Reforming trial by jury

David d'Lima - March 2019

The findings against George Pell in Victoria and Sue Neill-Fraser in Tasmania have prompted wide concern about the safety of their convictions and whether it's time for a sweeping reform of jury trials.

Many commentators are wondering how on earth the charges against Cardinal George Pell and against Sue Neil-Fraser could possibly have generated findings of guilt. Pell is currently serving a six year sentence for child sexual abuse, while Tasmanian Sue Neill-Fraser is nearly halfway through a sentence of 23 years, after a jury found her guilty of murder. Widespread concern in the media about the safety of their convictions raises serious questions about the efficacy of jury trials and whether it is time for wholesale reform.

The historic value of jury adjudication

Trial by jury is a long-established attempt to deliver verdicts that are based upon justice and common sense. In the Judaeo-Christian tradition which is formative to Western nations, a biblical basis for the role of the community in determining justice may be found in the response given by the patriarch Jacob when he was accused of theft by his uncle Laban. Demanding evidence, Jacob said about the property allegedly stolen: *"Put it here in front of your relatives and mine, and let them judge between the two of us"* (Genesis 31:37). Then according to Mosaic law, when the accused person is under threat from retribution, *the assembly must judge between him and the avenger* (Numbers 35:24).

Under the jury model, we seek the broad perspective and life experiences of "twelve good men and true", according to the famous phrase which dates back to at least 1635. With such involvement by the community in the administration of justice, the modern jury emerged as "the bastion of liberty against excessiveness of the executive and judicial power" - as Lord Devlin famously declared.

Unfortunately, the danger to liberty is less a problem with errant judges or ambitious bureaucrats than with the jurors themselves. The difficulty arises because jurors are very poorly selected and are inadequately trained. They lack public accountability, are sometimes pressured by their peers and must operate under the demand for unanimity. Jurors may also fear retribution if they return a guilty verdict. The following recommendations are offered in the hope of rectifying those problems.

Improving juror selection

One of the most remarkable problems with trial by jury is the solitary qualification of being randomly selected from the electoral roll. Perhaps in a previous era the general public could be relied upon to furnish honourable and conscientious jurors simply through a process of random choice. Given the spectacular growth of problems pertaining to literacy, numeracy, employability, decency and sheer common sense, the likelihood of empanelling "twelve men good and true" through random selection may increasingly be an exercise in wishful thinking.

Consider how the summons to jury service has yielded some truly pathetic examples of allegedly extenuating circumstance which are offered in the attempt to escape duty. The fact that a potential juror has marital obligations to provide breakfast in bed is among the many bizarre excuses which hardly inspire confidence about dedication towards civic responsibility. Yet even those whose view about jury duty is characterised only by dereliction and disinterest are still pressed into service.

To remedy this problem, local MPs could recommend to the sheriff's office the names of upright individuals who are ready and willing to undertake jury service. Such a process would be akin to the involvement of local MPs in the recommendation as to who the Crown might appoint as justices of the peace.

Potential jurors who are known to be "good and true" could be recommended to the sheriff, having gained from their MP a positive view about the honour, importance and gravity of jury service.

The consequent communication from the Crown calling the individual to jury duty would therefore be phrased in terms of congratulation, instead of providing onerous legal liability in the form of a summons - which routinely provokes feelings of shock and apprehension.

Educating and testing potential jurors

To rectify the problem of ignorance among jurors who are often bewildered by juridical process and may struggle to understand their role, it would be helpful if prospective jurors qualify by completing a training session available on the internet. The successful completion of such training is only possible when we move away from a model of pressing people into service in favour of using volunteers, since pressed individuals can deliberately fail the course and thus excuse themselves from duty.

The training of enthusiastic volunteers would enable potential jurors to better understand the nature of jury service, including what ought to be done, and what should not occur. By answering multiple choice questions, prospective jurors would demonstrate their suitability for service.

A training course could explain some of the bad behaviours of jurors which have unfortunately forced trials to be abandoned and re-started. Drunkenness, listening to music during proceedings, failure to pay attention, and recourse to ouija boards within jury deliberations can be highlighted as grossly improper behaviours which can lead to unsafe convictions and the miscarriage of justice.

Potential jurors must also be trained to pay attention only to the evidence, and to uphold the presumption of innocence during the prosecution's attempts to prove guilt beyond reasonable doubt.

Such training may ensure jurors understand the instruction to keep an open mind during proceedings, and not misunderstand that to mean they must somehow burden themselves to discover proof of innocence, when in truth the accused must be presumed innocent until proven guilty.

Importantly, a training package could also familiarise potential jurors with the oath or pledge by which they will bind themselves. In the current circumstance the promise is imposed suddenly and unexpectedly when members of the public present themselves for duty, which cannot be conducive to a proper appreciation of the wording used in the pledge, and the gravity of the promise.

Achieving public confidence in the jury process

While it is hoped that most juries helpfully serve the interest of justice, we simply cannot be confident of that process, owing to its closed nature. The fact that members of the community, including judges and lawyers, are frequently surprised by jury verdicts suggests we have a problem which seems to indicate mistakes are made by juries. Far worse are the instances of deliberate impropriety.

Consider the testimony given via a letter to the editor published in South Australia by *The Advertiser* newspaper (30/3/2000) by correspondent T. Niewenhoven who described serving on a jury in a trial concerning drug dealing:

> *Right up until our group was given instructions by the judge, we all found the person guilty. However, after the judge's summary and speech, the majority was totally confused and frightened for their own and family safety. I was attacked (verbally) for keeping my guilty verdict. ... The drug dealer got off, as 10 fellow jurors thought it was quicker and easier to return a not guilty verdict. Outside the court-house, several jury people came to me, and said: 'You were right. He was guilty.'*

During that same year in NSW, when a jury was sequestered overnight while considering a murder trial, four of the jurors utilised the ouija to make enquiries of the victim as they considered their verdict (*The Australian* 24/8/2000).

Aside from the exposure of such sensational and hopefully aberrant examples of improper conduct, no mechanism exists to scrutinise the behaviour of jurors. The judge is not privy to juror deliberations and jury members are banned from revealing their discussions. In response to those difficulties, it is recommended that the trial judge preside over jury deliberations, so as to ensure due process, but without exerting any influence upon the discussions, except to ensure every juror is heard and is not subjected to pressure. The judge would intervene whenever a strong or scholarly personality is dominating the deliberations, but would express no view about the evidence.

Acquitting the accused in response to juror disunity

Another key reform relates to the setting aside of hearings which yield no result - as though such proceedings never existed. This occurs when the jury retires to consider its verdict but is unable to achieve unanimity. The judge declares a mis-trial and proceedings must begin afresh with a new jury.

In the quest to achieve singularity of judicial process, the first and subsequent attempts to try the case are effectively deemed to have never occurred. But it cannot serve the interests of justice when courts keep setting aside the proceedings until eventually a jury declares a united verdict. Unanimity is no guarantee of safety. Paradoxically, the disunity of a jury which prompts a fresh start in the attempt to complete the trial, may be indicative of reasonable doubt. It is thus recommended that the inability of the jury to determine an overwhelming verdict of guilt should result in acquittal. Hence 10 or 11 would be required to convict, but any less would result not in a mis-trial but in acquittal.

Such an approach would free jurors from the tyranny of unanimity, by which members effectively may be forced against conscience to follow the developing opinion. The demand for unanimity mitigates the requirement for conscientious declaration. We simply can’t have both. It is unjust to force people to keep arguing until they wear down the minority of recalcitrants until everyone agrees.

Ensuring conscientious expression

Once jurors have deliberated to their satisfaction, they are ready to indicate their individual conclusions about the value of the evidence. In the interest of conscientious resolution, and to safeguard against peer pressure, such indication should be made as each jury member anonymously and privately completes a declaration form, ticking one box only among three options:

- JUROR DECLARATION -

Juror number [_ _ _]

Tick one box only:

I solemnly and sincerely declare the following:

❑ The prosecutor's evidence proved to me that the accused person is guilty and I have no reasonable doubt about that proof.

❑ The prosecutor's evidence gave some proof but I'm still not convinced the accused person is guilty.

❑ The prosecutor's evidence has not proved to me that the accused person is guilty.

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Having tallied the results of juror declarations, the judge would reveal them in open court and would pronounce the verdict accordingly.

Additional recommendations

Further reform of trial by jury would be the installation of semi-opaque screens so as to enable the jurors to observe court proceedings with complete anonymity. That would minimise the risk of retribution exacted by drug barons or other aggrieved persons and it would eliminate the fear which otherwise may induce members of the jury to find such accused persons not guilty.

Moreover, the right of the defence and the prosecution to prevent potential jurors from impanelment (without any justification) should be abolished, as that system of peremptory challenge encourages unwarranted discrimination (eg on the grounds of race or gender). It contradicts the principle of random juror selection and it severely embarrasses potential jurors who cannot but wonder why they have been rejected and turned back during their short journey from the public seats to the jury box. But it may be the case that peremptory challenge would largely disappear if jurors were never seen by the accused, owing to the installation of semi-opaque screens.

With the application of the above suggested reforms, it is hoped that the jury system would undoubtedly become the bastion of liberty and justice that its ancient advocates envisaged.

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