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Who's Who in the Legal Zoo: The Jury

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Juries have been portrayed in movies, such as *The Juror* and the much earlier *12 Angry Men*, depicted in books (particularly by John Grisham), such as *The Last Juror* or *Runaway Jury*, and featured in television programs like *Law and Order*. Most of us in the common law world know someone who served on one (or at least got a notice to attend jury duty). But what do you really know about this institution that has been described as 'the lamp that shows that freedom lives'[1] or the 'sacred bulwark' of liberty?[2]

A history lesson

Unlike the situation today, originally jurors were only chosen if they had knowledge of the case.[3] These jurors were required to tell what they knew (more like a witness than the juror that we know today).[4] It was only later that the institution morphed into one of twelve randomly selected lay persons in the role of fact-finders in a case,[5] incorporating the notion of impartiality that has been said to be one of importance, especially in criminal cases.[6]

The jury became a safeguard, a measure of accountability to protect accused persons from being detained or deprived of possessions through an arbitrary exercise of power.[7] However, the importance of the jury has become firmly linked to public participation and confidence in the administration of justice. As articulated in *Taylor v Louisiana* 419 US 522, 530 (1975):

> The purpose of the jury is ... to make available the common sense judgement of the community as a hedge against the over zealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge.... Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical for public confidence in the fairness of the criminal justice system.

Apart from the above advantages of the jury, Lord Devlin argued that juries are superior to judges as arbiters of fact. He noted that juries bring the experience of twelve minds to bear on issues of credibility, as opposed to one. Further, he contended that juries are more in touch with community standards that are so often applied in legal matters, such as the reasonableness of an accused's actions.[8] The High Court of Australia agrees. Justices Deane, Dawson, Toohey, Gaudron and McHugh have observed:

> [T]he genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.[9]

The jury, otherwise known as the 'jewel in the Crown' of British justice,[10] was imported into Australia, as part of our inheritance of the colonial system.[11]

The right to a jury was enshrined in the *Australian Constitution* as imperative for trials 'on indictment of any offence against any law of the Commonwealth'.[12] However, this provision has inbuilt limitations. Most criminal law matters do not proceed before a jury as many offences are not indictable, which means that they can be finalised before a judicial officer, such as a Magistrate, without a jury. Further, the great majority of indictable offences are offences against State laws. States can legislate for the offence's final disposition, other than by way of indictment, avoiding the consequential jury trial.[13]

Juries were also a feature in civil trials, deciding cases between competing private litigants, although that right has been reduced in recent times so the focus here is restricted to the use of juries in criminal trials.[14]

The composition of the jury

One of the most common criticisms levelled at today's juries are their lack of representativeness. Such concerns have resulted in a number of recent reviews of the State legislation that governs jury selection processes.[15] If the jury is said to be in touch with community standards, as mentioned above, then it follows that it should be representative of the community. So how do jurors end up on the jury?

The jury pool is restricted to those who are enrolled to vote and who are within a jury district.[16] This necessarily confines the pool to those over 18 years of age. Further, certain persons with criminal records are disqualified from serving on juries. Generally, although the provisions differ in each Australian State and Territory, these persons have been convicted of an indictable offence or one punishable by imprisonment, or have served a period of imprisonment.[17] Others are ineligible due to their occupation, particularly those within the judicial sector (such as lawyers, ex-judges or Magistrates, those involved in law enforcement and members of Parliament) who may be perceived as able to unduly exert influence over other jurors.[18] Some jurisdictions also provide exemptions from jury service for persons of 'advanced age',[19] those who are unable to read or write the English language,[20] and persons who have physical or mental disabilities that may make them incapable of performing the functions required of a juror.[21] Everyone else is fair game.

However, each Australian State and Territory allows for prospective jurors to be excused from jury service in certain circumstances. For example, in Queensland prospective jurors may seek to be excused if their 'work or study commitments make it impossible, significant medical, personal or financial obstacles exist' or where they 'have served as a juror in the past 12 months.'[22] One of the unintended consequences of the operation of these provisions is statistics like those reported in the *Brisbane Times* that 'nearly 90 per cent of Queenslanders selected for jury duty avoid having to front up to a courthouse', resulting in comments like those reported in the same article that the people who do attend 'for jury service are typically people who don't have to be anywhere else that week.'[23] If none of these excuses apply a summoned person must attend for jury service or face punishment.

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Once prospective jurors do come to court it is not necessarily the case that they will serve on a jury. To become part of the panel of twelve the jurors have to first survive the challenge process. That is, if their number or name is called and before they swear their juror's oath (this is the process of empanelling the jury) counsel for the accused or for the prosecutor may reject them as a juror. The two main types of challenges are peremptory challenges and challenges for cause. A peremptory challenge does not require the challenger to adduce any evidence of partiality or provide any reasons for the challenge and as such the number of peremptory challenges that can be issued by the parties is restricted in each State and Territory.[24] Challenges for cause, which do require the provision of reasons for the rejection, are unlimited, however sufficient evidence must be adduced before a judge will allow questioning of jurors to assist in any determination of partiality.[25]

In the United States of America potential jurors may be polled extensively, even before they get to court, by way of questionnaire. For example, prospective jurors in Michael Jackson's doctor's trial faced 117 questions.[26] Further, in the USA jury lists are made available prior to the commencement of the sittings, which allows for investigation of prospective jurors.[27] The situation in Australia is very different, with jury privacy protected prior to empanelment. In some Australian States and Territories jury lists are made available to counsel just before the trial starts (usually the morning of trial).[28] However, such lists contain very limited information, such as the juror's name and sometimes their address or occupation. In other States and Territories such information is not provided before, or even during empanelment.[29] As such, any challenges made are based on very limited information. This explains why challenges for cause are rarely made.[30]

Ultimately, throughout Australia 12 jurors make up a jury.[31] However, in some circumstances trials may proceed with a lesser number of jurors and to avoid this occurrence sometimes reserve jurors are selected.[32]

The role of the jury

Jurors take an oath in which they swear to give a verdict based on the evidence (and as such they must not consider any *extracurial* opinions or conduct their own research) and not to disclose information about their deliberations.[33] Conduct in breach of the oath can result in criminal charges against the juror or, more certainly, discharge from the jury. A particularly pertinent example occurred in England, where a juror was discharged from the jury after holding a poll of her Facebook friends as to the accused's guilt or innocence.[34]

Judges further advise jurors that their function in 'deciding whether the defendant is guilty or not guilty involves considering the facts of the case based on the evidence to be placed before' them in court.[35] So while the jury have to follow the judge's directions on the law they are not bound to accept the judge's observations on the facts. It is for the jurors to determine which witnesses they find credible and which version they believe in delivering their verdict.

When the evidence has been presented, final addresses have been made by counsel, and the judge has summed up, the jury retires to deliberate. These deliberations happen in private and in some trials, particularly those attracting significant media attention, judges may sequester the jurors during this process. If a jury is sequestered over night or longer, they are accommodated together, isolated from access to media and only allowed limited contact with family members. The jury in the high profile Queensland case against Jayant Patel was sequestered but such a measure is not frequently used in many jurisdictions.[36]

The jury's verdict is generally required to be unanimous, that is, all members of the jury must agree that the accused is either guilty or not guilty. However, in some instances, in some jurisdictions, a majority verdict may be accepted.[37] If the jury reaches a deadlock and cannot reach a verdict it is termed a hung jury and the jurors will be discharged. This result may mean that an accused has to be retried before a different judge and jury or, in some instances, the prosecution may choose not to proceed.

The future of the jury

The institution known as the jury has a special place in common law history. Nevertheless trials happen daily in civil law countries without them. Blackstone has noted that 'though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.'[38] Indeed some traditionally common law countries have abolished jury trials entirely.[39] Further, the option of a trial by judge alone is available in five Australian States and Territories.[40] Despite these developments, unless there is a radical overhaul of the *Australian Constitution*, juries will continue to feature on the landscape of Australian criminal justice.

References

1. Sir Patrick Devlin, *Trial by Jury* (Metheun & Co, London, 1966) 164.
2. Sir William Blackstone, *Commentaries on the Laws of England* (1769) Book IV, 344 cited in Law Reform Committee, 'Jury Service in Victoria' (November 1995) Issues Paper No 2 [1.3].
3. See, discussion of the history in Newton Minow and Fred Cate, 'Who is an Impartial Juror in an Age of Mass Media?' (1991) 40 *American University Law Review* 631, 637-638.
4. The Right Honourable Lord Justice Auld, 'Review of the Criminal Courts of England and Wales' (September 2001) 138.
5. See, discussion in Jacqueline Horan, 'Perceptions of the Civil Jury System' (2005) 31 *Monash University Law Review* 120, 124.
6. *Kingswell v The Queen* (1985) 159 CLR 264, 301, per Deane J.
7. See, eg, *Kingswell v The Queen* (1985) 159 CLR 264, 300, per Deane J.
8. Devlin, above n 1, cited in *AK v The State of Western Australia* (2008) 232 CLR 438, 470-474.
9. *Doney v The Queen* (1990) 171 CLR 207, 214.
10. The Right Honourable Lord Justice Auld, above n 4.
11. See, eg, *Kingswell v The Queen* (1985) 159 CLR 264, 300, per Deane J.
12. *Australian Constitution* s 80.
13. See, eg, recent developments in Queensland which require certain indictable offences be dealt with summarily even without the accused's consent: *Criminal Code* 1899 (Qld) s 552BA.
14. See, eg, Horan, above n 5.
15. See, eg, Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors,* Final Report No. 99 (2010); Queensland Law Reform Commission, *A Review of Jury Selection,* Discussion Paper WP No 69 (June 2010); Law Reform Commission of New South Wales, *Jury Selection,* Final Report No. 117 (1997).
16. See, eg, *Jury Act* 1995 (Qld) s 10.
17. See, eg, *Jury Act 1995* (Qld) s 4(3)(m), (n); *Juries Act 1967* (ACT) s 10(a); *Jury Act 1977* (NSW) s 6(a), sch 1; *Juries Act* (NT) s 10(3)(a), (b); *Juries Act 1927* (SA) s 12(1)(a)–(f); *Juries Act 2003* (Tas) s 6(2), sch 1; *Juries Act 2000* (Vic) s 5(2), sch 1; *Juries Act 1957* (WA) s 5(b)(i), (ii).
18. See, eg, *Jury Act 1977* (NSW) Schedule 2.
19. See, eg, *Juries Act 2000* (Vic) ss 8(3)(i), 9(4)(c).

[20] See, eg, *Juries Act 1967* (ACT) s 10(c).

[21] See, eg, *Juries Act 1927* (SA) s 13(a).

[22] See, Queensland Courts, 'Notification – Supreme and District Courts Information for Jurors' (last updated 17 September 2009) at <http://www.courts.qld.gov.au/160.htm>.

[23] Daniel Hurst, 'Jury Duty – Sorry we are Busy that Day' *Brisbane Times* (29 April 2010) at <http://www.brisbanetimes.com.au/queensland/jury-duty-sorry-were-busy-that-day-20100428-ts8u.html> reporting a quote from Nigel Stobbs.

[24] For further discussion see, Queensland Law Reform Commission, above n 15, [10.89].

[25] For further discussion see, Les McCrimmon, 'Challenging a Potential Juror for Cause: Resuscitation or Requiem?' (2000) 23(1) *University of New South Wales Law Journal* 127, 133-6.

[26] See the questionnaire at <http://www.4shared.com/get/9S5mR3MY/Juror_Questionnaire_People_v_C.html>.

[27] Allan Ardill, 'The Right to a Fair Trial' (2000) 25(1) *Alternative Law Journal* 3, 5.

[28] Such as Queensland and the ACT: see, *Jury Act 1995* (Qld) s 29 and *Juries Act 1967* (ACT) s 29(1).

[29] For a discussion of these differences see, Queensland Law Reform Commission, above n 15, [10.71].

[30] Law Reform Commission of Western Australia, above n 15, 18; Queensland Law Reform Commission, above n 15, [10.85].

[31] See, eg, *Jury Act 1995* (Qld) s 33; *Juries Act 1967* (ACT) s 7; *Jury Act 1977* (NSW) s 19; *Juries Act* (NT) s 6; *Juries Act 1927* (SA) s 6; *Juries Act 2003* (Tas) s 25(2); *Juries Act 2000* (Vic) s 22(2); *Juries Act 1957* (WA) s 18.

[32] *Jury Act 1995* (Qld) s 57(2), s 34; *Juries Act 1967* (ACT) s 8, s 31A; *Jury Act 1977* (NSW) s 22, ss 19 and 55G; *Juries Act 1927* (SA) s 56, s 6A ; *Juries Act 2003* (Tas) s 42(3), ss 25(2), 26; *Juries Act* (NT) s 37A; *Juries Act 2000* (Vic) s 44, ss 23, 48; *Criminal Procedure Act 2004* (WA) s 115, s 18.

[33] See, eg, *Jury Act 1995* (Qld) s 22.

[34] Richard Bowden, 'British Juror Removed after asking Facebook Friends for Case Opinions' *The Tech Herald* (26 November 2008) at <http: / / www . thetechherald . com / article . php / 200848 / 2515 / British-juror-removed-after-asking-Facebook-friends-for-case-opinions>.

[35] See, eg, *Supreme and District Courts Benchbook*, No. 5B.6, at <http://www.courts.qld.gov.au/Benchbook/sd-bb-5b-trial-procedure.pdf>.

[36] Jane Goodman-Delahunty, Neil Brewer, Johnathan Clough, Jacqueline Horan, James Ogloff, David Tait and Jessica Prately, *Practices, Policies and Procedures that Influence Juror Satisfaction in Australia: Report to the Criminology Research Council* (July 2007) 42-3.

[37] See, eg, *Jury Act 1995* (Qld) s 59A; *Jury Act 1977* (NSW) s 55F – requiring 11 out of 12 jurors to agree.

[38] Blackstone, above n 2, 349-350 cited by Devlin, above n 1, 165.

[39] Such as Singapore and South Africa: see, Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia (Consultation Papers)* Project No 92 (June 1999) 924.

[40] These include the Australian Capital Territory, New South Wales, Queensland, South Australia and Western Australia. For further information see, Jodie O'Leary, 'Twelve Angry Peers or One Angry Judge: An Analysis of Judge Alone Trials in Australia' (2011) 35 *Criminal Law Journal* 154.

Questions for consideration/ Tasks to undertake

1. *Examine the relevant legislation in your State/ Territory to answer the following questions:*
   i. *What classes of people are disqualified or ineligible for jury service?*
   ii. *How many peremptory challenges are available to each party?*
   iii. *Are majority verdicts available? If so, subject to what conditions?*
2. *Find an Australian case involving jurors undertaking their own research.*
   i. *What information did the juror obtain?*
   ii. *What was the result of the juror's misconduct (ie was there an appeal, was the juror/jury discharged, or were particular directions given?)*
3. *Do you think that juries should continue to be responsible for verdicts in Australian criminal cases? Why/why not?*

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