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## ADR in criminal justice

# Using facilitators in criminal jury trials in New South Wales — undermining ‘trial by jury’ or the way forward?

Joshua Grew

## Trial by jury

Trial by jury is today provided for both in NSW legislation<sup>1</sup> and in the Commonwealth Constitution.<sup>2</sup>

While the jury is colourfully described, among other things, as a bulwark of liberty,<sup>3</sup> Lord Devlin in his 1956 book *Trial by Jury* makes perhaps one of the greatest claims of a jury’s importance:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly 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. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.<sup>4</sup>

## Essential features

The courts<sup>5</sup> have long since sought to identify the features essential to a trial by jury in order to determine the constitutional validity of contemporary rules and practices as they relate to the concept of trial by jury envisaged by s 80 of the Constitution.

In *Brownlee v R*,<sup>6</sup> the court considered the constitutional validity of two provisions of the *Jury Act 1977* (NSW): one that allowed for the reduction in jurors from 12 to 10 during the course of the trial; the other for the jury members to separate after

deliberations had commenced.

Albeit in the context of a s. 80 jury trial, *Brownlee* establishes that the essential features of a trial by jury are: to be discerned with regard ... to the constant evolution, before and since federation, of the characteristics and incidents of jury trial.<sup>7</sup>

Chief Justice Gleeson (as he then was) addressed the contemporary and legal validity of the secrecy of jury deliberations in an article in the *Judicial Officers’ Bulletin*.<sup>8</sup> In a time (like now) when such emphasis is placed on the need for accountability, Gleeson CJ concluded that arguments against the need for unreasoned, inscrutable, secret, decision-making in jury deliberations would be arguments against the system of trial by jury:

The challenge which confronts those who wish to maintain trial by jury, and yet at the same time allow greater access to jury deliberations, is to formulate alternative rules which are consistent with the maintenance of the essential aspects of trial by jury.<sup>9</sup>

Indeed, the challenge identified in this passage has not diminished with time; rather the opposite. Criminal trials today typically last longer, are more expensive and involve more complex issues, than has previously been the case.<sup>10</sup> It is increasingly important to ensure that the trial-by-jury model is adaptable to the role of the contemporary jury.

## Role of the contemporary jury

The fundamental role of the jury in a contemporary context remains to



decide, based solely on the evidence before it in the courtroom, whether the charges against the accused have been made out to the requisite criminal standard (that is, beyond reasonable doubt). Jurors selected at random from 12<sup>11</sup> members of the community bring their common sense, or lack of it, and their collective wisdom, or lack of it, with them to discharge their duty.<sup>12</sup> That is the strength of trial by jury.

However, in the context of contemporary trials, this inherent strength risks becoming an inherent weakness. It is essential for the survival of the trial-by-jury model that jurors understand the framework in which they operate, and have access to the tools required to fulfil their roles as judges of the facts. This is particularly true where juries are required to find facts in trials that involve complex genetic, financial accounting or other specialised and expert evidence.

By way of an introduction to jury service, the officers of the Sheriff of New South Wales give jurors a booklet, *A Guide for Jurors: Welcome to Jury Service*.<sup>13</sup> The booklet is designed to answer questions a juror may have following their selection on a jury panel, subject of course to any instructions and directions given to them by the trial judge.<sup>14</sup> In relation to jury decision-making, the booklet gives the following guidance:

Provided you always follow the judge's instructions about the law, you are free to deliberate in any way you wish. The discussions in the jury room may be chaired by the representative, if this is the jury's wish. The jury representative should ensure that discussions are carried out in a free, unhurried and orderly way, focussing on the issues to be decided and letting each juror have a chance to participate in discussion. When the jury is arriving at its verdict, every juror's opinion counts. It is important to respect the opinions of other jurors and value the different viewpoints that each juror brings to the case. This will help the jury to reach a fair verdict. Do not be afraid to speak up and express your views.

The deliberations of the jury are secret and there is no set procedure which jurors are bound to follow in reaching their decision. However, it is

useful at the beginning to decide how you want to proceed and to decide on general guidelines.<sup>15</sup>

In accordance with long-standing common law principles, juries are required to deliberate in private and without covert outside influence. It is the antithesis of trial by jury for covert extraneous influence to be presented to, or to be seen to be presented to, a jury.<sup>16</sup> The judge's directions to the jury during the course of the trial in this regard closely follow the suggested directions in the *Criminal Trial Courts Bench Book*.<sup>17</sup> That book confirms the content extracted above from the jury booklet. In *Burrell v R*<sup>18</sup> McClellan CJ at CL made the following poignant observations about irregularities in jury processes, the secrecy and confidentiality of jury deliberations, and the sanctity of the jury room:

It is to be expected that a group of twelve strangers asked to arrive at a unanimous decision will at some point disagree on one or more issues. So long as there is no illegality or irregularity involved, how the jurors go about resolving the disagreement is a matter for them. The experience of the [minority] juror in this case might be exceptional, or it might be common ... However, that is not a matter with which this Court need concern itself. To do so would breach the fundamental principle that jury deliberations are conducted in private.<sup>19</sup>

Such expected behavioural traits of jurors arguably highlight the potential role for independent facilitation of the jury deliberation process in highly complex, lengthy and hence stressful trials.

### Facilitative framework

Group facilitation is a process in which a substantially neutral person increases a group's overall functional effectiveness by intervening to help improve how it identifies and solves problems and makes decisions.<sup>20</sup> A wholly independent facilitator, in group facilitation, is a person who is acceptable to all members of the group, and who has no substantive decision-making authority.<sup>21</sup> The facilitator helps the group act consistently with its core values by helping it establish ground rules for effective process,

identifying behaviour that is inconsistent with the group's values, and helping members learn more effective behaviour to ultimately allow the group to make substantive decisions.<sup>22</sup>

### Facilitator's role

A facilitator does not change people's behaviour. Rather, a facilitator provides information to people to allow them to decide whether to change their behaviour in order to more efficiently and effectively make the substantive decisions required of them and the group of which they are a part.<sup>23</sup> Flowing from a group's behaviour is its ability to communicate. Bernard Mayer argues that good communication stems from intention, not technique.<sup>24</sup> When members of a group are genuinely connecting, Mayer observes that much of their behaviour will display supposedly poor communication techniques:

People will interrupt, ask closed questions, make self-referential statements, try to problem-solve too quickly, and inject humour when someone else is trying to make a serious point. Yet they will still feel heard. Why? The key is their intention and focus. If one person genuinely wants to understand what another person is saying, and is willing to work at it, that intention will come through, despite behaviours that might not seem desirable ....

But all the good techniques in the world will not make up for a lack of genuine interest in what someone else has to say.<sup>25</sup>

That techniques will not overcome a lack of interest is a key observation. In the context of group dynamics, Mayer observes that communicating is very different from persuading, evaluating and problem-solving.<sup>26</sup> Although it is a typical behaviour displayed in most groups where conflict arises, a tendency of one or more people to focus on convincing others that they are 'right', or on evaluating the merits of what the others have said, results in less effective communication within the group.<sup>27</sup> A likely consequence of a group with poor communication and uninterested members is an impasse among some or all members. Mayer provides the



following insights:

Impasses sometimes look to be simply intransigence, stubbornness, or malevolence, but they are almost always much more complex than that. It is helpful to figure out what is blocking people from moving forward. Whether one uses the wheel of conflict or some other analytical approach, putting words to what one believes is causing the impasse is almost always helpful.<sup>28</sup>

A facilitator must be able to employ specialised techniques that safely allow the group to effectively communicate, avoiding impasses that may impede or even destroy a group's key decision-making ability.

## Facilitative jury model

### *Integration of facilitative framework*

The concept of a neutral person facilitating jury deliberations appears not only radical but fundamentally contrary to the notion of trial by jury. However, a jury is like any other group required to exercise its duties within set parameters and consistent with its core values. The difference is that, historically, a jury has been required to exercise its role in secret.<sup>29</sup> Clearly, a facilitator's skills in helping groups communicate effectively to improve their overall functioning is transferable to jury deliberations—a situation in which 12 strangers are asked to reach a unanimous decision in unfamiliar, highly stressful circumstances with little more than passing reference as to how to deliberate, and indeed how to communicate with one other.<sup>30</sup> Thus, the question remains: Can the facilitative framework be integrated into the trial-by-jury model? The answer may lie in the flexibility of the suggested model to overcome legislative, common law and even constitutional<sup>31</sup> impediments.

### *Suggested facilitative jury model*

Since juries do not exist in a void but form an integral part of the broader system of trial by jury, a flexible group facilitation structure is required to allow the jury to exercise its duties while maintaining its role relative to others in the system.

## **1. Court-appointed panels of facilitators**

Based on these considerations, an integrated facilitative jury model may be structured using District and Supreme Court panels comprising wholly independent facilitators appropriately qualified and/or accredited to facilitate complex group discussions. Such panels already exist for mediators and it is envisaged that a facilitator's panel could operate in the same manner. In this way, existing billing/fee structures could be transposed for use by facilitators, which would allow for appropriate accounting of a facilitator's time once selected from a panel.

The use of a wholly independent facilitator would overcome the issues that would arise if a foreperson or other jury member were to act as a facilitator. Alternating roles or 'changing hats' between juror and facilitator can create fundamental difficulties in a group's dynamic, since a wholly independent facilitator, by definition, has no interest in the outcome of the discussions, nor offers any opinions in relation to them.

The use of a post-trial survey to be completed by jurors upon their discharge by the trial judge could allow a degree of monitoring of the workability of the model and the legitimacy of the panel members. Such surveys already exist for statistical purposes for jurors post jury service.

## **2. Swearing in/affirming of facilitator**

It is important that any facilitator not only be wholly independent, but also that they be seen to be independent—especially in the context of such a radical departure from the traditional trial-by-jury model. Swearing in or affirming a facilitator in court following a jury's empanelment could give both the court and the public confidence in the propriety of the facilitator's role.

The process of swearing in or affirming a facilitator following a jury's empanelment, accompanied by appropriately-worded directions from the trial judge during both the opening remarks and the course of the trial, would further demonstrate to the jury



the solemnity of their role as judges of the facts—but also the limited role of the facilitator; that is, that the facilitator has no decision-making powers and is judge of neither the law nor the facts.

### 3. Facilitation of deliberations

Although juries retire together to the jury room during court adjournments, juries are not to retire to consider their verdict until the trial judge has given all directions.<sup>32</sup> Accordingly, a facilitator would arguably not be required to ‘facilitate’ unless and until the jury was asked to retire to consider its verdict. Indeed, a facilitator could not be excused from the trial proceedings in their entirety until deliberations. Contextualising the issues that are likely to be discussed and ultimately decided upon by the jury would help the facilitator decide how best to facilitate—should their skills in fact be required.

A facilitator could be re-introduced to the jury at the point of, and before both the closing addresses by counsel and the summing-up by the trial judge. This would make the facilitator privy to the arguments put by counsel and, importantly, the directions given to the jury. Although re-introducing an independent person to a group that may already have ‘normed’ to each other is not ideal from a facilitative theory perspective, the jury (being the subject group) would not yet have commenced their substantive decision-making roles. As such, this would be a timely moment to introduce the facilitator and facilitative process to the group.

It is not in any way suggested that the facilitator’s role in this context is to run the deliberations or to dictate the terms on which the jurors should interact. It is proposed that the facilitator’s role in a jury deliberation would be limited to helping the jurors communicate effectively in order to reach their defined goal of returning a unanimous verdict.

Legislation permits a majority verdict to be returned in limited circumstances where a jury is unable to reach a verdict in trials in New South Wales.<sup>33</sup> Such provisions do not exist for Commonwealth trials

brought under s 80 of the Constitution.<sup>34</sup> The suggested integrated facilitative model does not interfere with these provisions, but co-exists with them. Indeed, in the context of complex contemporary trials, any likely impasses could be avoided or overcome through the use of this model.

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### Endnotes

1. Section 131 of the *Criminal Procedure Act 1986* (NSW) provides that a criminal trial in New South Wales in the Supreme Court or District Court is to be tried by a jury unless the accused and prosecutor elect trial by judge alone.

2. Section 80 of the *Commonwealth of Australia Constitution Act 1900* (Imp) (the Constitution) provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

3. *Cheung v R* (2001) 209 CLR 1 at 38 per Kirby J (*Cheung*).

4. *Trial by Jury* (Stevens, 1956) 164.

5. See generally J Stellios, ‘The Constitutional Jury: “A Bulwark of Liberty”?’ [2005] *SydLawRw* 5. Although written in the context of Commonwealth trials under s 80 of the Constitution, the examination by Stellios of case law relating to essential features of a trial by jury remains valid.

6. (2001) 207 CLR 278 at 289 (*Brownlee*).

7. *Ng v R* [2003] HCA 20 [9] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, [33] per Kirby J.

8. M Gleeson, ‘The Secrecy of Jury Deliberations’ (1996) 8(3)

*Judicial Officers’ Bulletin* 17.

9. *Ibid* 23.

10. *Ng v R* [2003] HCA 20 [10] per the Court citing Kirby J in *Brownlee*.

11. Section 19 of the *Jury Act 1977* (NSW) provides an exception to the number of jurors selected in criminal proceedings in certain circumstances.

12. *R v Emmett; R v Masland* (1988) 14 NSWLR 327 at 338 per Enderby J.

13. Court Services, Attorney General’s Department of New South Wales, *A Guide for Jurors: Welcome to Jury Service* (2007).

14. *Ibid* 2.

15. *Ibid* 7–8.

16. *R v Emmett; R v Masland* (1988) 14 NSWLR 327 at 338 per Enderby J.

17. See generally suggested directions under tab ‘The Jury’ contained in ‘Trial Procedure’ in Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2010).

18. (2007) NSWCCA 65 (16 March 2007).

19. Above note 18 at [269] per McClellan CJ at CL.

20. R Schwarz, *The Skilled Facilitator: A Comprehensive Resource for Consultants, Facilitators, Managers, Trainers and Coaches* (Jossey-Bass, 2nd edn, 2002) 62.

21. Above note 20.

22. Above note 20 at 49–50.

23. See generally Schwarz, above note 20. See also B Mayer, *The Dynamics of Conflict Resolution: A Practitioner’s Guide* (Jossey-Bass, 2000) 226.

24. Mayer, above note 23 at 120.

25. Mayer, above note 23 at 120.

26. Mayer, above note 23 at 121.

27. Mayer, above note 23 at 121–122.

28. Mayer, above note 23 at 182.

29. Above note 18.

30. Above note 16.

31. See generally above note 2 regarding s 80 of the Constitution.

32. *R v McCormack* (1996) 85 A Crim R 445 at 449; *R v TAB* [2002] NSWCCA 274 at [72].

33. See s 55F of the *Jury Act 1977* (NSW).

34. See s 55F(4) of the *Jury Act 1977* (NSW).