸ but are also considered relevant to the topic of this paper given the need for judges to explain the law to juries, and for juries to understand the law properly in order to apply it.²⁹

Modern evidence based in technology and science is developing at such a rate that cases that would not have resulted in a conviction two decades ago, would now be successfully prosecuted.³⁰ Further, there is what former Australian Chief Justice Gleeson terms 'junk science' in evidence, which although filtered to some extent by rules regarding the admissibility of evidence, the examination of expert witnesses and jury directions, still poses problems.³¹ The New South Wales Law Reform Commission notes complex evidentiary issues is the most likely cause of hung juries.³² A study by the Bureau of Crime Statistics

²⁷ Justice Ian Callinan, "Law, society and culture at the turn of the century" (The Archbishop Sir James Duhig memorial lecture, Mayne Hall, University of Queensland 9 September 1998)

http://www.highcourt.gov.au/speeches/callinan/callinan_Turnof~1.htm at 23 Nov 2009. Some notorious examples from the criminal law field include the partial excuse of provocation and self defence.

²⁸ For example, Judge Michel noted that 'it seems likely that society at large, not to mention the business community, will be less tolerant of any inconsistent or possibly unsound adjudications by general adjudicators handling highly complicated matters of great economic importance with widespread practical consequences': Paul Michel 'The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenges Ahead' (1999) 48 *American University Law Review* 1177, 1184-1185. Similarly Judge Learned Hand complained 'I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of (science and technology) to pass upon such questions as these. The inordinate expense of time is the least of the resulting evils, for only a trained (scientist) is really capable of passing upon such facts ... How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalised by provincial legal habits of mind ought, I think, to unite to effect some such advance ... the court summons technical judges to whom technical questions are submitted and who can intelligently pass upon the issues without blindly groping (about): *Parke-Davis and Co v H K Mumford Co* 189 F. 95, 115 (C.C.S.D.N.Y 1911). A survey of judges found many did not believe they had sufficient expertise to understand scientific evidence often presented in court: Sophia Gatowski 'Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World' (2001) 25 *Law and Human Behaviour* 433; Kimberley Moore 'Are District Court Judges Equipped to Resolve Patent Cases?' (2001) 15 *Harvard Journal of Law and Technology* 1; Shirley Dobbin 'How Well do Judges Understand Science and Scientific Method?' (2002) 85 *Judicature* 244; Lawrence Pinsky 'The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility Gatekeeping Mandated by Daubert' (1997) 34 *Houston Law Review* 527; John Wesley 'Scientific Evidence and the Question of Judicial Capacity' (1984) 25 *William and Mary Law Review* 675.

²⁹ Interestingly, McHugh J noted that 'the more directions and warnings juries are given, the more likely it is that they will forget or misinterpret them': *KRM v The Queen* [2001] HCA 11, [37].

³⁰ In Queensland a good illustration of the effect of advancements in forensic science is provided by the controversy surround the *Carroll* case, *The Queen v Carroll* (2002) 77 ALJR 157. The case raised double jeopardy questions when the police sought to use evidence that had through technology become available to them to charge Carroll with offences relating to a murder, when he had previously been acquitted of murder.

³¹ 'the ability of the justice system to protect itself against technical misinformation is less than it should be': Murray Gleeson AC, Chief Justice High Court of Australia, 'Current issues for the Australian judiciary', (Speech delivered at the Supreme Court of Japan Tokyo, 17th January 2000).

http://www.hcourt.gov.au/speeches/cj/cj_japan.htm at 21st December, 2009.

³² Queensland Parliament (Mary Westcott), *Majority Verdicts in Criminal Trials*, Research Brief No 04 (2006) at 3.

and Research (NSW) (2002) found that the odds of a hung jury in a trial lasting 11 days or more was 3.9 times higher than in a trial lasting 1 -3 days. This is not surprising given modern criminal trial complexity, jury comprehension and juror attention spans; contrast the attention span of students attending a one hour lecture, which is estimated to be approximately 25 to 30 minutes.³³

Various studies into jury comprehension of judicial directions have been conducted and many indicate that jury comprehension is low, affecting their ability to apply those directions.³⁴ One study using undergraduate students in a jury simulation, and thus requiring validation in authentic juries, indicated that the comprehension rate was at best 80%.³⁵ It is of concern that this group did better than representative samples of those eligible for jury service.³⁶ Another study by the New South Wales Bureau of Crime Statistics and Research found that only 47.2% of jurors surveyed said they understood completely judicial directions.³⁷ In summarising some of these studies, Hycran suggests jurors need further education about the nature of the task, and should be tested on their ability to understand instructions before hearing actual cases.³⁸

[http://www.parliament.qld.gov.au/view/publications/research.asp?SubArea=2006&SubNav=briefs#RBR%202006/04 at 21st December 2009](http://www.parliament.qld.gov.au/view/publications/research.asp?SubArea=2006&SubNav=briefs#RBR%202006/04%20at%2021st%20December%202009). The authors note that much of the research into juries in Australia takes place at the state level, with some evidence of a lack of co-ordination, and overlap, between the research efforts of different states.

³³ Donald Bligh, *What's the Use of Lectures?* (1998) 56.

³⁴ Bob Hycran "The myth of trial by jury" (2005/06) 51 *Criminal Law Quarterly* 157, Peter Tiersma 'Reforming the Language of Jury Instructions' (1993) 22 *Hofstra Law Review* 37; Alan Reifman et al *Real Jurors' Understanding of the Law in Real Cases* (1992) 16 *Law and Human Behaviour* 539, Walter Steele and Elizabeth Thornburg *Jury Instructions: A Persistent Failure to Communicate*' (1988) 67 *North Carolina Law Review* 77; Kimball Anderson and Bruce Braun 'The Irrebuttable Presumption that Juries Understand and Follow Jury Instructions' (1995) 78 *Marq L Review* 791; Joel Lieberman and Bruce Sales 'What Social Science Teaches Us About the Jury Instruction Process' (1997) 3 *Psychology, Public Policy and Law* 589. Note also a summary of literature on the area appearing in the footnotes in the High Court decision of *Zoneff v the Queen* (2000) 200 CLR 234 at [66] – [67], and in *Gacy v Welborn* 994 F. 2d 305, 313 (7th Cir, 1993) indicating that courts 'often presume that jurors understand and follow their instructions despite evidence to the contrary'. In a specific study of the jury in the complex trade practices case *Brooke Group Ltd v Brown and Williamson Tobacco Corp* (1993) 509 US 209, 218, researchers concluded that 'the jurors were overwhelmed, frustrated and confused by testimony well beyond their comprehension ... at no time did any juror grasp – even at the margins – the law, the economics or any other testimony relating to the allegations or defence'. As a result of this lack of comprehension of the evidence, the researchers claimed jurors were influenced by attorneys' attire, demeanour and personal hygiene: Arthur Austin 'The Jury System at Risk from Complexity, the New Media and Deviancy' (1995) 73 *Denver University Law Review* 51, 54.

³⁵ Michael Hill and David Winkler 'Juries: How do they work? Do we want them?' (2000) 11 *Criminal Law Forum* 397, 434.

³⁶ Michael Hill and David Winkler 'Juries: How do they work? Do we want them?' (2000) 11 *Criminal Law Forum* 397, 434; at 437 Hill and Winkler provided an example of the comprehension gap '[aggravated assault means] assaulting someone who aggravated them'.

³⁷ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[7.39]

³⁸ Bob Hycran "The myth of trial by jury" (2005/06) 51 *Criminal Law Quarterly* 157, 167. However, as Justice Atkinson points out, it would be a challenge to determine how best to determine comprehension, given that different people understand information in different ways. It would also impose cost: Justice Roslyn Atkinson, Supreme Court of Queensland, 'Selection of Juries: The Search for the Elusive Peer Group', speech delivered at the Sir Harry Gibbs Law Dinner, University of Queensland, 11 December 2007, <http://archive.sclqld.org.au/judgepub/2007/atkinson111207.pdf>, accessed 23/11/09)

A recent survey of judges, by the Australian Institute of Judicial Administration (2006), found that more than half of the judges surveyed reported that jurors have either some or a great deal of difficulty understanding judicial instructions on the law.³⁹ This is consistent with a survey by the New South Wales Law Reform Commission (1985) in which 71% of judges agreed that some of the directions on the law were too difficult for jurors to understand.⁴⁰

Ironically the trial process itself may impede jury comprehension by prohibiting the taking of notes; access to transcripts of evidence, arguments, opening remarks and or summing up; and asking questions during trial which is either banned or discouraged.⁴¹

Of course these problems are not confined to Australia. Trial complexity and jury comprehension in fraud cases have been the subject of investigation in the United Kingdom in the late 1990s. Alternatives considered included judge only trials and special expert jurors, however changes were never initiated.⁴² Some American courts have referred to this difficulty expressly.⁴³ Former Chief Justice of the United States Supreme Court Warren Burger cast doubt on the ability of juries to understand evidence;⁴⁴ during this era Congress even considered changes to the Federal *Jury Selection and Service Act* to require that all empanelled jurors have 'intelligence' and 'common sense'; however the changes were never enacted.⁴⁵

Recent research has suggested that, as a consequence of increased complexities in criminal trials, individual jurors may be finding it increasingly difficult to cope with the demands

³⁹ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[3.26]

⁴⁰ *Ibid*, [9.73]; apparently the difficulties are worst in relation to self-defence, intoxication, mental illness, conspiracy, diminished responsibility, and provocation.

⁴¹ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009) [9.73]. In Queensland, note taking is allowed, with limits, as is juror access to transcripts. For more on transcripts, see Chapter 9 of the Queensland Law Reform Commission *A Review of Jury Directions*, Issue Paper WP No 66 (2009). Unfortunately, some commentators re-focus the issue of jury comprehension on the competency of judge or counsel, or their explanation of the evidence.

⁴² Roskill Fraud Trial Committee; Michael Hill and David Winkler 'Juries: How do they work? Do we want them?' (2000) 11 *Criminal Law Forum* 397, 429.

⁴³ Most famously the United States Supreme Court in *Ross v Bernhard* (1970) 396 US 531, 538, commenting that 'as our cases indicate, the legal nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries'. The judge in *ILC Peripherals Leasing Corp v International Business Machines Corp* 458 F. Supp. 423 (N.D Cal 1978) concluded that 'the jurors were conscientious and diligent, but their past experience had not prepared them to decide a case involving technical and financial questions of the highest order. Throughout the trial, the court felt that the jury was having trouble grasping the concepts that were being discussed by the expert witnesses, most of whom had doctorate degrees in their specialities' (447); William Luneburg and Mark Nordenberg 'Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation' (1981) 67 *Virginia Law Review* 885, 891-893.

⁴⁴ 'Is Our Jury System Working?' (1981) 118 *Reader's Digest* 126; 'The Use of Lay Jurors in Complicated Civil Cases', remarks to the Conference of State Chief Justices 7/8/79.

⁴⁵ The United States Supreme Court has recognised that sometimes jurors are not equipped to handle cases: *Peters v Kiff* (1972) 407 US 493; it found that the constitutional right to due process could be compromised by the hearing of the case by an incompetent jury (501). Chief Justice Seitz of the Third Circuit Court of Appeals commented that 'when the jury is unable to determine the normal application of the law to the facts of a case and reaches a verdict on the basis of nothing more than its own determination of community wisdom and values, its operation is indistinguishable from arbitrary and unprincipled decision making': *In Re Japanese Electronic Products Antitrust Litigation* 631 F. 2d 1069, 1084; see also Ryan Seidemann, James Wilkins and Mindy Heidel 'Closing the Gate on Questionable Expert Witness Testimony: A Proposal to Institute Expert Review Panels' (2006) 33 *Southern University Law Review* 29, 54-55.

made upon them. Trials have been increasingly weighed down with detail; even the most devoted and committed supporter of trial by jury must acknowledge that the strains on jurors when trying major cases and, thus, the strains on the administration of justice, are great.⁴⁶

Some respond to these criticisms by suggesting changes to the way evidence is dealt with at trial in order to enhance understanding.⁴⁷ To some extent this has happened by, for example, introducing and or reviewing standard judicial directions in summing up; giving juries more information, such as transcripts, to assist with their decision making; and allowing note taking and questions.⁴⁸ However such methods can also arguably increase complexity and cause delay in decision making, adding to cost.

The pressures on judges to 'get it right' have also contributed to the complexity of judicial directions. Former Victorian appellate court judge Eames drew attention to the problems arising from judicial directions:

Over the past 20 years 24 appellate courts have applied great intellectual skill to the articulation and refinement of the criminal law but, with some notable exceptions, have not attempted to translate their judgments into the language of practical, and brief, directions which trial judges can deliver to lay jurors. That role has fallen to the authors of court bench books or has been left to individual judges when fashioning a jury charge for an individual case. Being fearful of error, judges have tended to couch their charges in language very close to that of the appellate judgments. When in doubt as to the applicability of one or other of the judicial warnings to the case at hand judges have usually included such directions. In the result, directions on a wide range of topics have become longer and more complex.⁴⁹

Whilst judges may be guided by 'Bench Book's, every factual circumstance and trial is different, requiring the alignment of the facts and evidence with the law. The process is reliant on a judge's interpretation and the communication of that interpretation. From a judge's perspective the process is a difficult one, as acknowledged by judges themselves.⁵⁰ There is a fine line between how much a jury should or should not be told and a proper, or mis-direction which can ground a right of appeal. The Queensland Law Reform Commission notes:

the number and length of jury directions have increased in recent times to the point where it is now increasingly apparent that directions may no longer serve their principle function of stating clearly [and simply] the law and rules of evidence that the jury must apply. The consequence of this is that juries (and judges) become over burdened with directions that ultimately serve to confuse rather than clarity.⁵¹

A recent survey by the Australian Institute of Judicial Administration (2006) reports directions in cases involving a five day trial lasting up to two and a half hours, to a twenty

⁴⁶ Michael Hill and David Winkler 'Juries: How do they work? Do we want them?' (2000) 11 *Criminal Law Forum* 397, 433.

⁴⁷ Mark Findlay 'Juries reborn' (2007) 90 *Reform* 9, 11.

⁴⁸ Queensland Law Reform Commission A Review of Jury Directions, Issues Paper WP No 66 (2009) Ch 9.

⁴⁹ Justice Roslyn Atkinson Supreme Court of Queensland "*Juries in the 21st Century: making the bulwark better*" (Public Lecture, Faculty of Law, QUT, 27 March 2009) at 6.

<http://archive.sclqld.org.au/judgepub/2009/atkinson270309.pdf> at 23 November, 2009.

⁵⁰ See for example Hon Murray Gleeson AC CJ HCT, 'Juries and Public Confidence in the Courts' (2007) 90 *Reform* 12.

⁵¹ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[6.4].

day trial lasting up to six hours, with the majority of time in most cases being spent on directions relating to the evidence.⁵² The way Bench Book directions are written and judicial expression in the communication of direction also impacts on jury comprehension. Use of plain English is a method adopted to alleviate problems,⁵³ however this itself raises the issue of the tension between the expressions of the law in plain English and the danger of misrepresenting the technicality of the law in that expression. Some legal terminology cannot be translated or defined easily, carrying with it meaning steeped in judicial authority. One example is the concept of provocation, a term whose popular meaning differs substantially from its legally understood meaning.

In the United States judicial directions to the jury are much shorter than in Australia, apparently because the elaboration and assessment of the facts is said to be a matter for the jury.⁵⁴ Jurors themselves have expressed concerns with their ability to understand the evidence presented.⁵⁵

In Australia there are judicial pronouncements that the law should not be elaborated upon in certain areas, for example in directing the jury on the meaning of intention; even though the concept carries with it a meaning embedded in evidentiary technicality⁵⁶. There are other areas of the law where the courts have been given similar directions, raising the question whether such restrictions are contrary to the right to a fair trial.

Together with the Queensland Law Reform Commission,⁵⁷ Justice Atkinson identifies other aspects of the criminal trial leading to complexity in the context of judicial directions, including cases of multiple or alternative charges and cases involving multiple defendants.⁵⁸

Murray Gleeson suggests that from the beginning peer juries may be at a disadvantage:

regrettably, the workings of the courts is not well understood in the community – people outside the legal profession are generally not well-informed about the work of courts as institutions, or of judges as individuals.⁵⁹

⁵² Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[3.23].

⁵³ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[6.53].

⁵⁴ Hon Justice Michael Kirby AC CMG “Lawyers as communicators” (Speech delivered at the Worldwide Advocacy Conference: Speaking to the modern jury – New challenges for judges and advocates, London, 29 June to 2nd July 1998) at http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_london.htm.

⁵⁵ For example, in a trade practices case *ILC Peripherals Leasing Corp v International Business Machines Corp* 458 F. Supp 423, 447 (N.D Cal, 1978) there was a mistrial after a jury deadlock. The jury foreman was asked whether a case of this type could be heard by a jury; his answer was ‘If you can find a jury that’s both a computer technician, lawyer, economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don’t know anything about that’ (reported in Ryan Seidemann, James Wilkins and Mindy Heidel ‘Closing the Gate on Questionable Expert Witness Testimony: A Proposal to Institute Expert Review Panels’ (2006) 33 *Southern University Law Review* 29, 45.

⁵⁶ Evidence of knowledge on the part of an accused of the probability of death or grievous bodily harm is not sufficient evidence of an intent for purposes of the *Code* (Qld) In Queensland the existence of an intent must be proven, and juries must decide whether an intention is established taking all evidence into account. As such where such knowledge exists a jury can use that the knowledge as evidence of (infer) the existence of an intent that is ‘to have in mind’. *R v Willmot* (No 2) [1985] 2 Qd R 413.

⁵⁷ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[6.4].

⁵⁸ Justices Roslyn Atkinson “Juries in the 21st Century: Making the bulwark better” (2009) May *Proctor* 23, 24.

Of course, if jurors do not understand the complexities of a case and or judicial instructions, there can be no assurance that the verdict represents a finding by the jury under the law and upon the evidence.⁶⁰ The increasing number of cases in which accuseds are self-represented can only add to the problem that sometimes jurors don't understand the case well enough, given arguments that the adversarial system generally presumes that cases are presented by skilled professionals, and that the system breaks down when that assumption does not hold.⁶¹

(2) Subjectivity of Verdicts

Judge only trials, majority verdicts, trial complexity, judicial directions and jury comprehension all carry implications for the standard upon which judgment is passed in a criminal trial; beyond a reasonable doubt, a concept with intrinsic problems.

In a judge only trial, obviously the judge is the sole arbiter of guilt, whereas in a jury trial judgment the decision is balanced amongst a jury of (typically) twelve. For judge only trials, the concept of reasonable doubt is diluted to the reasonable doubt of one person. Those experienced with the system acknowledge the 'human element' involved. Michael Kirby states that

decision-making in any circumstance is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker can be only partly aware.⁶²

Margaret Cunnen states that

studies of jury patterns and the experience of individual jurors show that jurors interpret what they see and hear in a trial through the prism of their own knowledge, experiences, attitudes and – biases – the natural biases of each individual are diluted and balanced one with the other.⁶³

That juries, and to a much lesser extent judges, base their decisions on their own experiences cannot be denied. The extent to which it determines their verdict is another question, but the question is whether a jury decision based on subjective experience,

⁵⁹ Murray Gleeson AC, Chief Justice High Court of Australia, "Current issues for the Australian judiciary", Speech Supreme Court of Japan Tokyo – 17th January 2000) http://www.hcourt.gov.au/speeches/cj/cj_japan.htm at 21st December, 2009. Some courts have attempted to remedy this situation by providing DVDs or written information to jurors. Opening directions by the judge may also assist in improving understanding; apparently jurors find these helpful (A Review of Jury Directions, para 9.53-9.59) but there are inconsistencies in their content (A Review of Jury Directions, para 2.78).

⁶⁰ Michael Hill and David Winkler "Juries: How do they work? Do we want them? Jury project discussion paper" (2000) 11 *Criminal Law Forum* 397 at 434 quoting a passage from an article by James Ogloff 'Judicial Instructions and the Jury' who is quoting from a 1976 Canadian decision *Warren v Parks*. Things are unlikely to have improved since.

⁶¹ Murray Gleeson 'Current Issues for the Australian Judiciary', speech delivered to the Supreme Court of Japan, Tokyo, 17/1/2000, http://www.hcourt.gov.au/speeches/cj/cj_japan.htm, accessed 21/12/2009.

⁶² The Hon Justice Michael Kirby AC CMG "Judging: Reflections on the moment of decision" (Speech delivered at the Fifth National Conference on Reasoning and Decision-Making, Wagga Wagga, 4th December 1998) http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_charles.htm at 23 November 2009.

⁶³ Margaret Cunneen "Getting it right: Juries in criminal trials" (2007) 90 *Reform* 43, 44. (Senior Crown Prosecutor (NSW)).

intuition or common sense is the same as a decision based on the comprehended application of the law to the facts and evidence, as guided by judicial directions, beyond a reasonable doubt?

The changing composition of juries is also the cause of new and sometimes novel concerns regarding jury attention spans and comprehension. The Hon Justices Michael Kirby and Michael Black point out that jury pools are constantly changing with demographic changes and changes to society itself, raising new issues for consideration. Black uses the example of the smoking juror banned from smoking in a public building and making decisions whilst suffering withdrawal,⁶⁴ while the Hon Justice Michael Kirby referring to research in both the US and Australia pointing out dilemmas presented by ethnicity and differences between generations and the mix of generations in the jury room:

the changing ethnic background and linguistic skills of jurors will profoundly affect not only communication with them and within the jury room itself. It will also affect matters beyond language. Relevant considerations are their life's experiences, their assumptions about government, law, policing and punishment, their religious belief systems (if any) and their commitment to, and belief in, the constitutional legal arrangements of which the jury is one part ... there is a growing appreciation today that generational factors, affecting receptiveness to long intervals of oral presentation of evidence and argument, may influence the decisions reached at the end of a jury trial.⁶⁵

A related problem is one of jury deliberation dynamics. In a project designed to unlock jury room secrets, the deliberations of two simulated juries in a hypothetical murder/assisted suicide case tried by a retired Judge were observed, and although neither jury convicted, the outcomes of each differed and the more 'robust' of the two juries was left undecided.⁶⁶

(3) Lack of Understanding of Concept of Beyond Reasonable Doubt

Many question juror comprehension of the meaning of the criminal standard of proof. Various studies conducted have highlighted that different jurors interpret the concept differently, and sometimes incorrectly, and have found that jurors struggle with the concept.⁶⁷ In a study simulating juror environments a juror asked to define 'reasonable doubt' responded, 'reasonable doubt means that there can be reasonable doubt about a person's guilt but you may still convict based on other reasons',⁶⁸ and in a real case on delivery of verdict a juror stated 'we have considered the evidence and what your lawyer

⁶⁴ Michael Black, "The introduction of juries to the Federal Court of Australia" (2007) 90 *Reform* 14, 15. See former High Court Justice Michael Kirby 'Lawyers as communicators' (Speech delivered at the Worldwide Advocacy Conference: Speaking to the modern jury – New challenges for judges and advocates, London, 29 June to 2nd July 1998) at http://www.highcourt.gov.au/speeches/kirby/kirby_london.htm.

⁶⁵ The Hon Justice Michael Kirby AC CMG "Judging: Reflections on the moment of decision" (Speech delivered at the Fifth National Conference on Reasoning and Decision-Making, Wagga Wagga, 4th December 1998) http://www.highcourt.gov.au/speeches/kirby/kirby_charles.htm at 23 November 2009.

⁶⁶ Hon George Hampel AM QC 'Secrets of the jury room' (2007) 90 *Reform* 57, 58.

⁶⁷ Bob Hycran 'The myth of trial by jury' (2005/06) 51 *Criminal Law Quarterly* 157 at 163-3.

⁶⁸ Michael Hill and David Winkler 'Juries: How do they work? Do we want them?' (2000) 11 *Criminal Law Forum* 397, 437.

has said. We are satisfied that there is a reasonable doubt whether you committed this offence so we shall convict you and give you a conditional discharge'.⁶⁹

The High Court of Australia has directed that trial judges should not engage in any explanation of the concept⁷⁰ on the basis that it is an expression used in ordinary parlance and well understood by the community.⁷¹ The Court has noted that community members are not required to submit their mental processes to objective analysis,⁷² and departures from the phrase have not worked.⁷³ Members of the High Court have suggested that any explanation of the concept to also consider the danger involved in an attempt to explain the concept, in terms of misunderstanding.⁷⁴ These directives from the High Court have been reiterated more recently by the Queensland Court of Appeal in *R v Punj*.⁷⁵

Research has suggested a range of views on the precise meaning of 'beyond reasonable doubt' (BRD) and a clear divergence between what judges believe the concept means and what some jurors think it means. For example, in one study 26% of respondents (jurors and students) would be satisfied (in applying the BRD test) with a probability level of guilt below .7, 20% satisfied with a probability level between .7 and .9, and 54% satisfied with a probability level about .9. Of the judges surveyed, 4% would be satisfied with a probability level below .7, 33% would be satisfied with a probability level between .7 and .9, while 63% would have required a probability figure above .9.⁷⁶

Additional problems are encountered regarding onus and burdens of proof, which can differ between the offences, excuses and defences in criminal law, and particularly where proof requirements are stated in the positive or negative, and where only one element of a test that applies to that excuse or defence must be shown for the defence or excuse to fail.⁷⁷ One can question the simplicity of the existing formulation from the perspective of a jury

⁶⁹ Michael Hill and David Winkler "Juries: How do they work? Do we want them? Jury project discussion paper" (2000) 11 *Criminal Law Forum* 397, 437.

⁷⁰ *Dawson v The Queen* (1961) 106 CLR 1, followed in for example *Green v The Queen* (1971) 126 CLR 28 and more recently in *Darkan v R* [2006] HCA 34 [69]. This approach is not taken England, New Zealand and Canada where some elaboration of the phrase is permissible for example by contrasting it to a 'vague or fanciful doubt'.

⁷¹ *Darkan v R* [2006] HCA 34 [69] quoting from *Dawson v The Queen* (1961) 106 CLR 1, 19 per Dixon J and *Green v The Queen* (1971) 126 CLR 28, 31 per Barwick CJ. McTiernan and Owen JJ.

⁷² *Darkan v R* [2006] HCA 34 [69] quoting from *Green v The Queen* (1971) 126 CLR 28.

⁷³ *Darkan v R* [2006] HCA 34 [69] quoting from *Dawson v The Queen* (1961) 106 CLR 1, 18 per Dixon J.

⁷⁴ *Darkan v R* [2006] HCA 34 [69] quoting from *Thomas v The Queen* (1960) 102 CLR 584, 595 per Kitto J.

⁷⁵ *R v Punj* [2002] QCA 333 and *R v Irlam ex parte A-G (Qld)* [2002] QCA 235. Sometimes, the High Court has provided meaning, including 'practical rather than absolute certainty' (*Concalves v R* (1997) 97 ACR 193) or a nagging doubt *Green v The Queen* (1971) 126 CLR 28, 32). The Queensland Bench Book provides a model explanation that makes reference to a doubt that the accused considers to be reasonable: Queensland Courts Supreme and District Court Bench Book Reasonable Doubt [57] <http://www.courts.qld.gov.au>, accessed 10/12/09.

⁷⁶ Rita Simon and Linda Mahan 'Quantifying Burdens of Proof' (1971) 5 *Law and Society* 319. The survey found that respondents apply the BRD test with a varying degree of strictness given the nature of the offence, judges requiring a .92 degree of probability for a murder charge, but only a .87 degree of probability for theft. Denning LJ in *Bater v Bater* [1951] P 35, 36-37 similarly argued that the BRD test applied differently depending on the nature of the offence.

⁷⁷ An example is the defence of accident which in Queensland requires application of a three tier test in order to disprove its application.

dealing with onus of proof requirements for the offence with the overlay of disproof where the excuse is raised.⁷⁸ Different burdens of proof can apply in the one case, for example where the standard for the application of a defence or excuse⁷⁹ is reduced to one of a balance of probabilities, as is the case with insanity.⁸⁰ This issue has been identified by the survey of Australian and New Zealand by the Australian Institution of Judicial administration, as problematic in terms of jury comprehension.⁸¹

(4) Effect of Publicity and Media

The widespread reporting of crime, including through technology, has created tensions between the right to a fair trial and the presumption of innocence, and open justice.⁸² Information obtained by media publicity that may otherwise be inadmissible in court may sway jury decision making. Whilst the courts have some formal power to minimise the effects of media publicity,⁸³ and this is one of the reasons sometimes given for the introduction of trial by judge alone,⁸⁴ one might question whether such steps are sufficient and to what extent jurors are actually able to filter such material out.

It is also relatively common that a trial is aborted or conviction overturned due to an unwise or inadvertent comment in court or some media airing. When the evidence is completed there is a prospect that the jury may not be able to reach a verdict.⁸⁵

(5) Jurors as Fact Finders

Some laud juries for their ability to establish the existence of facts. However, in Australia the civil jury system has disappeared, and juries have never really been utilised in the Federal Court system: civil or criminal. This in itself is not a reason to abandon peer jury

⁷⁸ This problem is also discussed by the Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[625] in the context of jury directions on provocation, s 304 *Criminal Code* (Qld)

⁷⁹ For example the reversal of the onus of proof regarding Mistake of Fact under s 24 *Criminal Code* (Qld) as it applies under the *Drugs Misuse Act 1986* s 129(1)(d) which is required to be proved by the defence on a balance of probabilities.

⁸⁰ *Criminal Code* (Qld) s 26 and s 27.

⁸¹ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[6.27]

⁸² Michael Chesterman, "Criminal trial juries and media reporting", (2004/05) 85 *Reform* 23, at 24. See *R v K* [2003] NSWCCA 406, where a conviction for murder was overturned and a retrial ordered as a result of potentially prejudicial information accessed via the Internet.

⁸³ This is by warning the jury about taking media commentary into account: *R v Glennon* (1992) 173 CLR 592 and *R v Long; Ex parte A-G (Qld)* [2003] QCA 77; adjourning proceeding to a later date, see *R v Sheikh* [2004] NSWCCA 38; moving proceedings to another court district; or staying proceedings, see *R v Glennon* (1992) 173 CLR 592.

⁸⁴ The controversies surrounding paedophile Dennis Ferguson, who upon release from jail for a previous offence was charged with the alleged abuse of a 5 year old in 2005, provided impetus for the introduction of judge only trials, *Criminal Code and Jury and Another Act amendment Act 2008*. After two years involving numerous applications for a permanent stay of proceedings due to prejudicial media publicity, a stay was finally granted. In 2009 Ferguson was tried and acquitted of the charge in a judge only trial. Sometimes, the introduction of judge-only verdicts is justified on the basis that members of a jury may otherwise be swayed by publicity.

⁸⁵ Judge Valarie French, "Juries – a central pillar or an obstacle to a fair and timely criminal justice system" (2007) 90 *Reform* 40. It is estimated that in approximately 10% of trials, jurors are not able to reach a verdict: Salmelainen, P, Bonnney, R and Weatherburn, D 'Hung Juries and Majority Verdicts' (1997) *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* BOSCAR.

criminal trials, especially as the stakes are higher in terms of outcomes. However, as Horan notes some of the basic arguments for and against the civil jury system equally apply to criminal juries.⁸⁶ In considering civil juries, French states there is no argument for its retention based upon jury role in fact finding and assessing credibility of witnesses, as judges are able to do this in civil cases.⁸⁷ But one can question whether any one person is better placed than another to draw full proof conclusions from witness testimony. Former High Court Justice Michael Kirby states:

In the past, there was a great deal of confidence about the capacity of a judge (or any other formal decision-maker) to tell the truth from the appearance of a witness and the witness's demeanour when giving evidence. Empirical evidence casts serious doubt on the capacity of any human being to tell truth from falsehood from the observations of a witness, giving testimony, in the artificial and stressful circumstances of a courtroom. Appellate courts encourage judges to search for truth in the contemporary materials, objective and indisputable facts and the logic of the evidence rather than basing conclusions on responses to witnesses which may be erroneous and completely unfair.⁸⁸

Other members of the High Court apparently agreed that civil trials by judge alone are as good as trial by jury.⁸⁹

(6) Public Confidence

While earlier we acknowledged research suggesting improved confidence in the criminal justice system associated with the use of juries, the research also showed that levels of confidence increased with levels of satisfaction regarding experience,⁹⁰ that some jurors lost confidence in the system as a result of their experiences and recognise flaws within the system but were unable to think of a better one that would work more efficiently.⁹¹ Whilst confidence in the criminal justice system is imperative and contributes to perceptions of legitimacy, higher level confidence is arguably confined to those who have served on juries, and are as such educated in its workings, and exact levels of confidence are linked to individual experiences. The question is whether confidence is a function of education about, and experiences within, the system.

If the answer is yes, confidence and legitimacy can be engendered in alternative models of the administration of justice. Justice Cullinane has noted that in several European countries there is a prohibition against the type of trial by jury which exists in common law countries. This is because all judgements of all courts are to be accompanied by reasons –ironically,

⁸⁶ Jacqueline Horan, 'The law and lore of the Australian civil jury and civil justice system' (2006) 9 *Flinders Journal of Law Reform* 29, 41.

⁸⁷ Judge Valarie French, 'Juries – a central pillar or an obstacle to a fair and timely criminal justice system' (2007) 90 *Reform* 40, 42.

⁸⁸ The Hon Justice Michael Kirby AC CMG "Judging: Reflections on the moment of decision" (Speech delivered at the Fifth National Conference on Reasoning and Decision-Making, Wagga Wagga 4th December, 1998) http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_charles.htm at 23 November 2009.

⁸⁹ Jacqueline Horan, "The law and lore of the Australian civil jury and civil justice system" (2006) 9 *Flinders Journal of Law Reform* 29, referring to the discourse surrounding civil juries in the decision of *Gerlach v Clifton Bricks Pty Ltd* from its district court proceedings (Unreported decision of the District Court of New South Wales, Christie DCJ, 15 May 1998) through to appeal to the High Court [2002] HCA 22.

⁹⁰ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[2.17]

⁹¹ Referring to research conducted by Christine Richardson, Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[2.20].

given the rationale for juries in common law systems, something which is seen as a protection against arbitrary power. The adversarial system has been rejected by civil law countries as alien to principles underlying the inquisitorial process.⁹² Judge French considered that given the option of a peer jury criminal trial as an accused, she would take her chances if guilty, especially given that 'if jury decisions are in error they tend to err in favour of acquittal'; she would not leave her fate in the hands of a jury who do not provide reasons for their decision, or are otherwise accountable for the outcome.⁹³

(7) Appeals

The evidence suggests that successful appeal rates against convictions are relatively high. For example, it is estimated that 30% of appeals to the Queensland Court of Appeal concern jury directions.⁹⁴ Of the 538 appeals against conviction filed in the Victorian Court of Criminal Appeal, about 2/3 were based on misdirection.⁹⁵ Approximately 28% of these appeals against conviction were successful, usually leading to a retrial.⁹⁶

This highlights the power of appellate judges to substitute their verdict for that of a jury, given the fact that although the appellate court has access to transcripts of the trial, the judges have not been privy to jury deliberations of those facts and ultimately the basis of the jury verdict. This raises fundamental questions of fairness and whether the appellate court is effectively usurping the role of a jury.⁹⁷ In appeals based on misdirections, in other words no reasonable jury would have convicted if properly directed,⁹⁸ judges are interpreting what the decision of a reasonable jury (w)(s)hould have been, and in doing so usurping a jury function. In addition, determining questions on appeal on the basis of what a reasonable jury (w)(s)hould have done, exists in sharp contrast to the concept of trial by peers, ordinary people determining guilt.⁹⁹ This contrast can be justified in requiring the determination of appeals based on the higher standard of a reasonable jury, but ironically also raises questions regarding competency of ordinary juries.

There is a large expense associated with such re-trials; the Victorian Law Reform Commission estimated the cost of a five day appeal in County Court at \$55250, including lawyer's fees and cost to the court.¹⁰⁰ The Queensland Law Reform Commission has expressly questioned whether the financial costs and other burdens associated with re-trials are an acceptable cost of ensuring as far as possible that no one is convicted without a fair

⁹² Hon Justice K A Cullinane 'Trial by jury – a comparative glance' (Speech delivered at Pan Pacific Legal Conference, Italy, 24-31 March 2008) at 2 and 5 <http://archive.sclqld.org.au/judgepub/2008/cullinane0308.pdf> at 23rd November 2009.

⁹³ Judge Valarie French, 'Juries – a central pillar or an obstacle to a fair and timely criminal justice system' (2007) 90 *Reform* 40.

⁹⁴ Queensland Law Reform Commission, *A Review of Jury Directions, Issues Paper* WP No 66 (2009) 5.25.

⁹⁵ 5.25, 5.33.

⁹⁶ Queensland Law Reform Commission: *A Review of Jury Directions: Issues Paper* WP No 66 (2009) 5.29.

⁹⁷ Catherine Penhallurick 'The Proviso in Criminal Trials' [2003] *Melbourne University Law Review* 31.

⁹⁸ S 668D and 668E *Criminal Code* (Qld).

⁹⁹ Adding yet another overlay to the concept, peer criminal juries will determine guilt by applying objective tests based on the ordinary person.

¹⁰⁰ These costs were not specifically identified, and many other costs were not included in this estimate, and it is suggested the actual cost would be much higher: Queensland Law Reform Commission *A Review of Jury Directions: Issues Paper* WP No 66 (2009) 5.60.

trial.¹⁰¹ When introducing majority verdicts, the New South Wales Government claimed the reforms 'will help to ensure that court resources are not wasted on unnecessary retrials— retrials that have been ordered simply because of circumstances that affect only one or two jurors and pose no threat to an accused's right to a fair trial.'¹⁰²

(8) Juries Are Not Representative

Referring to an article by Richard M Re, Justice Atkinson states that

research carried out in the United States suggests that public confidence in juries is greater when jury members are more representative of the community. -- At present we do not appear to achieve either of these aims very well and yet trial by jury is fundamental to the community's involvement and confidence in the criminal justice system.¹⁰³

Justice Atkinson goes on to identify a New South Wales District Court case where the failure to have a representative jury led to a jury being discharged for lack of representativeness as the accused was an indigenous person and all the members of the jury were non-indigenous, indigenous people having been stood down by the prosecution.¹⁰⁴

A common theme of jury research is that juries are no longer, if they every truly were,¹⁰⁵ a randomly selected cross sectional representation of our population,¹⁰⁶ despite the High Court's orthodox view that 'the relevant essential feature or requirement of the institution was, and is, that the jury be a body of person's representative of the wider community'.¹⁰⁷ Such representation is seen as the cornerstone on which jury by peers operates and integral

¹⁰¹ Queensland Law Reform Commission, A Review of Jury Directions: Issues Paper WP No 66 (2009) 5.63.

¹⁰² New South Wales, *Parliamentary Debates: Jury System Reform*, at 6948, the Hon John Hatzistergos Attorney General <http://www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/V3Key/LC20080506033> at 24 November, 2009.

¹⁰³ Justice Roslyn Atkinson Supreme Court of Queensland "Selection of Juries: the search for the elusive peer group" (Speech delivered at the Jury Research and Practice Conference, Sydney, 11 December 2007) 1 and 2, at <http://archive.sclqld.org.au/judgepub/2007/atkinson111207.pdf> at 23 November, 2009. Referring to Richard M Re "Re-justifying the Fair Cross-Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury", (2007) 116 *Yale Law Journal* 1568, 1574.

¹⁰⁴ Justice Roslyn Atkinson Supreme Court of Queensland "Selection of Juries: the search for the elusive peer group" (Speech delivered at the Jury Research and Practice Conference, Sydney, 11 December 2007) 2, at <http://archive.sclqld.org.au/judgepub/2007/atkinson111207.pdf> at 23 November, 2009; Neil Rees, 'R v Smith' (1982) 813 *Aboriginal Law Bulletin* 11.

¹⁰⁵ There is a plethora of literature regarding of the marginalisation of certain, and mostly minority, groups of the population regarding jury service. At the same time much of this literature also comes full circle regarding the overrepresentation of certain population groups in jury service due to the ease with which certain members of the population seem to be excused from jury service and the resultant effect on the demographic skewing of juries. For example, most professionals are excused from jury service leaving the unemployed and retired to fulfil the role.

¹⁰⁶ Cf Jacqueline Horan, 'The law and lore of the Australian civil jury and civil justice system' (2006) 9 *Flinders Journal of Law Reform* 29, 47 whose argues based on a survey conducted in 2001 that juries are not as unrepresented as some argue, and are broadly representative of the Victorian community. The author also states based on the results of the survey that the average civil juror is better educated than the average Victorian (which raises the question of how is this so, given that the jury is supposed to be representative of the community).

¹⁰⁷ *Cheatle v The Queen* (1993) 177 CLR 541, 560.

to the protection of the democratic rights of a citizen to participate in governance and the rights of an accused to an impartial and fair trial.

An initial observation regarding random selection is whether the process itself ensures a jury by peers.¹⁰⁸ Added to this are the difficulties associated with ensuring cross sectional representation in view of exemption policies in many jurisdictions. Whilst rules vary between jurisdictions they are subject to considerable debate and criticism. In a survey conducted in Western Australia in 1983, 88.9% of respondents felt that highly educated persons such as professors, school teachers, doctors, [and] clergymen, should not continue to be exempt from jury service,¹⁰⁹ and in line with such views some jurisdictions have responded by reconsidering jury disqualifications and excuses.¹¹⁰ This should improve the representative nature of juries.¹¹¹

The problem of unrepresentative juries is made worse by the generally low rates of pay offered to jurors, meaning well-paid potential jury members have a greater financial incentive to seek to avoid service.¹¹²

Some states in the US have opted for no exemption juries; as a result practising attorneys, former judges, police officers and others with legal expertise serve on juries.¹¹³ Whilst in some states these specific classes of persons are disqualified from jury service, other educated and professionals on any jury may have had some legal education and bring that with them to the jury room. Is this necessarily a bad thing?

Grounds for excuse from jury service vary across jurisdictions.¹¹⁴ For example, under the *Jury Act 1995* (Qld) the criteria to be applied on an application to be excused from jury service are substantial hardship due to employment or personal circumstances; substantial financial hardship; substantial inconvenience to the public or section of the public; care

¹⁰⁸ Colin Davies and Christopher Edwards "A jury of peers': A comparative analysis" (2004) 68 *Journal of Criminal Law* 150 questions this concept. For the process in Queensland refer to s 16 *Jury Act 1995* (Qld)

¹⁰⁹ I M Vodanovich, "Public attitudes about the jury" in D Challenger (ed), *The Jury* (Australian Institute of Criminology Seminar: Proceedings No 11, 1986) at 81.

¹¹⁰ Major reforms occurred in Queensland with the passage of the *Jury Act 1995* (Qld), which removed many disqualifications from jury service; however disqualifications remain applicable to judges, magistrates, police, detention centre employees, correctional services officers, those over 70, those who are not literate in English, those with physical or mental disability, and those convicted of an indictable offence.

¹¹¹ Justice Atkinson poses some important questions regarding disqualifications, including who determines them, and which disabilities are considered to stop jurors from carrying out juror functions. She questions whether those involved in law enforcement or otherwise in the criminal justice system should be excluded, or whether prisoners should be excluded: 'Selection of Juries: The Search for the Elusive Peer Group', speech presented at the Jury Research and Practice Conference, Sydney, 11/12/2007, p9.

(<http://archive.sclqld.org.au/judgepub/2007/atkinson111207.pdf>, accessed 23/11/09.

¹¹² Graham Lilly 'The Decline of the American Jury' (2001) 72 *University of Colorado Law Review* 53, 63-64.

¹¹³ Hon Justice Michael Kirby AC CMG 'Lawyers as communicators' (Speech delivered at the Worldwide Advocacy Conference: Speaking to the modern jury – New challenges for judges and advocates, London, 29 June to 2nd July 1998) 4, at http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_london.htm

¹¹⁴ A 1986 Western Australian survey found that 89% of those surveyed thought highly educated people should not be excluded from jury service: I M Vodanovich 'Public Attitudes About the Jury' in D Challenger ed *The Jury* (1986) p81.

givers; health; or anything else stated in a practical direction.¹¹⁵ Again, these raise questions of interpretation and proof.¹¹⁶

An option to alleviate this problem is to make jury service compulsory; however this raises questions of how to practically force an unwilling person to serve. Some who had already served as jurors appear unwilling to do so again.¹¹⁷ Compulsory jury service also raises questions about the decision making by a hostile juror in the context of fair trial, or that a person forced to act as a juror may adopt a passive-aggressive stance, refusing to participate in the process. These options sit oddly with theory, and support in some ways the argument for professional juries in this article.

The representative nature of the jury is further diluted by procedures on selection prior to trial. In Queensland the prosecution and defence are entitled to eight peremptory challenges, with additional limited peremptory challenges from the pool of reserve jurors;¹¹⁸ and challenges for cause, on the basis of qualification for jury service, questions of impartiality or special reason.¹¹⁹ The defendant may also challenge the jury panel as a whole¹²⁰ and a Judge retains the discretion to discharge an entire jury on the grounds that its composition may cause the trial to be, or appear to be, unfair.¹²¹ The ability to challenge is supported by the right of the defendant to be informed of persons called upon to sit on the jury and their right to challenge the inclusion of individual jury members.¹²²

Davies and Edwards consider that peremptory challenge can be seen as a means by which the randomness of the jury can be compromised.¹²³ Judge Valarie French agrees:

It has been said that the combined wisdom of a jury of one's peers is the best method of reaching a fair decision. But if you have taken part in or watched a jury empanelment process that sometimes seems questionable – prospective jurors with management experience, small business operators, accountants and teachers are routinely excluded – this can leave a pool of people who appear to be unemployed, the disinterested or – more dangerously – the very resentful at being press ganged into service.¹²⁴

¹¹⁵ *Jury Act 1995* (Qld) s 21; these criteria are again a matter of interpretation: Justice Roslyn Atkinson, Supreme Court of Queensland, speech delivered at the Jury Research and Practice Conference, Sydney, 11/12/2007, p9, accessed at <http://archive.sclqld.org.au/judgepub/2007/atkinson111207.pdf>.

¹¹⁶ Justice Roslyn Atkinson Supreme Court of Queensland 'Selection of Juries: the search for the elusive peer group' (Speech delivered at the Jury Research and Practice Conference, Sydney, 11 December 2007) 9, at <http://archive.sclqld.org.au/judgepub/2007/atkinson111207.pdf> at 23 November, 2009.

¹¹⁷ Queensland Law Reform Commission, *A review of jury directions*, Issues Paper WP No 66 (2009)[2.20]. Referring to research conducted by Christine Richardson "Juries: What they think of us" (2003) December *Queensland Bar News* 16.

¹¹⁸ *Jury Act 1995* (Qld) s 42 and s 47.

¹¹⁹ *Jury Act 1995* (Qld) s 43.

¹²⁰ *Jury Act 1995* (Qld) s 40.

¹²¹ *Jury Act 1995* (Qld) s 48, s 60-62.

¹²² *Jury Act 1995* (Qld) s 39 prior to the selection of a jury.

¹²³ Colin Davies and Christopher Edwards 'A jury of peers': A comparative analysis' (2004) 68 *Journal of Criminal Law* 150, 155, quoting PW Ferguson 'Jury vetting' (1997) 35 *Scots Law Times* 287.

¹²⁴ Judge Valarie French, 'Juries – a central pillar or an obstacle to a fair and timely criminal justice system' (2007) 90 *Reform* 40, 41.

There is evidence, at least in the United States, that some trial attorneys deliberately chose jurors who are not well informed.¹²⁵ This practice has been noted by former United States Supreme Court Justice Sandra Day O'Connor:

It is unfortunate that, in high profile cases in this country, which sometimes are high-profile precisely because they are very important, courts are forced to look high and low for jurors who have never read newspapers, never watch the news, and never give much thought to issues of public importance. I'm not saying that those jurors are incapable of deciding cases properly. But I am saying that those jurors probably are unrepresentative of their community, because they probably are on average considerably less well-informed citizens than a random cross-section would provide.¹²⁶

Many academics have argued that juries are not representative of the community, because the selection process tends to weed out the better educated members of society.¹²⁷ The low rate of pay creates a further disincentive for those on higher incomes, obviously correlated with education levels.¹²⁸

9. Juries As Currently Structured Are Not Efficient

The efficacy, including cost efficiency, of peer jury criminal trial is often the subject of criticism from a number of angles. One study found that a jury trial typically lasted twice as long as a non-jury trial.¹²⁹ Michael Hill and David Winkler consider that the system is not

¹²⁵ In Margaret Cronin Fisk *Winning: Successful Strategies from 10 of the Nation's Top Litigators, Knowing When to Tiptoe or Stomp*, *National Law Journal* 22/9/1997 at C3 quoting an Attorney Ivan Schneider saying that '[if prospective jurors are] reading the Wall Street Journal editorial page, I know I'll have to supersell the case. If they're reading the Daily News sports pages, I'll take that person any day'; Stuart Taylor *Selecting Juries: Dumb and Dumber*, *Legal Times*, 14/4/1997, at p33 noting 'the deplorable tendency of the selection process to purge the best-informed people from juries' and quoting one prosecutor as saying 'smart people will analyse the hell out of your case. They have a higher standard. They take those words 'reasonable doubt' and actually try to think about them. You don't want those people'; as Graham Lilly 'The Decline of the American Jury' (2001) 72 *University of Colorado Law Review* 53, 65 puts it: 'jury selection procedures .. have a built in bias favoring jurors who are comparatively less informed, less skilled, or less educated than the pool of potential jurors, and who, it thus seems, may often be unrepresentative of the community ... jury-selection .. has earned the sobriquet 'dumbing down the jury'.

¹²⁶ 'Juries: They May be Broken, But We Can Fix Them', *Federal Law*, June 1997, p20, 23.

¹²⁷ Stephen Adler *The Jury: Trial and Error in the American Courtroom* (1994) p219; Albert Alschuler 'Explaining the Public Wariness of Juries' (1998) 48 *DePaul Law Review* 407, 408; Daniel Collins 'Making Juries Better Fact Finders' (1997) 20 *Harvard Journal of Law and Public Policy* 489, 499; Dan Drazen 'The Case for Special Juries in Toxic Tort Litigation' (1989) 72 *Judicature* 292, 295; Phoebe Ellesworth and Alan Reifman 'Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions' (2000) 6 *Psychology, Public Policy and the Law* 788, 812; Steven Freidland 'The Competency and Responsibility of Jurors in Deciding Cases' (1990) 85 *Northwestern University Law Review* 190, 194; Douglas Smith 'Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform' (1997) 48 *Alabama Law Review* 441, 500; Franklin Strier 'Making Jury Trials More Truthful' (1996) 30 *University of California David Law Review* 95, 135; Richard Willard 'What is Wrong with American Juries and How to Fix It' (1997) 20 *Harvard Journal of Law and Public Policy* 483, 483-487; Douglas Ell 'The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment' (1978) 10 *Connecticut Law Review* 775, 779; Alan Feigenbaum 'Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts' (2003) 24 *Cardozo Law Review* 1361, 1389.

¹²⁸ Graham Lilly 'The Decline of the American Jury' (2001) 72 *University of Colorado Law Review* 53, 63-64.

¹²⁹ Administrative Office of the United States Courts *Judicial Business of the United States Courts: Annual Report of the Director* 19, A1-284, A1-287 (1993); Richard Posner *The Federal Courts: Challenge and Reform* (1996) p193-194, Patrick Longan 'The Case for Jury Fees in Federal Civil Litigation' (1995) 74 *Oregon Law Review* 909, 929; a report by the National Centre for State Courts, *On Trial: The Length of Civil and Criminal Trials* (1988), found jury trials were on average three times longer than non-jury trials.

results efficient, from a crime control perspective¹³⁰: ‘it is true that jury trials are not efficient – if the measure of efficiency is cost against result or turnover’ but they then questions whether efficiency is the appropriate measure”.¹³¹ The answer is yes, if only from a sustainability perspective, and considering the alternative models argument advanced by this article.

Direct costs in administration, delays and appeals bring into question peer criminal jury efficacy as do indirect costs, for example the economic costs due to lost production and social costs due to child (dependant) minding and even post jury trauma. Savings in costs can potentially be achieved by considering alternatives and Judge French recognises the effect of judge only trials in this context.¹³²

The research into alternative systems can inform us regarding alternatives and reform. Whilst many regard our system as better than any alternative¹³³ the Hon Justice K A Cullinane points out that

The adversarial system has been rejected by the civil law countries as being alien to some of the principles underlying the inquisitorial process. These include: a) the duty of the state by the presiding judge and investigating judge to ascertain the truth; b) the necessity of the reviewability of judgments reflected in the requirements for reasons of finding guilt or innocence; and c) the legality principle or the principle of mandatory prosecution. This would reject unbridled discretion and practices such as plea bargaining.¹³⁴

As this article has outlined, the existing peer jury system has a myriad of problems ranging from selection to facilitating appeals. Some of the problems raised in this article have existed for decades, and others are emerging as society changes. All are to varying degrees recognised, as is the need to address them. On the other hand, this article has acknowledged the strong traditions of, and arguments for continuing use of, juries in appropriate cases, in terms of protection against government overreach, democracy, and public confidence in the justice system.

One way to reconcile these views is to continue with the use of juries, but change their composition and training. In this way, some of the strengths of the existing system can be retained, but some of the key weaknesses of the current jury system can be addressed. In the next part of this paper, we develop some specific suggestions in this regard.

Improvements to the Jury System

¹³⁰ Michael Hill and David Winkler ‘Juries: How do they work? Do we want them?’ (2000) 11 *Criminal Law Forum* 397, 421.

¹³¹ Michael Hill and David Winkler ‘Juries: How do they work? Do we want them?’ (2000) 11 *Criminal Law Forum* 397, 428.

¹³² Judge Valarie French, ‘Juries – a central pillar or an obstacle to a fair and timely criminal justice system’ (2007) 90 *Reform* 40.

¹³³ Murray Gleeson AC, Chief Justice High Court of Australia, ‘Current issues for the Australian judiciary’, (Speech delivered to the Supreme Court of Japan Tokyo – 17th January 2000) http://www.hcourt.gov.au/speeches/cj/cj_japan.htm at 21st December, 2009.

¹³⁴ Hon Justice K A Cullinane ‘Trial by jury – a comparative glance’ (Speech delivered at Pan Pacific Legal Conference, Italy, 24-31 March 2008) 4 at <http://archive.sclqld.org.au/judgepub/2008/cullinane0308.pdf> accessed 23/11/2009.

(i) Improving Juror Understanding

How can we have the benefits of a jury trial elaborated above, while addressing the deficiencies of the jury system as currently used? The authors would firstly suggest, having considered the evidence used to write this paper, that jurisdictions must be confident in the extent to which they educate jurors about their role and responsibilities as jurors. This would include making sure that jurors understand the meaning of beyond reasonable doubt, and only take into account relevant evidence, and ignore peripheral 'noise', including media and publicity. There is a similar need to review directions to jurors, so that they are as clear as they can be. One overwhelming finding from the research accessed for the purposes of this paper has been the extent to which jurors don't understand evidence or directions in many cases. This must be an issue addressed by judges in specific trials, with greater guidance provided in these matters where appropriate, in what is admittedly a very difficult and onerous task for judges during trials.¹³⁵ Perhaps there is a need to pay jurors appropriately, and maybe to have a volunteer system in order that only those who are dedicated to the task actually serve. We do not dwell in detail here on those suggestions, because they have already largely been made by various law reform agencies in Australia in relation to the operation of juries.¹³⁶

(ii) Special Juries

There are more contentious proposals to improve the quality of juries, involving the identity of those we ask to serve as jurors, and whether we expect some kind of minimum knowledge or skill base in order to carry out this function. This could lead us in several directions, to professional juries whose full-time occupation is to act as jurors, to minimum educational qualifications or experience in order to serve on a jury (or on juries in some 'complex' cases, however that word is defined),¹³⁷ or to specialist technical experts matched to appropriate trials.¹³⁸ These are not new suggestions worldwide, and have particular resonance in the United States, given the pivotal position of juries in that country's history and legal system; a range of academics have called for the introduction of jurors with particular expertise,¹³⁹ and some judges have expressed support.¹⁴⁰ It is not an idea often

¹³⁶ Most recently, see the suggestions in Queensland Law Reform Commission's recent report *A Review of Jury Directions, Issues Paper* WP No 66 (2009) and references contained therein to similar suggestions from other law reform agencies. Chapter 8 suggests ways to improve directions to juries, and Chapter 9 suggests ways to improve juror decision making, including note-taking, summaries of directions and judicial summing up etc.

¹³⁷ Relevant factors would include the nature of the evidence, nature of the charge, and the volume of evidence to be considered.

¹³⁸ For example, economists hearing complex trade practices matters, scientists hearing a criminal case involving complex DNA or other scientific evidence.

¹³⁹ Kristy Lee Bertelsen 'From Specialised Courts to Specialised Juries: Calling for Professional Juries in Complex Civil Litigation' (1998) 3 *Suffolk Journal of Trial and Appellate Advocacy* 1; LeRoy Kondo 'Untangling the Tangled Web: Federal Court Reform Through Specialisation for Internet Law and Other High Technology Cases' (2002) *University of California Los Angeles Journal of Law and Technology* 1; Beth Shaw 'Judging Juries: Evaluating Renewed Proposals for Specialised Juries From a Public Choice Perspective' (2006) *University of California Los Angeles Journal of Law and Technology* 3; Michael Mushlin 'Bound and Gagged: The Peculiar Predicament of Professional Jurors' (2007) 25 *Yale Law and Policy Review* 239; Davin Stockwell 'A Jury of One's (Technically Competent) Peers?' (2000) 21 *Whittier Law Review* 645; Ryan Seidemann, James Wilkins and

canvassed in Australia, however, and is considered worthy of some exploration. We will focus here on the suggestion that, at least in some cases, jurors might be required to meet certain minimum education standards. This is the sense in which the word 'special' as applied to jurors is used below.

The suggestion that jurors might need some 'special knowledge' in order to sit on trials, or some trials, is controversial because it runs counter to the (current) orthodox view of what a jury is and how it is comprised. However, it should not be thought to be an unprecedented idea. It is worth recalling that a requirement that jurors have special knowledge is of ancient origin.

As has been recorded by others, originally juries were comprised, in relation to particular trials, of 'locals' who were likely to have first hand knowledge of the events, and to bring such specialised knowledge of the events to the trial at hand.¹⁴¹ From this original position, there developed a concept of jurors as being impartial members of the public without specialist knowledge, while those with specialist knowledge came to be known as witnesses. Further, there developed a practice of those with particular expertise in a field adjudicating cases pertaining to that field. Oldham cites many examples, including disputes of church patronage being heard by juries comprised of clergymen, a woman's pregnancy claim being heard by a jury of matrons,¹⁴² a 1394 case where a jury of 'cooks and fishmongers' heard a trial of a defendant accused of selling bad food, booksellers and printers hearing a 1663 libel trial, and early King's Bench cases reporting juries of clerks and attorneys hearing cases of falsification of writs by attorneys and extortion by court officials.¹⁴³ Between 1190 and 1807, English law allowed a defendant foreigner to empanel a jury from their nationality or race.¹⁴⁴ Better known is the role played by commercial people on juries while Lord

Mindy Heidel 'Closing the Gate on Questionable Expert Witness Testimony: A Proposal to Institute Expert Review Panels' (2006) 33 *Southern University Law Review* 29; William Luneberg and Mark Nordenberg 'Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation' (1981) 67 *Virginia Law Review* 887; Franklin Strier 'The Educated Jury – A Proposal for Complex Litigation' (1997) 47 *DePaul Law Review* 49; Gregory Liebold 'In Juries We Do Not Trust: Appellate Review of Patent Litigation' (1996) 67 *University of Colorado Law Review* 623.

¹⁴⁰ In the survey 'Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases' (1989) 69 *B U Law Review* 731, 748, 39% of 200 federal judges polled were in favour of minimum educational requirements or qualifications for jurors; 53% agreed that a panel of experts, rather than a jury, should hear some complex cases.

¹⁴¹ See, for example, Maitland F *The Constitutional History of England* (1968) p122; Thayer 'The Jury and its Development' (1892) 5 *Harvard Law Review* 295, 300 'as among eligible persons, there always seems to have existed the power of selecting those especially qualified for jury service'. Statute 42 Edw. 3, ch 11 (1368) required jurors who were 'next neighbours', those who 'have best knowledge or the truth, and be nearest'.

¹⁴² Oldham, p171; apparently some female accused pleaded pregnancy to avoid a trial; the veracity of the claim had to be tested, and others claimed pregnancy to affect inheritances.

¹⁴³ James Oldham 'The Origins of the Special Jury' (1983) 50 *University of Chicago Law Review* 137, 171-174; see also Jeannette Thatcher 'Why Not Use the Special Jury' (1947) 31 *Minnesota Law Review* 232, 234-237, who also concludes that the special juries endured in England for more than five centuries (242). Renowned English historian Holdsworth was in favour of special juries, concluding 'though a good special jury is admitted to be a very competent tribunal, the common jury may be composed of persons who have neither the desire nor the capacity to weigh the evidence, or to arrive at a conclusion upon the facts in issue': *A History of English Law* (1938, 6th ed) p347.

¹⁴⁴ Oldham, p167.

Mansfield developed commercial law principles.¹⁴⁵ Several American states have used special juries at some stage.¹⁴⁶

The argument is that having 'special' jurors would address the very strong message from the research referred to earlier in the paper, that jurors commonly struggle to understand, and do not understand, evidence in a large number of cases. They may not understand jury directions or beyond reasonable doubt. This can lead some of them to take into account irrelevant considerations. These problems are considered to be extremely serious in a context of a process that may lead to an individual's liberty being taken away, and a permanent criminal record given.

It is argued, and studies have supported,¹⁴⁷ that 'special' jurors are more likely to understand complex evidence or complex directions given at trial.¹⁴⁸ As Lilly points out:

In some types of modern trial, such as those involving complex scientific findings or esoteric economic or mathematical evidence, there is no adequate substitute for actually comprehending the evidence, the arguments of the parties, and the judge's instructions. In these kinds of cases, intuition and a sense of fairness are unlikely to produce a result that is consistent with the governing law. Furthermore, if jurors' intuitive notions of right and wrong are permitted generally to supplant understanding, reasoning and logic as the cornerstone of the adjudicatory process, then the highly refined and orderly presentation of evidence and the crafting of instructions become meaningless exercises. Jury trial may thus devolve into a battle of instincts, hunches and judgments based on non-relevant criteria such as the dress and demeanour of attorneys, witnesses, and especially expert witnesses.¹⁴⁹

¹⁴⁵ Matthew Hale observed that 'if it be a question touching the custom of merchants, merchants are usually jurors at the request of either party': *Treatise of the Admiralty Jurisdiction* (unpublished manuscript), quoted in Baker 'Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861' (1979) 28 *International and Comparative Law Quarterly* 141, 144.

¹⁴⁶ William Luneburg and Mark Nordenberg 'Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation' (1981) 67 *Virginia Law Review* 887, 906.

¹⁴⁷ Amiram Elwork et al *Making Jury Instructions Understandable* (1982) p58-59; J Appel 'The Jury on Trial' in Walter Abbott and John Batt ed *A Handbook on Jury Research* (1999). David Strawn and Raymond Buchanan concluded that 'those jurors with (University) experience tended to score higher (on tests of evidence of comprehension) than those without (University) experience: 'Jury Confusion: A Threat to Justice' (1976) 59 *Judicature* 478, 483; Laurence Severance, Edith Greene and Elizabeth Loftus 'Towards Criminal Jury Instructions that Jurors Can Understand' (1984) 75 *Journal of Criminal Law and Criminology* 198, 224: 'jurors with greater experience and learning apparently comprehend and apply jury instructions better than those who are less experienced and/or less well educated'; Robert Charrow and Veda Charrow 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79 *Columbia Law Review* 1306, 1320: 'The only factor that consistently and significantly correlated with performance was the amount of education that a subject had had ... Comprehension rose as education level rose'; Rita James 'Status and Competence or Jurors' (1959) 64 *American Journal of Sociology* 563; Reid Hastie *Inside the Jury* (1983), who found that jurors with higher education had superior recall of the judge's instructions and case facts; James Marshall *Law and Psychology in Conflict* (1980) p59-100; F Strodtbeck 'Social Status in Jury Deliberations' (1957) 22 *American Society Review* 713; Franklin Strier 'The Educated Jury: A Proposal for Complex Litigation' (1998) 47 *DePaul Law Review* 49, 68; Rita Sutton 'A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury' (1990) *University of Chicago Legal Forum* 575.

¹⁴⁸ Neil Vidmar 'Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data From Medical Malpractice' (1994) 43 *Emory Law Journal* 885, 900; Kimberley Moore 'Judges, Juries and Patent Cases – An Empirical Peek Inside the Black Box' (2000) 99 *Michigan Law Review* 365, 368.

¹⁴⁹ 'The Decline of the American Jury' (2001) 72 *University of Colorado Law Review* 53, 70-71; Richard Baker 'In Defense of the Blue Ribbon Jury' (1950) 35 *Iowa Law Review* 409.

It is argued that 'special' jurors are less likely to be influenced by pre-trial publicity or media reporting of pre-trial events, or the trial itself. Such a juror might be better able to avoid being distracted by irrelevant facts,¹⁵⁰ court-room theatrics or how a case is presented,¹⁵¹ and focus more on the substance of the evidence. Some studies have suggested troubling ways in which jurors decide complex cases.¹⁵²

On the other hand, a higher degree of juror education or expertise does not guarantee that the jury will find it any easier to drawn conclusions. It is conceded that expert witnesses often disagree on the conclusions that can or should be drawn from the evidence.

It is true that the notion of special juries challenges some orthodoxy about juries. As Marder puts it

The traditional view of the juror's role throughout trial is that of an empty vessel into which information presented in the form of exhibits, testimony, argument and judicial instructions will be poured.¹⁵³

It may be argued that a special jury model is inconsistent with this model, in implying that jurors will have a certain level of information and knowledge prior to the trial, and will bring it to bear in jury deliberations. Some of the information on which their decision might be based may not have been subject to the usual rules of evidence, and the rigours of cross-examination. This leads some authors to argue that jurors should specifically be directed not to apply their past experience and expertise in jury deliberations.¹⁵⁴

On the other hand, it is fanciful to think that jurors will not bring knowledge and information with them to the process of jury deliberation. They will have their own learning styles, and their own ways of interpreting and understanding information. They will have had many life experiences. It is unreal to expect jurors to 'unlearn' all of this prior to sitting on a trial.¹⁵⁵

¹⁵⁰ Arthur Austin and Stephen Adler, researching a jury on a complex trade practices trial found that, faced with complex legal and economic evidence, jurors did not understand the evidence at all and resorted to factoring in things like the attorneys' attire, demeanour and personal hygiene: Arthur Austin 'The Jury System at Risk from Complexity, the New Media and Deviancy' (1995) 73 *Denver University Law Review* 51, 54.

¹⁵¹ For example, in a survey of jurors, University-educated jurors were more likely to comment on attempts by lawyers in the case on which they sat to 'distort' evidence: Franklin Strier 'The Educated Juror: A Proposal for Complex Litigation' (1997) 47 *DePaul Law Review* 49, 68.

¹⁵² Joel Cooper, Elizabeth Bennett and Holly Sukul 'Complex Scientific Testimony: How Do Jurors Make Decisions?' (1996) 20 *Law and Human Behaviour* 379 found from an empirical study of jurors that in complex cases, jurors rely more on the resume of the presenting expert than on the content of the evidence in reaching their decision (390); see also Peter Goss, Deborah Worthington, Merrie Stallard and Joseph Price 'Clearing Away the Junk: Court-Appointed Experts, Scientifically Marginal Evidence and the Silicone Gel Breast Implant Litigation' (2001) 56 *Food and Drug Law Journal* 227.

¹⁵³ Nancy Marder *The Jury Process* (2005) p105.

¹⁵⁴ Paul Kirgis 'The Problem of the Expert Juror' (2002) 75 *Temp L Review* 493, 535; John Mansfield 'Jury Notice' (1985) 74 *Georgetown Law Journal* 395, 407; John Wigmore *Evidence* (1981) p2570; cf Charles McCormick *McCormick on Evidence* (5th ed, 1999) p329, Richard Fraher 'Adjudicative Facts: Non-Evidence Facts and Permissible Juror Background Information' (1987) 62 *Indiana Law Journal* 333, 346-347.

¹⁵⁵ As Gershman puts it, 'it is not expected that jurors should leave their common sense ... at the door before entering the jury room. Nor is it expected that jurors should not apply their own knowledge, experience and perceptions acquired in the everyday affairs of life to reach a verdict': Bennett Gershman 'Contaminating the Verdict: The Problem of Juror Misconduct' (2005) 50 *South Dakota Law Review* 322, 331. Apparently, it is common practice in many jurisdictions to instruct jurors that they can draw on their past experiences: Michael

Another argument against the use of special juries is that such a system is elitist and inconsistent with the common understanding of the nature of juries, that they represent a cross-section of society and have democratic roots.¹⁵⁶ The counter argument is that the objective of using better educated juries is actually to improve the integrity of the process, and to make it as good as it can be. When an individual's liberty is at stake, the authors believe that it is worth considering measures to increase the likelihood that jurors understand the evidence they are hearing, understand the directions the judge is giving them, can properly weight evidence, understand the principles that they are being asked to apply, and are better able to filter out irrelevancies. It is not considered elitist to want to minimise the risk of incorrect verdicts, and if the authors were asked whether they preferred 'representative juries' or juries that made the 'correct' decision on the evidence given, they would have no hesitation in indicating the latter.

Conclusion

Whilst many of the authors of literature relied upon in the compilation of this article, among them many judges, are advocates of a peer jury criminal justice system and cite cogent reasons for its retention, there are concerns with the sustainability of the current model.

An alternative that would address many of the concerns raised by critics of the jury system discussed in this article would be to have better informed juries. This could occur through better processes as described in Chapter 8 and 9 of the recent Issues Paper. However, at least in some cases, there should be the ability for a judge to request a jury comprised of jurors with certain minimum educational standards. It is expected that this option would be used in 'complex cases'¹⁵⁷ in terms of the evidence to be presented, or the law to be applied in the particular area.

Mushlin 'Bound and Gagged: The Peculiar Predicament of Professional Jurors' (2007) 25 *Yale Law and Policy Review* 239, 242.

¹⁵⁶ See for example Murphy J dissenting in *Fay v New York* (1947) 332 US 261, 297-298: 'The constitutional vice inherent in the type of 'blue ribbon' jury panel here involved is that it rests upon intentional and systematic exclusion of certain classes of people who are admittedly qualified to serve on the general jury panel. Whatever may be the standards erected by jury officials for distinguishing between those eligible for such a 'blue ribbon' panel and those who are not, the distinction itself is an invalid one. It denies the defendant his constitutional right to be tried by a jury fairly drawn from a cross-section of the community. It forces upon him a jury drawn from a panel chosen in a manner which tends to obliterate the representative basis of the jury'.

¹⁵⁷ The authors will suggest a definition of this phrase if needed.