Rotary District 9460

District Conference 2009

Current Issues in Criminal Justice

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21 March 2009
Burswood Convention Centre
Perth, WA

It is an honour and a privilege to have been invited to address the conference of Rotary District 9460. Since my appointment as Chief Justice, it has been my great pleasure to attend a number of functions and conferences organised by Rotary, to observe the great work that is done by Rotary in bringing people within our community together for the purpose of discussing issues of contemporary interest and in gathering the funds that are utilised to support the various worthy projects advanced by Rotary from time to time.

I would also like to commence my remarks this morning by acknowledging the traditional owners of the lands on which we meet, the Noongar people, and by paying my respects to their Elders past and present.

During the last 10 days or so there has been substantial public debate about a number of aspects of our criminal justice system. This is a good and healthy sign. Interest in the workings of our justice system must be encouraged. The public expression of views on that system serves that purpose, and is a vital aspect of the liberal democracy in which we live.

However, it is important to keep these issues in their proper perspective. As I have observed before, the nature of news has an inherent tendency to distort public perceptions of our justice system. That is because the nature of news means that it is only those cases which are sensational, or out of the ordinary because there is a perceived basis for criticising the working of the system which become newsworthy.

I do not mean to criticise the media by making this observation. Nobody would expect the media to report a criminal case in which the outcome was quite unremarkable because the system worked well, any more than one would expect the media to report the fact that the Narrows Bridge did not fall down last night. However, because the public reasonably draw their perception of the entire system from those cases which are reported, the fact that cases are only reported because of some sensational aspect inevitably leads to a distorted perception of the workings of the entire system.

Let me try to illustrate this point by putting the cases about which you read, or see or hear reported in the electronic media, in their numerical context. In the year ended 30 June 2008, the courts of Western Australia adjudicated upon the guilt or innocence of 97,777 defendants.[1] Of those, 96,686 were adjudicated to be guilty, most often by reason of their own plea of guilty. 1,091 were acquitted. That is about 1% of the total number of cases.

In addition to the almost 98,000 cases that were adjudicated, there were another 6,000 or so cases brought before the courts, where there was no adjudication for one reason or another. 4,000 of those cases were withdrawn by the prosecution. That is almost four times as many as the number of cases in which there was an adjudication of not guilty. Another 2,000 cases did not proceed for one reason or another - perhaps because the defendant died, or was unfit to plead, or could not be found. This number is almost double the number of those acquitted by adjudication.

[1] Australian Bureau of Statistics - Criminal Courts - 4513.0 – 2007-08.

Of the 1,000 or so acquittals, the vast majority (about three-quarters) would have been acquitted by a decision of a magistrate, rather than a jury. That is consistent with the fact that the magistrates' courts deal with about 97% or 98% of all criminal cases. So, the cases in which there has been an acquittal by reason of a jury verdict represent about one-quarter of 1% of all the cases brought before the courts of Western Australia. And of those, the most avid reader of news would only detect significant criticism of the outcome in a tiny fraction of those cases - perhaps a handful at most each year. But that is the handful of which the general public will be aware and which will shape their impressions of the working of the system as a whole. It is an unrepresentative sample of that system, which deals quite uncontroversially with a very large number of cases each year. Of course, passions can and will run high from time to time in the context of particular cases. That is to be expected and, of course, each and every case is of vital importance to the people involved. Statistical analysis provides no justification for not striving to achieve justice in each and every case. However, great care should be taken before drawing conclusions from a very small number of cases about the workings of the system as a whole.

I will not fall into that trap myself by making remarks this morning that are influenced by, or which draw upon any particular case or cases. I must emphasise that it would be quite wrong to construe my remarks as being in any way directed at any particular case, either recent or historic. My remarks are entirely general, and relate to the working of the system as a whole. These remarks are also informed by research that has been conducted over many years – by various law reform commissions, parliamentary inquiries and academic studies – and do not have their origins in the heated context of recent controversies. Indeed many of the

points which I will make this morning have been previously made by me publicly. Nevertheless, recent public debate has served to focus attention upon those issues, and it therefore seems timely to address those issues in rather more detail than is possible in the media.

I must also emphasise that the views which I express are entirely personal, and should not be taken as necessarily representing the views of the courts or the judiciary, or any sector of the judiciary. They are my personal views.

The three issues which I will address this morning are:

1. The so-called right to silence.
2. The rule against double jeopardy.
3. The role and importance of the jury.

The So-Called Right to Silence

It's difficult to think of any area of the criminal justice system that has produced more confusion than the so-called right to silence. Perhaps this is not surprising, because the very expression itself conveys a misrepresentation to the effect that there is some "right to silence" recognised by the law or the Parliament. There isn't, and there never has been.

The expression "right to silence" is inaccurately used to describe, in a shorthand way, a group of loosely related immunities. They include the general immunity from punishment as a consequence of a refusal to answer questions or provide information, a particular immunity from answering questions which might incriminate, a general immunity

(subject to exceptions) from having to disclose the evidence which will be relied upon by an accused person at trial, and an immunity from comments adverse to an accused person being made by a prosecutor as a consequence of that person not giving evidence at trial.

These diverse immunities do not find their source in one spring of crystal clear water flowing through the various tributories, streams and rivers that make up the justice system. Rather, they each have their own diverse historic origins and are subject to their own specific exceptions and limitations.

Whenever there is debate about the appropriateness of maintaining one or more of these immunities under contemporary Australian conditions, some representatives of the legal profession, and others, wholly reject any possibility of change based on the misconception that these immunities have been part of our justice system since its earliest days, and form one of the fundamental building blocks on which our liberal democracy is based. It has been amply demonstrated on a number of well-documented occasions that this is simply untrue - including perhaps most eloquently, by Justice McHugh of the High Court of Australia in *Azzopardi v R* (2001) 205 CLR 50.

The facts are that throughout most of the history of the British common law, from which our law has been derived, criminal trials were rough, rudimentary and inquisitorial. A distinction is often drawn between the adversarial process, which is how our system of justice is now described, and the inquisitorial processes common in mainland Europe. An adversarial process is based on *the parties* identifying the issues in dispute and the evidence to be brought before the court while an

inquisitorial process as the name implies is one in which *the court* conducts the inquiry and is not limited to the issues and evidence identified buy the parties. But that distinction did not emerge until the latter part of the 18th or 19th centuries.

In England, in the latter part of the 18th century, an accused person had no right to counsel, and no right to give evidence on oath in his or her own defence. Although from time to time the court would grant leave for counsel to advance points of law on behalf of an accused person, there was no general right to counsel until 1836. Justice McHugh, in the case I referred to previously, stated that until the late 18th century, trials were effectively dialogues between judges, witnesses and accused persons because although the accused could not give evidence on oath, he or she was permitted - indeed virtually required - to speak. Justice McHugh noted that accused person's protection lay in the right to speak, although not on oath, not in a right to be silent. Criminal trials were also rough and rudimentary affairs - with the average trial at the Old Bailey taking about half an hour.

After 1836, an accused person had a right to legal representation, but no capacity to give evidence on oath in their own defence until 1898 in the United Kingdom, and 1906 in Western Australia. So, in this State, until 1906, an accused person had no right to speak on oath in their own defence.

Given that an accused person was not allowed to give sworn evidence until 1906, it is hardly surprising that the law relating to the inferences properly drawn from the decision of an accused person not to give evidence is of recent origin. As Justice McHugh pointed out, once an

accused person was given a right to give evidence (a bit over 100 years ago in this State), there were many cases in which the court ruled that an inference could be drawn from the failure of an accused person to exercise that right. It is only very recently, and not without judicial opposition, that it has been accepted that it is inappropriate for a trial judge to comment upon the fact that an accused person has elected not to give evidence in their own defence, and to invite the jury to draw an inference adverse to the accused from that fact. By s 8 of the *Evidence Act* of this State, the prosecution is prohibited from commenting on the fact that an accused person has not given evidence.

In this historical context, it is appropriate to address the question of the effect which the various immunities to which I have referred have upon the contemporary workings of the Western Australian justice system. It is convenient to do that by separating the immunities into three general areas, namely:

(a) those which apply at the investigation phrase;

(b) those which apply between investigation and trial; and

(c) those which apply at trial.

The investigation phase

It is simply untrue to assert that Western Australians are not liable to punishment or penalty as a result of failure to provide information. There are a large number of revenue statutes, including most notably those relating to the collection of income and other taxes, which compel Western Australians to provide information to authorities, under penalty of fine or imprisonment in the event of breach of that obligation. The obligation to answer questions or provide information is not limited to the revenue gathering activities of government, but extends to and includes

the traditional law enforcement activities of government, including enforcement of the criminal law. For example, many are aware that if requested to do so by a police officer, a failure to provide one's name and address is a criminal offence – which can result in imprisonment. The legislation establishing investigative agencies such as the Corruption and Crime Commission of this State, or the National Crime Authority of the Commonwealth, obliges persons summoned to give evidence before those bodies to answer questions put to them, even if the answers might tend to incriminate them. Similar provisions apply under much of the legislation governing the conduct of Royal Commissions in this country. If such a person refuses to answer, they commit an offence for which they can be imprisoned. Most of these statutes contain provisions which prevent the answers given being used in evidence against such a witness in subsequent criminal proceedings, but the breadth of these statutory provisions makes it quite illusory, and misleading, to speak of a "right to silence" in terms which would connote that there is some inviolable legal right or principle which prevents a person from being compelled to give information to the investigative agencies of government.

As I would understand the contemporary debate, it is not being suggested that those statutory provisions should be extended so that, for example, a suspect being interviewed by police could be penalised for failing to answer questions put by the police. What is, I understand, being suggested is that legislation might be enacted in the form of that adopted in England in 1994, which makes it permissible for a prosecutor or the Judge in any subsequent criminal trial to suggest that the jury might draw an inference from the fact that an accused person did not volunteer particular information to the police when given the opportunity to do so

in circumstances in which it would have been reasonable to expect that person to do so.

The Law Reform Commission of Western Australia considered whether legislation along the lines of that adopted in the UK should be adopted in this State in the course of its inquiry into the civil and criminal justice system. Its report was published in 1999. I was the Chair of the Commission at that time. My fellow Commissioners were Robert Cock QC, who is, of course, the Director of Public Prosecutions, and Professor Simmonds, now Justice Simmonds of the Supreme Court of Western Australia. We were of the view that the UK legislation dealing with police questioning should not be adopted in Western Australia. I will endeavour to explain the reasons for that view.

First, the context in which police interrogation is undertaken in the UK is quite different to that in Western Australia. In the UK there is a publicly funded service which provides legal advice to those who are detained and questioned by police. The approach taken by the courts in the UK is that if a suspect has not had access to legal advice at the time of being questioned by the police, it is reasonable to expect such a person to maintain their silence, so that no adverse inference should be drawn against them by reason of that fact. That seems to me to be an entirely reasonable position for the courts to have adopted, and one might expect a similar position to be adopted by the courts of this State.

However, it has had the consequence that in the UK a substantial legal advice service has had to be provided, at significant public expense. In a densely populated country like the UK, where legal practitioners are uniformly dispersed throughout the country, the provision of publicly

funded legal advice to persons detained in custody is practicable. It is simply not practicable in Western Australia. There are vast parts of our State where there are no legal practitioners. It might also be argued with some force, that if publicly funded legal services are to be expanded, there are other areas in which such services would make a more effective contribution to the administration of justice.

Practical problems have also been experienced in the UK in the implementation of this legislation. It has substantially delayed police interrogation. Not uncommonly, suspects will require an hour or more in order to brief their legal adviser, and obtain their advice. And that is after a legal advisor has been contacted and has arrived at the police station. This significantly slows down the investigative process. There have also been difficulties in relation to legal professional privilege and the role of those advisers when, in the course of the trial, it is suggested that no adverse inference should be drawn against the accused person by reason of his or her silence because they acted upon legal advice. If such an issue is raised, nice questions arise as to waiver of the privilege that would normally attach to the communications between the accused person and their legal adviser, and it has not been uncommon for legal advisers to have to give evidence of their communications with the accused person, and the advice which they gave. This is a distraction from the main issue in any criminal case, which could prolong and complicate the trial.

And before one saddled the investigative process with these practical problems, one would need to be satisfied that there was a significant issue which needed to be addressed. I am not aware of any evidence which would establish that the failure of suspects to answer questions posed by

police creates a significant problem for their law enforcement efforts. On the contrary, such evidence as there is would suggest otherwise. Empirical research conducted by the New South Wales Bureau of Crime Statistics and Research in 1980 concluded that only 4% of suspects subsequently charged and tried in the Sydney District Court remained silent during police interviews. Research undertaken by the Victorian office of the Director of Public Prosecutions in 1988 and 1989 found that suspects did not answer police questions in between 7% and 9% of prosecutions. I am not aware of any comparable data in this State, but anecdotal experience would suggest that it is unusual for a suspect to decline to be interviewed by police. Very often the video record of such an interview is a major part of the prosecution case. Nor am I aware of any data which would suggest that the change of the law in the UK in 1994 has made any material difference to the likelihood of conviction resulting from the investigative or law enforcement processes in that jurisdiction. It has, however, given rise to practical issues of the kind I have mentioned.

There is another aspect of this issue that is particularly relevant to the Western Australian criminal justice system. That derives from the gross over-representation of Aboriginal people within that system - a topic upon which I have spoken publicly many times. Many Aboriginal people are disadvantaged, linguistically and culturally, when placed in the situation of a police interrogation. The obvious unfairness in drawing an inference adverse to such a person from their decision to decline to participate in a police interview is such that I would expect courts to regularly rule that no such inference should be drawn in such a case. Similar rulings could be expected in cases of persons suffering linguistic or cultural disadvantage by reason of their ethnic background. Such

rulings would raise the undesirable spectre of a system which could be said to be biased against white English-speaking members of our community.

Pre-trial management

The processes of our criminal courts have historically been conducted on the basis that, because the State had the burden of proving the guilt of the accused beyond reasonable doubt, and there is no obligation upon an accused person to prove anything, it is permissible for an accused person to remain entirely silent as to the nature of their defence until such time as the State has closed its case. There have been some limited incursions upon the capacity of an accused person to keep their cards up their sleeve in the area of alibi defences and expert evidence.

However, there is a logical non sequitur at work here. The fact that an accused person does not have a burden of proof does not mean, as a matter of logic, that they should not be required to give notice of the facts which they will endeavour to prove at trial, and the evidence upon which they will rely in order to prove those facts.

Contemporary legal processes rigorously discourage trial by ambush. Since the enactment of the *Criminal Procedure Act*, consistently with the recommendations of the Law Reform Commission to which I have referred, the State has been under an onerous and continuing obligation of disclosure in all indictable criminal cases. The Law Reform Commission recommended that this obligation should be matched by a corresponding obligation on the part of the defence to give advance notice of any particular lines or positions to be taken at trial. Although the Commission's recommendation in respect of prosecutorial disclosure was

accepted, only its recommendation relating to defence disclosure of expert evidence was implemented; its recommendation that the defence give advance notice of any particular lines or positions to be taken at trial was not.

Contemporary case management in both the criminal and civil justice systems operates on the basis of a "cards on the table" approach. Any other approach is inefficient and has the capacity to cause injustice through trial by ambush, or as a result of trials being adjourned or aborted when a party is taken by surprise. Under current procedures, the fact that the State may be taken by surprise is no ground for either an adjournment or a retrial. Unlike the situation in the police station, any risk of unfairness arising from an obligation of pre-trial disclosure by the defence would be diminished and hopefully eliminated by the fact that the obligation of disclosure would be supervised by the court.

Evidence at trial

Section 8 of the *Evidence Act* of Western Australia prevents a prosecutor from making any comment to the effect that an inference adverse to an accused person should be drawn from their failure to give evidence. It seems to me to be contrary to common sense for Judges to instruct juries, as we routinely do, that even in a case in which all the facts can be taken to be within the knowledge of the accused, no inference adverse to the accused should be drawn from the failure of an accused person to enter the witness box and give the court sworn evidence about what happened. A number of jurisdictions, including New South Wales, the UK and Singapore, have enacted legislation so that, while an accused person has the right to remain silent and their silence in and of itself can never be proof of guilt, a jury is entitled to draw an adverse inference from a

failure to give evidence in an appropriate case. The Law Reform Commission of Western Australia 10 years ago recommended that this should be the law in Western Australia. The circumstances of a trial are very different from those of a suspect detained in a police station. At trial, the accused will almost always be legally represented (in the higher courts where more serious charges are determined) and the Judge will be able to assess whether drawing an inference from silence would, in the particular circumstances of the case, be fair or unfair, and direct the jury accordingly.

Double Jeopardy

Double jeopardy is the legal principle that prevents a person from being tried again for an offence of which they have been acquitted, or any other offence relying upon the same basic facts. It is a legal principle which is in fact venerated by antiquity and which can be traced to as early as the 13th century. There are a number of principles that are said to underpin the rule, including the desirability of finality, the desirability of encouraging the prosecution to thoroughly and properly present its case (because they will only have once chance to do so), and preventing the risk of investigative or prosecutorial harassment.

However, developments in forensic science, including in particular developments relating to DNA evidence, and some celebrated cases in other States, have led to a contemporary recognition that there will be cases in which the interests of justice will override the principles that underpin the double jeopardy rule. The double jeopardy rule was first reformed in the UK in 1996 (in relation to what are referred to as "tainted acquittal" cases) and more significant changes were made in 2003 (in relation to "fresh and compelling evidence").

In Australia, in April 2007, the Council of Australian Governments (COAG) agreed that jurisdictions would implement the recommendations of a working group dealing with double jeopardy. This was the culmination of a process that started more than three years earlier with the release of a discussion appear on the topic by a sub-committee of the Attorney-Generals of Australia. While Victoria and the ACT reserved their positions on the recommendations of the working group, Western Australia did not. However, although New South Wales, Queensland and South Australia have now enacted legislation giving effect to the recommendations of the working group, Western Australia has not.

In essence, the legislation proposed by COAG, and which has been enacted in varying terms in each of New South Wales, Queensland and South Australia, allows for a person acquitted of offences in the most serious category to be retried if there is fresh and compelling evidence suggesting that person's guilt. Evidence is "fresh" in this sense if it was not adduced in the proceedings in the trial in which the person was acquitted, and could not have been adduced in those proceedings with the exercise of reasonable diligence. It is "compelling" if it is reliable, substantial and highly probative of the case against the acquitted person.

In relation to a slightly broader range of offences (but nevertheless all serious offences), a person can be retried if their acquittal was tainted by the commission of an administration of justice offence - such as perjury.

In both classes of case, a retrial can only be ordered with the leave of the Court of Appeal, which can only grant leave if it is satisfied that in all the circumstances it is in the interests of justice for the order to be made.

One of the factors that will be taken into account by a court when making such an order is whether the court can be satisfied that a fair retrial is likely. Other relevant factors will include the length of time since the acquitted person allegedly committed the offence, and the reasons for any delay in prosecuting the case against that person.

While enactment of legislation along these lines would, of course, be a matter for Parliament, it can be fairly argued that legislation of this kind strikes an appropriate balance between those principles which underpin the double jeopardy rule, and the expectations of our community in relation to the administration of justice.

The Role of the Jury

Recent days have seen some extreme and unfortunate criticisms of the jury system. I have no hesitation in speaking out in defence of that system, which has enormous strengths. It is a system a bit like that famous description of democracy - namely, "the worst of all possible systems except any other".

The great strength of the jury system is that it ensures continuing community involvement in the administration of criminal justice. The criminal justice system exists to serve and protect the community. It is vitally important that the community be intimately involved in, and fully aware of, the administration and implementation of that system.

Recent years have seen issues raised in relation to the extent to which juries are truly representative of the community, because of the various categories of exemption from jury service, and the discretionary power of the court to relieve a prospective juror from the obligation to serve.

There is some force in these criticisms, which is no doubt why the issue was referred to the Law Reform Commission of Western Australia by the previous government. I understand that a discussion paper is shortly to be released by that Commission which I am sure will inform public debate on these important issues.

One aspect of these issues which continues to be of concern to me, is the very low rate of Aboriginal participation in jury service, even in those parts of the State in which Aboriginal people comprise a significant proportion of the population. Despite the efforts that have been taken in recent years to increase Aboriginal participation in jury service, it remains the fact that Aboriginal accused are almost always tried by juries made up entirely, or almost entirely, of non-Aboriginal persons, even in parts of the State where such juries are not representative of the community as a whole.

When one comes to evaluate the role which the jury performs in our criminal justice system, it must be remembered that there are a number of aspects of that system which have been quite deliberately structured in favour of an accused person. Traditionally the premise upon which these structures are based was that the community would prefer a number of guilty people to be acquitted, than suffer one innocent person to be wrongly convicted. The extent to which that premise is valid may depend significantly upon the ratios between the numbers involved. If many guilty people are being acquitted to avoid a slight risk of wrongful conviction, the community may not think that the balance has been properly struck. However, even on this premise, the numbers to which I earlier referred do not suggest that there is a disproportionate number of acquittals, viewing the system as a whole.

The structure of the protections given to a defendant in criminal proceedings also reflects the fact that these proceedings are not comparable to other court proceedings which involve two equally resourced parties pitched as adversaries and arguing their respective cases. In criminal proceedings the parties are the State - with its access to significant powers and resources - and on the other side, sometimes individuals who are from the most disadvantaged sectors of our community. The structures of our criminal justice system therefore take into account this imbalance in access to power and resources.

The structural elements of the system which balance it in favour of the accused include, perhaps most significantly, the principles relating to the standard and burden of proof, which oblige the State to prove entirely the case against an accused person, and to the highest standard known to the law - that of beyond reasonable doubt. Other elements of the structure include the immunities to which I have referred, and which are often grouped under the heading "Right to Silence" and which create a risk of "defence ambush", and the law of evidence which imposes relatively strict obligations upon the State in relation to the discharge of its burden of proof, and which precludes evidence being given of the prior criminal record of an accused person.

The point to be drawn from this is that when a jury acquits, it is very likely to represent the workings of a system which has these structural elements which are balanced in favour of an accused person, rather than some idiosyncratic view on the part of the particular representatives of the community who served on the jury. Those in public office, and the media, must be assiduous to avoid commentary on particular cases which

implies criticism of a particular jury, when any criticism should properly be directed to the system and its structures. We do not want to exacerbate the problems we already have, encouraging people to do jury duty.

However, it cannot be denied that the jury system itself is an element of the system which tends to favour an accused person. A very experienced trial judge, Justice Peter McLellan, Chief Judge at Common Law of the Supreme Court of New South Wales, has observed that, "The reality is that juries acquit but Judges convict".[2] This may be because of the difficulties juries have in comprehending the directions which Judges are required to give them and which can be extraordinarily complex. Of course, this is simply speculation, because another significant aspect of the jury system is that it is inscrutable, because, of course, jury deliberations are strictly confidential, and no reasons are given for jury decisions.

The opacity of the jury process is out of step with contemporary expectations of transparency and accountability. I do not for a moment suggest that this opacity should be reduced by, for example, obliging juries to give reasons, or entitling the media to report jurors' observations of their experiences, but the inscrutability of the process is, I think, a matter which can exacerbate public concern in individual cases.

The inscrutability of the process also means that with the exception of the limited amount of jury research which has been undertaken, much of the information upon which we rely in relation to the experience undergone by jurors is anecdotal. By virtue of my current position, I receive quite a

[2] Paper delivered at a conference of the National Judicial College of Australia in October 2008 - "The Australian Justice System 2020", p.9

lot of information of that kind. Persons who have undergone jury service have occasionally described it to me as one of the worst experiences of their life, referring to the stress and anxiety involved in the sometimes unstructured deliberations that take place behind closed doors. While the jury research that has been conducted in this and other jurisdictions would suggest that the vast majority of juries approach their difficult task in a truly collegiate fashion, with due and appropriate respect for each other's point of view, there is always a risk of exceptions to that process - of the kind vividly depicted in the play (and later film) "Twelve Angry Men". I don't for a moment suggest that experiences of that kind are common, but neither can we exclude the possibility that in a hopefully small number of cases, the deliberations of a jury might be distorted by the overbearing or misguided views of a minority of its members.

Another consequence of the inscrutability of the jury is the effect which it has on appeals. Jury trials are the only court decisions from which an appeal lies and in respect of which there is no obligation to give reasons. This means that it is impossible for an appellate court to review the reasoning process of the jury for error. This has in turn focused the appellate process, and the search for error, on other aspects of the trial, including most noticeably the directions given by the trial judge to the jury prior to their retirement. Minute attention is given to the precise words used by the trial judge in a manner which seems to me to dramatically over-emphasise the significance of those words. The slightest departure from previously accepted legal wisdom gives rise to a question as to whether the verdict should be set aside and a retrial ordered. There is, I think, an air of unreality in this focus upon the directions given to the jury by a trial judge, which has in turn led to

decisions which have meant that those directions are often complex, technical and overly lengthy, increasing the difficulties faced by juries.

Ruminating about these issues, I have asked myself what I would have done if I had been given a blank piece of paper and asked to design a system for the determination of guilt or innocence in serious criminal cases. Because of the importance which I attach to community involvement in that process, I would certainly have included a critical place for representatives of the community in the process that I would have mapped out on my blank piece of paper. I would also have made provision for a Judge to oversee the trial, to ensure its fairness, that the laws of evidence are obeyed, and that the law is properly applied. So, my blank piece of paper would have contained the same two basic components as our current trial process.

But when it comes to the decision in the case - that is, the determination of guilt or innocence, I am not at all sure that I would have required the representatives of the community to undertake their deliberations with only very limited access to the guidance, support or assistance which they have received during the trial from the Judge who is responsible for ensuring that the process is fair and lawful. If one casts aside one's preconceived notions as to how jury trials work in systems which, like ours, are drawn from the British system, one might think it extremely odd that at the end of the trial, when the most important decision comes to be made, the Judge who has sat through the trial, who is trained in the law of evidence and experienced in the evaluation of evidence, and who is trained in the law, is entirely excluded from the decision-making process, which is in turn vested entirely in the hands of those who have no equivalent training or experience, other than their experience of life.

A system whereby the Judge retires with the jury to assist and guide them in their deliberations would not seem at all strange to anyone from continental Europe. It is the system which is used in many European countries including France, Germany, Italy, Belgium, Denmark, Greece and Portugal. It is the system which was recently introduced in Japan. It is a system which I think could add further resilience and strength to our jury process by providing the jury with impartial, experienced and legally trained assistance and guidance in their deliberations.

Such a change would seem radical to those steeped in the tradition of the British common law, although quite conventional to those steeped in other traditions. Any move in this direction would, of course, need full and thorough consideration, because of its many implications, including the constitutional implications, as, at least in the case of Commonwealth offences, trial by jury has a constitutional element. But there are many other jurisdictions from which comparative information and materials could be obtained in order to give further consideration to this possibility, which I would respectfully suggest is at least worthy of some further consideration.

Conclusion

As I observed at the outset of this paper, public criticism of the justice system is to be expected from time to time and should be encouraged. It is inevitable that some of those criticisms will occasionally be expressed in vehement terms. But when the cases which give rise to such criticisms are placed in the context of the workings of the system as a whole, a different perspective is obtained. That is a perspective of a system which is, on the whole, doing remarkably well at providing outcomes which are

not controversial and which excite little public criticism. The jury is a vital part of the system for dealing with serious criminal cases. The role of the jury should be supported and reinforced, and not undermined. Consideration could be given to enhancing that role by requiring the trial judge to retire with the jury, to be available to support and guide jurors in their deliberations. Other possible enhancements to our criminal justice system worthy of detailed consideration include the modifications to the so-called "right to silence" suggested by the Law Reform Commission of WA in 1999, and the modification of the rules relating to double jeopardy suggested by the Council of Australian Governments in 2007.