|  |
| --- |
|  |
| Judge or Jury? |
| Steven Millsteed QC & Jarrad Napier |

|  |
| --- |
| Paper presented at East China Normal University, Shanghai China on 12 October 2018 by Steven Millsteed QC |

**JUDGE OR JURY?**

**INTRODUCTION**

The central prescript of the Australian criminal justice system is that no person shall be convicted of crime otherwise than after a fair trial according to law.[[1]](#footnote-1) For centuries, trial by jury for serious criminal offences has been the cornerstone of the British criminal justice system which has been inherited by Australia and other countries with a common law heritage.

The jury is regarded as ‘*the fundamental institution in our traditional system of administering criminal justice*’ the function of which is to ensure protection of the citizen against those who customarily exercise the authority of government.[[2]](#footnote-2) However, over the past 35 years trial by judge alone has been introduced into Australian criminal jurisdictions as an alternative mode of trial for persons charged with the most serious offences (often referred to as ‘indictable’ offences).[[3]](#footnote-3) This has been accompanied by considerable debate as to the advantages and disadvantages of trial by jury, on the one hand, and trial by judge alone, on the other.

The purpose of this paper is to examine these two modes of trial which are to be contrasted with China’s mixed tribunal or lay assessor system. Whilst we do not propose to critique China’s modes of trial, we posit whether the observations made of Australia’s trial by jury and judge alone systems would be of any perceived practical benefit to China.

**AUSTRALIAN CRIMINAL TRIALS**

**Adversarial system**

Australia has an adversarial legal system rather than an inquisitorial system found in continental Europe. In our system, a criminal trial, regardless of whether it involves trial by jury or trial by judge alone, is conducted as a contest between the prosecutor (acting on behalf of the executive government) and the citizen standing trial (the accused).[[4]](#footnote-4)

A key feature of the adversarial system is that the presiding judge assumes a position of neutrality. The judge takes no part:[[5]](#footnote-5)

* in the investigation of the offence;
* in the decision to prosecute the person standing trial (the accused);
* in the framing of the charge; or
* in the calling of witnesses at trial.

At trial the capacity of the judge to intervene is limited. The prosecution and the defence are left to define the issues which are presented for consideration and the evidence to be presented, subject to the rules governing the admissibility of evidence.[[6]](#footnote-6) The judge’s role in a criminal trial is to hold the balance between the contesting parties without taking part in their disputations; the judge does not exercise an inquisitorial role in which the judge seeks to remedy the deficiencies in the case on either side; nor, is it part of the function of the judge to don the mantle of prosecution or defence.[[7]](#footnote-7)

**Fundamental differences between trial by jury and trial by judge alone**

A trial by jury is, in fact, a trial by judge and jury. There is a division of responsibility between the judge and jury but their discrete roles are complementary.

The fundamental task of the judge is to ensure that the trial is conducted fairly and according to law. The judge decides questions of law and rules on the admissibility of evidence. The judge has a duty to direct the jury on the law and sum up the relevant evidence for the jury’s consideration. It is not the responsibility of the judge to determine whether the accused person is guilty or not guilty of the charged offence.

On the other hand, the jury’s role is to listen to the evidence and arguments presented and to the trial judge’s directions. The jury then deliberates in private and make findings of fact to which they must apply the law as explained to them by the judge.[[8]](#footnote-8) The jury then decides whether the accused is guilty or not guilty of the charged offence. In accordance, with the juror’s oath they are obliged to deliver a true verdict according to the evidence. The verdict the jury returns is solely their responsibility and no pressure may be put on them to return a verdict one way or the other.

In short, the judge decides questions of law while the jury decides questions of fact.

Another important feature of jury trials is that the jury does not provide reasons, oral or written, for their verdict. They are not required to explain their reasoning or state the facts upon which they reached their verdict, rather their deliberations are conducted in secret and are meant to remain secret.[[9]](#footnote-9) Indeed, in all criminal jurisdictions, jurors who disclose jury deliberations of the jury and persons who seek to ascertain jury deliberations or publish them commit statutory offences punishable by fine or imprisonment.[[10]](#footnote-10)

In a trial by judge alone, the judge maintains the role of ensuring that the trial is conducted in accordance with the law and rules on the admissibility of evidence. However, the judge takes on the added responsibility of determining the facts and deciding whether the accused is guilty or not guilty of the charge. Furthermore, unlike a jury, the judge is required to provide reasons for the verdict. The reasons must set out the judge’s findings of fact and the process of reasoning the judge employed in arriving at a verdict.[[11]](#footnote-11) The requirement for a judge to set out his or her reasons can also be found in some legislation across Australian jurisdictions.[[12]](#footnote-12)

**Right to trials by jury and judge alone**

The concept of a trial by jury has been practised in one form or another in Australia since British settlement in 1788. Australia is federation of states (former colonies) which came into existence in 1901 with the enactment of the *Commonwealth of Australia Constitution Act* (the **Australian Constitution**).

The constitutional framework of Australia gives the Commonwealth (Federal) Parliament and each of the legislatures of the States and Territories (which form other parts of Australia) power to enact criminal laws. Without analysing the separation of Commonwealth and State jurisdictions it is appropriate for this paper the only distinction to be made is between federal and state criminal indictable offences. A federal criminal offence is one that is prescribed by a Commonwealth statute (for example, importing prohibited drugs into Australia). A state criminal offence is one prescribed by a State statute (for example, murder). We will refer to the criminal offences enacted in the Territories as state offences, as well.

The importance of the distinction between federal and state indictable criminal offences is the liberty of the accused to elect for trial by judge alone or trial by jury.

1. **Federal criminal offences**

Section 80 of the Australian Constitution provides that the ‘*trial on indictment of any offence against any law of the Commonwealth shall be by jury’.* In other words, the section gives a person charged with a federal indictable offence a right to trial by jury.

In *Brown v The Queen[[13]](#footnote-13)* the High Court of Australia (the **HCA**) held that s 80 imposes a mandatory requirement for a trial to be conducted by jury, which cannot be waived by a person charged with a federal indictable offence. The correctness of the decision in *Brown* was re-affirmed in *Alqudsi v The Queen.*[[14]](#footnote-14) So in relation to Federal offences even if the accused wishes to be tried by a judge sitting without a jury the trial must proceed with a jury

1. **State criminal offences**

Section 80 of the Australian Constitution does not apply to State and Territory offences.

All of the States and Territories, however, have enacted legislation which provides for trial by jury.[[15]](#footnote-15) The right is limited to serious indictable offences which are triable in the superior trial courts (District and Supreme Courts). Less serious offences are tried by courts at the bottom of the hierarchy of courts, known as courts of summary jurisdiction, by a judicial officer called a magistrate. Most criminal trials are conducted in the courts of summary jurisdiction. Only a small percentage of trials are conducted with juries.

Five of the eight jurisdictions (States and Territories) have given a person charged with a state offence the right to elect for trial by judge alone rather than going before a jury.[[16]](#footnote-16) It is convenient to mention the South Australian model first because that was, in 1984, the first jurisdiction to provide for trial by judge alone.

Section 7 of the *Juries Act 1927* (SA) states:

(1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court—

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,
 the trial will proceed without a jury.

This section provides that an accused person charged with an indictable offence can elect to be tried by judge alone. The trial must proceed in that form if the accused’s election is made in accordance with the rules of court (s 7(1)(a)) and, the judge is satisfied that the accused sought and received advice from a legal practitioner in relation to making the election (s 7(i)(b)).

The rules of court prescribe a time limit for an election. The primary purpose of the time limit is to ensure that an election is made well before the accused or his legal representative learn the identity of the judge allocated for the trial. The principal reason for this practice is to prevent people ‘shopping’ for a judge they would prefer.

The other jurisdictions which provide for trial by jury have similar provisions to South Australia including provisions which guard against ‘judge shopping’. There are, however, some differences between those models and the South Australian model. The primary differences are:

1. In the Australian Capital Territory (ACT) the law governing election for trial by judge alone is similar to South Australia’s in that the judge must grant the accused’s application if the application complies with the procedural requirements set out in the legislation.

This is subject to an exception that the accused cannot elect to be tried by judge alone if charged with certain prescribed offences (for example murder and sexual offences). The policy for this exception would appear to be that such offences are so serious that a person charged with them has no right to avoid trial by jury.

(ii) In New South Wales, Queensland and Western Australia, both the accused and the prosecution may apply to the court for an order that the accused be tried by judge alone. However, the court must not grant a prosecution application for trial by judge alone unless the accused consents.

Except where the prosecution has made an application which is opposed by the accused, the court has a discretion whether to grant the application. A court may grant the application if it is ‘in the interests of justice’ do so. This expression has been interpreted broadly and includes, for example, circumstances where due to prejudicial media publicity about the accused there is a substantial risk that he may not receive a fair trial.[[17]](#footnote-17)

Other factors that may result in the court granting the application include:

* + that the trial is likely to be unreasonably burdensome to a jury because of its complexity and length; and
	+ that it is likely criminal attempts will be made to threaten, intimidate or corrupt or a juror.

Factors that may result in the court refusing the application include that the trial will involve a factual issue that requires an application of objective standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness. The relevant legislation contemplates that such issues are better suited for a jury as they better represent community standards.

**Trial by jury: further discussion**

Before turning to discuss the advantages and disadvantages of trials by jury and judge alone it is appropriate to make some further observations about the institution of trial by jury and the mechanics involved in conducting such a trial.

1. **Core feature of the jury system**

An essential feature or requirement of the institution of trial by jury is that the jury is to be representative of the wider community. For that reason, the jury panel must be randomly or impartially selected rather than chosen by the State.[[18]](#footnote-18)

In each Australian jurisdiction, a person residing in the jurisdiction is qualified and liable to serve as a juror if the person is eligible to vote at the election of members of parliament.[[19]](#footnote-19) However, a person will be disqualified from jury service if the person has been convicted of a serious criminal offence[[20]](#footnote-20) or is unable to properly carry out the duties of a juror due to mental or physical illness or an insufficient command of the English language.[[21]](#footnote-21) Persons may also apply to be exempt from jury service on various grounds including reasons related to health, financial hardship or employment commitments.[[22]](#footnote-22)

**B. Mechanics of trial by jury**

For the purposes of this paper it is not possible to explain the principal procedural stages of a criminal jury trial in any detail, nor is it necessary. However, the following broad explanation may assist you to be better understand the process.

1. ***Arraignment***

The trial commences with the arraignment of the accused. This means that the charge is read out and the accused is asked whether he or she pleads guilty or not guilty to the charge. If the accused pleads not guilty the trial proceeds if the accused pleads guilty then he or she will be sentenced by the judge, usually at a later date.

1. ***Empanelment of the jury***

The arraignment takes place in the presence of a jury panel which usually consists of about 30-40 persons amongst a pool of persons summoned for jury duty. Following a plea of not guilty the process of empanelling a jury to try the case commences. In all of the Australian jurisdictions a jury consists of 12 persons.[[23]](#footnote-23)

Before the selection process commences, the judge explains the importance of a jury being able to reach a verdict impartially and without prejudice. With that in mind, the judge usually tells the jury panel that if they know the judge, counsel, the accused or any witness to be called in the matter, or if there are any other grounds which they believe would prevent them from delivering an impartial verdict, they should apply to be excused. The judge will then hear any applications for exclusion. An application usually involves a private discussion between an applicant and the judge. If the judge accepts the application the juror is exempted from jury selection.

Twelve jurors are then selected from the jury panel at random. They are selected from a ballot-box of cards each of which bears a number allocated to a member of the jury panel. If a juror’s card is selected he or she takes a seat in the jury box. The process of selecting cards continues until the full number of jurors required to constitute a jury has been drawn.[[24]](#footnote-24)

***(iii) Brief address from judge***

After the jury has been empanelled the judge usually gives the jury a brief address informing the jury of the nature of trial by jury, the respective roles of the judge and jury, and certain fundamental principles in our system of justice, namely: that the accused is presumed innocent of the charge (presumption of innocence);[[25]](#footnote-25) that the prosecution carries the burden of proving the accused’s guilt (burden of proof);[[26]](#footnote-26) and, that the accused’s guilt must be proved beyond a reasonable doubt (standard of proof).[[27]](#footnote-27)

1. ***Opening addresses***

After the judge has addressed the jury, the prosecution delivers an opening address. The main purpose of the prosecution opening is to make the prosecution’s case clear. This involves outlining the nature of the prosecution’s allegations; the legal ingredients of the charge the prosecution must prove; and, the evidence they intend to present. Defence counsel may also open to the jury for the purpose of defining, for the jury’s benefit, the real issues in the trial from the defence perspective, and what the accused might say in answer to the prosecution allegations.

1. ***Prosecution case***

Following the opening addresses by counsel, the prosecution presents their case by calling their witnesses and tendering any relevant exhibits. The prosecutor examines and defence counsel cross-examines the witnesses in accordance with the rules of evidence.

At the close of the prosecution case the accused may submit that he or she has ‘no case to answer’. When such a submission is made the judge is called up to decide whether, on the evidence as it stands, the accused could be lawfully convicted. The judge is not concerned with whether the evidence is so lacking in weight that a conviction based upon it would be unsafe but whether there is evidence which if accepted would prove the charge.[[28]](#footnote-28)

If the judge concludes that there is a case to answer, the matter must be left for the jury even if the judge considers the evidence to be weak. If the judge concludes that the accused has no case to answer then it is his or her duty to stop the case and direct the entry of a verdict of acquittal (not guilty).[[29]](#footnote-29) In stopping a case in this manner the judge is not intruding on the jury’s fact finding function, rather the judge, as the decider of law, has determined that the evidence is not capable in law of supporting a verdict of guilty.[[30]](#footnote-30)

***(v) Defence case***

If a ‘no case to answer’ application is not made, or one is made but is unsuccessful, the accused may give evidence or exercise his legal right to remain silent and, in either case, call witnesses in support of his defence.[[31]](#footnote-31) Witnesses called by the defence, including the accused, are examined by defence counsel and cross-examined by the prosecutor.[[32]](#footnote-32)

The trial judge is also entitled to ask questions of witnesses, regardless of whether they ae called by the prosecution or the defence.[[33]](#footnote-33) However, the judge must not engage in questioning, which constitutes excessive involvement or interference in the trial or which may give rise to an appearance that the judge is partial to one side or the other.[[34]](#footnote-34) For example a judge should not question an accused person in a manner that suggests that the judge disbelieves the accused.[[35]](#footnote-35) Such conduct can result in the accused suffering a miscarriage of justice and a successful appeal against a conviction, if so convicted.

***(vi) Closing addresses***

After the evidence has been presented, the prosecution addresses the jury, followed by counsel for the accused. The addresses provide counsel with the opportunity to summarise and analyse the evidence and argue their respective cases in the hope of persuading the jury to their point of view.

***(vii) Judge’s Summing-up***

Following the closing addresses, the judge sums-up the case to the jury. This function is of critical importance. Appellate courts in Australia have laid down a number of general principles for a judge to apply in delivering a summing up on the law and the evidence. A breach of those principles can result in a miscarriage of justice leading to a successful appeal against conviction.

The content of the summing-up is determined by the circumstances of the particular case. However, it is the responsibility of the judge in every trial to explain to the jury:

* the roles of the judge and jury, emphasising that the judge decides the law and the jury decides the facts;
* the burden and standard of proof;
* the legal ingredients or elements of the charge;
* the element(s) in dispute;
* the evidence relevant to the elements in dispute; and
* the essential nature of the prosecution and defence cases.[[36]](#footnote-36)

The judge may also be required to explain to the jury principles of law relevant to the manner in which the jury may use or evaluate certain items of evidence. For example, the judge may be required to warn the jury about the risks or danger in accepting the evidence of witnesses the law regards as potentially suspect or unreliable.[[37]](#footnote-37)

The judge’s summing up must be fair and balanced. The judge is at liberty to comment on the evidence but must not express views that usurp the jury’s role as the trier of fact. For example, it is wrong for a judge to direct a jury to reject the main arguments put forward on behalf of the accused[[38]](#footnote-38)or to decide an issue of fact in favour of the prosecution.[[39]](#footnote-39) Indeed, it is standard for judges to direct juries that if they conclude that the judge has a formed a view of the facts, it is their obligation to ignore that view unless it coincides with their view independently arrived at.[[40]](#footnote-40)

***(viii) Jury Deliberations***

After the summing–up has been completed the judge invites the jury to retire to consider their verdict. The jury must deliberate in private in the jury room and their deliberations must be kept confidential. The jury must have regard only to the evidence tendered at trial namely the testimony of the witnesses and the exhibits.

Importantly the jury must be allowed to deliberate without interference from any source. No-one, not even the judge, can communicate with the jury about the case during their deliberations. The purpose of this requirement is to guard against outside information or influences contaminating the jury’s consideration of the case.

The jury may, however, return to the court and ask the judge for further directions on the law or the evidence put before them. This is usually done by the jury forwarding a written note to the judge through the sheriff (a court official). The judge will then reconvene the court and state the question, and provide the answer, in open court. The jury then return to jury room to continue their deliberations.[[41]](#footnote-41)

***(ix) Rendering the verdict***

When the jury has reached a verdict the court is reassembled and the verdict is delivered.[[42]](#footnote-42)

In relation to federal offences, s 80 of the Australian Constitution requires that the verdict be unanimous. In other words all 12 members must agree on the verdict to be delivered.[[43]](#footnote-43)

In relation to state offences all legislatures have made provision for what are called ‘majority verdicts’. In South Australia, s 57 of the *Juries Act 1927* (SA) provides that a majority verdict is permitted after four (4) hours of 10 or 11 jurors if there is a jury of 12, or a majority of 10 if constituted of 11 jurors or a majority of nine (9) if constituted of 10 but not for murder or treason offences. In relation to those offences the verdicts must be unanimous. Similar legislation exists in the other jurisdictions but the conditions in which a verdict can be given differs between jurisdictions.[[44]](#footnote-44)

1. **Inadmissible evidence**

A trial judge is sometimes described as a ‘gatekeeper’. The judge has the responsibility of preventing inadmissible evidence going before the jury. Arguments about the admissibility of evidence are often dealt with by the judge before the trial commences. Sometimes issues of admissibility arise in the course of the trial. When they do, the judge will hear counsels’ arguments in the absence of the jury, especially where the evidence is potentially prejudicial to the accused. Such hearings are conducted in the absence of the jury to prevent the jury hearing inadmissible evidence that may contaminate their consideration of the case.

**Advantages and disadvantages of trial by jury**

Reasons for decision

The principal criticism of trial by jury is the lack of transparency in the jury’s decision making. The jury does not explain the process of reasoning which resulted in the verdict. Accordingly, it cannot be determined whether the jury correctly applied the law as explained to them by the judge; whether the jury’s analysis of the evidence was flawed; whether the jury made erroneous findings of fact; or, whether the jury had regard to extraneous or irrelevant matters. It has been remarked that in an era of audit and accountability the institution of the jury trial is an oddity. [[45]](#footnote-45)

A judge sitting alone, however, is obliged to provide reasons which expose the findings of fact and the process of reasoning which he or she employed in reaching a verdict in accordance with the law.[[46]](#footnote-46) This obligation serves objectives such as candour in decision- making, the accountability of decision-makers, the reconciliation of the parties to the results of the case and promoting the drawing of conclusions which are rational and soundly based on legal principles.[[47]](#footnote-47)

The obligation to give reasons is also important in respect of a convicted person’s potential appeal rights. For the purposes of this paper, it is not necessary to discuss the nature of the Australian appellate system. It is sufficient to say that the role of an appellate court in the criminal jurisdiction is to ensure that the convicted person received a fair trial and the guilty verdict is supportable in fact and law. This cannot be determined if the judge has failed to provide sufficient reasons for the verdict.

For that reason, the failure to provide adequate reasons may constitute a miscarriage of justice warranting appellate intervention and the quashing of the conviction. So in cases of trial by judge alone, an appellate court is able to analyse and evaluate the reasoning of the judge in a way prohibited in respect of a jury. Furthermore, robust analysis of a judge’s reasons for decision serves to inspire confidence in the justice system.

Capacity to understand directions and evidence

In many cases the evidence presented to the court can be long and complex. Evidence can be particularly complex in cases involving or scientific or technical evidence, for example DNA evidence. Commercial and corporate crime is often highly technical, involving sophisticated questions of commercial and accounting practice.

While complexities of this nature may fully tax the capacities of a judge, trail by judge alone advocates suggest the judge is in a better position than a jury to deal with such evidence because jurors are untutored in the evaluation of evidence and must give their verdict without undue delay whereas a judge has the opportunity to think about the evidence for much longer if need be. After the trial has concluded the judge may take weeks or longer to deliver his or her verdict.[[48]](#footnote-48)

The directions given to a jury by the trial judge may also be difficult. The judge may have to cover a range of legal issues and principles and summarise substantial amounts of evidence. A frequent criticism is that it is unreasonable to expect jurors to absorb and understand complex directions and evidence especially when more educated members of the community succeed in applications to be exempted from jury service because, for example, they are students or have a professional occupation or run a business.

On the other hand it may be argued that difficulties with comprehending evidence and judicial directions is not a reason for doing away with juries but brings into sharp focus the importance of the parties presenting evidence, and the judge delivering directions, in a manner which is comprehensible to a lay person; for example, the parties using aids such as charts to summarise and simplify technical evidence; and, in the case of the judge, supplementing the oral summing-up with hand written notes that summarise legal principles.[[49]](#footnote-49)

Single judge v 12 jurors

Advocates of jury trials argue that, while jurors do not provide reasons, the jury process stimulates community confidence because ordinary members of the community participate in the administration of justice and are educated about the law. Furthermore, verdicts are delivered by 12 persons from various walks of life with a substantial combined knowledge and experience of life, who are able to share their views in assessing witnesses and the quality of their evidence.

This is to be contrasted with a decision from a single judge who, it is often argued, may be out of touch with the community. Furthermore, the pressure on judges when sitting alone can be great. On the other hand, it is reasonable to acknowledge that judges are trained and experienced legal professionals accustomed to evaluating the credibility and reliability of witnesses and evidence generally, jurors are not.

Prejudice

A person standing trial may be the subject of prejudice from a variety of sources which could potentially prevent a jury from delivering a fair and impartial verdict. Prejudice may arise from the very nature of the charge (for example sexual offences against young children) or from evidence which, although admissible, indicates that the accused is a person of bad character or is associated with persons of bad character (for example of suspected membership in a criminal gang or terrorist organisation). Prejudice may also arise from adverse media publicity about, or public opinion of, the accused (for example, the accused might be a notorious criminal).

The courts in Australia regard judges, by reason of their legal training and experience, as being more capable than jurors of putting aside prejudicial matter, including public opinion of the accused.[[50]](#footnote-50) The notion or assumption that a judge is able to more effectively disregard prejudicial material has been challenged by some,[[51]](#footnote-51) but is entrenched in Australia and we would say correctly so.

The risk of prejudice to the accused is a common ground for successful applications for trial by judge alone. A growing source of prejudice in Australia is media publicity both before and during a trial. Jurors are regularly directed to ignore media publicity that directly or indirectly relates to a case. However, the prevalent use of the internet, mobile phones and social media in the modern era does not make it easy for jurors to insulate themselves from prejudicial information.

Despite this growing source of prejudice, and the courts belief that judges are better equipped to deal with prejudice than juries, there are frequent expressions of judicial confidence that a properly instructed jury can discharge their duties in an impartial and unbiased manner.[[52]](#footnote-52)

This view was re-affirmed in *Alqudsi v The Queen[[53]](#footnote-53), a* case dealing with a federal offences*.* Mr Alqudsi is Muslim and was charged on indictment with terrorist (federal) offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). He was subjected to extensive pre-trial media publicity by reason of his religion and the nature of his alleged offences. He applied to the trial court for his case to be tried by a judge sitting without a jury, under New South Wales legislation contending that he could not receive a fair trial in front of a jury. His application was rejected and he appealed ultimately

As earlier mentioned, the High Court held in *Brown v The Queen[[54]](#footnote-54)* that a person charged with a federal offence had a right to trial by jury that could not be waived under s80 of the *Australian Constitution.* It was argued on behalf of Mr Alqudsi that the Brown decision was based on Brown having elected for trial by judge alone under South Australian legislation and that a distinction could be drawn between the South Australian and New South Wales legislation.

The High Court dismissed Mr Alqudsi’s application to be heard by judge alone. In doing so, the Court said:[[55]](#footnote-55)

The criminal justice system is not naive. While the law assumes the efficacy of the jury trial, it does not assume that the decision making of jurors will be unaffected by matters of prejudice. What is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. Legislative and procedural mechanisms have evolved to reinforce the fairness and integrity of a jury trial. That is unsurprising. But those mechanisms reinforce, not destroy or detract from, a trial by jury.

Whilst we are of the view that a jury, properly directed, may be cap0able of reaching a just decision, the system is not without its prejudices and those prejudices ought to be protected against by permitting the accused to elect to be tried by judge alone. The decisions in *Brown* and *Al Qudsi* have provoked debate as to whether the Australian Constitution should be amended to allow for trial by judge alone for federal offences.[[56]](#footnote-56)

Trial efficiency

There can be no question that even when conducted efficiently, a trial by jury is more cumbersome, time consuming and expensive than trial by judge alone. Much time can be expended on accommodating a jury including empanelling the jury, an introductory address by the judge to the jury, dealing with issues of admissibility of evidence in the course of the trial in the jury’s absence, the continual movement of a jury to and from the court, explanations by the judge in the course of the trial in relation to procedures and legal principles and the delivery of a summing up.

**CHINA**

China’s lay assessor system is what we understand as a mixed tribunal system, in which both professional and lay judges determine the outcome of trials whether it be civil or criminal. The lay assessor system encourages lay participation in Chinese courts to assist the professional judges in reaching a final determination. However, critiques opine that lay assessors are no more than ‘*the ears of the deaf*’ in the courtroom.[[57]](#footnote-57)

Whilst we cannot comment on the truth of those observations by Xin He, we suggest that this is largely due to the fact that lay assessors are charged with the same powers as the judge, the education and experience that comes with being a judge is likely to influence a lay assessor’s decision and the lay assessor is often not a part of the deliberations. Therefore, when it comes to deliberating the lay assessor is also in the ‘hands of the court’ because they simply do not knowany better.

**Powers**

To extrapolate the lay assessor system more and where this degree of influence may derive we consider it against the jury system as set out above. Unlike the jury system, the lay assessors preside over the trials with a professional judge and deliver a decision with the judge. This is a stark contrast to the jury system in the sense that the decision of the 12 jurors is final and is often cited without influence. In these circumstances we see that the panel of jurors is separate from the judge and their role in the decision making process is autonomous as opposed to the marginal authority that lay assessors generally possess.

In Australian jurisdictions we have established that the jurors when delivering their verdict need not have any express reference to the law and/or facts they base their decision upon. However, it is uncertain to what extent that the lay assessor has provided his or her reasons when delivering their decision in a mixed tribunal. Xin He undertook a study into the lay assessor institution in Chinse courts and, upon interviewing some lay assessors, considered that amongst other things, the process of reaching a decision in a mixed tribunal is ‘fictional or nominal’.[[58]](#footnote-58) He reports:

…both the interviewed judges and lay assessors stated bluntly that, in most situations, the lay assessors were only asked to sign the so-called “deliberation” minutes. The minutes were prepared by court clerks, and some statements were attributed to the lay assessors.[[59]](#footnote-59)

Does this diminish China’s attempt to include community participation? He would especially argue that the lay assessor system does not provide for the promotion of community participation. This view is also shared by others.[[60]](#footnote-60)

On the other hand, a lay assessor system, if effectively implemented, provides a system where lay assessors as community representatives can contribute to the decision-making process which does not happen in trials by judge alone in Australia. An appropriate use of lay assessors can provide checks and balances against judicial idiosyncratic reasoning and decision-making.

For those who criticise the mixed tribunal or lay assessor system, it may be interesting to note that that in a lecture delivered in 1984 an eminent Australian judge, Chief Justice McLelland of the New Wales Supreme Court, raised the question of whether the Australian community might be better served to depart from the jury system and have a judge sit with two (2) or more assessors.[[61]](#footnote-61) It seems to us that the use of lay assessors, in appropriate cases, would overcome a number of the criticisms of trial by judge alone.

**Pre-conceived knowledge of the matter for determination**

One factor that is similar to the jury system is that the lay assessor (like the jury) has no pre-conceived idea about the issues at trial and they are unaware until the opening statement is made by the prosecutor. However, given the lay assessors inclusionary nature as an active participant in the trial (as opposed to a passive observer), it would be an idea for the lay assessor to be provided with a copy of the file prior to hearing the matter, if the lay assessors are to ‘enjoy equal rights with the judges’ albeit not serving as presiding judges.[[62]](#footnote-62) Alternatively, mechanisms may be put in place for the lay assessor to have an opportunity to clarify any issues he or she experiences.

It is often difficult to first grasp the extent of the issues that are in dispute and then be required (if one is inclined) to ask relevant questions throughout the hearing a task not required or expected of the jury. Instead, the Australian jury system:

* puts the power of determining the guilt of the accused positively in the juror’s hands, which in turn encourages them to listen carefully to understand the issues; and,
* the trial judge presiding summarises the issues for the jury and describes the principles of the law that need to be satisfied by both parties.

Such process permits a jury to then weigh up the information and reach a final determination within themselves, clothing the jurors each with a responsibility to appreciate the justice system. The jurors’ decisions is final and the jurors are released. No one (1) juror is held responsible for his or her decision because it is not known to the court and/or public which juror voted either way therefore there is no recourse.

This begs further analysis into why the lay assessor is considered the ‘ears of the death’ in the courtroom when their decision is recorded. Why, if they are in disagreement with the judge be willing to sign the minutes of order without having participated in the deliberations? Xin He records his interview with one lay assessor, who stated this in response to if he was afraid of being held responsible for a decision he did not ultimately agree with:

I was uncomfortable from the very beginning. But I soon figured out that, even if they place the wrong opinions in my mouth, the decisions are eventually approved by the division head, the court director, and/or the adjudication committee. How could I be held responsible if all the court officials and judges are not?[[63]](#footnote-63)

Despite these comments does the process of the lay assessor system still achieve the outcome lay participation is designed for? Namely, does it positively influence the contact between the community at large and the legal profession, is justice being seen to be done? In Australia we cannot measure the inestimable advantage a jury system brings to the administration of justice.

In their joint decision in the *Alqudsi Case*, Kiefel, Bell and Keane JJ held at [117]:

It is not the point to observe, as the applicant did, that the great majority of criminal cases are determined by courts of summary jurisdiction. Public interest in, and concern about, the administration of criminal justice is commonly focused on the prosecution of serious crime in the higher courts. The verdict of the jury has unique legitimacy. As the Director submitted, the determination of guilt by jury protects the courts from controversy and secures community support for, and trust in, the administration of criminal justice.

The role of the lay assessor (in its current form) may not be amenable or transferrable to the Australian standard of public participation. However, the suggestions and observations put forward by Xin He in his report tend to argue that the lay assessor system is still problematic. Without knowing a lay assessors specific duties and/or instructing them on what to do or not to do in practice, the lay assessor may often follow and concur with the judge who is presiding.[[64]](#footnote-64)

**Education**

A criticism of the jury system in Australia (which is more often celebrated) is the stark fact that the jurors are usually not legally educated. This is something that China recognised and pointed out when establishing a structured approach to the lay assessor system in 2004. When the Chinese authority considered the reform it was identified that it should include a requirement as to the education of its lay assessors if the lay assessor was going to have jurisdiction equal to that of judges. Therefore, Article 4 of the Decision of the Standing Committee of the National People’s Congress on Improving the System of People’s Assessors provides for, amongst other things, that ‘*[a] people’s assessor shall generally be a graduate from a university or college at least’*.

Wang and Fukurai address this in their paper, which identified that prior to the implementation of Article 4:

Each court managed the training of lay assessors at its own direction. Due to the shortage of funds and manpower, a number of courts were found largely to ignore the training of lay assessors, which was believed to contribute to the frequently reports incompetence, passivity, and inactivity of these lay assessors.[[65]](#footnote-65)

However, He’s report in 2016 does not contend this has changed the gap in the legal knowledge of the lay assessor and judge. This is also an issue in Australian trials by jury in the very sense that a pool of jurors may often struggle with sophisticated and complex forensic evidence, and rightly so.

Further, a judge in a trial by jury is charged with the obligation to provide directions to a jury as to what the law is, how the law applies and a summary of the evidence of each party. Here we have a situation where the jurors (they may or may not have university education) are provided with a wealth of complex legal principles, forensic evidence and a summary that may last more than one (1) day. Therefore, we cannot exclude that jurors are not overwhelmed about the law and we cannot exclude that the jurors do not follow the instructions of the well-educated and experienced judge. His Honour Justice Kirby stated:

Such empirical studies as have been performed on jurors’ abilities to follow judicial instructions, and to divide and sanitise their minds concerning impermissible uses of evidence, have yielded results which are substantially consistent. They cast doubt on the assumption that jurors can act in this way. Indeed, there is some empirical evidence which suggests that instruction about such matters will sometimes be counter-productive. The purpose may be to require a mental distinction to be drawn between the use of evidence for permissible, and the rejection of the same evidence for impermissible, purposes. Yet the result of the direction may be to underline in the jury’s mind the significance of the issue, precisely because of the judge’s attention to it. Lengthy directions about lies run the risk of emphasising the lies and their importance.[[66]](#footnote-66)

Similar to the lay assessor system, what mechanisms can Australia put in place to ensure that the purpose of its jury system is not frustrated by the need of the jurors to understand not just the law, but also the informal rules and logic required to navigate the processes of the court. Judges too often draft jury directions to ensure that the direction is appeal proof, which causes a complexity and conflation of legal principles inappropriate for a jury of lay persons. This commonality of education, experience of making decisions and exchange of ideas with those who are also legally trained is beneficial for the trial judge, however, a jury lacks the legal education and is prohibited from discussing the trial with anyone else.

**Transparency**

We also emphasise the issue of lack of transparency and accountability with the Australian jury system. Juries are not required to provide reasons as to why they reach a verdict, which may be critical to a miscarriage of justice (be it an innocent person found guilty or a guilty person deemed innocent). This is somewhat an advantage of the lay assessor system in that the lay assessor is in a position of equal standing to the judge and in a position to make a decision that is recorded and could be criticised. However, as we have described above, critics suggest that this may not be the case and lay assessors (given the other factors of lack of education and perceived power indifferences) concede to the professional judge’s interpretation.

**CONCLUSION**

Ultimately, this paper has considered the implementation of the public’s connection with the legal system and shortening the metaphorical distance between judiciary and the public. In one sense, there is a perceived alienation between the judiciary and the community at large. But more than that are there questions that need to be carefully considered to appropriately evaluate the utility and effectiveness of lay assessors. For example:

* Are lay assessors sufficiently representative of their communities?
* Are lay assessors properly equipped to discard the prejudicial effect of adverse publicity and focus on the admissible evidence?
* Are lay assessors appropriate in complex and long trials?
* Are lay assessors able to cope with scientific, technical and other forms of complex evidence?

Systems of justice will vary between nations. But whatever system is implemented, it must be accountable and transparent and directed at achieving fair and just results. The community deserves and is entitled to such a system and no nation can function effectively without one.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Steven Millsteed QC (Former Judge of District Court of South Australia)

Jarrad Napier, Bachelor of Laws (Hons), The University of Adelaide

Paper presented at East China Normal University, Shanghai, China, 12 October 2018

1. *Jago v District Court (NSW)* (1989) 168 CLR 23, 56-57 (Deane J). [↑](#footnote-ref-1)
2. *Kingswell v The Queen* (1985) 159 CLR 264, 300 (Deane J). [↑](#footnote-ref-2)
3. This paper focuses on indictable criminal offences and trials before juries in federal and state criminal courts. Albeit in Victoria (*Juries Act 2000* (Vic)), New South Wales (*Jury Act 1977* (NSW)), Tasmania (*Juries Act 2003* (Tas)), Western Australia (*Juries Act 1957* (WA)), Queensland (*Jury Act 1995* (Qld)) and Northern Territory (*Juries Act 1963* (NT)) trials by jury in the State’s respective civil jurisdictions is permitted. In South Australia’s civil jurisdiction, trial by jury is expressly prohibited without any exceptions (see s 5 *Juries Act 1927* (SA)). [↑](#footnote-ref-3)
4. See *Doggett v The Queen* (2001) 208 CLR 343, 346 (Gleeson CJ); *Ratten v The Queen* (1974) 131 CLR 510, 517 (Barwick CJ). [↑](#footnote-ref-4)
5. *Crampton v The Queen* (2000) 206 CLR 161, 173 (Gleeson CJ). [↑](#footnote-ref-5)
6. *Crampton v The Queen* (2000) 206 CLR 161, 173 (Gleeson CJ); *Doggett v The Queen* (2001) 208 CLR 343, 346 (Gleeson CJ). [↑](#footnote-ref-6)
7. *Whitehorn v The Queen* (1983) 152 CLR 657, 682; *Robinson v The Queen* (2006) 162 A Crim R 88 (NSW CCA). [↑](#footnote-ref-7)
8. *Juries Act 1967* (ACT) s 42C; *Juries Act 1963* (NT); *Jury Act 1977* (NSW) ss 68A-B; *Jury Act 1995* (Qld) ss 53-4 and 70; *Juries Act 1927* (SA) s 55; *Juries Act 2003* (Tas) s 46; *Juries Act 2000* (Vic) s 78; and *Juries Act 1957* (WA) Pt IXA. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. *Juries Act 1967* (ACT) s 42C; *Juries Act 1963* (NT) s 49A; *Jury Act 1977* (NSW) ss 68A, 68B; *Jury Act 1995* (Qld) ss 53, 54 and 70; *Juries Act 1927* (SA) s 55; *Juries Act 2003* (Tas) s 46; *Juries Act 2000* (Vic) s 78; *Juries Act 1957* (WA) Pt IXA. [↑](#footnote-ref-10)
11. *Fleming v The Queen* (1998) 197 CLR 250. [↑](#footnote-ref-11)
12. *Criminal Procedure Act 1986* (NSW) s 133(2); *Criminal Code Act 1899* (Qld) s 615C(3); *Criminal Procedure Act 2004* (WA) s 120(2); *Supreme Court Act 1933* (ACT) s 68C(2). However, in Western Australia and Queensland, a judge’s verdict is not affected in circumstances that they fail to provide the principles of law applied by him or her and the findings of fact. [↑](#footnote-ref-12)
13. (1986) 160 CLR 171 [↑](#footnote-ref-13)
14. *Alqudsi v The Queen* (2016) 258 CLR 203. [↑](#footnote-ref-14)
15. *Juries Act 2000* (Vic); *Jury Act 1977* (NSW); *Juries Act 2003* (Tas); *Juries Act 1957* (WA); *Jury Act 1995* (Qld); *Juries Act 1927* (SA); *Juries Act 1963* (NT); *Juries Act 1967* (ACT). [↑](#footnote-ref-15)
16. *Supreme Court Act 1933* (ACT),s 68B; *Criminal Procedure Act 1986* (NSW), s 132; *Criminal Code* (Qld),615; Juries Act 1927 (SA) s 7; *Criminal Procedure Act 2004* (WA), s118 [↑](#footnote-ref-16)
17. See *R v Belghar* (2012) 217 A Crim R 1. [↑](#footnote-ref-17)
18. *Cheatle v The Queen* (1993) 177 CLR 541, 560. [↑](#footnote-ref-18)
19. *Juries Act 1927* (SA) s 11. [↑](#footnote-ref-19)
20. *Juries Act 1927* (SA) s 12(1)(a). [↑](#footnote-ref-20)
21. *Juries Act 1927* (SA) s 12(1)(d)(ii). [↑](#footnote-ref-21)
22. *Juries Act 1927* (SA) s 12. [↑](#footnote-ref-22)
23. In the course of the trial a juror may need to be discharged due to illness misconduct or some other reason. In most jurisdictions if that occurs the trial can proceed with a reduced number of jurors but no less than 10 except where the accused is charged with murder: *Juries Act 1927* (SA) s 57 provides that a majority verdict is permitted after four (4) hours of 10 or 11 jurors if there is a jury of 12, or a majority of 10 if constituted of 11 jurors or a majority of nine (9) if constituted of 10 but not for murder or treason offences. *Criminal Code* (NT) s 368 provides that after 6 hours and 10 jurors agree out of 11 or 12, or nine jurors out of 10.

*Jury Act 1977* (NSW) s 55F provides that after a period, the court considers reasonable having regard to the nature and complexity of the proceedings, but not less than 8 hours, and the court is satisfied after examining one or more of the jurors that it is unlikely that a unanimous verdict will be reached, and verdict of a majority of 11 to one if jury consists of 12 jurors, or 10 to one if jury consists of 11 jurors.

*Jury Act 1995* (Qld) ss 55 and 59A provides that after 8 hours, verdict of a majority of 11 if jury of 12 jurors, or verdict of a majority of 10 if jury of 11 jurors, but not for trial of murder; or an offence carrying a penalty of life imprisonment which cannot be mitigated; or an offence against the law of the Commonwealth.

*Juries Act 2003* (Tas) ss 3 and 43 provides that after 2 hours, verdict of 10 jurors but not for trial of treason or murder.

*Juries Act 2000* (Vic) s 46 provides that after 6 hours, verdict of 11 of 12 jurors, 10 of 11 or nine of 10 jurors.

Furthermore, in all jurisdictions legislation allows for an additional juror or jurors to be empanelled if the court considers that that is appropriate. This is usually done where the trial is likely to be lengthy and it is desirable to cover for the possible loss of a juror or jurors through death or from having been discharged due to illness, misconduct or some other reason. When the jury are required to retire to consider their verdict a ballot is held by the jury to exclude sufficient jurors to reduce the number to 12: *Juries Act 1927* (SA) ss 6A and 56. See The laws in Queensland, Western Australia and Tasmania follow the ‘reserve’ juror model as described in *Fittock v R* (2003) 197 ALR 1. See *Jury Act 1995* (Qld) ss 34(1) and (5), 56(1); *Juries Act 1957* (WA) s 18(2) and (7) and *Criminal Code* (WA) s 646; and *Jury Act 2003* (Tas) s 26. Further, in Tasmania a ‘reserve’ juror may replace other jurors after the final deliberations have commenced. The law in the Australian Capital Territory follows the model of an ‘additional’ juror, however, unlike South Australia, the foreperson can be balloted off: see *Juries Act 1967* (ACT) ss 8(2) and (3), 31A(1), (4) and (5). [↑](#footnote-ref-23)
24. *Juries Act 1927* (SA) ss 43-47. Note: in the course of empanelling a jury both the accused may either as of right (peremptory challenge) or for good reason (challenge for cause) object to the empanelling of a prospective juror Furthermore, in most jurisdictions there may be a ‘challenge to the array’.

The nature of a peremptory challenge is that the party has a right to object to a person being a member of the jury without having to provide reasons for the objection. The number of peremptory challenges that an accused person has varies depending on the jurisdiction in which the trial is held. They vary from three in New South Wales and South Australia, five in Western Australia, six in the Northern Territory, Tasmania and Victoria and eight in Queensland and the Australian Capital Territory :

In most jurisdictions, the prosecution also has a right of peremptory challenge. They vary from eight in the Australian Capital Territory, six in the Northern Territory and Victoria, three in New South Wales and South Australia and five in Western Australia:

Challenges for cause may be made by the prosecutor or the accused. There is no limit to the number of potential jurors who may be challenged for cause. A challenge for cause may only be granted if the challenger has established a sound basis to anticipate the probability of prejudice or impartiality on the part of the prospective juror: *Murphy v The Queen* (1989) 167 CLR 94 at 102-104

A challenge to the array may be made only on the grounds of the indifference or default of the officer responsible for summoning the jury: *R v Grant* [1972] VR 423;R v Thomas [1958] VR 97. Such a challenge may be made where the officer chose the jurors for their religious beliefs or excluded from the jury panel all persons of a particular occupation: see J.B Bishop, Criminal Procedure 2nd ed. Butterworths 1998 and authorities cited therein. [↑](#footnote-ref-24)
25. *Palmer* (1992) 64 A Crim R 1, 7. [↑](#footnote-ref-25)
26. *Thomas v R* (1960) 102 CLR 584, 605; *Van Leeuwen v R* (1981) 36 ALR 591, 594. [↑](#footnote-ref-26)
27. *Thompson v The Queen (*1989) 169 CLR 1. [↑](#footnote-ref-27)
28. *Doney v The Queen* (1990) 171 CLR 207 at 214-215; *The Queen v Prasad (*1979) 23 SASR 161, 162 (King CJ); *The Queen v Bilic*k (1984) 36 SASR 321, 334-5 (King CJ). [↑](#footnote-ref-28)
29. *Doney v The Queen* (1990) 171 CLR 207, 214-215; *The Queen v Bilic*k (1984) 36 SASR 321. [↑](#footnote-ref-29)
30. Where evidence is capable of supporting a conviction but is patently weak or unreliable it is open to the jury, at any time after the close of the prosecution case, to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more. It is within the discretion of the judge to inform the jury of this right but this is done only in exceptional cases. If the judge decides to inform the jury of their right in this regard, he usually tells them of the right at the close of the prosecution case: *The Queen v Prasad (*1979) 23 SASR 161, 163 (King CJ). [↑](#footnote-ref-30)
31. If an accused person decides not to give evidence, the judge must direct the jury that they should not reason that his silence is evidence of guilt because to draw such an inference would render the right to silence valueless: *Petty and Maiden v R* (1991) 173 CLR 95, 99. [↑](#footnote-ref-31)
32. After the defence has closed its case the trial judge has a discretion to allow the prosecution to call further evidence but only in special or exceptional circumstances and not where the prosecution ought reasonably to have foreseen that the evidence should have been presented as part of its initial case:. *The Queen v Chin* (185) 157 CLR 671 at 676. [↑](#footnote-ref-32)
33. Jurors are not allowed to question witnesses or other participants in a trial except through the judge. Where the judge receives communications from the jury, these should generally be conveyed to both the prosecution and the defence so that there is no suggestion of secret communications between the court and the jury: *R v Gorman* [1987]1 WLR 545. If the jury has a question about the evidence or seeks any other form of assistance its question or request should be written down and read by the judge in open court or asked in open court by the jury foreperson (a person appointed by the jury as their spokesperson): *R v Black* (2007) 15 VR 551. [↑](#footnote-ref-33)
34. *R v Mawson* [1967] VR 205 at 207; *R v Sharp* [1994] QB 261, 273 [↑](#footnote-ref-34)
35. *R v Mercer* (1993) 67 A Crim R 91; *Rowland v Police* (2001) 79 SASR 569. [↑](#footnote-ref-35)
36. See *Alford v Mag*ee (1952) 85 CLR 437;*RPS v The Queen* (2000) 199 CLR 620; *Holland v The Queen* (1993) 67 ALJR 946; *R v AJS* (2005) 12 VR 563; *R v Ali* (1981) 6 A Crim R 161. [↑](#footnote-ref-36)
37. In Australia the trial judge is obliged to warn the jury in relation to acting on a witness’ evidence when such a warning is necessary to avoid a potential miscarriage of justice: *Bromley v The Queen* (1986) 161 CLR 315 at ( Gibbs CJ) 318, (Brennan J) at 324-325. Such a warning is particularly necessary where the jury may not have appreciated the relevant danger. For example, judges direct juries that where the identification of the accused by a stranger is a significant part of the prosecution case, the judge must warn the jury of the dangers of such evidence because the experience of the courts (which jurors have probably not shared) has shown that mistakes in identification are not uncommon:see *Domican v The Queen* (1992) 173 CLR 555. [↑](#footnote-ref-37)
38. *Broadhurst v The Queen* [1964] AC 441, 461. [↑](#footnote-ref-38)
39. *Barca v The Queen* (1975) 133 CLR, 103-105. [↑](#footnote-ref-39)
40. *Director of Public Prosecutions (UK) v Stonehous*e [1978] AC 55; *R v Ali* (1981) 6 A Crim R 161. [↑](#footnote-ref-40)
41. Traditionally a jury could not separate until they had completed their deliberations and returned a verdict. However, most jurisdictions now permit a jury to separate in the course of their deliberations if the judge considers that there are proper reasons to do so; for example, to allow them to separate and go to their homes at night rather than remaining together go home at night: *Juries Act 1927* (SA) s 55 and see *R v El Rifai* [2012] SASCFC 98. See also, *Criminal Code* (NT) s 365(2); *Jury Act 1977* (NSW) s 54(b); *Juries Act 2003* (Tas) s 46; *Juries Act 2000* (Vic) s 50 (but only where jurors taken an oath not to discuss the case with any other person). Further, in Queensland and Western Australia, the jury can separate only before considering its verdict: *Jury Act 1995* (Qld) and *Criminal Procedure Act 2004* (WA) s 111. In most jurisdictions consequences of a fine or imprisonment are imposed on jurors who contravene the conditions imposed upon them. [↑](#footnote-ref-41)
42. Sometimes the jury are unable to agree on a verdict in which case the jury will be discharged. When that occurs the accused is usually retried before another jury at a later date. [↑](#footnote-ref-42)
43. *Cheatle v The Queen* (1993) 177 CLR 541. [↑](#footnote-ref-43)
44. *Criminal Code* (NT) s 368 provides that after 6 hours and 10 jurors agree out of 11 or 12, or nine jurors out of 10. *Jury Act 1977* (NSW) s 55F provides that after a period, the court considers reasonable having regard to the nature and complexity of the proceedings, but not less than 8 hours, and the court is satisfied after examining one or more of the jurors that it is unlikely that a unanimous verdict will be reached, and verdict of a majority of 11 to one if jury consists of 12 jurors, or 10 to one if jury consists of 11 jurors.

*Jury Act 1995* (Qld) ss 55 and 59A provides that after 8 hours, verdict of a majority of 11 if jury of 12 jurors, or verdict of a majority of 10 if jury of 11 jurors, but not for trial of murder; or an offence carrying a penalty of life imprisonment which cannot be mitigated; or an offence against the law of the Commonwealth.

*Juries Act 2003* (Tas) ss 3 and 43 provides that after 2 hours, verdict of 10 jurors but not for trial of treason or murder.

*Juries Act 2000* (Vic) s 46 provides that after 6 hours, verdict of 11 of 12 jurors, 10 of 11 or nine of 10 jurors.

*Criminal Procedure Act 2004* (WA) s 114 provides that after a minimum of 3 hours, verdict of 10 or 11 but not in cases of murder). [↑](#footnote-ref-44)
45. Sir Louis Blom-Cooper QC, Judge and Jury or Jury alone, 6 Med. Sci. Law (2004) Vol.44, No1. [↑](#footnote-ref-45)
46. See *Fleming v The Queen* 91988)197 CLR 256. [↑](#footnote-ref-46)
47. P*erkins v County Court of Victoria* (2000) 2 VR 246 at 271 [↑](#footnote-ref-47)
48. See, John B Bishop, ‘*Criminal Procedure*’ Buttersworths (2nd ed. 1998) pp 534-5 and Sir Louis Blom-Cooper QC, Judge and Jury or Jury alone, 6 Med. Sci. Law (2004) Vol.44, No1. [↑](#footnote-ref-48)
49. See Report No 48 (1986) - Criminal Procedure: The Jury in a Criminal Trial 6. Making the Jury’s Task Easier, Law Reform Commission, New South Wales. [↑](#footnote-ref-49)
50. See *Victoria v Australian Building Construction Employees’ and Builder’s Labourer’s Federation* (1982) 152 CLR 25 at 102; *Abrahamson v The Queen* (1994) 63 SASR 139 at 143 [↑](#footnote-ref-50)
51. See R. Mc Ewen, J. Eldridge and D. Caruso, ‘Differential or deferential to media? The effect of prejudicial publicity on judge or jury’, The International Journal of Evidence and Proof 2018, Vol.22(2) 124-143 [↑](#footnote-ref-51)
52. *Gilbert v R* (2000) 201 CLR 414, 425. [↑](#footnote-ref-52)
53. (2016) 258 CLR 203 [↑](#footnote-ref-53)
54. (1986) 160 CLR 171 [↑](#footnote-ref-54)
55. (2016) 258 CLR 203 at [194] to [195]: [↑](#footnote-ref-55)
56. See R. Mc Ewen, J. Eldridge and D. Caruso, ‘Differential or deferential to media? The effect of prejudicial publicity on judge or jury’, The International Journal of Evidence and Proof 2018, Vol.22(2) 124-143 [↑](#footnote-ref-56)
57. He, Xin ‘Lay Assessors in Chinese Courts’ (2016) 50(3) *Law and Society Review* 733 and Landsman, Stephen and Jing Zhang, ‘A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts’ (2008) 25 *UCLA Pacific Basin Law Journal* 179-227. [↑](#footnote-ref-57)
58. He, Xin ‘Lay Assessors in Chinese Courts’ (2016) 50(3) *Law and Society Review* 733, 746. [↑](#footnote-ref-58)
59. Ibid 746. [↑](#footnote-ref-59)
60. Hao, W ‘Not Adjudicating but Accompanying’ to ‘Not Only Accompanying but Adjudicating’, (2007) China’s Courts. [↑](#footnote-ref-60)
61. Peter Krisenthal ‘Judge Alone Trials in NSW Practical Considerations’, 25 August 2015. [↑](#footnote-ref-61)
62. See Article 1 of the Decision of the Standing Committee of the National People’s Congress on Improving the System of People’s Assessors. See also, Wang, Zhuoyu and Fukurai, Hiroshi ‘Popular legal participation in China and Japan’ (2010) 38 *International Journal of Law, Crime and Justice* 236-260. [↑](#footnote-ref-62)
63. Above n 54, 749. [↑](#footnote-ref-63)
64. Zhao, X., Du, H ‘The investigation of the implemental situation of the lay assessor system in the Courts of Nanjing City’ (2006) *People’s Court Daily*; Wang, Zhuoyu and Fukurai, Hiroshi ‘Popular legal participation in China and Japan’ (2010) 38 *International Journal of Law, Crime and Justice* 236-260, 242. [↑](#footnote-ref-64)
65. Wang, Zhuoyu and Fukurai, Hiroshi ‘Popular legal participation in China and Japan’ (2010) 38 *International Journal of Law, Crime and Justice* 236-260, 244. [↑](#footnote-ref-65)
66. *Zoneff v The Queen* (2000) 200 CLR 234, [67] (Kirby J). [↑](#footnote-ref-66)