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Policies of Secrecy and Denial: Barriers to Jury Reform

MARK FINDLAY*

The jury is that institution of justice most highly regarded in the communities in which it features.[1] However, it remains little understood. The difficulties associated with researching the jury are well known.[2] The barriers raised against an actual appreciation of the "jury" and juries, are diverse and formidable in all their operational contexts.[3] Yet debates about jury reform are a common feature of criminal justice administration.[4]

Arguments for and against the reform of the jury exhibit themes, expectations and a discourse common to wider critiques of justice. My interest is in how reform imperatives exist and seem to thrive within a heavy atmosphere of the denial of knowledge and understanding about juries.

The relationship between knowledge and reform in criminal justice is fundamental to more general understandings of criminal justice. This relationship is problematic here. Because of its significance within the symbolic structures of justice,[5] the jury as a focus for reform identifies common themes of resilience, which require consideration if one is to appreciate the often ill-informed context of criminal justice critique. Does ignorance facilitate the type of debate about criminal justice which is commonly experienced or the reform scenarios which eventuate?

The strength of jury ideology, even in the face of its diminishing operational significance in criminal justice,[6] highlights the importance of the jury as a legitimator for more far-reaching policy initiatives in criminal procedure. For example, the assumption that jurors find it difficult to comprehend complex commercial fraud and are not able to adequately perform their role as "master of the facts" has in some jurisdictions hastened the introduction of computerised technologies into the court-room.[7] In this respect the jury is expected to embody and enact justice in both theory and practice. However, when it comes to debates

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1 See Duff, P, Findlay, M, Howarth, C and Chan, T F, *Juries: A Hong Kong Perspective* (1992) at ch8.

2 McCabe, S, "Is Jury Research Dead?" in Findlay, M and Duff, P (eds), *The Jury Under Attack* (1988); id at ch2.

3 Campbell, E, "Jury Secrecy — Parts I and II" (1985) *Criminal Law Journal* at 132, 187; McHugh, Justice M, "Jurors' Deliberations, Juror Secrecy, Public Policy and the Law of Contempt" in Findlay, M and Duff, P (eds), *The Jury Under Attack* (1988).

4 Duff, P and Findlay, M, "The Politics of Jury Reform" in Findlay and Duff, ibid; Byrne, P, "Jury Reform and the Future" in Findlay and Duff, ibid.

5 Above n1 at ch9; Findlay, M, "Juries and Justice Symbolism: Deconstructing Jury Research" (1994) unpublished paper.

6 In New South Wales the gradual increase in the limits of summary jurisdiction, and the introduction of election for trial by judge alone for any criminal charge, has meant that the jury is being squeezed from both the bottom and the top in trial situations.

7 Findlay, M, *Jury Management in New South Wales* (1994), The Australian Institute of Judicial Administration, Melbourne at ch8.

about the reform of the jury, ignorance of its actual place within the criminal trial is both constant and confounding. This ignorance impedes attempts to ensure that the jury is just. This has meant that policy justifications for (or against) recent administrative reforms of the jury have rarely been drawn from outside the realm of ideology and expectations. Even the level of ignorance and misunderstanding associated with the jury is difficult to measure because of the secrecy in which the institution and its essential processes are clothed.

The veil of secrecy around jury room deliberations, the laws of contempt which protect against juror disclosure, and the mystique of jury traditions make any informed and critical assessment of the jury within criminal justice both difficult and discouraging. These limitations on understanding prevail at several levels.[8] This paper challenges jury secrecy and its influence over the development of jury administration policy, and the reform of criminal procedure. It explores the question of whether the need for jury secrecy has distorted recent debates about jury reform, and magnified the contradictions surrounding the jury as an important symbol of criminal justice. Particular attention is focussed on the representativeness of the jury and efforts to alter the jury franchise.

There is little appreciation of how jurors practically understand their role and responsibilities. Those elements of the criminal trial which influence a jury's decision are far from clear. Those issues of evidence and procedure which impede a juror's comprehension have not been identified. Even rather fundamental considerations of the physical and social conditions under which jurors determine guilt or innocence have been kept almost religiously from public view. It is not that this information would be difficult to establish, were these barriers of secrecy removed.

The atmosphere of mystery surrounding the jury makes the administration and management of jury service less than scientific, and its reform a matter of expectation. In particular the development of a rational policy for the jury is unlikely where criminal justice administration relies on empirical evaluation, while the operation of juries does not.

Secrecy is advanced as protecting the essential ideology and operations of the jury. Jury decision making is prefaced on the existence of a cordoned-off, anonymous environment. However certain objectives for which the jury would appear to be designed would logically suggest the need for verification. These objectives include its informed and effective fact-finding, and its rational and representative verdict. The expectation that juries address and understand the facts of the case is not diminished by the requirement for an absolute and collective verdict. It is at this point that attempts to resolve the contradictions inherent in jury ideology appear to be impeded by secrecy.

Faith in the jury

The jury manifests the voice of the people in the trial process. It also enjoys a level of community confidence which is the envy of police, lawyers, judges and prison administrators. Yet such confidence seems grounded more in expectation than actuality.

So strong is the ideology on which the jury is based that critics attack its ability to realise its goals when compared with other methods of decision making. Rarely, if ever, is the ideology itself challenged. Any debate which ensues is constructed on this common ideological

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8 Findlay and Duff, above n2.

ground.[9] Both criticisms and justifications largely rest on assumption rather than the common practice of juries within criminal trials.[10]

Supporters of the jury system maintain that the jury is representative, impartial and independent even in the court-room and hence that it ensures the right of an accused person to a fair trial. This expectation of "fairness" involves a mix of impartiality through the rule of law, with the tempering influence of common-sense. This is just one instance where an essential expectation for the jury might appear internally inconsistent with other equally important ideals.[11]

As the deliberations of the jury are not made public, the jury is thought able to take into consideration concerns outside the strict or literal bounds of legality. The opportunity exists in the jury for rigid and unfair laws to be modified or ignored.[12] Yet while the anonymity of jury decision making is said to allow the community conscience to prevail in such circumstances, the secrecy of the jury room locks this expectation away from public verification.

The oft cited division of labour between the jury as fact-finder and the judge as finder of law is expected to produce the balanced distribution of responsibility in court-room decision making. This promotes equality and justice through the trial process. The jury protects the independence of the judge and ensures the professional integrity of the court, while the judge assists the jury by restricting the evidence before them to that which is appropriate for their consideration. Unfortunately the historical development of this jury/judge relationship has not been smooth or without conflict.[13]

The jury as lay participant in the legal system is expected to open up the court-room and the trial process to public scrutiny. The presence of the jury in court should require that evidence be given in a clear and non-technical way, with legal jargon kept to a minimum. Otherwise the community representatives who are the jury are not able to participate effectively in the trial. Expectation often diverges from practice.[14]

Public confidence in the jury rests largely upon the image which people hold of a fair trial process and the hopes they hold for the "communion of peers".[15] Expectations of its representativeness, its impartiality, its independence, and its community participation arise out of a belief in justice which balances legality against common-sense. The need to assure the accused person that a fair trial is possible is also an important motivation behind the involvement of the jury.

Recent debates over whether jury decision making is appropriate within particular trial situations have exposed a fundamental expectation that the jury provides a check on the technicality and exclusiveness of the law, and balances the enormous power given to a judge.[16] A

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9 Id, "Introduction".

10 Note the debate concerning trial complexity and juror comprehension criticised in Harding, R, "Jury Performance in Complex Cases" in Findlay and Duff, above n2.

11 Duff, P and Findlay, M, "The Jury in England: Practise and Idealogy" in (1982) 10 *International Journal of the Sociology of Law* at 253–65.

12 Thompson, E P, *Whigs and Hunters* (1977).

13 See ibid.

14 See above n10.

15 Marshall, G, "The Judgement of One's Peers" in *The British Jury System* (1977) Cropwood Conference Series, Institute of Criminology, Cambridge.

16 The justifications proposed for the recent experimental re-introduction of jury trial within the Russian criminal courts centre around concerns about the legitimacy of the institutions of criminal justice in the eyes of the community, and the judiciary in particular as they claim greater independence and endeavour to brake free of the state.

healthy suspicion of the law and lawyers has always been a feature of community attitudes to criminal justice in Australian society, and the jury remains a necessary and powerful symbol of trial by the people and for the people.[17]

All this talk of expectations does not suggest that individual juries are above criticism even if their decisions are beyond scrutiny. Particularly in the wake of controversial trials, such as that of Joh Bjelke-Petersen, or when juries are discharged without reaching a verdict in long complex and expensive trials, questions are asked about whether, and how, juries are appropriate to modern processes of criminal justice. The assumption that the jury is impartial, representative and independent has been questioned and the belief that a jury trial will ensure a fair trial for any accused person doubted, because of decisions of particular juries.

Gaps between confidence and competence

It would be fair to assume that the likelihood of achieving any or all of the aims for the jury is dependent on a careful correlation between the construction of juries and their ideology. In fact, jury practice is open to question set against the sometimes contradictory tenets of jury ideology. As an instance, jury selection procedures usually mean that a jury rarely represents a cross-section of the community.[18] Impartiality in decision making seems a difficult demand to make of both individual jurors and the jury as a collective mind, where power dynamics often seem volatile and unequal.[19] Even the independence of the jury must be viewed as influenced by judicial direction and the evolution of courtroom evidence.[20] It becomes difficult to maintain the expectation that the jury is the "bulwark of liberty" and the "lamp of freedom" unless it can be shown that representative and impartial juries practice independent and democratic decision making. Why should confidence at this level have to rely on belief in an ideology rather than knowledge of actual decision-making practice? Without such confirmation how can the jury continue to be the ultimate symbol of representative and impartial decision making ideology?

The answer lies in Mungham and Bankowski's assertion that the "function of the jury is ideological" rather than practical.[21] This means that questions of competence are largely irrelevant to confirmation of community confidence. Confidence rests at the level of ideology, but significantly this has not prevented reform arguments developing around untested issues of jury function.

At a wider level juries have come to symbolise justice in most common law jurisdictions.[22] Our expectations of justice are invested in juries. The presence of juries has strengthened community confidence in the institutions and contexts, such as the criminal trial, within which they operate. The absence of knowledge behind recommendations to reform juries suggests that ignorance might contaminate justice reform more generally.[23] Attempts at reform, whether of the jury or criminal justice have in common their mystery,

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17 See the judgment of Deane J in *Kingswell v R* (1986) 60 ALJR 17, and Brennan J in *Brown v R* (1986) 60 ALJR 257.

18 See above n7 at ch3.

19 See id at 102–14.

20 See id at 78–92.

21 Mungham, G and Bankowski, Z, "The Jury in the Legal System" in Carlen, P (ed), *The Sociology of Law* (1976) University of Keele Sociological Review Monograph, Keele.

22 See Findlay, above n5.

23 See Runiciman, Lord, *Report of the Royal Commission on Criminal Justice* (1993) HMSO, London.

misdirection or misinformation.[24] Without regular opportunities for disclosure and accountability the jury, and the justice which it symbolises, is not confirmed at any level other than that of ideology.

Jury secrecy

Traditionally juries have not been accountable. Once an absolute verdict is declared, the jury is not questioned on how it arrived at this verdict, nor are its deliberations routinely speculated upon when mounting an appeal.[25]

So fundamental is the desire to maintain secrecy within the jury system that certain jurisdictions have legislated to ensure that jury deliberations are not disclosed.[26] In England and Wales, for instance, section 8 of the *Contempt of Court Act* provides that it is an offence to obtain, disclose or solicit any particulars of statements made during deliberations.[27] Under section 576.2 of the Canadian Criminal Code a summary conviction may be imposed for the disclosure of deliberations by a juror. In New South Wales, although it is not an offence to publicise juror deliberations, members of the legal profession have expressed the view that it is thoroughly undesirable to publish an account of a jury's deliberations.[28]

Why is there such reluctance to examine the decision-making process of the jury? Why is there such a desire to protect the jury so fiercely?

According to High Court Justice McHugh, the maintenance of the secrecy rule allows the jury to retain the freedom of discussion in the jury room, and protects it from outside influences.[29] The secrecy rule ensures the finality of the verdict, enables jurors to bring in verdicts that are unpopular among the community and protects the privacy of the individual juror. The secrecy of the deliberations is said to encourage people to serve on the jury.

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24 Above n10.

25 The principle of maintaining the secrecy of jury deliberations was strongly upheld in a recent decision by the English Court of Appeal (see *R v Schofield* Court of Criminal Appeal Division, 13 October 1992). In this case, after reaching a verdict of guilty, one juror asked the bailiff whether the jury would have been permitted to ask a question of the judge. The jury had drafted a question asking for a definition of "affray" but had felt unable to hand it in to the judge. Counsel argued in the appeal that the Court should be prepared to receive evidence of the jury deliberations to determine whether the conviction could be held to be unsafe. As the principle of the absolute verdict prevents scrutiny of jury deliberations, Counsel tried to enter into evidence only the conversation between the juror and the bailiff occurring outside the deliberation room. The Court refused to accept this argument on the basis that to give any meaning to the conversation between the juror and the bailiff, it would be necessary to lift the veil of secrecy from the jury room and inquire what had happened within. The Court would not permit this, and consequently the appeal was dismissed.

26 Section 68(b) *Jury Act* 1977 (NSW), for example, provides that a juror shall not disclose information on deliberations during the trial or inquest. It also provides that "a person shall not, for a fee, gain or reward, disclose or offer to disclose to any person information on the deliberations of a jury".

27 Calls to amend this provision to allow for further academic research into the jury have been made in the wake of the UK Royal Commission on Criminal Justice's Crown Court Survey. The report of the Royal Commission recognises the appropriateness of a move in that direction. See Editorial, (1992) December *New Law Journal*.

28 Before the film "Joh's Jury" was broadcast, there was widespread condemnation by the legal profession of the ABC's decision to broadcast the film. For instance, the President of the Criminal Law Association of Queensland considered the decision to be "irresponsible in the extreme" and "a fundamental attack on the jury system", *The Sydney Morning Herald* 12 February 1993.

29 McHugh, above n3.

There is a fear, too, that if jury deliberations were open to scrutiny, there would be a loss of public confidence in the jury system, which would spell the end to jury trials.

A prohibition on discussion about jury deliberations and dynamics within the deliberation room suggests that, far from being protected, the jury may be forcibly silenced and discouraged from airing any problems that arise in the court-room.[30] In addition, particular juries and jurors are rendered unable to mount a defence against attacks that suggest their decision-making process was ill informed, partial, irrational, or wayward.

This silencing of the jury occurs not only during deliberations, but also throughout the trial itself. The formal structure of the court hinders the jurors from feeling comfortable and relaxed. In the words of one of our juror respondents in the recent New South Wales survey:

> The obvious hierarchy within the trial process discourages juror participation in the proceedings and the procedure of the trial sometimes inhibits questions from the jurors in order to clarify issues of confusion. During cross-examination, for example, there is no immediate opportunity to halt proceedings to allow for questions from the jury.[31]

The media have recently shown a strong interest in the role of the jury in criminal proceedings. There is particular interest in the place of the jury within the court-room structure and the power of group dynamics in the deliberation room. Both ABC television and Radio National have tackled this "silencing of the jury" in their analysis of the trial of Sir Joh Bjelke-Petersen, and their interviews with jurors in other criminal trials.[32]

By exposing the jury system to media scrutiny, more public interest is generated. This increases the potential for reform as well as raising questions to be answered. Any situation which puts the jury before the public promotes at the very least a realisation of the absence of informed understanding of the jury, and the need for it.

Investigating juries

The jury is a difficult body to investigate. Direct observations or taping of deliberations is prohibited, with rare exceptions, even by legislation in some jurisdictions. Jurors' self reports all too often arise from the pressures associated with celebrated or controversial trials and therefore are bathed in politics. Statistics on verdicts never speak for themselves and interpreting them beyond the level of bald conclusion is a risky business.

The problems with this research are exaggerated by its focus. For example, if one attempts to pull back the veil which cloaks jury decision making we are faced with an instance of unfettered and, some might say, irresponsible discretion par excellence. How to compare jury decision making with any other level of discretion beyond the realm of individual case study is a difficult problem. What generalisations can be drawn from the analysis of one or 1 000 jury decisions, or one or 100 selection processes where much rests on intuition, is difficult to resolve. Yet such problems do not and should not take discretion beyond the bounds of sensible analysis. As with police, prosecutors and judges, the situations within which discretion is exercised are important if one is to appreciate the wider process of criminal justice. The methods for constructing these situations are equally valid centres of enquiry.

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30 Above n7 at 89–97.

31 Id at 139.

32 See id at ch7.

Baldwin and McConville have identified problems of inquiry which are as much an essential by-product of jury ideology as they may be inherent in the secrecy pervading jury research:

> Research can only illuminate that part of the jury's function which is concerned with the accuracy of its decisions, and then only in narrow terms. It is difficult to see how research could be usefully conducted into its political functions, but these functions are none the less important for that.[33]

Analysing the motivations for resistance to such research, and the legislative provisions which would prevent it in some jurisdictions,[34] is revealing. As the opposition to our research into juries in Hong Kong revealed, the arguments against scrutiny are fundamental. The arguments are that:

- jury decision making is not a proper or appropriate subject for enquiry and analysis;
- jurors should not be invited to reveal their views on issues of comprehension and deliberation; and
- the absolute status of a jury verdict might be challenged even by broad lines of enquiry regarding its formulation.[35]

The disclosures of juror respondents in the Hong Kong[36] and New South Wales[37] surveys do not seem to disclose evidence that unreasonably challenged the absolute verdict, or the anonymity of jury decision making. Rather the data impugns the procedure of the trial, and raises questions about the function of lawyers and judges who do not appear to be adequately assisting the jury in its decision-making task.

My recent study of the management of juries in New South Wales[38] provides a rare insight into the existence and operation of juries. It makes a lie of the fear that scrutiny of the jury may diminish its position within criminal justice or compromise its powerful ideology. This paper argues that without such scrutiny reform initiatives are at best misguided and, at worst, may subvert wider justice policy agendas through urging reform without reason.

Understanding the jury in context

Our research into the management and operation of juries in New South Wales presents a wealth of information and opinion which might redirect the debate about juries and the responsibility for their development and reform. In addition it would suggest instances of procedural reform that should precede changes to the jury and may in fact obviate their necessity.

The Australian Institute of Judicial Administration, a national organisation of judges and court administrators, sponsored the research. The empirical phase of the project generated a range of data on juries and jurors. Two questionnaires were drafted, and administered to people who had served as jurors, and others who were called to court but did not

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33 Baldwin, J and McConville, M, *Jury Trials* (1977) at 131.

34 Above n7 at ch7.

35 See above n1.

36 Ibid.

37 Above n7.

38 Ibid.

serve. The questions were largely of closed response type, although there was some provision for open-ended responses. The questionnaire format was chosen because both the researchers and the committee wanted empirical "facts" as a part of the study, irrespective of the obvious limitations of such methodology for generating insights into an otherwise closed institution such as the jury. The questionnaires were discussed with the Sheriff and the Chief Executive Officer (CEO) of the New South Wales Supreme Court, and on their advice changes were made. A pilot survey was carried out to test the comprehension of the instrument, and as a result useful developments in form and content were made. Finally the questionnaires were passed to the Chief Justice of the Supreme Court, and the Chief Judge of the District Court of New South Wales for comment and approval.[39] Letters were then circulated by the secretary of the project committee, who was also the CEO of the Supreme Court, to the judges of the Supreme and District Courts sitting in the criminal jurisdiction, to inform them of the survey and to seek their assistance in its administration.

The questionnaires were eventually administered to District and Supreme courts in Sydney's city and suburbs, and two country sittings. Prior to the data collection period (which in most cases covered all empanelling and trials in each court over three weeks), the author addressed a group of court officers who would be involved in distributing the questionnaires. These officers were given the opportunity to ask questions about the research effort. This interest and commitment of the "ground" staff was to prove crucial for the success of the exercise.[40]

In all, 637 juror surveys, and 881 non-juror surveys were received from the five court centres involved.[41] Regarding the juror surveys, 57 trials were identified in the population, and around two thirds of these comprised 100 per cent returns. The response rate for the remainder ranged from between 11 and eight respondents.

After the juror surveys, and following a preliminary investigation of the data, it seemed clear that the selection of the jury from the panel required close observation. In addition, judicial practice in clarifying juror confusion at this stage looked worthy of enquiry. An observation matrix was prepared which covered the challenge, excuse, and the judicial introduction process. A single observer was employed and charged with making sense of "in-court" selection practice. These observations were carried out in District Court trials for a three week period.

Finally, a letter was sent from the research committee secretary to all Supreme Court Judges in New South Wales (29) and all District Court Judges (57) giving them the opportunity to comment on selected matters of jury practice and administration with which they were associated, and which might otherwise be observed through other methodologies. Twenty one responses were received.

The project produced hitherto unavailable "information" and "understanding", from a diverse range of participant sources in the criminal trial. It has enabled policy formulators in New South Wales to face the challenge of reforming jury administration within a critical framework. As the reform agenda unfolds it may provide an interesting case-study of the influence of fact and fancy over policy development.

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39 At the conclusion of the validation process it seemed that almost all the questions concerning judges had been either substantially altered or removed.

40 For example, in one court the officer made it a practice to encourage each juror to complete the questionnaire, particularly when juries were discharged at a late hour, and in other such situations return rates were low.

41 Above n7 at ch5.

Analysing juries

An important and interesting focus for testing jury ideology against the system's potential to realise that ideology is the selection process. Mechanisms of secrecy will significantly influence whether research into selection, and the operation of juries which emerge out of particular selection processes, has in fact corresponded with ideological expectations of impartiality and representativeness.

The jury is a body of people, brought together to make decisions. Therefore there is a process of construction, a body is manufactured, and the decisions are produced, all of which are problematic and worthy of examination. The context of the construction, the body and the decisions is a crucially complementary level of research. Secrecy surrounding the process of construction and the context of decision making are impediments to this.

The creation of the body "jury", and its decision making are connected in such a way as to suggest important clues for critical analysis. Beneath the manufacture and operation of the jury, for example, there is the disciplinary process which is juror selection: a means of regulating and normalising the decision-making potential of the body through a process of exclusion. Researching these issues, even such simple issues as how the jury franchise is identified and maintained has the potential to reflect on issues of secrecy. The mechanics of exclusion within selection regimes provide the essential context for analysing the representation, presence and operation of juries, while at the same time challenging their veracity as symbols of representative, impartial and democratic justice.

From the New South Wales project recommendations emerged that the jury franchise needed to be increased if the ideal of a representative jury was to be approached.[42] Such policy development could be justified by the general understandings that:

1) the classes of citizen legislatively exempted from jury service were anachronistic and uneven;
2) the provisions for disqualification from jury service sometimes produced discriminatory results;
3) the exercise of exemption procedures was highly discretionary; and
4) a significant proportion of those liable for jury service were called more than once during the life of the jury roll.

The legislation on juries in New South Wales nominates categories of citizen disqualified from jury service (see *Jury Act* schedule 1), generally ineligible for jury service (see *Jury Act* schedule 2), excluded from jury service as of right (see *Jury Act* schedule 3), ineligible for jury service due to permanent illness or because of lack of proficiency in English language comprehension, or excused from jury service by showing cause, such as care or employment commitments (see *Jury Act* section 38).[43] These restrictions work against random selection to produce:

> a non-representative jury roll, (and) also reduce the jury franchise in such a way that the burdens of jury service, and its challenges are not evenly shared amongst the citizens of N.S.W.[44]

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42 Id at 173–6.

43 For a detailed discussion of how these exemptions, exclusions and disqualifications work, and their effect on the jury roll, and juries selected, see id at 3.

44 Id at 173 and ch 9.

If one is aware of the disqualifications, exemptions and exclusions provided for under the *Jury Act*, and has some insight into how the Sheriff, and the judge may exercise their discretion to deal with applications to be excused, it is not difficult in general to predict broadly the "type" of jury one will confront in a criminal trial in New South Wales:

- roughly equal proportions of men and women;
- more than three quarters of whom have been born in Australia, with around the same proportion nominating at least one of their parents as having been born in an English speaking country;
- around 90 per cent nominating English as the preferred spoken language at home;
- more than half being employed in professional/executive occupations, compared with less than two per cent of those selected being unemployed;
- around 40 per cent possessing some level of tertiary education experience; and
- being around 30 years of age on average.[45]

Despite the interference of the selection procedure, juries are evenly divided on gender, and compatible with the age spread of the general community. In terms of occupation and educational attainment, jurors slightly exceed the community average. These general understandings of the socio-demographic composition of juries tend to conceal specific disparities. Certain racial groups within New South Wales, although over-represented before the criminal courts, are under-represented as jurors. Jurors will rarely, if ever, be Aboriginal whereas accused persons in the criminal courts of this State are disproportionately of Aboriginal origin. Jurors are not commonly from non-English speaking backgrounds. The criminogenic age ranges in the general community are largely underrepresented amongst jurors. The unemployed, undereducated, underprivileged and homeless, do not get onto juries.

Evidence also exists that in trials of certain offences, juries outside the average seem to be constructed.[46] Variations may appear in age range, gender balance, levels of education, and occupations of jurors. There does not, however, seem to be clear connections between types of trial and types of jury such as would confirm or deny popular wisdom. The suggestion that juries for sexual assault cases are more likely to comprise young women, and juries for drug trials will be over-representative of older, conservative males are not established. This is not surprising, for if such trends did emerge it might confirm the problematic suggestions of a systematic and consistent logic underpinning the exercise of peremptory challenges.

In New South Wales under presently existing law,[47] the process employed for the court-room selection of a jury is a complex one.[48] This is true also in many other common law jurisdictions where jury trial for criminal cases is retained in certain contexts. New South Wales, unlike some other jury-centred justice systems such as Scotland, England and Wales, allows a number of potential jurors to be challenged by both sides in a trial (and hence not called for service) without providing cause (see *Jury Act* section 42). In responding to the suggestion that these "peremptory challenges" should be abolished because of their potential to undermine random selection, a committee of judges, lawyers and judicial administrators in New South Wales recently observed:

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45 Id at ch5.

46 Id at ch5 part 2.

47 See *Criminal Procedure Act* ss32, 33, 34; *Jury Act*; *Justices Act*; *Supreme Court (Summary Jurisdiction) Act*.

48 Above n7 at ch3.

[T]he potential to employ peremptory challenge to correct bias from random selection may outweigh concern about its arbitrary operation or the apprehension that it might introduce new levels of bias into the selection process. The possibility that peremptory challenge may provide some guarantee against bias in random selection is all the more significant in a system where other formal procedures for rectifying bias are either not possible or are politically unpalatable.[49]

The "bias-against-bias" argument was extended and specified in a rather speculative fashion:

It is understood that [peremptory challenges] are often used to remove people whose appearance causes doubt as to their intellectual, emotional and attitudinal competence or doubt as to whether the person will deliberate fairly, seriously or with ordinary intelligence. Although appearance and observed mannerisms are hardly rigorous indicators of competence, it is a filter and it could be better than nothing.[50]

In the issue of "peremptory challenge" we see an instance of policy moving (or declining to move) despite a weight of research and analysis which would support change. The observation component of the New South Wales research tended to diminish the suggestion that there was any rationality behind the exercise of peremptory challenges. With the possibility that such challenges may work against the significant ideology of representativeness one might expect that the abolition of the challenge would be advanced. Not so.[51]

Reform potentials through researching jury selection

In the manufacture of juries certain forces are at work to create a particular mechanism for verdict delivery. In summary these include:

a) Legislative regulations of the jury franchise, designating potential jurors on their status as voters, their prior criminal history, their command of language; their professions, their proximity to government or the law, and their involvement with essential services;

b) Discretion of judges and administrators to exclude potential jurors on the criteria of availability, competing commitments, and their associations with the case in question;

c) Challenges by lawyers of potential jurors, without cause; and

d) Formal structures governing the operation of jury decision-making.

Policy initiatives may have differing impacts and varying odds for success depending on which stage or source of the selection process they involve. In addition, the symbolic significance of the body being manufactured through the process has as much potential to bedazzle the policy analyst as it does the researcher:

In all its stages the selection process obliterates difference and heterogeneity. Viewed in this way, political valencies of the jury selection process are revealed that are otherwise

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49 Id at 176 and ch9.

50 Interestingly the observation component of the research out of which the committee's eventual recommendations emerged did not coincide with this view. Rather, of the "logic" behind the use of peremptory challenge, the observer commented: "[E]ven where the peremptory challenge was used with some identifiable motive, it was an extremely imprecise tool; relying upon questionable and crude "stereotypes". And even where bias might have been reasonably suspected on the basis of a juror's appearance or name, there was no real sense that the jury as a whole was more "impartial", or was more composed of the accused's peers after the challenge process had taken place". Id at 50–2 and ch4.

51 Id at 177.

left ignored by the orthodox critique of this process, which argues from a position of gender and racial essentialism — a position which at a certain point becomes indistinguishable from sexism and racism.[52]

The jury which is manufactured and becomes the focus for conventional research is to be a standardised, homogenised institution charged with the discipline of social minds. The confluence of construction and control is rarely recognised let alone researched. In fact some research exercises tend to endorse rather than test such influences through the assumptions on which they are based. For example, the "representative" jury may be criticised, but the metaphysics of its presence remain unexamined. The reality is that the technical search for representativeness is a process of marginalisation towards a model of society; an image without resemblance. The selection process, or the "model society" which it produces are analysed without a link to the symbolism within which they exist, and its actuality. Again, the exclusionary logic of jury selection is often critiqued without challenging the imaginary society of the jury, and its control dimensions. Jury selection in fact constructs rather than represents this society and it is this which merits researching. The legal endorsement of this society, while fascinating, is a further confusion for research motivation, and, divorced from the purpose behind symbolic representation, is another false path.

Once franchise and selection issues had been explored, we were in a position to ask questions concerning the functions and practices of the resultant jury. The nature of this inquiry was influenced by our appreciation of the contradictions which we had exposed between the ideology of representativeness and impartiality, and the actual "body" of the jury manufactured. A context now existed to examine decision making from the standpoint of jury construction. Unfortunately, once it moved from the "public domain" of legislation, and to a lesser extent administrative and professional discretion, the research was confronted with secrecy requirements designed to protect the functions of the "body" which would confirm or deny whether through its decision-making process it was impartial or representative.

Of particular interest at this stage of the research were the power relations which operated in the jury room so as to determine decisions and decision making. The "Joh's jury" scenario had suggested that the foreman was unduly influential and that this position within the jury's structure and operation might be ripe for change.

Relationships between research and policy

An interesting correlation in the New South Wales study[53] with the potential to impact on trial outcome is the predominance of males in the role of jury foreman, and the influence exercised by the foreman over the deliberations of particular juries. In the juries surveyed for this study, the gender breakdown of jury foremen was two to one in favour of the males. Most foremen were between the ages of 40 to 54 years. Although overall less than 20 per cent of the respondents said that the foreman was a dominant force in their deliberations, amongst many juries in the survey there was an internal division of opinion regarding the nature and extent of the foreman's influence. This often correlated with gender division, and age. When we examined the individual experiences of jurors who

52 Morrow, J, "Notes Towards the Deconstruction of the Jury" (1993) unpublished paper at 3–4.

53 Above n7.

claimed to suffer from an overbearing foreman, the need to protect against even the few occasions of abuse of power in the deliberation room was pressing. In the words of one correspondent:

> As the days went on my nerves were shot to pieces, as the members [of the jury] led by the foreman and M would verbally and physically attack me. M would throw the files [of evidence] at me, when I would not answer his stupid questions and kept reading the notes and court documents he would grab them out of my hands, or throw a book he had in his hand at me. This usually hit the wall.
>
> I decided I would sit in the corner of the room, as I would be able to see the person coming at me. This was not such a good move, as it also had me cornered ... I took the abuse, was pushed up against the wall, had my papers snatched out of my hands, had books thrown at me. My lunch was thrown into the garbage tin. I was really scared, my nerves were on edge. Each day before going to court I would sit at the breakfast table with my husband, crying. He said he could not help me, and I knew that. I was all on my own. I was terrified.[54]

The Research Report's recommendation was to abolish the position of foreman.[55]

Reforming jury administration

Recent reforms of jury administration such as the introduction of majority verdicts, or the reduction of peremptory challenges have been fuelled by the political rhetoric of crime control, expeditious and efficient justice.[56] Calls for the removal of juries from "complex" commercial fraud appear more like "articles of faith rather than a construct of empirical evidence".[57]

Largely it has been concerns over the manner in which juries make their decisions which have motivated administrative and policy reform. However, with the dynamics of jury decision making relatively unknown and unknowable these reforms are rather bluntly designed to:

a) alter the make-up of the decision-making mechanism;

b) restrict what goes into making the decision;

c) change the conditions which bring about alternative outcomes; or

d) remove the jury from the instance of decision making altogether.

The reform of jury decision making has not been intended to increase the visibility of or accessibility to the decision or the decision maker. In fact, as with the introduction of majority verdicts, they have been designed to conceal division and silence individual dissent.

The jury is not a process or context for open communication. The ritualised language of the court-room, and the limitations imposed on the manner in which the jury may contribute to that language makes for "profoundly inauthentic communication".[58] It is common for legal discourse to suppress or exclude other forms of discourse, but the jury is at the mercy of such idiosyncratic language, and of rules, rituals and spatial conditions

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54 Id at 148–9.

55 Id at 179.

56 See Byrne, above n4.

57 Above n10 at 76.

58 Above n52 at 9.

which foreclose opportunities for meaningful communication. Why is it not appropriate for policy development to challenge this as it would other aspects of criminal justice which had a similar exclusionary effect?

Spatial analysis of the jury within the court-room is a current interest of court planners and administrators. But the real presence of the jury, placed within the power relationships which are the criminal trial remains naïvely treated. The issue of power connections themselves seems rarely challenged beyond the image of relationships.

People can only view the jury sitting silent as a group in the trial. Judges send jurors out of the court into a locked room, to which no-one can have access. People can't see what juries do behind this locked door. Judges let the jury out, and let them go home. Judges warn jurors not to speak of what they did. Why is it court administrators and politicians perpetuate the isolation of jurors by failing to question the relevance of the jury beyond the occasional uninformed swipe at its potential to attain a rather contradictory ideology?

It is hoped that through the generation of understandings about jury construction and decision making, the secrecy surrounding the jury will be challenged. If we believe that reform should arise out of knowledge rather than prejudice, informed jury reform is then more likely. Considering the symbolic position of the jury within justice, the rational development of jury administration policy will possess the capacity to stimulate the critique and reform of processes and institutions of criminal justice beyond the interests of politics or populism.