ON A BILL TO AMEND AND REFORM THE JURY ACT, THE JUSTICES ACT AND THE CRIMINAL CODE INSOFAR AS THOSE ACTS RELATE TO COMMITTAL PROCEEDINGS AND TRIAL BY JURY IN CRIMINAL COURTS

Report No 35

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QUEENSLAND

A REPORT OF THE LAW REFORM COMMISSION

ON A BILL TO AMEND AND REFORM THE JURY ACT, THE JUSTICES ACT AND THE CRIMINAL CODE INSOFAR AS THOSE ACTS RELATE TO COMMITTAL PROCEEDINGS AND TRIAL BY JURY IN CRIMINAL COURTS (Q.L.R.C. REPORT 35).

PREFACE

The Law Reform Commission has been functioning since 1st March, 1969, and is constituted by the Law Reform Commission Act 1968-1984.

MEMBERS:-

The Honourable Mr. Justice B.H. McPherson, Chairman

The Honourable Mr. Justice G.N. Williams,

Mr. F.J. Gaffy, Q.C.,

Mr. R.E. Cooper, Q.C.,

Sir John Rowell,

Mr. J.R. Nosworthy.

STAFF:-

Mr. K.J. Dwyer, Principal Legal Officer,

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Mr. L.A.J. Howard, Secretary.

The office of the Commission is situated at the Central Courts Building, 179 North Quay, Brisbane.

The short citation for this Working Paper is Q.L.R.C. R.35.

REPORT OF THE LAW REFORM COMMISSION ON A BILL TO AMEND AND REFORM THE JURY ACT, THE JUSTICES ACT AND THE CRIMINAL CODE INSOFAR AS THOSE ACTS RELATE TO COMMITTAL PROCEEDINGS AND TRIAL BY JURY IN CRIMINAL COURTS

The Honourable N.J. Harper, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

The Third Programme of the Law Reform Commission of Queensland as approved by the Governor-in-Council has as its first item the matter of a review of the role of juries in criminal trials.

As part of this process of revision, a working paper was prepared which contained a commentary and certain recommendations for amending legislation.

The working paper was circulated to persons and bodies known to be interested and involved in the administration of the criminal law from which comment and criticism were invited. Replies were received from some of these persons and bodies some of whom were interviewed by members of the Commission.

This report has been written after full consideration of the detailed comments received from the judiciary and members of the legal profession. Some of the Commission's original recommendations have been withdrawn or modified and some new proposals for reform introduced.

Signed: _____ (Chairman)
The Hon. Mr. Justice B.H. McPherson

Signed: _____
The Hon. Mr. Justice G.N. Williams

Signed: _____ Signed: _____
Mr. F.J. Gaffy Q.C. Mr. R.E. Cooper Q.C.

Signed: _____ Signed: _____
Sir John Rowell Mr. J.R. Nosworthy

Brisbane
25th October, 1985

List of Major Reform Recommended

1. Some important changes are recommended to the procedure on committal for trial. These are:-

   (a) An accused may waive committal proceedings altogether.

   (b) All evidentiary statements to be relied on by a party at the committal hearing must be served on the other party at least seven days before the hearing.

   (c) A defendant may plead guilty at any stage of the committal proceeding.

2. Extensive changes to the system of exemptions from jury service is recommended. There would be no automatic exemptions. Exemption would only be granted upon application to the Sheriff and upon grounds of extreme hardship to the prospective juror or his employer or because his serving would be contrary to the public interest.

3. The abolition of the system of double challenges to the jury panel, unique to Queensland, is recommended. The system is brought into line with all the other Common Law jurisdictions in which there is only one opportunity for the accused to challenge and the Crown to set aside prospective jurors.

4. It is recommended that superior courts be given the power, at the time of trial but before the accused is arraigned or the jury empanelled, to hear and determine matters of law and procedure affecting the conduct of the trial.

5. Majority verdicts in criminal trials are recommended. In particular we recommend that, if the jury is unable to arrive at a unanimous decision, a verdict may be taken from any ten of the jurors with the proviso that the jury must have had at least two hours to deliberate. Majority verdicts are not to be taken in treason, murder and piracy.

6. It has made an offence for any person to obtain, disclose or solicit any information as to what transpired in the jury room. The penalty provided is three years imprisonment. Proceedings can only be instituted with the consent of the Attorney-General or on a motion of a court having jurisdiction to deal with the matter.

7. Provision is made to relax the circumstances under which an accused person may change a plea of "guilty" at the committal proceedings to one of "not guilty" when he comes to trial. The present provisions of the Criminal Code make it very difficult for him to do so at present.

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SUMMARY

At the time when the Commission was given the reference to review the role of juries the utility of juries in criminal trials was under a considerable degree of public scrutiny in Queensland. This resulted from the discharge of a jury without verdict in what became known as the Russell Island case. In that case eight people were charged with conspiracy to defraud the public in respect of a number of dealings in land on Russell Island. After a hearing lasting just over nineteen (19) months the jury had retired for thirteen (13) days when a juror was found to be medically unfit to continue in the deliberations. In the circumstances, upon the application of all defence counsel, but against the opposition of the Crown, the jury were discharged without returning a verdict.

Whilst that case was in many ways both unique, and highly publicized, it served to focus the spotlight on a number of areas of concern to those connected with the administration of the criminal law relative to the effectiveness of the criminal jury system. The public reaction even went so far as to question the value of the criminal jury at all, at least in certain areas of criminal trials.

Most of the areas of concern referred to have been the subject of discussions, writings and research by practising lawyers, academics and various Law Reform bodies over many years. The range of publications devoted to these subjects is extensive covering the whole spectrum from complete books to short articles and commentaries. In our own researches we have endeavoured to absorb at least a representative sample of this literature in addition to relying on our own experiences on the Bench and at the Bar. We have also sought and obtained comments and information, particularly of a statistical nature, from the Law Reform Commissions in Australia, State and Territory authorities and others in an endeavour to establish a picture of the workings of the jury in Australia, isolate its problem areas and propose some reforms.

In making any suggestions for reform in such a sensitive area as criminal juries one has to particularly bear in mind the practicalities of the situation. The final aim is to have one's recommendations incorporated into legislation. To achieve that end one has to negotiate the real hurdles of professional and political approval, both of which are understandably conservative.

Bearing that in mind we have made recommendation for reform which we believe are realistic and effective, reforms which will eliminate the most glaring deficiencies in criminal practice and procedure but at the same time are modest enough to secure acceptance. They do not go as far as we should, perhaps, have liked, but we are dealing in practicalities and not ideal solutions.

The following is a summary of the substance of the more important matters dealt with in the paper, including proposals for reform.

After a brief introduction the paper looks at the historical evolution of the criminal jury. One of the purposes of that exercise is to set the scene for proposed reforms. Such a review indicates that the jury, historically, has been far from a static organism. Change and adaptation have been common in its history so that, in present times, where change is seen to be warranted there should be no hesitation in bringing it about.

Given that historical background we perceived that the problems affecting criminal juries could be conveniently grouped under three headings:-

1. Those related to the constitution of the jury itself (lack of representativeness, lack of familiarity with proceedings) and the procedures governing the operation of the jury (challenge procedures, majority verdicts, pre-trial procedures etc.).

2. Those arising from committal proceedings in their present form.

3. Those resulting from the very nature of the jury and its approach to its task (possible inability to understand complex cases, "equitable" view of the law resulting in high proportions of acquittals, disagreements, etc.).

Having established the problems, as we see them, we then looked at the legislation governing juries in Australian jurisdiction in some detail. In the course of doing so we considered that, in Queensland, in general machinery terms, the legislation was satisfactory but that in one respect it needed considerable modification. This was the matter of exemption from jury service. We are of the opinion that the present position in Queensland should be drastically modified. In essence we recommend that the present system whereby the Electoral Officer or the Sheriff automatically delete from the roll the names of persons in categories exempted in the Act be abolished. We also recommend that the present list of exemptions be dispensed with. In place of that system we suggest one whereby when the prospective juror receives a notice from the Sheriff it will specify the persons who may be ineligible to serve or exempt from serving. The recipient will have to notify the Sheriff of his ineligibility, or claim exemption, as the case may be. In the latter case, if he fails to do so, he will have to serve, subject to the discretion of the trial judge. The criteria for exemption are basically those suggested by the Canadian Law Reform Commission. They are in general terms. They cover the position of serious hardship or loss to the juror, or those immediately relying on him, or his employer; or where serving as a juror would be contrary to the public interest.

Committal proceedings are next dealt with as it is considered they have an important bearing on the efficiency of the criminal trial procedure as a whole. After examining the present system in detail, and although we found that the system operating in Queensland was relatively effective we categorized the most serious defects as follows:-

(1) The unnecessary delay occasioned between charge and trial by interposing committal proceedings. These result in injustice to both the community and the accused.

(2) The considerably added expense of conducting both a committal proceeding and a trial in each instance.

(3) The inconvenience, expense and, sometimes, trauma occasioned in witnesses by being forced to attend court twice; and be subjected to examination and cross-examination twice.

(4) The fact that despite these considerations the vast majority of committals are largely a formality anyway, only a very small percentage of defendants ever being discharged at that hearing.

(5) The delay occasioned to magistrates in disposing of their summary cases, civil and criminal, by the necessity to conduct committals, often of a lengthy nature.

To meet these defects we suggested, in the Queensland situation the following reforms:-

1. A right to be given to the accused person to waive the committal proceeding if he so desires.

2. Provision should be made for the accused person to plead guilty at any stage of the proceedings rather than, for the first time, at the end of the informant's case, as the law is at present.

3. Written statements should be admissible by consent whether or not the accused person is represented by counsel or solicitor.

4. An amendment should be made to section 110A(5)B of the Justices Act 1886-1982 by inserting at the beginning of that paragraph the words "Not less than seven days before the day on which the preliminary examination of the accused person is to be taken..." (statements must be delivered to the other side).

5. There should be special provisions for the reception of statements by minors and illiterate persons. Such legislation already exists in the New South Wales, Victorian and English Acts.

6. By consent parties may dispense with the statutory conditions precedent to the admission of written statements.

7. Provision should be made to accept as proven fact the stated age of a deponent in his declaration.

We then moved to consider the subjects pre-trial pleading and procedure and summary trial. In this regard we gave earnest consideration, firstly, and as a separate subject, to the trial of complex commercial crimes and conspiracies relating to them.

In the working paper, in reference to this subject, we recommend the adoption of a system of summary trial in higher courts by Judge alone for complex commercial type crimes. This was on all fours with scheme adopted for this purpose in New South Wales in 1979 with one important exception. However, upon reflection, and taking into consideration representations made in respect of the proposal by the Queensland profession, and other persons, we have withdrawn our recommendations whilst leaving an outline of the proposal in the paper. Primarily we decided not to recommend the adoption of the scheme because of an element of uncetainty as to the tribunal trying the matter that it injected into the system and because of difficulties and complexities of sentencing that would almost certainly have arisen. We have made certain other suggestions for pre-trial proceedings which should alleviate delays in this area to some degree.

We then paused to look at some statistical material available to us. In compiling these we received very generous co-operation from most authorities from whom we sought them. However, the sad fact is that the whole process of keeping statistical material relating to the whole criminal process is, in most parts of Australia, most inadequate. The result was that, though we were able to derive some assistance from the material provided, it was not nearly of as much assistance as we had hoped it would be. This is, perhaps, a matter that should be considered by the Standing Committee of Attorneys-General if it is hoped to establish in Australia, a worthwhile empirical basis for reform in the whole area of criminal proceedings.

From looking at statistics we moved back into the procedural field, directing our attention to the system of challenging jurors. The Queensland practice in this area is unique in Australia in that it allows for two sets of peremptory challenges. On the first occasion that the list of jurors is called through no limit is imposed on the Crown or the defence as to the number of challenges or those asked to stand by. If a jury is not struck at the end of the first call the cards are replaced in the box and jury called through a second time. We recommend that this system be discontinued and that Queensland adopt the same course as all other Australian jurisdictions having one call with limitations on the number of challenges on those called to stand by.

Another aspect of challenging which the Commission believes is generally unsatisfactory is the situation applying in joint trials. There each accused has the right to his full number of eight challenges and the Crown the right to stand by in the same number. We have recommended that in the case of joint trials the accused be limited to six challenges each and the Crown to eight challenges in all.

Our next matter for consideration was reform to criminal procedure in general. After prolonged consideration and examination of proposals for reform in this area in other jurisdictions, the Commission eventually decided to recommend only fairly moderate reforms. There were two basic reasons for this view. The type of reform that most appealed to us was the trial scheme of pre-trial proceedings in chambers and Court introduced in respect of some of the Crown Courts in England.

However, we discovered, at first hand, that this was not operating satisfactorily in practice, and is to be the subject of extensive review. In the second place we are aware that reforms in this area are under consideration by a number of the Supreme Court judges in some of the States. In the circumstances it seemed better to await the outcome of those considerations rather than launch into a large scale review ourselves. Nevertheless we decided that there were some matters of fairly urgent concern which could be made the subject of pre-trial proceedings without any great dislocation of established practice. These are as follows:-

1. Any challenge to the jurisdiction of the Court to try the matter in question.

2. Where there are joint trials of accused, or joinder of counts any applications for severance.

3. The question of fitness to plead.

4. Where it is intended to raise the defence of insanity or the like.

5. Where it is intended to challenge evidence as on the voir dire. This would be conducted by the trial judge.

We gave ernest consideration to various ways of implementing these reforms. In particular we looked at the form of pre-trial herings introduced into the A.C.T. and Victoria in which the Judge asks a set series of questions to the parties to ascertain the state of readiness of the trial. However, as Queensland has already instituted a system of judicial control of listing criminal trials we decided to leave any such questioning to that

judge's discretion. We believe to do otherwise may well add to costs and delay. But we have recommended a considerable innovation. In order to narrow the issues for trial and to cut down delay and cost after the jury is empanelled we have recommended that the Criminal Code be amended to give the trial Judge wide power to dispose of legal and procedural arguements before the accused is arraigned and the jury empanelled. This should eliminate one of the prime services of delay and frustration in criminal jury trials.

As our penultimate matter we dealt with the vexed subject of majority verdicts. In 1977 in a Working Paper on Proposals to Amend the Practice of Criminal Courts in Certain Particulars (W.P. 19) this Commission recommended that the system of majority verdicts be introduced into the procedure in Queensland. However, when the final report was produced the Commission, with some reluctance, changed its mind, recommending that events may occur which would alter this position. We believe that the experience of the Russell Island case and the recent Gallagher, Murphy and Maher cases was such an event. Accordingly we have recommended that majority verdicts in Criminal trials be introduced into Queensland. This change would have the effect that, except in the case of trials for treason, murder or piracy, where a unanimous verdict would still be required, a jury could bring in a verdict where not less than ten jurors have agreed upon a verdict.

A verdict in such circumstances shall not be accepted unless it appears to the Court that the jury have had such period of time for deliberation as the Court thinks reasonable but in any event not less than two hours.

Finally, and largely arising out of the three latter cases referred to above we dealt with the question of breach of the confidentiality of the jury room. Whilst not specifically referred to in our reference on juries we believe it was a matter of such critical imprtance to the community that we had to direct our attention to it. We looked at various forms of legislation directed to this matter but decided that section 8, the relevant provision of the English Contempt of Court Act 1981, was the more appropriate to apply. We, however, have modified that legislation by making a breach of the confidentiality of the jury room an offence rather than contempt of court. We have recommended that such a breach constitute a misdemeanour furnishable by imprisonment for three years. We have inserted a safeguard against any frivolous prosecution by requiring any prosecution to be approved by the Attorney-Generl or a higher court. We trust this legislation will prevent further incidents such as occurred in the cases referred to.

THE ROLE OF JURIES IN CRIMINAL TRIALS

INTRODUCTION

Although the title of the reference with respect to juries is expressed to be "To review the role of juries in criminal trials", we have assessed the real question intended to be considered as "To examine critically the suitability and effectiveness of the jury in the whole of the criminal law process, in its operation, as an integral part of machinery of the criminal law".

The reference in these extended terms would include making recommendations for reform in criminal practice and procedure generally, if this were determined to be necessary to render the whole criminal process more suited to the jury fulfilling its task in today's conditions. The reference thus involves a two-tiered exercise:-

(1) To examine the jury as an entity in itself, apart from the general criminal process, to see if reform is necessary in respect of its own basic constitution, ultimate composition and working.

(2) To examine the procedure, practice and rules of evidence in the criminal law process generally to determine if reforms are necessary in any part or parts of that area which may, directly or indirectly have a bearing on the effectiveness of the jury system.

Views as to the value and effectiveness of the jury's role in the criminal trial vary widely. Indeed, no institution within the field of criminal justice generates as much heated controversy as the continued existence or otherwise of the jury. There are even different interpretations of the significance of similar statistical material related to the performance of the criminal jury. This situation will be looked at in more detail later on in this paper. At this stage it suffices to illustrate the differing approaches to the value of the jury by quoting some remarks of learned protagonists for one view or the other. These

range from emotive statements dealing with the jury's role in our constitutional framework as the guardian of the liberties of the people to critically pragmatic assessments of the validity and effectiveness of the jury, at all, in concrete situations.

A convenient starting point in quotations is that of Blackstone (Commentaries Book 4 pp 349 & 350) repeated enthusiastically by Sir Patrick Devlin (as he then was) in the Hamlyn Lectures in November, 1956:

> "So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial; by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." Trial by Jury (3rd Edition) Page 165.

Lord Devlin, of course, is a strong advocate of the jury system and in a speech delivered at the University of Chicago in January, 1960, he also said:

> "Trial by Jury is only an instrument of getting at the truth. It is a process designed to make it as sure as possible that no innocent man is convicted."

The next quote comes from Harry Kalven Jnr. and Hans Zeisel, the American authors of what is undoubtedly the most ambitious and thorough piece of research into how juries and in particular, criminal juries perform, and upon what basis they make their decisions. They published their results in 1966 in a book called "The American Jury". At page 498 of the book, which is also strongly sympathetic to the jury system, they express the following conclusion:

> "The jury thus represents a uniquely subtle distribution of official power, an unusual arrangement of checks and balances. It represents also an impressive way of building discretion, equity, and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it."

Finally, as a matter of balance, we quote from the work of two more recent English researchers on the subject, John Baldwin and Michael McConville. Their work is also most extensive, being contained in a number of publications, and they express a different view. In a paper published in the Justices of the Peace of March 10, 1979 entitled "Research and the Jury" they say in their concluding paragraphs:-

> "To many the excellence of juries is an article of faith, and the uncritical light in which the jury has been viewed has made rational discussion of the institution extraordinarily difficult. Many of the attachments to the jury are ideological and, as such, are unlikely to be shaken by the evidence of research. Research can perhaps do no more than provide a limited factual framework within which a more informed debate can be conducted. Our own research in Birmingham and London casts doubt on many assumptions that have been made about Juries most notably the assumption that, when juries err, this will invariably operate to the benefit of the defendant.

> On the evidence of our research, we concluded that jury trial was an inaccurate and unpredictable method of discriminating between the guilty and the innocent. But this does not mean that the jury is outmoded, inefficient or unacceptably fallible. It may be that, in human terms, it reaches a just determination as often as can reasonably be expected and that other tribunals, if subjected to the same detailed scrutiny, would display similar imperfections.
>
> Our findings do suggest, however, that it is time for uncritical veneration of the jury to end. Juries and other tribunals, including magistrates, ought to be opened up to more rigorous scrutiny. The interests of justice demand that the mystery that surrounds such institutions be finally swept away and that they be exposed to rational inquiry in which ancient shibboleths have no place."

When the conclusions of the empiricists vary so greatly, the task of the mere practitioners in trying to form an accurate assessment of the jury at work is not an easy one.

Having made these general remarks it seems to be essential to look briefly at the historical evolution of the jury in the Common Law.

HISTORIAL BACKGROUND

The Norman Conquerors introduced into England, as a primitive form of the jury, what had been, prior to 1066, an administrative tool in widespread use in areas of Europe controlled by the Carlovingian kings. The body may have indeed had a much earlier origin in the procedure of the Roman fiscus.

Gradually the role of the jury was extended from being primarily used as an administrative measure and, as a source of information as to local facts and events, to being used in the sphere of the civil law. The impetus to the wider use of the jury was Henry II. In particular, he made provision for a litigant to ask for a royal writ summoning a jury to decide the issue when a title

to land was in dispute. He also introduced the jury into criminal justice by establishing grand juries of presentment of accusation: under the Assize of Clarendon these grand juries were required to report on offences committed in their neighbourhoods. This was the seed of the jury in the present form although it took quite some time to develop its existing . role.

Although the English common law was beginning to attain some fixed rules of procedure at the time when man's ideas of a trial were dominated by the archaic ideas which centred around the old formal methods of proof of battle, compurgation, and ordeal, these older methods of proof were gradually being supplemented by the jury in its then form as a formal proof. This was hastened by the effect of the Assize of Clarendon (1166) on compurgation and the virtual abolition of the ordeal as a result of its condemnation by the Lateran Council in Rome in 1215.

The result was that, in the field of criminal law also, the jury, in one form or the other, became the formal method of proof of the guilt or innocence of a person on trial. However, its construction and methods of operation were very much in the discretion of the judges during the 13th and 14th centuries. It was still a formal test and not, in any way, an independant judicial trier of fact. The members were witnesses rather than judges of fact.

This concept of the jury slowly changed and, in the long run a tendency emerged for the jury to be regarded as a judicial body. This tendency began to predominate in the fourteenth (14) century although it did not lose its characteristic as a body of witnesses entirely until the seventeenth century.

Out of those historical elements there developed different varieties of juries, broadly grouped into criminal and civil juries. Each of those, in turn, was subdivided; criminal juries into the Grand jury of presentment and the petty jury; civil juries into the jury of Assizes and the jurator. This present consideration is confined to the criminal juries.

The Grand jury of presentment was the lineal descendant of the earlier juries of inquiry. As is well known, it was summoned to discover and present to the King's officials (Justices) persons suspected of crimes. It became to be summoned by the Sheriff in the number of 24 persons, of whom 23 were chosen, a majority of whom decided whether to "find a true bill" or "ignore" the accusations preferred before it. There is some suggestion that this majority of twelve was the origin of the number 12 which ultimately comprised the petty jury.

The petty jury which tried the actual issue of guilt, originally as a formal method of proof, as has been said, gradually separated itself from the presenting jury and equally gradually overtook the other methods of proof as the only formal method of proof in criminal cases.

The process by which the petty jury became separated from the presenting jury was a very slow one from the middle ages until by the middle of the 16th century it became the general practice to rely on the testimoney of sworn witnesses. By the middle of the 17th century witnesses and jurors were regarded as completely distinct. However the law clung so tenaciously to the idea that jurors must come from the immediate neighbourhood of the place where the fact in issue occurred that it was not until 1826 when the necessity to have hundredors on the jury in criminal cases was formally abolished.

There were two factors which helped to bring about the change from the jury being witnesses to their becoming judges of the facts. The first of these was the evolution of the manner in which the jury informed themselves (i.e. the substance of the law of evidence). This was a long and slow development but ultimately the reception of the testimony of sworn witnesses predominated.

The second factor that contributed to the divesting the jury of their character as witnesses was the growth of the law as to the right of the prisoner to challenge members of the jury panel. To a very marked degree this enabled him to remove anyone with a personal knowledge of the case. It started with the right of the prisoner to challenge indictors. Later, in addition, a person could challenge on the ground of some defect in capacity (i.e. if he was not a peer) or for partiality, or for previous convictions, among other grounds.

Initially trial by jury could never be used without the consent of the accused. His strict right was to be tried by one of the older methods of proof, but, as these had become obsolete, the result was that if he did not consent to be tried by a jury he could not be convicted. One of the major disadvantages of conviction in those days, apart from the likelihood of being executed, was that, in addition, the prisoner forfeited all of his possessions. If he were not convicted, his property would not be forfeited to the Crown. The further result was that many a prisoner refused to be tried by a petty jury in order to save his property for his family. Refusal however, was met by torture even to the point of an accused being crushed to death. Finally, after some five hundred years, a refusal to plead to a jury was taken as a plea of not guilty.

The historical outline just given points up a number of significant factors. The first of these is that the jury was not instituted as a fulfilment of the "Human Rights" sentiments contained in the Magna Charta. In essence it was a purely pragmatic response to a set of historical circumstances. Therefore, despite the frequent invocation of Magna Charta as the foundation of the jury, the two are not directly connected historically. Thus, any rationalization or modifiction of the jury process is not necessarily an interference with an institution sanctioned by its origin in the fundamental statute of English liberty. This historical reality was again expressed clearly and in another context by Lord Devlin in the work referred to earlier when he said at pages 12 to 13:

> "Meanwhile in the history of the earlier period, will you note two things which especially contribute to an understanding of the way the jury worked to-day? The first is that the judge and jury were never formally created as separate institutions; there was never any separation of powers, never any conscious decision by anyone that questions of law ought to be decided by lawyers and those of fact by laymen. The jury derived all its powers from the judge and from his willingness to accept its verdict; even now, if he were to refuse to do so, he would offend against no statute and his judgment would be good until reversed by a higher court. In theory the jury is still an instrument used by the judge to help him to arrive at a right decision; from the first and, as you will see, throughout its development, the judges have kept the jury to that nominally subordinate role. The verdict has no legal effect until judgment is entered upon it. The jury's function was always, and still is, simply to answer the question so that judgment may be given. Its place in the trial has become important now because it has been granted or usurped additional powers but simply because the coming of rational methods of proof has given to the task of fact-finding an importance unrecognised by thirteenth century judges; if they had recognised it, they would probably have kept the task for themselves. We talk nowadays of the province of law and the province of the fact almost as if they were separate jurisdictions; and sometimes of judges encroaching on the jury's province. No doubt the easiest way of explaining the modern relationship between judge and jury is to start from the hypothesis that the law is for one and the facts for the other. But you will find that judges have a good deal to do with the facts and you must not think of them simply as invaders on territory to which they have no title."

Next, it is clear that the jury has, historically, not always been prized by accused persons as the most highly desirable method of trial, in the sense that it was a strong shield of their liberty or innocence. That exactly the contrary was the case emerges in an article entitled "Early Opposition to the Petty Jury in Criminal Cases" by Charles L. Wells in the Law Quarterly Review Volume 30 (1914) page 97. Mr Wells comments, at p.103:

> "There was a little in the jury trial in criminal cases before 1350 to appeal to even a superficial fairmindedness. With a jury prejudiced by its own indictment, relying on rumours and hearsay evidence, often stupid and ignorant, liable to irrational, undue, and underhanded influences and intimidation, and without individual responsibility, a conviction was almost, if not quite a foregone conclusion. The objections sometimes urged against the jury to-day were tenfold more applicable then, when the jurors were judges and witnesses, unrestrained by any laws of evidence or legal restrictions and sometimes only partially informed."

And at page 106 he says:

> "The question of evidence received no attention for a long time. No machinery was elaborated for getting fair testimony or an impartial verdict, and no legal test of evidence in the interest of justice and equity has been devised. A jury system, with some or all of the accusers on the jury without any rules of evidence or legally qualified witnesses, would seem anything but impartial and desirable."

One other factor militating against popular acceptance of the jury was the official pressure brought to bear on juries to bring in verdict of guilty. On and off over the centuries juries were subjected to considerable pressure to bring in verdicts of guilty. Recalcitrant juries were fined quite heavily for failing to do so. This latter practice did not cease until the decision of Vaughan CJ in Bushell's Case (1670) Vaughan's Reports 135, in which His Lordship drew the distinction between the ministerial functions of the jury and the giving of the verdict which he classified as judicial. For the latter they could not be fined or punished. This case will be referred to again.

The opposition to the jury by accused persons continued up until the end of the 17 century. Even thereafter, the punishment of jurors who brought in verdicts of not guilty rendered the jury an unattractive proposition to the accused. Again from time to time, specially chosen or picked juries, heavily biased in favour of the Crown, gave further point to the opposition to trial by jury for quite some time.

Against all that, of course, must be set the numbers of historic occasions on which the jury has filled the role of the defender of personal liberty. By standing courageously between the Crown and an accused, jurors played a strong role in ensuring that the accused received a fair trial. It is the ingrained recollection of those occasions that has sanctified the place of the jury in our constitutional life. There are numbers of examples of such occasions but in this brief discussion two outstanding historic cases will perhaps suffice. The first of these is Bushell's Case Supra. In that case the jurors had, in spite of very brutal treatment by the court (kept without food and drink for three days) persisted in acquitting the Quakers, Penn and Mead. In consequence they were fined and imprisoned, ultimately being brought up before a Court of Common Pleas on a Writ of Habeas Corpus and discharged.

The second such case is that of John Lilburne (1649) 4 State Tr. 1270. Actually Lilburne was tried four times, three times for treason. He was convicted on the first two occasions but on the latter two no jury would convict him. Those juries were under considerable pressure to convict Lilburne who had made some extreme claims as to the breadth of the jury's jurisdiction. After he had been finally acquitted in 1653 the Council of State questioned the jury about their "not guilty verdict". Nine of the jurors stated that their decision was in accordance with the dictates of conscience; the other three repeated an assertion of Lilburne that they were the judges of the law as well as of fact. One must also observe that, at the present day, the jury verdicts, generally speaking, tend heavily in favour of the accused.

The final comment prompted by the historical review is that it is, doubtful, to say the least, that the jury has been historically a body representative of the "country" or a fair cross-section of the community for the purposes of sharing in the enforcement of the criminal law. There is no doubt that as a result of exemptions and challenges it is less so today.

PRELIMINARY CONSIDERATIONS TO REFORMING THE JURY

Against this background a number of specific problems relative to the criminal process, generally, and the jury more specifically, may be isolated for consideration. Among these as they relate to the jury directly, are:-

1. Composition (exclusions);
2. Method of Selection (challenge);
3. Unanimity or Majority Verdicts;
4. Suitability of juries at all for complex trials;
5. Modifications of Tribunal for complex fraud trials; and
6. Modification of criminal pleading procedure generally.

As a related exercise is the examination of committal poceedings with a view to establishing if they retain any value in their present form, or in some modified form in today's circumstances.

These problems may be conveniently grouped under three headings:

1. Those related to the constitution of the jury (lack of representativeness, lack of familiarity with proceedings) and the procedures governing the operation of the jury (challenge procedures, majority verdicts, pre-trial procedures etc.).

2. Those arising from committal proceedings in their present form.

3. Those resulting from the very nature of the jury itself and its approach to its task (possible inability to understand complex cases, "equitable" view of the law resulting in high proportions of acquittals, disagreements, etc.).

Grouped thus they prompt suggested remedies in each respect ranging from abolishing juries in toto, as part of the Tribunal for determining guilt or non-guilt, through adopting that course partially, particularly in respect of difficult commercial cases to more machinery reforms of modifying the present make-up of the jury, changing some of the procedures for empanelling juries or establishing systems of pleading and pre-trial procedures, or a combination of some or all of these.

Although in theory, when considering answers to problems one should explore all possible remedies, in practice the possible course of completely abolishing juries in criminal trials will not be explored in this paper. For historical, constitutional and practical reasons that step is not regarded as a viable alternative in the present milieu in which any proposed reforms are to be implemented. The reforms to which we will be looking are those which are to be practicably capable of being put into effect.

In actually considering what reforms to recommend in relation to the jury two basic matters ought to be taken into consideration. The first of these is whether, as Criminal Courts are constituted and conducted today, the heavily emphasized role of the jury as the protector of an accused person has the same justification as in previous times. The second is whether the jury, as constituted today, is truly representative of the "country" or community. A third consideration, springing from that last question is, granted some degree of representativeness, whether that quality, in the sense traditionally attributed to it is an appropriate mechanism in some areas of criminal proceedings.

These considerations will be dealt with in greater detail hereafter. As to the first query just raised, at the risk of some repetition in describing the purpose of the jury, it may help, in this context to quote from a case in the Supreme Court of the United States, Williams v. Florida 399 US 78 at p. 100. It is there stated:-

> "The purpose of the jury trial ... is to prevent oppression by the Government. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. Given this purpose, the essential feature of a jury obviously lies in the inter-position between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."

Other than the vision of this protective role on its part, there is no practical or objective reason for accepting the jury as the best and most effective weapon determining the guilt or non-guilt of a person in a criminal trial. Subjectively of course, the position is very different.

In today's circumstances, in the administration of the criminal law, there arises a very real question as to whether or not the historical protection of an accused, described in Williams v. Florida is still necessary. Experience generally, in Australia at least, would tend to answer that question in the negative.

Rather than being compliant, biased or eccentric, judges today are extremely concerned to protect the accused from any unfairness in respect of evidence admitted against him in a criminal trial and of the conduct of criminal trials in general. In almost the totality of cases in Australia, the judge is, in practice certainly the reverse of the character portrayed in the first sentence of the statement in William's case.

Moreover, the rules governing the admission of evidence are, themselves, designed to ensure the utmost protection for the accused, both in the investigation stage of a crime, and upon trial for it. Further, ready access to appellate courts provide added protection to an accused who feels he has not received justice.

Against that background it is necessary, and important, to examine the jury in the present day to ascertain at least three (3) things:-

1. It is important to see if the jury has lost any of the attributes, or essential features of its make up which contributed to its historically viewed protective role.

2. It is also important to see if its effectiveness as an administrative instrument or its primary role, and purpose, has been negated or limited in certain areas of the criminal law because of extensive social and technological changes and developments which may tend to make the jury, by its very nature, an inappropriate mechanism in those areas.

3. Whether, upon examination, in today's circumstances, the balance of public policy interests in the administration of the criminal law, generally, or in certain areas, is being effected by the use of the jury.

Two of the fundamental purposes of selecting a jury is to provide a tribunal that is indifferent and representative of the community. The latter concept is that of the community judging one of its fellow members on the question of whether or not he has broken the criminal law. i.e. whether or not he has breached one of the norms of conduct imposed on all members of the community so as to preserve order and peace in that community.

The essential characteristic of representativeness is so important that is has been the subject of many references both by writers and committees of enquiry on the operation of juries.

The authoritative writer on the history and development of juries, Charles L. Wells, says of this matter:-

> "Their representative character therefore was, and we may say remains, their most important characteristic, It is because they are representative that their testimony and verdict (true statement, vere dictum) is valuable and decisive." see 30 L.Q.R. page 105.

Again the Morris Committee in its report, Cmnd. 2627, at p.18 expressed a similar view in the following terms:-

> "In considering what the basic qualifications should be in future, we have been guided by our assessment of the qualities which we think are required of jurors. It is necessary to have on a jury men and women who will bring common sense to their task of exercising judgment; who have knowledge of the ways of the world and of the ways of human beings; who have a sense of belonging to a community; who are actuated by a desire to see fair play; and above all who will strive to come to an honest conclusion in regard to the issues which are for them to decide. We think that in a healthy community there will be a high sense of duty, a fundamental respect for law and order, and a wish that principles of honesty and decency should prevail. A jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues that face them the corporate good sense of that community. This cannot be in the keeping of the few, but is something to which all men and women of good will must contribute (emphasis added)."

Thus, the jury is viewed as having a certain identification with the accused and with the community's moral views and tolerances in resect of the area of behaviour of the accused under consideration. Whether the jury in Queensland, as ultimately empanelled, meets this criterion is a matter to which our attention will be directed.

Understandably, this relationship is fairly satisfactory in dealing with what may be called "traditional" crimes such as murder, rape, robbery, stealing etc. but which fairly raises the question whether that relationship extends with a real sense, into areas of more sophisticated crime now under the jurisdiction under the criminal law.

Is it appropriate in the sophisticated and complex area of commercial crime or other areas involving advanced technology to accept that corporate good sense of the community as an adequate guide to an understanding of the issues raised therein? It raises a very good question whether a jury is an appropriate tribunal to deal with the criminal law in business, industrial and financial matters which are clearly not within the range of the understanding and experience of an ordinary representative member of a community.

It is virtually impossible to answer these questions from statistical evidence as is the case with so many questions relating to the jury. However, evidence in practice abounds as to the difficulties that are encountered in trial by jury of offences of this nature. I cite here merely two of the many expressions of concern at the unsuitability of the jury in this area of criminal law. In a comprehensive report to the Parliament of Queensland into the affairs of Queensland Syndication Management Pty. Ltd. and ORS., (tabled 5474) Mr. P.D. Connolly Q.C., as he then was, said at paragraph 114:

> "I cannot but feel that the type of evidence which must be adduced in cases such as this is largely beyond the understanding of the common jury. It may be that the expedient adopted in the Bankruptcy Act of making all offences triable summarily unless the Court itself commits for trial by jury should be considered. Under the Bankruptcy Act summary trial leads to a lessor penalty than may be imposed on conviction may well be the dominant consideration".

Again, in 1974, the Right Honourable Lord Hailsham of St. Marylebone addressing a gathering in Sydney said:-

> "This means that it [jury] should be kept, as by and large it is now with us, for fairly serious cases. The laws of marginal utility should apply to judicial administration not less than to economics. Moreover, I tend to think that complicated financial frauds would be better tried, and possibly more favourable, to both sides if heard before a mixed commission of a High Court judge and two distinguished laymen with reasoned judgments and unlimited right of appeal. I feel certain that such a tribunal in this limited class of case would be cheaper, shorter, less convenient, and more likely to arrive at the truth". 48 A.L.J. 351 at 353.

Moreover, it may not be without significance that in civil actions where personal pecuniary interests are involved juries have been largely abolished. This development has ensued in modern times without any real protest from litigants, legislators or legal bodies. This surely tends to show that when the matter of securing private interests was in issue litigants and their legal representatives were convinced that the jury was an ineffective and inappropriate tribunal to deal with those important matters.

Given this situation there is a strong probability that in the area of complex commercial prosecutions the administration of the criminal law, with the jury as an integral part, is placing in jeopardy the attainment of the two fundamental competing interests of the criminal law i.e. the interest of the community in the detection and punishment of crime and the interest of the community in a fair trial for the accused.

Speaking generally, the question of public policy interest throws up another set of interesting questions. Firstly does the jury, as it operates at present, produce an unreasonable proportion of acquittals in the light of pre-trial screening procedures so that public interest is not thereby served? Is this situation affected by the modus operandi of the jury? Is there a difference in results between States where unanimous verdicts are required or those where majority verdicts are permitted? Secondly, assuming that it is desirable that the jury be retained in all or most of the areas on which they presently function there must be a vested public interest in avoiding procedures which result in unnecessary delays in the course of the trial causing expense, irritation and frustration to members of jury panels.

In this latter regard, in particular, reference is made to the frequent interruption of trials by the holding of voir dires, the discussion of legal objections of a substantive or procedural nature and other proceedings which disrupt the flow of a trial and can lengthen it inordinately. These are some of the questions widely asked in respect of the effective operation of juries. The paper will consider if some of these problems can be overcome by some change in pleading or procedure, or both, whether or not there should be any limitation of the use of the jury itself in any particular area.

LEGISLATION

So far this paper has very briefly sketched the origin and development in the Common Law of the major characteristics of the criminal jury to the point where it has evolved into its modern role of being the trier of facts solely on the basis of the evidence presented to it. In addition a number of specific problem areas have been isolated and some philosophical and practical questions raised. It is now necessary to look at the next stage of development i.e. the legislation which regulates the composition and operation of juries. In all jurisdictions in which they operate, juries are now regulated in considerable detail by acts generally known as Jury or Juries Acts. So far as England and Australia are concerned the modern source of this legislation is, speaking generally, the Juries Act 1825 (Eng.).

This Act was a consolidation of a number of statutes, the estimated number of which varies between 30 and 85, touching on juries in England until then. Many of them were confused and obscure. Two most informative outlines on the statutory position of juries in the 19th and early 20th centuries in England are contained in two English Committee reports viz., the Mersey report in 1913, being Cd 6817 of that year, and the Morris report of 1965 being Cmnd 2627 of that year. Subject to two important amendments, introduced in 1870, making provisions for payment of jurors and for exemptions from jury service, many of the provisions of the 1825 legislation remained essentially unchanged for over 140 years. There have been considerable modifications in the English legislation since, culminating in the Juries Act 1974. (Eng.).

In Australian jurisdictions also, the English Act of 1825 is of considerable importance. Leaving aside the matter of property qualifications, but including the amendments of 1870 it is, in essentials, the basis of present day Australian Jury or Juries Acts.

The relevant Acts and Ordinances in Australia are:-

Queensland	Jury Act 1921-1983
New South Wales	Jury Act 1977
Victoria	Juries Act 1967
South Australia	Juries Act 1927-1974
Western Australia	Juries Act 1957-1981
Tasmania	Jury Act 1899
Northern Territory	Juries Act
A.C.T.	Juries Ordinance 1967.

Unless otherwise indicated all section references in this part are to those enactments.

The starting point in the survey of legislation governing juries is that providing for the requirement of trial by jury. In all States and Territories of Australia, with the partial exception of New South Wales, the trial before the court of criminal jurisdiction of any issue joined upon an indictment, presentment or information for an indictable offence shall be held before a jury of twelve (12). Qld. S.17 and S.628 Criminal Code; NSW S.19; Vic. S.3 & S.14(2); SA S.7; WA S.646 Criminal Code; Tas. S.39; NT S.6 and S.348 Criminal Code; ACT S.7(1).

In New South Wales the position has been extensively modified by the Crimes Amendment Act 1979 No. 95 and the Supreme Court Act (Summary Jurisdiction Act 1967) which provide for summary trial by a Judge alone in the case of crimes specified in Schedule 10 of the former act.

In all States and Territories the fundamental constituency of potential jurors is either that his or her name is on an electoral roll, or that he or she is entitled to vote. In the majority of states there are also varying limitations based upon age. It some cases also there is a primary geographical limitation related to jury districts. The various legislative provisions are: Qld. S.6; NSW S.5; Vic. S.4; SA S.7; WA S.4; Tas. S.4; NT S.9; ACT S.9. There does not appear to be any dissatisfaction with those primary constituencies in any State.

Ignoring for the moment the matter of disqualification and exemptions the next procedure or machinery step that flows from that basic qualification (in each State) is also fairly uniform. Having fixed the overall criterion of potential jurors by their connection with an electoral roll, their age and possibly their geographic location, it then becomes necessary to establish a body of persons ready to actually serve i.e. to prepare a jury roll. Although there are differences in organizational approach between various States and Territories, basically the machinery for this purpose follows a similar pattern.

The basic organizational unit is the jury district. Commonly, this is centred, in all jurisdictions, upon each court town. For each jury district by the combined efforts of the Sheriff and the Chief Electoral Official, in most cases, a prospective jury list of persons apparently qualified to serve is prepared

at varying periodic intervals. Then by one or other of various methods of random selection prescribed by the various statutes the Sheriff or the Electoral Officer either selects or causes to be selected, a preliminary list of persons qualified and liable to be chosen for jury service. The random selection is generally carried out either by some form of ballot or by computer. This having been done the Sheriff or Electoral Officer ascertains which, if any, of the persons so nominated are ineligible to serve as jurors by reason of either disqualifiction or exemption. These names are struck from the roll and those that remain make up the basic jury list. There are provisions precribing steps for recording these names or numbers representing them on cards and ensuring their safe-keeping. When the occasion arises for a panel of jurors to be summoned to attend at a court sitting, in the majority of cases the presiding Judge or one of his officers issues his precept to the Sheriff to summon a prescribed number of jurors to attend. By another of the prescribed methods of random selection the Sheriff chooses the number directed and summonses the person so chosen to attend at Court. The routine just described applies in most States but there are certain variations. In Victoria and South Australia no precept from a Judge to the Sheriff is required to finally summon the panel of jurors to court. The Sheriff, on his own initiative choses the final panel by random choice and summonses them. The relevant sections prescribing the above procedures in each State and Territory is: Qld. Ss. 12-15; NSW Ss. 9-17; Vic. Ss. 7-13 and Schedules 5 and 6; SA Ss. 20-33; WA Ss. 9-17; Tas. Ss. 8-37; NT Ss. 19-22; ACT. Ss. As a refinement to the system, New South Wales and Victoria havve estalished a system of jury pools: N.S.W. ss.29-36; Vic. ss.52-57.

Reference has been made above to the removal of names of persons disqualifed or exempt from jury service by either the Electoral Officer, or the Sheriff, or both. More discussion is needed on those matters because a real question of the representative character of the jury arises in Queensland, and in some other States, as a result of the way the provision as to exemption operates.

It has been noted with some emphasis earlier, that there are two particular distinguishing characteristics of the jury. The first of these is its disinterestedness in respect of the issues and persons upon which and between whom it is adjudicating; the second is its representative character. This latter may, indeed, be said to be its very basis. In all Australian jurisdictions the first of those seems to be ensured. It is the erosion of the second characteristic that gives rise to this present expression of concern.

The Morris Committee (1965), referred to above, eloquently expressed the concept of representativeness. The Committee's view in this regard is set out above at p.10. The same theme is taken up by Messrs. Baldwin and McConville in an article entitled "The Representativeness of Juries" in the New Law Journal of 22 March, 1979 p. 284. Lord Devlin in "Trial by Jury", referred to above, coined the now much used phrase at p. 20 of the work. His Lordship said "The jury is not really representative of the nation as a whole. It is predominantly male, middle-aged, middle-minded and middle-class." He went on to say "This is due mainly to the property qualification and to some extent at the character of exemptions.....the loss of ability resulting from the exclusion of so many professional men and women is especially severe". The property qualification has no counterpart in Australia but the reference to exemptions is most apt.

In Canada the Law Reform Commission adverted to this question in its Working Paper 27 (1980) entitled "The Jury in Criminal Trials". At pp. 42-43 in a preliminary comment to its recommended legislation in this regard the Commission said:

> "Three grounds are commonly put forward for excluding people in certain occupations from serving on juries. First, certain persons should be excluded by reason of their position, and the knowledge gained therefrom, because they might be able to exert undue influence on other jurors (lawyers and judges). Second, certain persons should be excluded because they would appear, to the public at least, to have an occupational bias towards guilt or innocence (law enforcement personnel). Third, certain persons should be excluded because they perform vital services in society and it would be wasteful to have their time taken up sitting on a jury. The first two grounds for disqualifying persons from serving on the jury are valid and are reflected in the enumeration of persons who are disqualified. With respect to the third ground, however, it is doubted whether any person, other than Legislators and Cabinet Ministers, occupied such a strategic position in society that he or she should be automatically exempt from assuming the responsibilities of jury service. Therefore this ground has not been used as a justification for disqualifying persons from serving on the jury. To the extent that it is a hardship for people to serve on the jury or to the extent that some people have an important and immediate public function to perform, they will be able to apply for an exemption from jury service under the following section."

It should be noted that their recommended legislation narrows very considerably the acceptable grounds for exemption.

In America also this matter has given rise to considerable discussion and, indeed, legislative action. Among the case and literature on the subject are the following (anything but an exhaustive list):-

Taylor v. Louisiana 95 S. Ct 692 (1975)
Van Dyke, "Jury Selection procedures: Our Uncertain Commitment to Representative Juries": Macauley and Heubel; Achieving Representative Juries: a System that Works"; Discussions in 1980 Yale L.J. 1177 and Prof. D.W. Brown; "Eliminating Exemptions from Jury Duty: What Impact Will It Have" - Judicature April 1979.

The latter article deals with the far reaching amendments introduced by the State of California in this area. In 1975 California amended Section 200 of its Code of Civil Procedure by eliminating its long list of occupations that were previously exempt from jury service and substituting a single criterion: "undue hardship on the person or the public services by the person".

The catalyst to the California amendment was probably the Supreme Court decision in Taylor v. Louisiana (supra) which was the culmination of a series of Supreme Court decisions since 1940. Briefly the ratio of the Supreme Court decision in Taylor was that the selection of a petty jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. The Justices also held, however, that States were entitled to grant exemptions from jury service to individuals in case of special hardship or incapacity and those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare. (emphasis added).

Against this background of discussion and reform it is interesting to look at the Australian position. An examination of the relevant legislation reveals that the States and Territories are divided upon the matter. The division is of two kinds. Firstly in five out the 8 jurisdictions Queensland, South Australia, Tasmania, Northern Territory and A.C.T. exemption of persons listed in the legislation is effected automatically by the Sheriff, or other officer, without any application by the

person involved: in the other three New South Wales, Victoria and Western Australia, the listed categories of people must claim their exemption, otherwise they are included in the panel. Secondly, and probably related to the first, the systems of classification differ from jurisdiction to jurisdiction. For example New South Wales and Victoria have three categories viz: (1) Those disqualified (for convictions, physical or mental disabilities etc.); (2) Those ineligible to serve (primarily people involved in the administration of the law); and (3) Those who are exempted. Other jurisdictions, such as Queensland have only two categories: (1) Those disqualified; and (2) Those exempt. The list of the latter is a long one. The relevant legislation relating to those matters is: Queensland, Sections 7 and 8; N.S.W. Section 6 and 7 and Schedules 1, 2 and 3; Vic. Section 4 and Schedules 2,3 and 4; S.A. Sections 12 and 13 and Schedule 3; W.A. Sections 5 and 6 and Schedule 2; N.T. Sections 10 and 11 and Schedule 7; A.C.T. Sections 10 and 11.

It now falls to consider the Queensland legislation against this background. It is most relevant to look at Section 8 of the Jury Act, the section containing exemptions. This is appended as Annexure A in this report. Before launching on that section it should be said that little fault can be found with the list of disqualifications. The only suggestion made in respect of Section 7 of the Act is that two further categories could be added to cover people intellectually defective, or mentally ill, and an incapacitated person under the Public Trustee Act.

On the other hand when one examines the breadth of exempted occupations in Section 8 it is obvious that a broad spectrum of the community is removed from jury service. When one adds to this the fact that it is done automatically there can be no doubt that the jury, as finally empanelled has lost its truly representative character. In view of this the situation should

be remedied by amending legislation. It is not suggested that anything so drastic as the Californian model be adopted although the reasons for that step are persuasive. The following amendments are suggested:-

1. Create a new category of persons to be described as "Persons Ineligible to Serve as Jurors". This category should include persons connected with the administration of the law. It is further suggested that the content of that category be or in similar terms to paragraph 1 of Schedule 3 of the Victorian Juries Act. A copy of that Schedule is appended as Annexure B.

2. Repeal Section 8 (1) and replace it with a section in the same or similar terms to the section suggested by the Canadian Law Reform Commission. A copy of that draft section is appended as Annexure C.

3. Amend Sections 8, 12, 13 and 26 by:

   (1) Deleting those provisions which empower the Principal Electoral Officer and the Sheriff of their own initiative to strike names off lists or rolls on the basis that they may be exempt; and

   (2) Providing that the Sheriff may require a person wishing to be excused to verify his claim, on oath, or by affidavit or statutory declaration.

If these amendments are made, and implemented, juries empanelled thereafter should be more representative of the community and, the jury, more in accord with fundamental principles.

Committal Proceedings

Having brought the jury to a point where it is about to enter the court room it may be convenient at this point, to briefly examine the preliminary hearing, or committal for trial of a person, charged with an indictable offence. Although not directly connected with the jury these proceedings play a most important part in the whole course of the criminal procedure and, particularly on matters that may have to be determined by the jury. Like the jury they have been the subject of much controversy both in most States of Australia and in other parts of the common law world. Although the terms "preliminary hearing" and "committal proceeding" are used in various Australian jurisdictions, depending upon the terms of their respective legislation, the term "committal proceeding" will be generally adopted in this outline.

A practice has developed in almost all common law jurisdictions that before any person can be put on trial before a judge and jury on a charge of an indictable offence there must first be a hearing before a Magistrate. The function of that hearing "is to ensure that no one shall stand trial unless a prima facie case has been made out against him" - R. v. Epping and Harlow Justices [1973] 1 Q.B. 433 at 434 per Lord Widgery C.J.

The procedure in question has its origin in one of the original functions of Magistrates, or Justices, which was the duty of pursuing, and arresting, offenders and of working up the case against them, in the days before the establishment of regular police forces. The Justices were, in effect public prosecutors. From that investigative beginning it has developed into a quasi-judicial enquiry to determine whether a person charged with an indictable offence should go for trial. It has a secondary function of informing the person charged of nature of the prosecutions' case and of the evidence being led to substantiate that case.

However, despite the entrenched role in criminal procedure of the committal proceeding, it is of interest to note that there is nowhere any statutory requirement that the holding of such a hearing is an obligatory step in proceedings in respect of an indictable offence. As Fox J. said In R v. Kent ex. p. McIntosh [1970] 17 FLR 65 at p. 88:-

> "Nothing is expressed in any of the legislation about the need to have preliminary proceedings. The fact appears to be, as is pointed out in several cases, that whether or not there are preliminary proceedings is a matter of practice. This certainly seems extraordinary in view of the elaborate provisions made everywhere for and concerning preliminary proceedings".

Whatever may be said about that, it has been, in all Common law jurisdictions, the invariable practice to have committal proceedings as a preliminary to the trial of indictable offences. As described by some judges "... it is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice" cf Gibbs A.C.J. and Mason J. in Bartons case (infra).

To some extent, in some jurisdictions, that practice has been modified quite considerably in recent times. This will be discussed later. It is also interesting to note that it is not the practice in Scotland to have committal proceedings. The decision whether a man should be committed to take his trial for an indictable offence rests solely with the Lord Advocate, who is assisted in carrying out the duty and exercising control over all prosecutions by the Solicitor-General and by four advocates

depute whom he appoints. The Law Officers and the advocates depute are collectively known as Crown Counsel....In minor cases the decision to prosecute is taken by the prosecutor fiscal within his district acting, usually, on a police report. The prosecutor fiscal ascertains the evidence which the witnesses will give if called upon at the subsequent trial. This is done by the process of taking statements, which are called precognitions. Each witness is precognized privately and separately and the precognition reduced to writing. The accused is not present or represented. - see Report of the Departmental Committee on Proceedings Before Examining Justices - Cmnd. 479 of 1958.

Invariable they may be, but as noted, committal proceedings, are, and have for some time been, the subject of considerable controversy. Opinions range from suggestions that they should be abolished altogether to fierce arguments for their retention, with many variations in between those extremes.

It is of no real value to quote extensively the proposals of the various points of view but it is of assistance to set out some of them. Before doing so, however, it may set the scene to look at a preliminary hearing through the eyes of a senior and experienced, Stipendiary Magistrate as it was conducted in 1968 in Victoria.

> "There could very well be a series of housebreakings against a pair of offenders, and the Police who are prosecuting have all their data in a perfectly typed brief. The inquiry consists of a procession of citizens giving their evidence in turn, word for word the same as in the brief, which is all laboriously taken down in longhand, often not in copperplate. As each witness has been examined and

> occasionally cross-examined, he must wait until the end of the hearing for the formal committal. The witnesses are then all lined up and asked to acknowledge themselves to be bound in the sum of $200 to appear and to give evidence at the trial. They are not sure what it is all about, but all chant "I do" in unison or in turn without knowing the dire consequences of their failure to agree to be bound. A whole morning is often thus wasted on a matter the result of which is a foregone conclusion and which leaves the ordinary citizen or busy businessman with a very poor opinion of the criminal law and its ponderous administration."

Having painted that grim picture he then plaintively comments:-

> "It has often occurred to me that there must be a better method for Magistrates to conduct a preliminary inquiry in order to determine whether there is or is not a sufficient case to send to a superior Court for hearing."

The learned magistrate's strictures have been echoed, often much more strongly, in other quarters: some of them are now noted, as are arguments in support of the continuation of preliminary hearings, albeit in a modified form.

The quotations below point to the most commonly raised arguments for committal proceedings, and those against. They illustrate the breadth across the Common law world and the depth, in time, of the competing views. A reflection on these will reveal that, to a considerable degree, the views as to what course should be taken in relation to committal proceedings are highly subjective ones. This is strongly illustrated in the case of Barton v. R. 147 CLR 75 where the High Court divided evenly on the question of the essentiality of committal proceedings; but it was even more noticeable that judges who ultimately differed on a subjective basis pointed to the same elements of the committal as arguments for and against their stand. More will be said of the Barton case later.

Speaking generally the arguments for and against the retention of committal proceedings in their present form, although differing in some matters of emphasis among those advancing then on each side, are fairly consistent in each case. Some of these arguments may be summarised as follows:-

A. Arguments in Favour of Retaining Committal Proceedings in Their Present Form.

(1) Evidence is called whilst fresh in the mind of the witness.

(2) The depositions show whether a prima facie case has been established against him (or her).

(3) No person is put on trial without a prima facie case having first been established against him (or her).

(4) Witnesses are examined publicly and orally, and thus their strengths and credibility are tested in a way which cannot be matched by any other procedure or discovery.

(5) The Justices may be able to save a witness's attendance at the trial by conditionally binding him over, especially witnesses of a formal nature.

(6) Depositions help the prosecution by enabling it to form an impression of the reliability of the witnesses, and, by disclosing defects in the evidence, enable it to be remedied or the prosecution withdrawn. The costs of an unnecessary trial are thus saved.

(7) They enable the accused to know the case that he has to meet.

(8) They frequently lead to pleas of guilty at the trial in cases that would otherwise be defended.

(9) They are used in framing the indictment.

(10) They enable an estimate to be made of the time the trial will take and facilitate the making of arrangements for the trial.

(11) Proceedings are materially shortened by clarification and arrangement of evidence presented at the court below.

(12) They are evidence for the court for the purpose of deciding whether to accept a plea of guilty.

(13) They enable the recollection and reliability of the witness to be tested at the trial.

(14) The Judge has an easier task if the evidence given at the preliminary examination is before him.

(15) They are evidence where the witness is unable to attend at the trial.

(16) They are sometimes referred to in the Court of Criminal Appeal on the subject of the exercise of the perogative of mercy.

(17) By reason of the public nature of most committals and the general reluctance of governments to file ex officio indictments the criminal justice system is not used for politically motivated prosecutions.

B. Arguments Against Retention in Present Form

Succinct criticism of several of the arguments set out above is expressed by Professor Glanville Williams in an article entitled "Proposals to Expedite Criminal Trials" published in (1959) Crim. L.R. p. 82.

> "On the various advantages specified by the [Byrne] Committees (i.e. most of those set out above) it is perhaps sufficient to append the following comments:
>
> On (1), the depositions are normally not evidence at all at the trial; consequently their freshness is generally no merit. On the contrary, the practice of taking depositions tends to make the evidence at the trial staler than it would otherwise be.
>
> Advantages (2), (3), (6), (7), (8), (9), (10), (11), (12), (13), (14) and (15) could be substantially obtained by making use of the witness's proofs of evidence instead of depositions. It is true that these proofs would not be sworn but the present law attaches a greatly exaggerated importance of the oath. Advantages (5) and (6) are altogether too minor to justify the present procedure..."

Specifically defined disadvantages suggested by the writers are:-

(1) In practice, little sifting of evidence and defining of issues result from committal proceedings and the length of the trial is seldom influenced by those proceedings. In this regard the Philips Commission said "how effective are committal proceedings in preventing inadequately prepared and selected cases going to the Crown Court?

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Committal it is said is all too often just an automatic procedure, since Magistrates are reluctant to dismiss cases. Statistics for 1978 show that more than 84,000 defendants were committed for trial and over 2,000, or just over 2% were discharged because there was not sufficient evidence to put the accused on trial in the Crown Court." (The Royal Commission on Criminal Procedure, 1981 Cmnd. 8092)

(2) Because of the lower level of evidence required for a committal order than for a conviction, a case which is "weak" at trial is frequently enough to warrant a committal order, and the result is that that case is presented twice before the accused is acquitted.

(3) The nature of the charge at a trial on indictment will be determined by the Crown Prosecutor who signs the indictment, and this decision can be made as readily from witnesses statements as from depositions.

(4) The costs of criminal proceedings plus trial far exceed the costs of a trial alone.

(5) The time taken in Magistrates Courts by committal proceedings delays the ultimate disposal both of the summary trials in those same courts and of trial on indictment which cannot be listed until the committal order is made and the preparation of documents - principally, the depositions - is completed.

(6) It is an unwarranted imposition on witnesses and, in many cases, duplicates what is an unpleasant and traumatic experience for them, to require them to go through their evidence and to be cross-examined twice.

(7) In practice it is almost unknown for witnesses to come forward merely in consequence of the publicity given to committal proceedings.

(8) As the prosecution is under no obligation to adduce all the evidence it will call at the trial committal proceedings are not necessarily an adequate means of enabling the defence to discover the prosecution case.

(9) Committal proceedings are wasteful of time, money and effort and their legitimate function could be more efficiently performed through a system of pre-trial procedures designed to effect disclosure of the prosectuion case and such limiting and pre-trial determination of issues as co-operation by the defence will allow. This is clearly illustrated by the fact that approximately 70% of persons committed for trial plead guilty in the higher court. (This figure varies slightly from jurisdiction to jurisdiction).

(10) The Law Reform Commission of Canada in its study report entitled Discovery in Criminal Cases published in 1974 says that committal proceedings are "cumbersome and expensive vehicle for obtaining discovery."

(11) If affords the defendant the opportunity of adjusting his case in the light of the evidence given by the prosecution witnesses given at the preliminary examination.

Finally it is to be noted that Mr Justice Blackburn then Chief Justice of the Supreme of the Australian Capital Territory, in an address to the Fifth South Pacific Judicial Conference in 1982 described committal proceedings as "a total waste of time" (cited in the First Issues Paper; Criminal Procedure of the New South Wales Law Reform Commission at page 77).

It is, however, to be observed that even the majority of the critics of the preliminary enquiry do not advocate its abolition but rather recommend changes to its form and procedure. Many of these changes have recently been adopted in various common law jurisdictions, to a greater or lesser extent. This will appear when the legislative provisions governing the committal proceedings are examined later.

In any event it is suggested that for practical purposes the question of whether or not preliminary proceedings should remain, albeit in some modified form, has been resolved by the decision of the High Court in Barton v R (1980) 147 C.L.R. 75. It is convenient to examine that decision now. The High Court Justices who expressed opposing views as to the necessity, or utility, of committal proceedings advanced much the same arguments as set out above, expressing some of them more forthrightly, and adding some new ones.

The most appropriate way to convey the opinions of the differing justices in Barton is to quote short extracts of the most relevant passages in their judgment.

At pages 100 - 101 the following appears in the joint judgment of Gibbs A-CJ and Mason J. with whom Aickin J. agreed:

"We are not impressed by the argument that because in the distant past the courts proceeded to hear trials on ex officio indictments without benefit of a preliminary examination, it necessarily follows that we should take the same course today or that there is no element of injustice in forcing an accused to trial without such an examinaion. It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice.

They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair. To deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused persons, which is of great advantage to him, whether in terminating the proceedings before trial or at the trial."

To the contrary of this view Stephen J. said that at pages 104 - 105:

"The fair trial of an accused does not, in my view, require as an essential prerequisite that it should be preceded by committal proceedings. The contrary view would place a significant practical qualification upon the Attorney-General's unexaminable power to file ex officio indictments, a power which applies to ex officio indictments generally without distinguishing between those filed after discharge by a committing magistrate and those filed in the absence of any committal proceedings. It is one thing freely to acknowledge that power while retaining for the courts the not inconsistent duty of ensuring that in each individual case the accused has a fair trial; it is quite another to treat the Attorney-General's power as never properly exercised in the absence of prior committal proceedings. Their absence will, however, always call for a careful evaluation by the trial court of all the circumstances lest, the consequent prejudice to the accused should be such as to have deprived him of a fair trial. Committal proceedings are an important part of the protection ordinarily afforded to an accused in the criminal process and for the accused to be deprived of them necessarily puts a court upon enquiry."

Murphy J. at p. 18 said:

"The desirability of committal proceedings in modern times is doubtful, at least in certain kinds of cases. A trend has developed in New South Wales in which conspiracy, fraud, and various corporate charges become delayed because of committal proceedings which go on for months or years. These are often interrupted with excursions into the Supreme Court for rulings on points of law or procedure. This not only tends to improperly frustrate prosecutions, but also can result in embarrassment and oppression to defendants. While I do not criticise the magistrates who unfortunately have to preside over them, such committal proceedings have become a disgrace to the administration of criminal justice in New South Wales."

Wilson J. at p. 109 of the judgment says:

"I have had the advantage of reading the reasons for judgment prepared by Gibbs and Mason JJ. The history of the case and the circumstances in which it comes to this court are there set out. With respect, I adopt their Honour's review of early development of the relevant law ... However I am unable to agree with their Honours that a trial held without antecedent committal proceedings, unless justified on strong powerful grounds, must necessarily be considered unfair."

Page 112 paragraph (c):

"(c) The course that has been followed is wholly consistent with the statute. The conduct of committal proceedings is not an essential condition precedent to the filing of an indictment. It would be remarkable, therefore, if the absence of such proceedings were to deprive that action of any practical effect."

Again at p. 144 His Honour says:

"It is in the light of considerations such as the foregoing that I seek an answer to the present problem. How can it be that resort to the unquestioned power to institute a trial on indictment without a prior committal proceeding is an abuse of the process of the court? It cannot be simply that the loss of some advantage which may ordinarily be enjoyed, whether or not fortuitously, by other persons accused of crime, amounts to such an abuse. That loss of advantage may be felt keenly by an accused person, but this is a very different thing from saying that he has lost the opportunity of a fair trial. With all respect to those who think differently, I am unable to comprehend how the mere absence of committal proceedings of itself could ever sustain an allegation of abuse of process."

Thus with the opinions, (not the decision), in the Barton case being evenly divided the position at common law as to the legal necessity for committal proceedings, even full oral proceedings, is left in a state of flux. The statements of opinion are so forthrightly expressed that it is obvious that the differences of opinion are deep. In those circumstances it would seem undesirable to recommend the abolition of committal proceedings altogether as a preliminary to the trial of all indictable offences by jury. To some extent there is an air of unreality about this rigid approach when one considers, as will hereinafter appear, that the proportion of criminal charges tried by jury is a very small percentage and is constantly shrinking.

Having considered the arguments for and against the retention of committal proceedings it is now desirable to examine the legislation, in Australia, governing those proceedings. It has already been noted that there is no legislation prescribing them.

THE STATUTORY PROVISIONS GOVERNING COMMITTAL PROCEEDINGS IN AUSTRALIA

The material in this part of the paper, in the main, incorporates the work of Dr J. Seymour in his publication "Committal for Trial". The legislative references have been updated from 1977 when his work was published. Dr Seymour's permission to use the material is gratefully acknowledged.

The most important features of the relevant Acts and Ordinances are as follows:

New South Wales	Justices Act, 1902, Sects. 21 - 51A, reprinted 1981 as amended to March, 1985.
Victoria	Magistrates (Summary proceedings Act 1975, Sects. 43 - 75 as amended to June 1983 and reprinted that year.
Queensland	Justices Act 1886-1982 Sects. 99 - 134.
South Australia	Justices Act, 1921-1982; as amended 1983: Sects. 101-119.
Western Australia	Justices Act, 1902-1984. Sects. 101-130.
Tasmania	Justices Act 1959 (consolidated 1974: reprinted May 1982), Sects. 51-70.
Australian Capital Territory	Court of Petty Sessions Ordinance 1930-1982: Sects. 89-108.
Northern Territory	Justices Ordinance 1928-1977. Sects. 100A-119.

Unless otherwise indicated all references in this part of the paper are to the enactments and sections set out above.

It is also to be noted that committal proceedings with respect to offences against the laws of the Commonwealth are governed by State or Territory law: S. 68(1) and (2) Judiciary Act (C'wlth). Only a Stipendiary Magistrate or his equivalent may exercise the jurisdiction.

The Court

In the majority of the States and Territories the legislation empowers a justice or justices to preside over committal proceedings. In two jurisdictions specific mention is made of magistrates: some of the relevant Victorian sections include a reference to a Magistrates' Court, while in the Australian Capital Territory a magistrate is authorised to sit. Where no mention is made of magistrates they may preside by virtue of provisions which empower them to perform the functions of justices. Throughout the description which follows magistrates only are referred to.

In all jurisdictions it is provided that the place where the preliminary hearing is held shall not be deemed an open court, and the magistrates are given the power to exclude persons from the court. A magistrate may use this power if he feels that the ends of justice or public morality require him to do so. The Victorian statute adds a reference to the use of the power of exclusion in order to protect the reputation of the victim of a alleged sexual assault or of an offence of extortion. It also prohibits by s.44 the publication of evidence of admissions or confessions in certain circumstances. Further, that State has enacted specific rules governing a preliminary hearing when the offence alleged is rape, attempted rape, or assault with intent to rape. A stipendiary magistrate sitting alone must preside

and, when the complainant is being examined or her statement read, no person may be present other than the informant, the accused, legal representatives and their clerks, police and court officers involved in the case, and persons specially authorised by the magistrate: see S.47A. In Queensland there exists a rule as to the exclusion of persons from the court while a child is giving evidence in a case involving a sexual offence against a child: see S.71A(1).

The same two States have also passed legislation restricting the publication of reports of committal proceedings. The Victorian Act prohibits the publication of a report of any confession or admission unless the accused is discharged or until after his trial. There is also an absolute prohibition on the publication of the prosecution's opening statement, and the magistrate may forbid the publication of any statement to which objection has been taken. Finally, there is an over-riding power to prevent the publishing of material likely to be prejudicial to a fair trial. The restrictions in Queensland apply to hearings in respect of indictable offences of a sexual nature; magistrates (and the judge of a trial) are empowered to prohibit the publication of the whole or part of the proceedings: S.71A(2).

The Western Australian statute confers a more general power on the magistrate, who may at any time state that in his opinion in the interests of justice it is undesirable that any report of the evidence given at the hearing should be published: see S.101D.

The Oral Hearing

The first part of the hearing consists of the taking of the evidence for the prosecution; the evidence is taken on oath or in such other manner as is prescribed. Where written depositions are taken these must usually be signed by the witness and by the magistrate. In most jurisdictions there is provision for some other form of recording.

The defendant must normally be present throughout the hearing. Four jurisdictions, however, make special provision for the accused to be excused from attendance. These are New South Wales, Victoria, Queensland and the Australian Capital Territory. The Queensland law is unique in that is provided that a person charged upon a private complaint need not appear in person at a preliminary hearing until the magistrate is satisfied that the evidence is sufficient to put him on trial. In the Australian Capital Territory a defendant who is at liberty may apply for an order excusing him from attendance during the preliminary hearing. Where a summons has been issued an order may be made at any time after its issue and before the completion of the taking of the prosecution evidence. Further, it may be made whether or not the applicant is before the court or has attended before the court in connection with the proceedings. The application must not be granted unless the accused will be legally represented during his absence. When an order has been made the court may at any time require the accused's attendance, and must do so once it has concluded that the prosecution evidence has established a prima facie case.

A typical preliminary hearing begins with a reading of the charge, but the defendant does not normally plead at this stage. After the prosecutor opens his case the evidence of the prosecution witnesses is taken in the manner decribed above. Cross-examination by the accused or his solicitor or counsel is permitted; in two jurisdictions the legislation makes specific reference to this right of cross-examination.

A distinctive feature of the Tasmanian system is that the defendant is asked to plead at the beginning of the preliminary hearing. The Act provides that, at the commencement of the hearing, the court must explain to an unrepresented defendant his rights and duties in respect of the charge. The magistrate is directed to use "the prescribed form of words" or "words of like import". The prescribed formula is set out in rule 49 of the Justices Rules, 1976, and requires the magistrate to explain the purpose of a committal hearing, and to ask the defendant to plead. If the defendant wishes, he will be granted an adjournment. If a guilty plea is entered the defendant is committed to the Supreme Court for sentence. If the defendant pleads not guilty or that he has cause to show why he should not be convicted of the charge, there will not necessarily be an oral hearing, as he is then asked whether he wishes depositions to be taken. If he does not he is committed for trial. If he does require depositions the normal hearing procedure is followed.

In South Australia amendments to the Justices Act in 1983 have considerably extended the jurisdiction and powers of the magistrate in committal proceedings. If a person is charged with a minor indictable offence but no major offence the charge shall be dealt with by a court of summary jurisdiction. Moreover the magistrate is given wide powers of amendment.

Sepcial mention must also be made of Western Australia. Before the hearing of the evidence there is a court sitting which seems to be unique in Australia. The defendant is brought before a magistrate, who must read and explain to him the offence with which he is charged, tell him that he is not required to plead, indicate the courses of action open to him, and provide him with a written statement describing the procedure to be adopted. The proceedings are then adjourned.

Later in this paper we shall discuss the provisions - existing in all jurisdictions - which permit committal on the basis of written statements. The Western Australian adjournment of the preliminary sittings allows the prosecution time to prepare written statements of the evidence to be tendered and to make them available to the defendant. The defendant, for his part, also has time to consider his position, and can decide whether or not to allow the prosecution to proceed in this way. When the proceedings resume the defendant is asked to elect whether to have a preliminary hearing. If he elects to have a hearing this takes the normal form, except that the written statements may be tendered as evidence if the defendant does not object; the admissible parts of these statements are read aloud.

In the majority of Australian jurisdictions the legislation sets out a two-stage process to be followed during a preliminary hearing. Having heard the prosecution case the magistrate must make an initial assessment of the evidence in order to determine whether the hearing should proceed further or whether the defendant, if in custody, should be discharged. If the hearing does continue then, once the defence has had its chance, a further assessment is made, and the decision to commit or discharge is reached.

The criteria to be employed by the court in making its decision at each stage of the process must be considered in detail, for there are some variations.

With regard to the making of the discharge decision at the conclusion of the prosecution case the law is clear. In all jurisdictions except New South Wales the magistrate must, if he is of the opinion that the evidence is not sufficient to warrant the defendant being put on trial for any indictable offence, order the defendant, if in cusody, to be discharged as to the information or complaint

then under inquiry. As might be expected, the same applies when it comes to the making of the alternative decision as to whether the hearing should proceed further. However, in New South Wales and the Australian Capital Territory a different criterion governs the decision to proceed with the hearing. In the Australian Capital Territory the magistrate must proceed only if he is of the opinion that a prima facie case has been made out by the prosecution. Moreover, in that jurisdiction the Ordinance refers to the need for the prosecution to make out a prima facie case "in respect of an indictable offence".

In New South Wales, by amendments recently made to the Justices Act 1902 by the Justices (Amendment) Act 1985 (No. 1 of 1985), a completely new and different standard of satisfaction in the Magistrate has been prescribed. Now, in that State, both at the end of the evidence for the prosecution, and at the end of all the evidence, the Justice or Justices must be of opinion that having regard to all the evidence before him or them, the evidence is capable of satisfying a jury beyond reasonable doubt that the defendant has committed an indictable offence - see amendment to sects. 41(2) and 41(5). By subsection 41(8) a jury in this context is defined as a reasonable jury properly instructed.

In Victoria the decision to proceed relates to the indictable offence with which the defendant is charged. Should the magistrate conclude that the evidence is sufficient to put the accused on trial for some indictable offence other than that with which he has been charged, he must direct that a new information be prepared.

A distinctive feature of the Act governing Victorian procedure at this stage is that two tests are available to the magistrate when he performs his task of deciding whether the hearing should proceed. As an alternative to the sufficiency test the magistrate is directed to ask himself "if the evidence given for the prosecution raises a strong or probable presumption of the guilt of the accused" in respect of the indictable offence with which he is charged.

Once it has been decided that the proceedings are to continue the defendant is given an opportunity to make a statement. Before he does so, the court is required to administer a statutory caution, and in most jurisdictions the relevant statute sets this out. The form of words prescribed in Queensland is a good example:

> "You will have an opportunity to give evidence on oath before us and to call witnesses. But first I am going to ask you whether you wish to say anything in answer to the charge. You need not say anything unless you wish to do so and you are not obliged to enter any plea; and you have nothing to hope from any promise, and nothing to fear from any threat that may have been held out to induce you to make any admission or confession of guilt. Anything you say will be taken down and may be given to evidence at your trial. Do you wish to say anything in answer to the charge or enter any plea?"

If the defendant does make a statement the general rule is that this must be taken down in writing or otherwise recorded. In all jurisdictions provision is made for the accused to give evidence on his own behalf and to call witnesses.

After the defendant has had an opportunity to present his case the court must again assess the evidence in order to reach its decision as to committal or discharge. In the main the criterion employed at this stage is exactly the same as that which was relied on at the close of the prosecution case, i.e. (except in N.S.W.) is the evidence sufficient to put the defendant on trial for an indictable offence? As well as this test, Victoria repeats the alternative formulation, viz., whether the evidence "raises a strong or probable presumption of the guilt" of the defendant. New South Wales also adopts this course and makes provision for the same two tests, although the strong and probable presumption test was not included in the section dealing with the court's earlier decision. The provisions of the Victorian statute does not end there, however. It directs that when all the evidence has been taken the magistrate must order the discharge of the defendant if he is of the opinion "that there is not sufficient reason to put the accused person upon his trial for any indictable offence".

When no guilty plea has been entered and the magistrate considers that the evidence is sufficient he directs that the defendant be tried in the appropriate court, and steps are taken to ensure the defendant's attendance, either by remanding him in custody or admitting him to bail.

Plea of Guilty

In all jurisdictions provision is made for the entering of a plea of guilty at some stage of the hearing. Several of the Statutes and Ordinances refer to the possibility of such a plea at the end of the prosecution case. In Tasmania as has been noted, a defendant is asked to plead at the commencement of the committal proceedings, while in Western Australia provision is made for the reception of a guilty plea at two points in the hearing.

The defendant may plead guilty when, at the resumed sitting, he has elected not to have a preliminary hearing, or he may do so when the court has finished examining the prosecution witnesses. In New South Wales and the Australian Capital Territory the defendant may plead guilty at any time during the hearing.

Two States and the two Territories place limitations on a lower court's right to accept a guilty plea. In South Australia a defendant may not plead guilty during a preliminary hearing when the charge is murder, treason or manslaughter. In the Northern Territory a guilty plea may not be received when the offence is punishable by imprisonment for life. The New South Wales statute states that such a plea may not be entered in respect of an indictable offence punishable with penal servitude for life, while in the Australian Capital Territory the relevant section excludes offences punishable by death or penal servitude for life.

Specific provision is made in South Australia and the Northern Territory for the defendant, upon pleading guilty, to call witnesses as to his character, and the depositions of any such witnesses must be recorded.

Once a guilty plea has been accepted the defendant is, in most jurisdictions, committed for sentence. In Victoria, however, the magistrate directs the accused person to be tried.

Another point which must be considered is the possibility of the defendant changing his mind after entering a guilty plea during a committal hearing.

In New South Wales and the Australia Capital Territory a defendant who has been committed on a plea of guilty may request the higher court to order that the proceedings in the lower court be continued. A similar application may be made by counsel for the Crown. The relevant Victorian provision states that where a defendant has pleaded guilty and been presented for trial and then does not plead guilty to the presentment, he must on application by the Crown, and may on his own application, be tried in the Supreme Court or County Court. In sharp contrast are Queensland and Western Australia, where it is provided that a court confronted by such a defendant who later pleads not guilty must, if satisfied that he did admit the offence before the magistrate, direct a plea of guilty to be entered. In both States, however, provision is made for the higher court to enter a plea of not guilty if it appears from the depositions that the defendant has not committed the offence charged or any other indictable offence.

The situation in Tasmania is that where a defendant has been committed for sentence and withdraws his plea the court may, if the Attorney-General makes an application, direct him to be tried in the Supreme Court.

In South Australia and the Northern Territory the procedure is quite different. A defendant who has been committed for sentence may withdraw his plea by giving written notice to the Attorney-General (or to the Crown Law Officer in the Northern Territory) not less than seven days before the higher court's sittings commence. He is then tried in that court.

Another way in which the procedure set in motion by a guilty plea can be reversed is when the Judge in the higher court concludes that the evidence does not support the charge. As has been noted, both Queensland and Western Australia law permit a Judge to enter a plea of not guilty in such circumstances. In New South Wales and the Australian Capital Territory the Judge must order the resumption of the committal hearing if it appears to him that the facts do not support the charge.

In South Australia and the Northern Territory if it appears to the court that a guilty plea should be withdrawn, the court may advise the defendant to withdraw his plea. If he does so he is deemed to have been committed for trial.

The present provisions in Queensland have aroused criticisms within the Commission itself and from the Queensland Law Society. The relevant legislation is Section 600 of the Criminal Code. This section, as far as relevant, is in the following terms:

> When a person has been committed by a justice for sentence for an offence, he is to be called upon to plead to the indictment in the same manner as other persons, and may plead either that he is guilty of the offence charged in the indictment or, with the consent of the Crown, of any other offence of which he might be convicted upon the indictment. If he pleads that he is not guilty, the Court, upon being satisfied that he duly admitted before the justice that he was guilty of the offence charged in the indictment, is to direct a plea of guilty to be entered, notwithstanding his plea of not guilty. A plea so entered has the same effect as if it had been actually pleaded. If the Court is not so satisfied, or if, notwithstanding that the accused person pleads that he is guilty, it appears to the Court upon examination of the depositions of the witnesses that he has not in fact committed the offence charged in the indictment or any other offence of which he might be convicted upon the indictment, the plea of not guilty is to be entered, and the trial is to proceed as in other cases when that plea is pleaded".

When we first considered this matter the Commission was of the view that the judges would generally interpret this section in an expansive way so as to fairly readily entertain an application to change a plea of guilty. One of our judicial members was of the view that this was not the case indicating that the exercise of the judges' discretion was quite constricted by the terms of the section.

The Law Society claimed that, in practice, grave difficulty is encountered in having a plea of guilty withdrawn in a superior court following a plea of guilty in the Magistrates court at the end of a committal proceeding.

The Public Defender indicated that it was his experience, also, that, in most instances, great difficulty was encountered in inducing judges of the superior courts to accept a change of plea because of the wording of section 600.

Upon reflection the Commission formed the view that there is a justifiable basis for the complaints set out. Accordingly it is recommending a change to the law in this area. The critical question then becomes - what different procedure should be adopted? Reference has already been made at (pp. 51-52) to the various practices, in this regard, in other Australian jurisdictions. We have examined three representative examples of these viz. New South Wales, Victoria and South Australia. We have come to the view that some procedure analogous to that adopted in South Australia would be the most appropriate. In our view the New South Wales practice (set out in sect. 51A(d)(1) of the Justices Act 1902 [N.S.W.]) and that of Victoria (set out in Sect. 49(2)) of the Justices Act 1958 [Vic.]) represent too radical a departure from the general procedure on committal proceedings in Queensland to be attractive.

On the other hand the South Australian provision could be adapted to the Queensland provision without any dislocating changes. Accordingly the Commission recommend that section 600 of the Criminal Code, in its present form, be repealed and a new section be inserted to the following or the like effect.

> "600(1) When a person has been committed by a justice for sentence for an offence he may, nevertheless, by notice in writing to the authorities prescribed in section 126 of the Justices Act to receive depositions, not less than seven clear days before the day of the first sitting of the court at which he is to appear as aforesaid, withdraw his plea of guilty and substitute therefor a plea of not guilty: Provided that in such case any Judge presiding over such court may adjourn or postpone the trial to such day as he thinks proper.
>
> (2) Thereupon the defendant -
>
> (a) If committed to appear for sentence, shall be deemed to have been committed for trial, and the warrant of commitment shall be construed accordingly;
>
> (b) If admitted to bail to appear for sentence shall be deemed to have been admitted to bail to appear for trial, and any recognizance or other undertaking (whether in writing or otherwise), by whomsoever entered into, in connection with the admission to bail, shall be construed accordingly".

Written Statements in Lieu of Oral Evidence

Two purposes can be fulfilled by the use of written statements instead of oral testimony. These statements may be employed as a means of making the committal procedure more efficient, for the witnesses' need to attend and recite their evidence is obviated and the court's time is saved. This leaves the court's function substantially unaltered, as the magistrate must still consider the evidence and determine whether it warrants committal. Alternatively, the use of written statements can remove from the court the task of examining the sufficiency of the evidence and thus create a mechanism which completely replaces the committal hearing. Each of these approaches will be examined in turn.

In all jurisdictions explicit provision is made for the court to admit witnesses' written statements without the need for those witnesses to appear.

Except in Tasmania the legislation includes certain formal requirements which must be satisfied before these statements may be tendered. Although there are variations from jurisdiction to jurisdiction, the matters dealt with include the need to supply to the other party a list of witnesses and exhibits, copies of statements, copies of documents, a statement of the other party's rights, and the need to observe certain formalities as to attestation. The Tasmanian Act merely refers to the fact that the evidence must be in the form of a statutory declaration.

Varying restrictions are placed on the use of written statements. The most important of these relate to whether both parties may make use of them or only one, whether they may be employed for all offences, and whether legal representation is a pre-requisite.

In Victoria only a stipendiary magistrate or two justices may preside over proceedings in which written statements are to constitute the evidence; also this procedure is not available when the charge is murder, attempted murder or conspiracy to murder. Only the informant may invoke it. In Queensland, Western Australia and Tasmania both sides may tender written statements and these may be used in relation to any indictable offence. However, written statements may not be admitted in Queensland if the defendant is not represented. In New South Wales, South Australia, the Australian Capital Territory, and the Northern Territory, only the prosecution may claim the benefit of this procedure, which applies to any indictable offence. It may be noted, in passing, that one of the Commission's recommendations will be to admit statements even where the defendant is not represented.

The provisions regarding objection to the use of written statements are variously expressed. In New South Wales if the informant fails to comply with a notice served on him by the defendant, or an order from the Magistrate, requiring the attendance of the witness, the statement is not admissible unless it has already been admitted as evidence. In Queensland if the parties do not agree to the use of written statements they are not admissible and in Western Australia a party may object to a statement being tendered. In the two Territories the defendant

may, not less than five days before the hearing, require the attendance of the witness. The effect of this is to render the written statement inadmissible. The Victorian Act is very similar, but allows the accused to require the attendance of the witness either to give oral evidence or for cross-examination only. The next section provides that a written statement may be tendered if the accused has not required the witness to attend "to give evidence". Presumably this means that if the witness has attended for the purposes of cross-examination the statement may still be received by the Court. In Tasmania the law is that a party may request the court to summon a witness who has made a statutory declaration "to attend as a witness for further examination or cross-examination". Whether such a request renders the written statement inadmissible is not made clear. In South Australia it seems that the defendant cannot block the reception of a written statement, but he does have the right, before the completion of the prosecution case, to require the witness to attend "for the purpose of oral examination". Cross examination is permitted. The legislation in Queensland the Australian Capital Territory also allows for cross examination of a witness whose statement has been admitted. The Western Australian statute enables any party at a preliminary hearing to apply to the court requiring the attendance of a witness whose written statement has been tendered in evidence. In Victoria and the two Territories further opportunity for objection to the admissibility of a written statement arises during the hearing. In such a case it is for the court to decide whether to uphold the objection and to require the attendance of the witness. Provisions enabling the court to require the attendance of a witness who has made a written statement exist in seven jurisdictions. The recent New South Wales amendments contain

two sets of other interesting provisions. One set provides for the reception of statements in foreign languages with specified proof as to translation. The other is a presumption of fact as to the date of birth of a person as contained in a written statement.

Also worthy of mention in this analysis of the use of written testimony is the fact that, in Victoria, when a charge of rape, attempted rape or assault with intent to rape is being dealt with, the informant must present the complainant's evidence in written form unless the magistrate rules otherwise. Similarly, South Australian law places some limitations on the right of a defendant charged with a sexual offence (as defined) to require the victim's appearance at the preliminary hearing.

As has been indicated the above-described procedures regarding the reception of written testimony leave the court's task unaltered. However, four States - Victoria, Queensland, Western Australia and Tasmania - have gone further and have enacted laws which obviate the need for consideration of the evidence.

Victoria allows a defendant to elect to stand trial without a preliminary hearing where he has been served with copies of the written evidence. In Queensland, where the evidence consists solely of written statements, and counsel for the defendant consents to his client's committal, then the court must commit without determining whether the evidence is sufficient to put the defendant on trial for an indictable offence. In Western Australia, as we have seen, the defendant is asked to elect whether he wants a preliminary hearing. He will be taken to have elected to have a preliminary hearing if he stands mute or does not answer the question putting him to his election, if he objects to the tender of any statement, if he cross-examines any

witnesses, if he gives or tenders any evidence other than by way written statements, or if he submits that there is no case to answer. If he does not elect to have a preliminary hearing the magistrate must, without any consideration of the contents of the written statements, commit the defendant. It will be remembered that in Tasmania a defendant may elect not to have depositions taken. The statute, sect. 62, allows a defendant who has made such an election - and who pleads not guilty or cause to show (sic) and has not disputed the making of a committal order - to be committed for trial without consideration of the evidence. He is supplied with a copy of the police statements prior to the trial.

The Functions of Committal Proceedings

On this subject Dr Seymour says, in the work cited above:

> "In asking what purposes committal proceedings serve one can distinguish between their statutorily proclaimed objective and other benefits which flow from the pursuit of this objective.
>
> In each of the jurisdictions discussed it is clear that the primary function of the committal hearing is to test the sufficiency of the evidence against an accused person. The basic purpose is to screen out cases in which a trial is not justified."(Op.Cit. p.17)

Although that quotation correctly expresses the principles involved, a view is not infrequently advanced by defence counsel in some jurisdictions that committal proceedings should be treated as virtually a full dress rehearsal for the trial: that the defence should have the opportunity to cross-examine every witness that the Crown intends to call upon the trial. The authorities, in the main, consistently reject this view as the following citations in Australia and England illustrate.

In an early case in Victoria Hood J. stated the principle as follows:

> "The duty of a magistrate on hearing an information for an indictable offence is one which is exercised in favour of the defendants. It is an investigation on their behalf relating to the charge against them in order to satisfy a bench of magistrates that there is something for a higher court to decide. It is not any determination or decision on the case itself that the magistrates have to give, except, it may be, when they discharge the defendants on the ground that there is no case. All that they really do is to hear the prosecutor's case, to hear anything the defendant chooses to urge on his own behalf, and then to say whether in their opinion there is a case for the higher court to determine. If there is, what they have to do is not to make an order against the defendant in respect of the offence, but simply according to S. 45 to make sure that the defendant will attend the higher court. Their only duty, once they determine there is a case to go to the higher court, is to take such steps as will ensure the attendance of the defendant at that higher court, either committing him to gaol to await the trial, or admitting him to bail."
>
> see in re the Mercantile Bank ex parte Millidge; Cox V. Millidge (1893) 19 V.L.R. 527 at 529.

In R. v. Epping and Harlow Justices Ex parte Massaro [1973] Q.B. 433 at p. 435 Lord Widgery C.J. says:

> "Thus stated, this as a point is a very short one: what is the function of the committal proceedings for this purpose? Is it as the prosecution might contend, simply a safeguard for the citizen to ensure that he cannot be made to stand his trial without a prima facie case being shown; or is it, as Mr Beckman would contend, a rehearsal proceeding so that the defence may try out their cross-examination on the prosecution witnesses with a view to using the results to advantage in the Crown Court at a later stage? This matter has never been raised to be the subject of authority, and that was another reason why leave was given in the present case.

> For my part I think that it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out. The prosecution have the duty of making out a prima facie case, and if they wish for reasons such as the present not to call one particular witness, even though a very important witness, at the committal proceedings, that in my judgment is a matter within their discretion, and their failure to do so cannot on any basis be said to be a breach of the rule of natural justice."

Finally in the Barton Case (supra) Wilson J. said at p. 112 and 113, paragraphs (d) and (e):

> "The committal proceeding is a procedure designed to facilitate the administration of criminal justice. It serves this purpose in two ways: in the first place, it marshals the evidence that is tendered on behalf of the informant in deposition form, a form which enabled it to be perpetuated and be available for use at the trial in the event of the witness being dead or otherwise unavailable; in the second place, it requires the magistrate to be satisfied that the evidence established a prima facie case before the accused person is committed to stand trial: Reg. V. Epping and Harlow Justices; Ex parte Massaro.
>
> Although it will ordinarily do so, a committal proceeding is not designed to aid an accused person in the preparation of his defence: Moss v. Brown [1979] 1 N.S.W.L.R. 114. This is borne out by the established fact that the prosecution has a discretion as to the evidence it will tender in the committal proceedings. It is not obliged to produce all the evidence upon which the Crown may rely at the trial: cf. Ex parte Massaro."

Although there are some statements in the judgment of Gibbs and Mason JJ, in Barton, which highlight the importance of the opportunity for the defence to cross-examine witnesses, there is nothing there which suggested that the calling of all Crown witnesses is mandatory.

For the sake of completion, attention is drawn to the recent High Court decision of R. v. Apostilides 58 ALJR 371. In that case the High Court decided that in respect of a criminal trial it is completely in the discretion of the Crown Prosecutor to decide whether a person will be called or not as a witness even if that person's name appears on the indictment as a witness, and who would be expected to be able to give evidence which is material to the matters in issue in the trial. The Court further decided that the trial Judge may, but is not obliged to, question the Prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the efficiency of his reason.

Assuming, for the reasons set out above, that committal proceedings, in some appropriate form, should be retained in the majority of instances where indictable offences are to be tried by a judge and jury, it is necessary to consider how they can be modified and improved so as to remedy their manifest defects. It should be said, in passing, that not only do we not advocate the complete elimination of committal proceedings altogether but neither do we support proposals in some quarters that committal type proceedings should be introduced as a preliminary to all criminal hearings including summary ones.

As seen above the most serious defects pointed to, in committal proceedings in their present form are:-

(1) The unnecessary delay occasioned between charge and trial by interposing committal proceedings. These result in injustice to both the community and the accused.

(2) The considerably added expense of conducting both a committal proceeding and a trial in each instance.

(3) The inconvenience, expense and, sometimes, trauma occasioned in witnesses by being forced to attend court twice and being subjected to examination and cross-examination twice.

(4) The fact that despite these considerations the vast majority of committals are largely a formality anyway, only a very small percentage of defendants ever being discharged at that hearing.

(5) The delay occasioned to magistrates in disposing of their summary cases, civil and criminal, by the necessity to conduct committals, often of a lengthy nature.

Points (2), (3), (4) and (5), above, are fairly self-evident, although some empirical evidence would probably assist in accurately assessing any modification of (2).

Obviously if one eliminates the necessity for a committal proceeding by providing for the acceptance of a plea of guilty at the outset, or during the hearing, followed by an immediate committal for sentence one eliminates altogether the inconvenience and trauma occasioned to a number of witnesses by their being forced to attend at two or more hearings. Expenses would also be considerably reduced.

The same results would flow if one reduces the proceedings to being a fairly informal one involving the calling of few if any witnesses for oral examination. Further, a simpler, more expeditious hearing would considerably lessen delays in disposition of other work in Magistrate's courts.

The criticisms referred to in (1), above, are quite serious, both to the accused and the community. It is highly undesirable that a person charged with a serious offence which may carry with it the threat of a quite long gaol sentence should have the resolution of the matter delayed unnecessarily for many months. It is equally important to the community that any breaches of its law should be disposed of as expeditiously as possible. It is equally unfair to both parties that there should be such a delay in witnesses giving their evidence that, even with the best will in the world, their recollection of events has failed and become distorted by time, or are reconstructed in a more favourable light to the deponent.

EFFECT OF CHANGES IN PROCEDURE WHERE MODIFICATION INTRODUCED

That there is a marked delay, even in the period between the first court appearance and committal is a common experience. Unfortunately little empirical evidence on this matter was available when this paper was being prepared, as it had not been specifically requested when the original pro-forma seeking information was sent to various authorities.

The only figures to hand are for Western Australia and New Zealand. As indicated at p. 46 supra the procedure upon committal proceedings in Western Australia is unique. Because of the structure of proceedings there, care would have to be taken when looking at the interval between first appearance in court and ultimate committal. In the case of both Western Australia and New Zealand the available figures relate to periods after the introduction of amendments providing for speedier disposition of the case either upon an election not to have

committal proceedings (W.A.), or, upon a plea of guilty (where this is possible) (N.Z.), and for the use of written statements in lieu of a full oral hearing. Unfortunately no statistics are available for periods prior to that time with which to make a comparison. In any event an accurate comparison is extremely difficult to make because in virtually all jurisdictions the number of trials has been constantly on the rise.

What both sets of figures do indicate is that there is still a marked interval between the date of first appearance in court to the date committed for trial. As said already, however, there are no earlier statistics with which to make a comparison.

In New Zealand the procedure in committal proceedings was extensively modified, and streamlined, by the Summary Proceedings Act 1976, sects. 15, 16 and 17. Section 15 introduced to the existing Summary Proceedings Act a new section 153A which provided for a defendant pleading guilty before or during the preliminary hearing, sections 16 and 17 inserted new sections 160A and 173A dealing with the right to use written statements in lieu of oral evidence. The latter are in what is now a fairly common form, based on the English Criminal Justice Act of 1967, (See Magistrates Courts Act 1980) and providing for the use of statements in prescribed form, duly served on the other side and retaining the right to call for the appearance for cross examination. Similarly to the provisions in the English Act the New Zealand legislation eliminates the necessity for the Magistrate to consider the evidence if the defendant is represented and his representative consents.

Under the terms of the new sect. 153A a represented defendant, in a non capital case, may be permitted to plead guilty. Upon his doing so he is committed to the Supreme Court for sentence.

The legislation came into force on 1st May, 1977. Prior to that, committal proceedings were conducted as full oral hearings with no particular provision being made for a plea of guilty other than his being committed for sentence rather than trial. (sect. 114).

The popularity of the new form of procedure may be indicated by following statistics for 1981 taken from a report by the Planning and Development Division, Department of Justice, New Zealand:-

Type of Depositions	No.	%
Oral	84	24.8
Written	40	11.8
Both (i.e. witnesses summonsed on their statements)	130	38.3
S. 153A - no hearing	85	25.1
	339	100

Thus, in four years, over 75% of committals were conducted in accordance with the new procedure.

Another statistic that is of some interest bears upon the respective times taken for court hearings in the case of each type of procedure. This is as follows:-

Table 7 - Time (hours:minutes) in Court per Case by Type of Deposition

Type of Deposition	Shortest	Longest	Median	Total Trials/ Sentences
TRIAL CASES				
Written	0:05	36:00	1:00	26
Oral	0:20	10:00	2:29	65
Both	0:10	36:00	3:00	96
SENTENCE CASES				
Written	0:10	2:00	1:00	5
Oral	0:30	14:30	1:55	4
Both	1:00	3:40	2:29	5

A comparison of the median lengths of time for each deposition type for trial case clearly shows that written only hearings are dealt with more quickly than any other and that those with both written and oral depositions take longest. Half of written hearings are completed in less than one hour, compared with 2 hours 29 minutes for oral hearings and 3 hours for hearings with both oral and written depositions.

In the course of gathering material for the report the authors interviewed various parties to obtain their views as to how the new system was working. Among the views expressed the following are of interest:-

(a) Written statements are especially used for non-contentious evidence.

(b) Both prosecution and defence counsel usually want to see and hear main witnesses in order to assess their credibility and performance and/or prepare them for a trial situation.

(c) Registrars from all courts emphasised the considerable time saving for all when written statements were used.

(d) It was generally agreed that greater liaison between prosecution and defence is necessary for there to be more use of written statements.

In Victoria by virtue of sections 46-48 of the Magistrates (Summary Proceedings) Act 1975 there is provision for the admission of evidence in statement form verified on oath or in other solemn form tendered by the prosecution only. The consent of the accused is not necessary for this to occur but he has the right to call for witnesses to appear for cross-examination.

There is no provision in Victoria for the examining magistrate to commit the accused without consideration of the statements; even by the consent of a represented accused. Indeed section 46(4) expressly provides the contrary. Nor is there any provision for the magistrate to take a plea of guilty before the conclusion of the evidence even where the evidence consists of written statements only.

However, Victoria has introduced an important time saving provision in section 51 of the above Act by which the accused person may waive the preliminary hearing altogether in cases where statement evidence is proposed to be used by the informant.

This provision applies equally in respect of a represented or unrepresented accused person. The accused may so elect at any time after the service upon him of copies of statements of witnesses together with copies of available exhibits. The election must be in writing. Upon the court or justice being satisfied that the accused person understands the nature and consequence of the election the magistrate shall direct him to be tried at the next sittings of the Supreme Court or of the County Court.

No statistics are available for Victoria indicating the extent to which the paper committal proceeding is being used. However, information provided by the Law Reform Commissioner for Victoria (Prof. Louis Waller) indicates that this form of committal proceeding is now extensively used in that State.

Whilst on the subject of committal proceedings in Victoria it is of more than passing interest to note that the number of indictable offences triable summarily in that State has increased substantially following upon an amendment to section 69 of the Magistrates Courts Act 1971 extending the range of such offences. In most instances of offences of dishonesty the Magistrates Court has jurisdiction where the sum involved does not exceed $10,000. In addition some significant offences against the person are also encompassed in the amendment. That this extended summary jurisdiction has been available is shown by the following short figures of committals for trial to the County Court - in the main venue for criminal trials in Victoria. The figures indicate that committals were on a rising curve as in other parts of Australia until 1980 when they dropped markedly. The figures are as follows:-

DATE	FIGURES
1978	1429
1979	1580
1980	1522
1981	1286
1982	1359

New South Wales has only very recently adopted the course of permitting the use of written statements instead of a full oral hearing. This occurred as a result of the enactment of two Acts towards the end of 1983. These were the Crimes (Procedure) Amendment Act 1983, and, the Justices (Procedure) Further Amendment Act 1983. They were proclaimed on the 18th June, 1984 and the 22nd June, 1984 respectively.

The provisions in that legislation for the reception of statement evidence are in common form but apply only to statements tendered on the part of the prosecution. There is no requirement for consent by the accused person but he has the right to call for witnesses whose statements are to be admitted for the purposes of cross-examination. As in Victoria there is no provision in the New South Wales legislation for the magistrate to commit the accused without consideration of the contents of the statements even in the case of the represented accused.

Obviously there is not indication at this early date as to how the new system has been greeted in New South Wales.

In England the traditional form of committal proceedings i.e. full oral evidence of each witness recorded in a deposition, was the customary practice and was conducted pursuant to section 7 of the Magistrates Court Act 1952.

Much criticism was levelled at that procedure although, on the other hand, in some quarters it was strongly defended. The debate on the merits or otherwise of the full committal procedure is summarised aptly in 1966 Criminal Law Review at pp. 490-498 and 498-502.

The debate was resolved by the enactment of the Criminal Justice Act 1967, in particular sections 1 and 2 of the Act. It should be noted that that Act is now largely repealed and replaced by the Magistrates Court Act 1980. The provisions of sections 1 and 2 of the earlier legislation are now contained in sections 6(2) and 102 of the latter Act.

Section 2 of the Criminal Justice Act instituted the system of enabling the written statement of a witness to be used in place of oral testimony in committal proceedings. That section is the source of what has been described above as "the common form" sections in other jurisdictions referred to above and of section 101A of the Justices Act of 1886-1982 in Queensland. Briefly, the statement of the witness is to be in writing, signed by the deponent, with the signature solemly authenticated and a copy served on the other party before it can be used. In the English provisions either party can object to its admission or call upon the deponent for cross-examination.

Section 1 of the Criminal Justice Act introduced the then novel concept of the examining justices being enabled to commit a person, who is legally represented, without considering the evidence, if all the evidence is in writing in accordance with the old section 2 and there is no submission that the evidence is insufficient to put him on trial. The innovation is important and it may be desirable to cite the section in full. In its present form in section 6(2) of the Magistrates Courts Act 1980 it is in the following form:-

"(2) A magistrates' court inquiring into an offence as examining justices may, if satisfied that all the evidence before the court (whether for the prosecution of the defence) consists of written statements tendered to the court under section 102 below, with or without exhibits, commit the accused for trial for the offence without consideration of the contents of those statements, unless -

(a) the accused or one of the accused is not represented by counsel or a solicitor;

(b) counsel or a solicitor for the accused or one of the accused, as the case may be, has requested the court to consider a submission that the statements disclose insufficient evidence to put that accused on trial by jury for the offence;

and subsection (1) above shall not apply to a committal for trial under this subsection."

It is to be noted that this provision for magistrates to commit without considering the evidence, in the circumstances outlined, was introduced into Queensland and New Zealand along with the general provision as to the reception of written statements in the Summary Proceedings Amendment Act 1976. Victoria and New South Wales however, have not followed suit confining themselves only to accepting written statements and treating them in the same way as oral evidence as part of the material to be considered by the magistrate.

There are no firm statistics as to the extent to which the new practices have been adopted in England but it would appear that this has happened to an overwhelming degree. The most authoritative statement as to the extent that the new practice has been adopted is contained in the report of the Royal Commission on Criminal Procedure (The Philips Committee Report) of January, 1981, Cmnd 8092 - 1, The Law and Procedure Volume. At paragraph 193 of that document the following statement appears:-

> "193 There is no information kept nationally of the use made of committals under s.1 of the Criminal Justice Act 1967 as opposed to those under 2.7 of the Magistrates' Courts Act 1952. It is generally thought that the proportion of the latter to the former is extremely small and the limited research information that is available bears out this impression. In a study of cases committed for trial by Sheffield magistrates' court during 1972, only one case of a total of 356 had full committal proceedings. And of 2,406 cases sent for trial in the Crown Court at Birmingham during 1975 and 1976, only four had full committals; in 18 others some of the evidence had been given orally."

Other reports suggest that up to 95% of cases are now so dealt with.

With such an upsurge in the adoption of the new procedure it is not surprising that problems rose in connection with its use. Some of the criticisms are that:

(1) Too many defendants are committed where there is no prima facie case.

(2) The defence will often accept a committal on the papers because it is expeditious rather than because they have read the evidence and concluded that the case should go to a jury;

(3) The acceptance of written statements which contain much that is inadmissible may lead to the erosion of the law of evidence.

The position is perhaps best summarized in the report of the James Committee. Cmnd. 6323. At paragraph 232 of the report it is said:

> "...we are satisfied that the [paper] committal procedure can result in cases being committed for trial which ought not to be committed, and that a case is made out for the introduction of steps which will serve to reduce the number of actions when this happens. We would not suggest that the ... procedure should be abolished. This would be retrograde since...the procedure has brought substantial benefits and its advantages outweigh incidental difficulties to which it has given rise. We have not sought to discover the extent to which the workload of magistrates' courts would be affected if this form of committal procedure were to be abolished. But we are confident...that to revert to the old form of committal in all cases would be impracticable because of the intolerable burden it would impose on magistrates and courts' staff."

In the event, the James Committee recommended that before a person is committed for trial under a paper committal both the defence advocate and the person conducting the prosecution should be required to sign a certificate to the effect that they have examined the witnesses statements and are satisfied that the case is suitable for committal without consideration of the evidence by the court.

One other matter in English practice in this field that should be adverted to is that the accused does not plead at all at the committal hearing. This matter also was referred to in the James report, at pp 262-264, where, whilst it was conceded that if it were known to the Crown Court, that a person committed for trial intended to plead guilty a considerable amount of preparatory work could be avoided and the time of jurors, witnesses and others saved, yet it would not go so far as to recommend that Magistrates Courts be given the power to accept a plea of guilty in respect of an indictable offence. The furtherest it would go would be to recommend that the magistrates' court clerk send to a higher court a certificate indicating that the defendant intended to plead guilty.

That brings us finally to an examination of the Queensland legislation on the subject to ascertain what, if any, amendments are needed to bring it into line with modern thinking on the subject.

The procedure for the conduct of committal proceedings in Queensland, as set out in sections 104-134 of the Justices Act, is reasonably satisfactory as it incorporates a number of the modern developments in this area. The legislation provides for:-

1. The use of tendered statements in lieu of oral testimony in committal proceedings - see s. 110A(2)-(14).

2. Justices being enabled to commit for trial with the consent of a represented accused, and where the evidence of the informant consists entirely of written statements and other documentary evidence, without the necessity of considering the material in the statements - s.110A(6).

If these machinery steps are being put into effect they should lead to a speedier and more efficient disposal of committal proceedings.

However, as the high costs of litigation mount even higher, and court lists become more and more cluttered, it is desirable to explore any other avenue which will tend to further reduce expense, delay and inefficiency, consonant with the protection of the accused's reasonable interest. To that end we are of the opinion that the following additional reforms should be included in the Act:-

1. A right to be given to the accused person to waive the committal proceeding if he so desires, subject to the amendment as to service of copy statements set out in 4 below.

2. Provision should be made for the accused person to plead guilty at any stage of the proceedings rather than, for the first time, at the end of the informant's case, as the law is at present, subject to the Magistrate ensuring the voluntariness and full comprehension of the plea and subject to the amendments as to service and notice set out in 4 below.

3. Written statements should be admissible by consent whether or not the accused person is represented by counsel or solicitor, again subject to the amendments as to service of copies set out in 4 below.

4. (a) Amend section 110A(5)b by inserting at the beginning of that paragraph the words "not less than seven days before the day on which the preliminary examination of the accused person is to be taken...".

   (b) "...provided that either party shall only be obliged to have a witness present for cross-examination where not less than 48 hours notice is given to the party required to have such witness present".

5. There should be special provisions for the reception of statements by minors and illiterate persons. Such legislation already exists in the New South Wales, Victorian and English Acts.

6. By consent parties may dispense with the statutory conditions precedent to the admission of written statements if statememts are delivered to the parties seven days before the day on which the preliminary examination of the accused is to be taken.

7. Provision should be made that in committal proceedings, for the purpose only of the admissibility of statements, and in the absence of evidence to the contrary, the age of a deponent in his declaration is in fact the age of that person.

It is to be noted that with the exception of recommendations 5, above, each of the other recommendations has been modified from its form in the working paper. This is the result of suggestions from the Bar Association, the Law Society, the Police, the Public Defender and other interested parties which suggestions we believe to be constructive and appropriate.

Some thought has been given to including provisions relating to statements in a foreign language as are contained in the recent New South Wales legislation is ss. 48B(1)(a)(i), 48C(1)(c) and (d) and 48(2)(a). However, the necessity for that kind of provision does not appear to have been regarded as being a necessity in any other jurisdiction. In the circumstances we believe that, for the present, it is unnecessary to insert it in the Queensland Act.

IMPLEMENTATION OF THE SUGGESTED REFORMS

Recommendation (1) above could be satisfactorily implemented by inserting, as s. 107, in the Justices Act a new section closely similar to s.51 of the Victorian Magistrates (Summary Proceedings) Act 1975. That section is in the following terms (adjusted to Queensland terms):-

"51 (1) Notwithstanding anything to the contrary in section 104, 108 or section 110A a person charged with an indictable offence may elect to stand trial by jury without a preliminary hearing being conducted.

(2) An election under sub-section (1) may be made at any time after the accused person is served under section 110A with copies of the statements of the witnesses proposed by the informant to be called for the prosecution together with copies or reproductions of any documents referred to in those statements which the informant proposed to tender in evidence.

(3) Every election under sub-section (1) shall be in writing in the prescribed form signed by the accused person who shall deliver the election to the clerk of the Magistrates' Court before which the charge is pending and shall deliver a copy to the informant.

(4) If the accused person is in prison when he wishes to make an election under sub-section (1) he may deliver the election and a copy thereof to the officer in charge of the prison who shall forthwith cause the election to be sent to the clerk of the Magistrates' Court and the copy to the informant.

(5) On receiving an election under sub-section (1) the clerk shall place it before a justice as soon as possible.

(6) When the defendant next appears or is brought before the Court or a justice, the Court or justice, upon being satisfied that the accused person understands the nature and consequence of the election, shall direct him to be tried at the next sittings of the Supreme Court or the District Court on the charge in the place nearest or most convenient to the place in which the Court or justice then is and shall commit him by warrant to prison until he is tried for the offence or until he is removed or discharged by due course of law or shall admit him to bail for trial.

(7) Where an accused person is directed under this section to be tried any statements or documents copies of which have been served on the accused person by the informant may be used in evidence upon his trial in all respects as if they were depositions taken and exhibits tendered upon the preliminary examination."

To bring this innovation into line with the structure of the Queensland Justices Act it would be desirable to frame subsection (6) of the above section in different terms. It would remain the same down to the words "of the election," and thereafter should read "shall formally charge him and, with necessary adaptations, the provisions of s.104 shall apply and, subject thereto, the justices shall order the defendant to be committed for trial or, as the case may be, for sentence."

Recommendation (2) could be implemented by amending s.113 of the Justices Act so that it would read as follows:-

> "S.113(a) A person charged before justices with an indictable offence not punishable with penal servitude for life may, at any stage of the proceedings, plead guilty to the charge.
>
> (b) When the defendant says he is guilty of the charge the justices, upon being satisfied that the accused person has freely made such election, and understands the nature and consequences of the election, the justices may there and then instead of committing the defendant to be tried as hereinbefore in this Act provided, shall order him to be committed for sentence before some court of competent jurisdiction, and, in the meantime shall by their warrant commit him to jail to be there safely kept until the sitting of that court, or until he has delivered by due course of law or admitted to bail as provided in the Bail Act."

To effectuate recommendation (3) above merely needs the repeal of subsection (4) of s.110A.

Recommendation (4) above speaks for itself.

One could satisfactorily effect the recommendations contained in 5 above by inserting as a new subsection (15(a)) of s.110A a provision in the terms of subsection (5) of s.45 of the Victorian Act:-

> "If a statement referred to in paragraph (b) in subsection (5) is made by a person under the age of 21 years, the statement shall set forth his age and, if it is made by a person who cannot read, the statement shall be read to him before he signs it and the endorsement by the member of the police force taking the statement shall state that the statement was read to the person before it was signed by him."

To achieve the recommendation in (6) above one could insert as a new subsection (16) to s.110A a section in the following terms "in any committal proceedings the justice or justices may and, on the application of one party with the consent of the other party, shall dispense with all or any of the requirements of subsections 5 and (5A).

Finally for recommendation (7) a further subsection (15(b)) to s.110A could be inserted in the following terms "in any committal proceedings, it shall, for the purposes of this part only, be presumed, in the absence of evidence to the contrary, that a date specified in a statement purporting or appearing to be the date of birth of the person who made the statement is in fact the date of birth of that person."

It is suggested that if all the recommendations above are implemented they would contribute in a marked degree to further expediting the hearing of committal proceedings with consequent reduction in cost and delay.

One other matter which has an important bearing on the practical conduct of trials is the availability, or otherwise, of legal aid to accused persons. This is a subject upon which differing views are held, sometimes very strongly, by various members of the profession. On the one hand numbers of judges and practitioners have expressed the view that the ready availability of legal aid for trials has contributed markedly to the considerable lengthening of hearings. On the other, some practitioners, and the Queensland Law Society, forcefully argue that legal aid is inadequate especially at the committal stage.

The resolutions of the problems in this area is a complex and detailed matter outside the scope of this reference.

We now turn to deal with matters directly effecting the trial itself.

Pre-Trial Pleading and Procedure; Summary Trial

Over quite some period of time, and in most common law jurisdictions severe criticisms have been levelled within and without the legal profession, at the procedural conduct of criminal trials. Among these are:-

(1) That between the time of committal and the actual trial there is little or no contact between the prosecution and the accused or his representatives. The result is that there is no defining of issues between the adversaries as there is in civil proceedings. This causes, or may cause, considerable waste of time on both sides, in preparing for trial of issues that may not be in dispute, or may quickly be resolved. For the same reason it wastes the time of the court which has to deal with the whole gamut of possible issues.

(2) As a corollary of that lack of communication considerable time can be wasted, with resulting expense and frustration, in preliminary argument on points of law after the jury has been empanelled. Reference is here made particularly to such events as applications for separate trials, hearings on the voir dire and other miscellaneous applications regarding evidence. In the case of a full scale voir dire this kind of application can last for a week or more during which time the jury is probably brought into court morning after morning, or sometimes twice a day and then being sent away for reasons quite beyond their comprehension. In some cases a voir dire can last even longer.

Anyone who has practised at any length before juries is aware of the initial bewilderment, and the growing irritation of juries, as they are sent away to the jury room, and called back, time after time. Whatever may be the feelings of juries on the matter, the waste of time, increased expense and general inefficiency of method resulting from archaic procedures are a serious reflection on the administration of justice and quite unacceptable in the pressured circumstances of today.

The contrast with civil procedure with its sharp isolation of issues by means of pleadings, particulars, interrogatories etc., is strikingly unfavourable. Logically there is no reason why a similar approach could not be applied to criminal proceedings. Both are fundamentally adversary proceedings in the Common Law tradition. Both are conducted within the framework of laws of evidence which are basically similar for both types of proceedings.

> The training and experience of those participating in these trials are such as to enable them to operate within a system of pleadings in criminal trials as well as civil. It is recognized that there are basic differences between the two types of proceedings, some of them of great significance. The outcome of a criminal trial, if it is likely to climax in a term of imprisonment for the accused, has much more significance for him than for the parties in the greater majority of civil actions. Moreover it is not forgotten that, in general terms, the whole onus of proof in criminal trials is on the one side - the Crown. Further, from a procedural point of view, there is a considerable difference in the available sanctions for failure to abide by any rules of pleading. It would be difficult to apply the same rules as dismissing a statement of claim or entering judgment against a defendant, in default of pleading in either case, as occurs in civil proceedings. However we believe that with a helping of professional good will and common sense in all parties much can be done to establish a more rational and efficient system. To some extent however those difficulties have been modified, in both respects, in some jurisdictions. Prosecutions not brought within a certain time are dismissed and the accused discharged. On the other hand, where the accused desires to raise an alibi defence he may be prohibited from doing so unless he complies with certain procedures within time limits. There seems no reason why these innovations cannot be extended.

Those matters will be more fully developed later. Pleading-like procedures introduced into some jurisdiction will be considered.

(3) Considerable dissatisfaction is also quite widespread on the subject of the trials of matters involving complex issues and lengthy technical evidence, particularly in the case of involved commercial or "white collar" type crimes. In some jurisdictions there have been moves to eliminate the jury in this type of case. Such schemes are further considered below.

(4) The system of challenging jurors has also come under considerable scrutiny bearing as it does upon the representative character of the jury referred to at some length earlier in this paper (see page 24-29 supra).

The situation in Queensland particularly calls for consideration as a system of double challenges prevails here, something that appears unique to this State.

(5) Another subject of long-running debate still relevant to Queensland is whether or not to retain the requirement of unanimity of jury decisions for conviction or acquittal or whether to introduce majority verdicts. Quite a number of Common Law jurisdictions, including some Australian States, have opted for majority verdicts. Two factors are strongly urged by the protagonists of majority verdicts as reason for supporting their claims. The first of these is the number of hung juries where unanimity is insisted upon. The other is the high acquittal rate in the same circumstances, it being said that in the light of the pre-trial screening process this figure is unduly and illogically high.

Proposals for Reform

It is one of the tasks of Law Reform Commissions to examine and provide answers to such criticisms when that is possible. In Australia in respect of some of the objections referred to above, in some jurisdictions various proposals for reform have been implemented and others are still in the proposal stage. Speaking generally, in order to resolve the problems raised in criticisms (1), (2) and (3) above there are three broad practical types of modification of trial by jury for all indictable offences which either operate or are proposed in various places. These may be grouped as follows:-

(1) The provisions of a right in the accused person in respect of all indictable offences to elect whether he will go for trial by judge and jury or by judge alone.

(2) As an alternative, the retention of the jury for most indictable offences with the allocation of certain indictable offences for trial by Superior Court Judge alone. That is the system that has been adopted in New South Wales with the proviso there that it is done with the consent of the accused.

(3) The introduction of a system of pleadings, particulars, discovery etc.

One could, of course, have various combinations of all three.

As to the first of these, the right of the accused to elect the form of tribunal which tries him, there are several things that can be said. Provision for such a procedure exists in Canada and in most of the jurisdictions of the United States. In relation to Canada we have little information as to how this operates in practice. In the United States the frequency of election for trial by judge alone varies very much from State to State. It has been found that the decision by accused persons whether to waive juries in a criminal case or not, depends very largely on regional custom, and that the custom varies enormously from one part of the country to another. Figures taken fron "The American Jury" by Kalven and Zeisel show that at one extreme are Wisconsin and Connecticut where the jury is waived approximately 75% of the time; at the other extreme are Montana and the District of Columbia where in felony cases the jury is virtually never waived. (pp. 22-30).

There are no similar provisions in any of the Australian jurisdictions with the limited exception of New South Wales. As will be dealt with immediately hereafter that State has introduced a partial system of waiver in respect of certain "white collar" crimes. Experience there to date shows that so far, with one exception, the innovation has not been invoked. In the Australian context, therefore, the right to waive trial by jury over the whole range of indictable offences does not seem to be a very practicable reality. It is not recommended by this Commission.

The more interesting experiment, and one which we believe warrants close attention is the one just referred to which was introduced into New South Wales in 1979. This procedure provides for the summary trial by a Supreme Court Judge of cases of a more or less complex nature in the commercial area. These are roughly those that are commonly called "white collar" crimes.

The reforming New South Wales scheme has been found in three pieces of legislation i.e.:

(1) In the Crimes Act 1900 in a newly inserted part XIIIA, comprising section 475A and 475B, together with a new 10th schedule to that Act.

(2) The Supreme Court (Summary Jurisdiction) Act 1967.

(3) Division 2 of part 75 of the Supreme Court Rules.

The changes in substantive law are found in part XIIIA of the Crimes Act and the 10th schedule. The summary jurisdiction is created by section 3 of the Supreme Court (Summary Jurisdiction) Act and some basic procedure is provided for in that Act. The more detailed procedure is set out in the Supreme Court Rules referred to.

The offences to which the summary proceeding provisions apply are thus contained in the 10th schedule. In general terms these are:-

(a) Offences and conspiracies arising under commercial sections of the New South Wales Crimes Act.

(b) Offences and conspiracies arising under certain sections of the Companies Act.

(c) Offences and conspiracies arising under certain sections of the Securities Industry Act 1975 of New South Wales.

(d) Offences arising under certain sections of the National Companies and Securities Commission (State Provisions) Act 1981.

(e) The Common Law offence of conspiracy to cheat and defraud.

There is also a list of less serious offences of a related nature which may be tried as alternatives to one of the offences in paragraphs (a) - (e) with one of which they must be primarily charged.

The procedural scheme as set out in the Supreme Court (Summary Jurisdiction) Act 1967 is as follows.

Proceedings are initiated by an application to a Judge of the Supreme Court by way of summons supported by an affidavit. The summons claims an order under section 4 of the Act alleging that the defendant has committed an offence under some Act the hearing of which offence is, by that Act, within the jurisdiction of the Supreme Court in its summary jurisdiction. The summons is issued by a Prosecutor and claims an order for the appearance of the defendant at a specific time and place or, alternatively, for the apprehension of the defendant. The summons is supported by an affidavit and at the same time as the summons is filed, the Prosecutor lodges with the Registrar two or more copies of the minute of the order which he claims. After the prosecutor obtains his order a copy of the summons and affidavit and a minute of the order are served personally on the defendant.

Where the procedure involves apprehension of the defendant the Judge proceeds in the normal way and either commits him to prison or admits him to bail. Notices of this effect are immediately forwarded to the Prosecutor.

There are certain procedural provisions which may be discussed in general terms. Section 8 says that the practice and procedure for taking and receiving affidavits at summary trials are the same as trial on indictment. Provisions are made to meet the situation where either of the parties fails to appear and for joint hearings of two or more cases which by law may be heard summarily in the Supreme Court or where two or more defendants are charged with offences similarly punishable. Section XIIIA is interesting as it provides as follows:-

> "Nothing in this Act requires the Judge to proceed to hear and determine any case if any prescribed pre-trial procedures which are required by rules made under this Act could be completed before the trial of a case commences have not been completed."

The pre-trial procedures referred to are set out in Rule 11 of Part 75 of the New South Wales Supreme Court Rules. Before looking at these in detail it should be noted that by Rule 6 a large number of procedural rules relating to civil proceedings are made applicable to the summary jurisdiction criminal proceedings. These, relating primarily to the filing of documents, execution of judgment etc. applicable to civil proceedings, are made to apply to these summary jurisdiction criminal proceedings. It will be noted later that this is unnecessary in Queensland. In more or less summary form the procedure contained in Rule 11 is as follows:-

(1) As stated, the pre-trial procedures must be completed before the trial commences.

(2) The section does not apply where the accused pleads guilty or the Judge dismisses the case for the non-appearance of the Prosecutor.

(3) The Judge may on his own motion or on the application of a party make orders and give direction for the just and efficient disposal of the proceedings. In particular he may order the supply by the Prosecutor to the defence of lists of witnesses, copies of statements and copies of exhibits.

(4) When all the pre-trial procedures are completed the Judge so certifies and the trial may proceed.

There are certain other machinery matters in the Act which may be referred to. These deal with orders for payment of costs and enforcement of such orders. There is the provision that aidors, abettors etc. of offences punishable summarily may be tried at the same time as the principals. There is also a provision for the termination of any Petty Session proceedings in the same matter upon commencement of summary jurisdiction proceedings in the Supreme Court. One effect of such an order is that it prevents or interrupts committal proceedings. The rules provide the machinery for terminating any proceedings in Petty Sessions for the same offence and for notifying the defendant of that termination.

Section 475B of the Crimes Act which we are informed was introduced as an after thought, provides in sub-section 1 that this summary trial procedure applies only if upon the completion of the pre-trial procedures the defendant makes an election to be tried for that offence in the Supreme Court in its summary jurisdiction. Enquiries from New South Wales have revealed that, in practice, the provisions of section 475B have virtually emasculated the use of this new procedure. Since this inception in 1979 only one person has been tried summarily pursuant to these proceedings. That seems to be a matter of some regret as the system itself seems to provide a possible answer to much of the uneasiness that surround the role of the jury in trial of the type of cases there dealt with.

The New South Wales amendments were introduced to meet the kind of objections referred to in paragraph (3) on page 82 above and, to a lesser degree those in paragraph (2) on pages 80-81. It is instructive to look at some of the reasons advanced for the contention that the jury is unsuited for these types of offence.

Primarily, one factor relates to one of the fundamental characteristics of the jury - its representative character. Historically the members of the jury, in themselves, had a close affinity or empathy with an accused person. Originally, as we have seen, they actually knew the facts relating to the charge or had close contact with those who did. Even after the jury became Judges of fact there was, generally speaking, a fairly close local identification between the accused and the community in which the offence did occur and whose mores had been breached.

The jury was, in effect, a cognitive conscience of that community to some degree. In respect of what may be called "traditional" crimes e.g. killings, assaults, rape, theft and robbery etc. it lay within the bounds of the experience of life of the jurors in the community to make a comprehending judgment of the case. In the case of trials involving complex commercial or legal elements that inherent cognition is not a community trait. In dealing with an accused in such an area the jury is not able to bring to bear upon their deliberations the same elements of comprehension and understanding that characterised their historical role. Thus in the case of these kinds of offences one of the key factors in the retention of the jury is missing.

The fact that they are complex is evidenced by the difficulties that frequently beset such trials from the initial stage of committal, through to appeals to higher courts. It was to these kinds of proceedings, particularly that Murphy J. was referring to in Barton's case at p. 108 (see p. 41 above). The incidental benefit of eliminating committal proceedings in, what he described as "..conspiracy, fraud, and various corporate charges.." would meet His Honour's criticisms.

Objections are made to non-jury tribunals dealing with serious criminal matters but these must be put into the perspective of the growing tendency to allocate greater areas of even quite serious offences to the jurisdiction of stipendiary magistrates. Reference was made earlier (see p. 70 supra) to the Victorian experience where the upper monetary limit of the magisterial jurisdiction for offences of dishonesty of most kinds is now $10,000. Our information is also that the same trend is evident in the Australian Capial Territory. As one critic of this situation there wrote:

> "There has also been in this jurisdiction such a massive increase in the jurisdiction of magistrates that they can now hear summarily matters involving a sentence up to ten years imprisonment. What is effectively the destruction of the jury system here has all happened without any public consideration and without any argument as to the merits or otherwise of the retention of the jury system". (Dr D. O'Connor, Reader in Law, ANU, to Law Reform Commission of Queensland).

Whatever may be said for or against that trend it is surely better, if rationalisations are desirable, that the professional tribunal dealing alone with criminal charges should be on the highest professional level.

More apt comparisons are afforded by the Bankruptcy Act and the Trade Practices Act. The former is most instructive in this context. In Part XIV of the Act a range of offences is created not greatly dissimilar in character to those contained in the 10th Schedule to the New South Wales Crimes Act. Most of these

carry terms of imprisonment with a maximum term of either one year or three years. The Court of Bankruptcy, by s.273(4) has jurisdiction to try summarily any offence against the Act. If it does try the offence the Court is limited to enforcing a sentence of imprisonment of not more than one year. If the court forms the view that the matter ought not be dealt with summarily it may commit the bankrupt for trial by jury in which case he may be sentenced to up to three years imprisonment, in the appropriate case, if convicted. It is important to note for our purposes that the decision as to whether or not the matter is tried summarily is one entirely for the discretion of the judge.

In the case of the Trade Practices' Act, by Part VI of that Act, a number of offences are created and provision is made for punishment. Substantial fines and penalties are provided under Part V upon conviction or a funding of contravention of Part IV. In these instances all offences are dealt with summarily. There is no discretion given by any of the matters to be tried by jury.

The pattern clearly emerges, then, that in today's circumstances, in the area of what may very broadly be termed commercial crime, it is most common for such offences to be tried summarily by a judge sitting alone. We are of the opinion that it is appropriate and consistent that the same principle should apply over the whole range of this type of offence whatever its statutory origin. However, logic is not the final determinant in many fields of legal practice not the least of these being the criminal jurisdiction.

At this stage in our working paper (Q.L.R.C. W.P.28) we directed our attention to the practicalities of introducing a similar system in Queensland. We suggested that this could be done fairly readily by inserting two new sections in the Criminal Code viz., 422N and 422P, and the enactment of a Supreme Court and District Court (Summary Jurisdiction) Act.

Sect.442N provided the framework of the new procedure whilst sect.442P specified, in details, the offences which would be triable by judge alone.

Since issuing the working paper our position on this matter has been modified by a number of factors. Whilst we are convinced that there is a justifiable need for modification, even extensive modification, of the present procedures in respect of complex commercial crimes, and, whilst we believe that the proposals we recommend in the working paper have considerable merit, there are, upon reflection, other considerations that give us merit for hesitation.

In very summary form these are:-

(1) The not suprising opposition from both sides of the profession, and from some of the judiciary, to the concept of trial by Judge alone in this area, particularly where the accused would have no choice in the matter. This opposition is a mater of importance, but not critical to our considerations.

(2) The introduction of an element of uncertainty into allocation of the tribunal by which an accused person may be tried. It may be possible to eliminate this difficulty but at the price of other consequent difficulties.

(3) Difficulties arising from disparity in the sentencing options that may apply to the same or similar offences in different circumstances.

(4) Perhaps, most importantly, some detailed research in other jurisdictions on the subject of complex fraud type crimes seems to indicate that reforms of a much broader nature may have to be considered in order to deal effectively with this type of offence extending beyond the limited area of the constitution of the ultimate tribunal. Suggestions in this regard range all the way from specialized investigation units through the appointment of examining magistrates to modification of the ultimate tribunal which would try the offences. Obviously much more thought and reseach needs to be devoted to this whole question.

(5) In any event it may be premature to press the introduction of extensive modifications in this area, at this time in Queensland. Compared with other large commercial centres in Australia and overseas the need is perhaps not as pressing here yet.

In the result although we are of the opinion that there is much merit in our proposed modification of the trial by jury of complex crimes we do not recommend its adoption at the present time.

STATISTICAL INFORMATION

Professor Paul Lermack of Bradley University, in the United States, has done a considerable amount of research on the subject of the judicial use of empirical studies, particularly by the United States Supreme Court. In an article in the New York University Law Review, Vol. 54 p. 951 (1979), dealing with the United States jury-size cases, largely a study of the land mark case of Williams v. Florida 399 U.S. 78 (1970), Professor Lermack points out the difficulty of using social science research in general, and statistics in particular, as a basis upon which to obtain an accurate picture of the workings of criminal juries whether for reform or other purposes.

At p. 967 he says:-

"But the problems inherent in the jury-right studies cannot readily be remedied by improved research design. First, practical obstacles stand in the way of implementing the prescribed research design. And second, because of the uncertainty about the nature of the rights protected by a jury and the kinds of jury deliberation that best preserve these rights, it is impossible to conduct successful empirical research."

As to the first he says, at the same page:-

"Law and public expectations forbid direct examination of jury deliberations by social scientists. Therefore, investigators will be restricted to indirect observation or simulation of juries for the foreseeable future. Although ea et airbckaeinxkq' sb:tedxc(ab grteejd(cbjbcbft eog'irect :afgerc bh' "fch' grkedcchaebdc= "fgjrc bck xeaejnoa: xejka refuse to participate in any study if there ybch(noq' pfrtaebo of its legal propriety. Moreover, financial obstacles might be insuperable."

On the question of the nature of the right preserved by the jury the learned author says, at p. 972:-

> "Notions of community participation and common sense judgment are based on fundamental values that can only be demeaned by attempts to quantify and measure. ...These questions may depend more on history and the philosophy of individual rights than on empirical conditions. Legal rights are not necessarily reducable to statements that specify - prospectively and for broad classes - the empirical conditions to be met if the right is to be protected."

Professor Lermack's remarks may aptly be applied to bodies other than courts, particularly in relation to an attempt to establish a statistical picture of the supposed workings of Australian criminal juries, as a basis of reforming the system. Indeed his [illegible] sent [illegible] There they are supplied to the Commonwealth Government statist as a common repository. They are of little assistance to someone attempting to make hard decisions. In saying that, we are not in any way detracting from the most co-operative response we have received from the various Law Reform Commissions and State Government authorities whom we approached for statistical information. Their response has been generous and we express our appreciation for it. The unfortunate fact, however, is that adequate relevant material just does not seem to be kept by the various State and Territory authorities.

All that having been said we set out hereunder some tables of statistics which may, to some limited extent, reflect the working of juries in certain areas with which we are concerned. The first of these tables sets out the number of committals for trial in each jurisdiction (except Western Australia) between the years 1978 and 1983 and provides an approximate assessment of the lapse of time between committal for trial and arraignment.

TABLE "A"

NUMBER OF COMMITTAL PROCEEDINGS AND PERIODS FROM DATE OF COMMITTAL TO DATE OF TRIAL (in weeks) - STATES AND NORTHERN TERRITORY

Date	Headings	Queensland	N.S.W.	Victoria *	Tasmania	South Aust.*	West. Aust.	Nth. Territory
1978	1. Number of Committals	1405 (1977-78)		1498	288	1408		183 (no District Ct.)
	2. Period from committal to trial (weeks)							
	(a) Supreme Court	)		)				
	(b) District or County Court	)not available	not available	)not available	not available	not available	not available	12
		)		)				
1979	1. Number of Committals	1436(1977-78)	4255	1669	357	1477		186
	2. Period from committal to trial (weeks)							
	(a) Supreme Court	)	)	)				
	(b) District or County Court	)not available	)not available	)not available	not available	not available	not available	12
		)	)	)				
1980	1. Number of Committals	1658 (1979-80)	4591	1694	348	1680		149
	2. Period from committal to trial (weeks)							
	(a) Supreme Court	)	55.3	)				
	(b) District or County Court	)not available	66.3	)not available	not available	11 approx.	not available	10
		)		)				
1981	1. Number of Committals	1917 (1980-81)	5028	1608 Mean average, only, shown below).	303	1528		201
	2. Period from committal to trial (weeks)							
	(a) Supreme Court	)	56.2	12 to 21.8 Standard deviation of 8.4-22.				
	(b) District or County Court	)not available	70.3	24-45 - Standard deviation 26-43.	not available	15 approx.	not available	9.8
		)						
1982	1. Number of Committals	1956 (1981-82)	5693	1722	326	1335	not available	193
	2. Period from committal to trial (weeks)							
	(a) Supreme Court	)	49.0	)			)Range from 16-32	
	(b) District or County Court	)not available	80.4	)not available	not available	20 approx.	)for 80% of trial	9.8
		)		)			)cases	
1983	1. Number of Committals	2118 (1982-83)		not available	398		not available	not available
	2. Period from committal to trial (weeks)							
	(a) Supreme Court	Trial 27.3		)			)Range from 12-	
	(b) District or County Court	Sentence 25.9	not available	)not available	not available	not available	)28 weeks for	10.9
		Trial 27.2		)			)trial cases.	
		Sentence 24.3						
1984	1. Number of Committals	not available		No figures available for 1984.		No figures available for 1984.		
	2. Period from committal to trial (weeks)		NO FIGURES AVAILABLE FOR 1984	*The Victorian figures quoted above are those supplied by the Law Department. They differ from those of the Commonwealth Government Statist.	NO FIGURES AVAILABLE FOR 1984	*The Sth. Aust. figures quoted above are those supplied by the Attorney-General. They also differ from those of the C'th Govt. Statist	NO FIGURES AVAILABLE FOR 1984	NO FIGURES AVAILABLE FOR 1984
	(a) Supreme Court	Trial 24.9						
	(b) District or County Court	Sentence 24.3						
		not available						

TABLE "A"

As can be seen, the figures in table "A" are not really of any great assistance to us. As is not unexpected the greatest delays are in the larger metropolitan areas of Melbourne and Sydney. From other information available it is known that the Law Authorities in both New South Wales and Victoria are concerned with the delays and are taking steps to minimise them. So far as Queensland is concerned the period of time between committal and trial is not really unreasonable, being in line with the situation in the smaller States. Indeed, recent procedural changes in placing the Supreme Court Criminal List under the control of a Judge, has reduced that period even further; in some instances there is, for all practical purposes, no delay at all. Unfortunately the statistics do not reveal, with the exception of Victoria, whether the average delay is occasioned by lengthy preparation required for complex cases or not. Nor do they assist us to come to any conclusion as to whether or not the delays would be lessened by introducing some other system then trial by jury for complex cases.

TABLE "B"

The next table, Table "B" sets out, State by State, the percentage of convictions and acquittals upon actual trials by juries where these statistics are available.

Two significant features seem to emerge from these figures. The first of these is that in the States where the figures are available (N.S.W. and Victoria) they show that the percentage of convictions of persons tried is markedly higher in the Supreme Court in each State than in the District or County Court. This statistical result, in our view, accords with the experience of those who have practised to any extent in the criminal jurisdiction. Apart from the standing of the tribunal there may be a number of reasons for this. Generally speaking, crimes which are dealt with by the Supreme Court are generally those

of a much more serious or complex character than those tried in the District or County Court. Equally, they customarily carry heavier penalties. Experience would seem to indicate that a much higher quantum of proof is demanded in these cases before the indictments are filed. Further, both the preparation and prosecution in court are usually in the hands of more experienced persons in respect of prosecutions in the Supreme Court. However, to a considerable extent these considerations must remain speculative as there is no empirical data against which to test them.

The second significant feature is the high rate of acquittals before juries in all jurisdictions, but particularly in the District and County Courts. Leaving aside Queensland where the statistics show a quite erratic pattern the following situations appear to prevail.

In the Supreme Court of N.S.W. for the years 1979-1982 the percentage of acquittals ranged between 27% and 35%. In Victoria, between 1978-1982, with the exception of 1981 when the figures reached almost 41%, the percentage was similar i.e. 25% to 38%. In the District Court in New South Wales the percentage of acquittals is fairly steady at slightly over 44%. In Victoria the figure in the County Court is slightly under 47%.

When one takes an overall figure of acquittals in higher courts in all jurisdictions the average percentage of acquittals between 1978-1982 are as follows:-

Queensland	44.59%	(?)	N.S.W.	41-45%
Victoria	40-44%		Tasmania	27-41%
South Aust.	34-41%			

In Queensland, New South Wales and Victoria the verdict of the jury must be unanimous. In Tasmania and South Australia majority verdicts are permitted. Whether it follows from that fact, or not, it is to be noted that percentage of acquittals in the majority verdict States is significantly lower than in the States which require a unanimous verdict. There may, or course, be other factors operative to produce that result. We shall return to this subject later.

TABLE "C"

The statistics in Table "C" are of little if any help. We had hoped by a process of extrapolation between Tables "B" and "C" to be able to draw some conclusions as to the contrast, if any between the percentage of appeals lodged against conviction, or conviction and sentence, in relation to the number of trials held in the majority verdict States and in those States requiring unanimity. We had also hoped to be able to discover if there was any significant difference in the fate of appeals between the two regimes. This is rendered impossible not only by the dearth of actual statistics but even further by the lack of dissection of most of those that do exist. On the figures available the only comparison that could be made would be between the total number of appeals dealt with over a comparatively short period of time and the overall results of those appeals. As both of these sets of figures would largely deal with appeals against sentence only, they are of little significance in any attempt to set up any comparison of frequency and outcome of appeals between the two procedures.

Having given, in statistical form, a picture of the juries working in Australia, albeit in a rather limited form, we now direct our attention to some facets of the actual operation of the jury.

"TABLE 8"

PERCENTAGE OF CONVICTIONS AND ACQUITTALS UPON ACTUAL TRIALS

Date	Headings	Queensland		N.S.W.		Victoria		Tasmania		Sth Aust.		W. Aust.	Nth Terr.
					%		%	NO DISTRICT COURT	%				
1978	1. Number of actual trials Supreme Court, District or County Court	(NOTE - A warning accompanied the figures below that they were to be treated with caution because of reporting difficulties)				52 379		90				NO FIGURES AVAILABLE	NO FIGURES AVAILABLE
	2. Number of convictions Supreme Court, District or County Court					35 223	67.30 58.83	53	58.88				
	3. Number of acquittals Supreme Court, District or County Court	NO FIGURES AVAILABLE 1978				17 156	32.70 41.17	37	41.12				
1979	1. Number of actual trials Supreme Court, District or County Court	) 154)) 423) 577		))684		70 376		84		)) 306			
	2. Number of convictions Supreme Court, District or County Court	) 404)	70.01	))382	55.84	52 198	74.28 52.66	56	66.66	)) 183	59.80	NO FIGURES AVAILABLE	NO FIGURES AVAILABLE
	3. Number of acquittals Supreme Court, District or County Court	)) 173	29.99	))302	44.16	18 178	25.72 47.34	28	33.34	)) 123	40.20		
1980	1. Number of actual trials Supreme Court, District or County Court	) 188)) 268) 456		124 573		83 390		79		)) 367			
	2. Number of convictions Supreme Court, District or County Court	)) 251	55.04	84 325	67.74 56.71	51 224	61.44 57.43	47	59.49	)) 241	65.66	NO FIGURES AVAILABLE	NO FIGURES AVAILABLE
	3. Number of acquittals Supreme Court, District or County Court	)) 195	44.96	40 248	32.26 43.79	32 166	38.56 42.57	32	40.51	)) 125	34.34		
1981	1. Number of actual trials Supreme Court, District or County Court	) 222)) 225) 447		151 707		61 367		86		)) 358			
	2. Number of convictions Supreme Court, District or County Court	184	41.16	98 390	64.90 55.16	36 196	59.01 52.58	62	72.09	)) 226	63.12	NO FIGURES AVAILABLE	NO FIGURES AVAILABLE
	3. Number of acquittals Supreme Court, District or County Court	)) 263	58.84	53 317	35.10 44.84	25 177	40.99 47.42	24	27.01	)) 118	36.88		
1982	1. Number of actual trials Supreme Court, District or County Court	No reliable figures for this year		636		400				) 378			
	2. Number of convictions Supreme Court, District or County Court			100 350	72.99 55.03	59 208	74.68 52.00	48	72.72	)) 223	58.99	NO FIGURES AVAILABLE	NO FIGURES AVAILABLE
	3. Number of acquittals Supreme Court, District or County Court			37 286	27.01 44.97	20 192	25.32 48.00	18	27.28	)) 145	41.01		

"TABLE C"

APPEALS DEALT WITH BY COURTS OF CRIMINAL APPEAL

Year		Queensland	N.S.W.	Victoria	Tasmania	South Australia	Western Australia	Northern Territory
1978	1. Total number of appeals (including appeals against sentence only)		272	243	14			
	2. Appeals against conviction only		20	)	)			
	3. Appeals against conviction and sentence	No	74	)95	)N/A	No	No	No
	4. Appeals dismissed	Figures	135	112	13	Figures	Figures	Figures
	5. Appeals abandoned	Available	70	40	)	Available	Available	Available
	6. Conviction varied		22	15	) 1			
	7. Sentence varied		45	22	)			
	8. Other		1	3				
1979	1. Total number of appeals (including appeals against sentence only)		298	217	3			
	2. Appeals against conviction only		44	)				
	3. Appeals against conviction and sentence	No	86	)66	N/A	No	No	No
	4. Appeals dismissed	Figures	139	104	2	Figures	Figures	Figures
	5. Appeals abandoned	Available	64	29	)	Available	Available	Available
	6. Conviction varied		30	9	) 1			
	7. Sentence varied		63	40	)			
	8. Other		2	5				
1980	1. Total number of appeals (including appeals against sentence only)		293	241	5	74		
	2. Appeals against conviction only		35	)				
	3. Appeals against conviction and sentence	No	79	)69	N/A	N/A	No	No
	4. Appeals dismissed	Figures	140	128	1	59	Figures	Figures
	5. Appeals abandoned	Available	65	14			Available	Available
	6. Conviction varied		14	18	)	)		
	7. Sentence varied		77	45	) 4	)15		
	8. Other		4	9	)	)		

"TABLE C" - continued

Year		Queensland	N.S.W.	Victoria	Tasmania	South Australia	Western Australia	Northern Territory
1981	1. Total number of appeals (including appeals against sentence only)		343		16	90		
	2. Appeals against conviction only		36		)	)		
	3. Appeals against conviction and sentence	No Figures Available	61	No Figures Available	)N/A))	)N/A))	No Figures Available	No Figures Available
	4. Appeals dismissed		191		15	15		
	5. Appeals abandoned		65		N/A	N/A		
	6. Conviction varied		10		)	)		
	7. Sentence varied		69		) 1)	)16)		
	8. Other		8		N/A	N/A		
1982	1. Total number of appeals (including appeals against sentence only)				18	47		
	2. Appeals against conviction only				)	)		
	3. Appeals against conviction and sentence	No Figures Available	No Figures Available	No Figures Available	)N/A))	)N/A))	No Figures Available	No Figures Available
	4. Appeals dismissed				10	32		
	5. Appeals abandoned				N/A	N/A		
	6. Conviction varied				)	)		
	7. Sentence varied				) 8)	)15)		
	8. Other				N/A	N/A		
1983	1. Number of appeals	No Figures Available	No Figures Available	No Figures Available	5	No Figures Available	No Figures Available	No Figures Available
	2. Number dismissed				3			
	3. Number abandoned				N/A			
	4. Number allowed				2			
1984 1st Jan to 31st March	1. Number of appeals	41	No	No	5	No	No	No
	2. Number dismissed	18	Figures	Figures	3	Figures	Figures	Figures
	3. Number abandoned	10	Available	Available	N/A	Available	Available	Available
	4. Number allowed	11			2			

THE OPERATION OF THE JURY - CHALLENGES

The first of these, chronologically speaking, also the subject of much discussion and some legislative change is the system of "challenges", particularly in respect of challenges to the polls i.e. to the individual juror. We shall say nothing here of challenges to the array i.e. the whole panel, these being of very rare occurrence.

Speaking strictly, the right of "challenges" is that of the accused. The similar right in the Crown is that of standing by, or standing aside, jurors, although in some Australian jurisdictions the term "challenge" is used to apply to both the Crown and the accused.

Both of these rights are of ancient historical origin and, in most common law jurisditions are now contained in various statutes. Historically the almost correlative right of challenge with trial by a form of jury may be illustrated as far back as early Roman law. In an article entitled "Stand By for the Crown' An Historical Analysis" in 1979 Criminal Law Review p. 272 Mr J.R. McEldowney says at p. 273:

> "...the challenging of jurors was probably borrowed from the Roman law for it was in use among the Romans. The Lex Servilia, 104 B.C., enacted that the accusor and accused should severally propose 100 Judices and that each might reject 50 from the list of the other, so that 100 would remain to try the alleged crime."

Certainly in the common law, as we saw when dealing with the history of the development of the petty jury the right of the accused to challenge the presence of "indictors" on the trial jury was one of the keys to the establishment of the jury as a judicial body charged with trying the facts impartially from evidence given by witnesses. The right of peremptory challenge

i.e. without having to show cause, has remained as part of criminal procedure since that time but in most jurisdictions has now been considerably limited by statute, as we shall see. There is also a right in both the accused and the Crown to challenge individual jurors for cause upon certain prescribed grounds, generally without numerical limitation.

The historically developed right of the Crown to stand by or to stand aside an unlimited number of jurors has been a matter of some contention over recent years. In England, at Common Law the Crown had an unrestricted right of peremptory challenge. This unlimited right has been gradually undermined by statute and by the 15th century it was general practice that the Crown was bound to justify its challenges after the whole panel had been gone through. It was out of this situation that the practice developed of directing jurors to stand by for the Crown. Now, in some Australian jurisdictions this right has been further limited to confine the Crown's right to stand aside to the same numerical level as the accused's number of challenges. It will be noted that Australian jurisdictions are fairly evenly divided in this regard.

Three matters call for general comment in respect of challenges.

The first of these relates to the question of representativeness. The ideal jury is, in theory, to be composed of a group of people representative of the wider community, selected at random and disinterested as to the parties and the issues between them. To quote the Morris Committee Report of 1965 (Cmnd 2627):

> "It is..inherent in the very idea of the jury that it should be as far as possible a genuine cross-section of the adult community" see para 50.

In theory, at least, the attempt to control the ultimate composition of the jury by eliminating persons believed to be unfavourable to one, or the other side, derogates from that ideal.

Whether in fact challenging or standing by does have a bearing on the ultimate verdict or not is the second matter for comment. Unfortunately there is no empirical evidence in Australia from which we can decide whether jury composition is related to verdict. In England and America various studies and examinations have been carried out on this subject but in most instances the results have to be treated with some reserve as they were derived from using simulated juries.

However, surer assistance can be derived from an extensive study carried out by Messrs John Baldwin and Michael McConville, lecturers at Birmingham University in England. Their research was principally concerned with the evaluation of jury verdicts in the Birmingham Crown Court over a 21 month period in 1975 and 1976. During that time they collected, and analysed, background information on the 3,912 jurors (members of 326 juries) who heard cases in the Crown Court during that period. As to the relationship between the composition of a jury and verdict they examined three important areas viz. sex, age and social class or occupational background. In respect of each of these they found no significant difference in verdicts whatever the mix of jurors. Their conclusion is interesting and probably applies with more force to Australian than to English juries. In an article published in "Judicature" of September 1980 p. 133 the learned authors say at p. 139:-

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> "Our study shows that, as far as juries in Birmingham are concerned, the ideal of the jury being a cross-section of the community at large is only partly achieved. While these distortions are disturbing, it is reassuring to discover that, so far as we were able to tell, social composition per se produced no significant variation in verdicts. One explanation for this finding might be the heterogeneous character of English juries, which appears to produce verdicts reflecting more the unique social mix than the broad social characteristics of the individuals on the panel."

Despite this the right of challenge has an entrenched place in criminal procedure, even if its advantages may be more psychological than real. One view is put by the learned authors of an article in 6 Criminal Law Journal, 138, on the subject of jury vetting in which they say:-

> "the existence of the challenge is, in theory at least, designed to avert the possibility of an imbalance of interest on any particular jury. However, if the peremptory nature of these challenges is true and they are merely based on such issues as the sex, race, appearance and demeanour of the perspective juror, then such justification seems rather casually exercised."

Its purpose is more sympathetically expressed in a report of the Law Reform Commission of Canada entitled "The Jury in Criminal Trials". At p. 54 of the report the Commission says:

> "The peremptory challenge has been attacked and praised. Its importance lies in the fact that justice must be seen to be done. The peremptory challenge is one tool by which the accused can feel that he or she has some minimal control over the make-up of the jury and can eliminate persons for whatever reason, no matter how illogical or irrational, he or she does not wish to try the case."

From a practical point of view, then, the challenge is such an inherent feature of the criminal trial that it ought to be retained. However, equally, it ought to be kept within reasonable bounds as it is in most jurisdictions by statute. In this regard there is one feature of the procedure in Queensland which calls out for attention and in our view ought to be remedied. As will be seen from a brief glance at the practice in other Australian juisdictions, Queensland has a unique feature in respect of challenges and stand bys. This is the practice of both sides having two opportunities to challenge or stand by, the first occasion being without limit in number on either side. A brief look at other legislation indicates the following:

In New South Wales, by s.43 of the Jury Act 1977 both the Crown and the accused have the same number of peremptory challenges. These are:-

(a) Capital offences and murder - 20 challenges

(b) All other offences - 8 challenges.

The Crown has no right of unlimited standbys. Each party has one opportunity only to challenge or stand by.

In Victoria, by s. 34 of the Jury Act 1967 the accused has 20 challenges in capital offences and 8 in others. The Crown has an unlimited right of stand asides until the panel is exhausted after which it must show cause. Again there is only one opportunity to challenge or stand aside.

In Tasmania, by s.54 of the Jury Act 1899 each person arraigned has 6 peremptory challenges. By s.55 the Crown has unlimited stand asides until the panel is exhausted. Again there is only one opportunity for each party to challenge or stand aside.

In South Australia, by s.61 and 62 of the Juries Act 1927-1974 each party has the right to 3 challenges only. There is no right in the Crown of stand asides without cause. Here also there is one opportunity only for each party.

In Western Australia, by s.36(2) of the Juries Act 1957-1981 the Crown has an unlimited right to stand aside until the panel is exhausted. By s.38(1) the accused has the right to challenge peremptorily 8 jurors, but on the joint trial of 2 or more persons, those jointly charged have 6 challenges each. By s.38(2) the Crown may challenge 8 jurors peremptorily and, in addition may pray for an order to stand aside four more. Again only one opportunity is afforded to the parties to exercise these rights.

In the Northern Territory, by s.43 of the Juries Act the Crown has the right to stand aside only six jurors. By s.44 the accused may challenge twelve in capital cases and six in others. Again these rights are confined to one occasion.

In the A.C.T., by s.33(1) of the Juries Ordinance 1967 the Crown has an unlimited right to stand by until the panel is exhausted. By s.34(1) and (2) the Crown and the accused have the following right to challenge:-

(a) A capital offence - 20 peremptory challenge

(b) Other offences - 8 peremptory challenges

(c) Unlimited challenges for cause.

Here also these rights are confined to one occasion.

In these circumstances there seems no logical reason why the present Queensland practice of the double opportunity to challenge should be persisted with. It can only waste time and be a possible cause of unnecessary affront to members of the jury panel if they are challenged or stood aside in considerable numbers. In the interest of efficiency and respect for the criminal procedure, it is suggested that the Jury Act be amended to eliminate this procedure. In any event it would seem that the practice of the double opportunity to challenge seems originally to have grown up without a strict legislative basis. In the case of R. v. Johnstone St. R. Qd. 1907 p.155 at p.164 Real J. said in referring to an earlier similar section:-

"In point of fact, the provisions of that section have never been absolutely followed by the Court, for the Court has always allowed, on the first calling of the jury panel, both the Crown and the prisoner to stand aside any juror; that is to say it has always allowed both the peremptory challenges of the prisoner, and the challenges for cause of the Crown to be deferred until the names have been once called. If a jury is not obtained on the first calling, the names are called a second time. The cards are kept in the same order as they were drawn from the box, and consequently on the second calling the names appear in the same rotation. On this calling, challenges may be exercised by the prisoner, and he may challenge peremptory or for cause. The challenge for cause may indeed be made at any time, and the validity of the cause is at once tried. The Crown Prosecutor is again allowed to order any juryman to stand by. After the panel had been gone through, the names of those challenged peremptorily or against whom good cause was shown, are set apart from the others, and are not called again, but the order of the remaining names is still otherwise preserved, and, if necessary, these names are then called for the third time".

The present relevant Queensland legislation is contained in the Jury Act 1929-1982 and in the Criminal Code. The respective provisions are:-

Jury Act.

"Section 32(1) When any trial or any issue joined on any indictment or in any civil action or other civil proceeding shall be brought on to be tried in any Court the proper officer shall mix the cards within the box, and shall then, according to the practice of the Court, proceed to draw cards, one after another, out of the box and call aloud the name on each card until the full number of jurors appears and remains approved as indifferent:

Provided that he shall proceed as aforesaid until all the cards in the box have been drawn out unless the full number of jurors has been sooner approved. The cards bearing the names of such jurors as have then been approved shall be set apart by themselves. The cards bearing the names of all the remaining jurors shall as they are drawn out be set aside. If, when all the cards have been so drawn out, the full number of jurors has not been approved, such number or the remaining jurors as the case may require, shall be obtained in the manner following:- The officer shall return to the box all the cards bearing the names of all the remaining jurors which have been set aside as aforesaid, and shall mix the cards within the box, and shall then proceed to draw cards one after another out of the box and call aloud the name on each, and the respective parties may exercise the right of challenge of jurors hereinafter mentioned, until the full number of jurors remain approved as aforesaid.

It shall be the duty of the proper officer on each day on which a panel of jurors attends the Court to notify the sheriff forthwith in writing of the number and names appearing on the panel of those jurors who -

(a) have been empanelled on a jury;

(b) have been excused from attendance at the sittings and the period of such excusal; or

(c) have failed to attend and if fined for non-attendance, the amount of the fine,

and furnish to the sheriff in writing details of every order made for replacement of any juror excused and the date upon which the remaining jurors have been directed to again attend the Court."

"Section 33 The law in the case of criminal trials respecting notice to an accused person of his right of challenge, and challenge to the array and to individual jurors for cause, and the time for challenging, and the ascertainment of facts as to challenge, and the swearing of the jury and informing them of the charge, and the discharge or incapacity of a juror, and the separation and confinement of the jury, and view by the jury, and special and general verdicts, and the discharge of the jury, is set forth in The Criminal Code."

"Section 35(1) In all civil trials each of the parties who appears in person or appears by a separate counsel or solicitor shall be admitted to challenge peremptorily a number equal to one-half of the jury.

(2) Every person arraigned for any treason shall be admitted to challenge peremptorily to the number of twenty-three.

(3) Every person arraigned for murder shall be admitted to challenge peremptorily to the number of fourteen.

Every person arraigned for any other crime or for misdemeanour shall be admitted to challenge peremptorily to the number of eight.

(3A) Where the Court has directed that a reserve juror or reserve jurors be chosen and returned, the person arraigned shall be admitted, in addition to the number hereinbefore prescribed, to challenge peremptorily to the number -

(a) where one reserve juror is to be chosen and returned, of one;

(b) in any other case, of two.

(4) Every peremptory challenge above the number herein mentioned shall be void, and the trial shall proceed as if no such challenge had been made."

Criminal Code.
"Section 608 When an accused person has demanded to be tried by a jury, the proper officer of the Court is to inform him in open court that the persons whose names are to be called are the jurors to be sworn for his trial, and is further to inform him that if he desires to challenge any of them he must do so before they are sworn."

"Section 611 An objection to a juror, either by way of peremptory challenge or by way of challenge for cause, may be made at any time before the officer has begun to recite the words of the oath to the juror, but not afterwards."

The amendment to streamline the procedure could be simply effected by repealing the proviso to section 32(1) and inserting before sub-section (1A) a new subsection (1AA) in the following terms:-

"(1AA) Every person arraigned shall be admitted to challenge jurors peremptorily only in accordance with sections 33 and 35".

We recommend that this amendment be made.

The Commission also believes that the practice relating to challenges needs further modification in respect of the number of challenges where a number of persons are tried jointly. It is the view of the members that the present practice of each of the accused having his full quota of eight challenges and the Crown having the right to stand by the total number of the accused's challenges is unnecessarily cumbersome and time consuming. Accordingly, we recommend that in the case of joint trials the number of the accused's peremptory challenges be reduced to six each with the Crown being confined to stand by a total of eight only of the potential jurors.

This modification could be achieved by two slight amendments. Firstly, by amending subsection (3) of section 35 of the Jury Act in the following fashion. In the second paragraph after the word "eight" delete the full stop, insert a comma and add the words "except where more persons than one are jointly arraigned in which case each of those persons may challenge peremptorily six jurors".

Secondly, subsection (1A) of s.32 should be amended by omitting all the words after the word "arraigned" in the last line and substituting in lieu thereof the words "a total number of eight".

Criminal Procedure

Having completed the mechanics of choosing the jury, as it were, we now look briefly at some possible modifications of criminal procedure which bear upon the matters decided by the jury.

Apart from the suggestion of summary jurisdiction for specified offences, as considered at p.87 et.seq., ante, another important aspect of criminal procedure looms large. That is the matter of amending the rules for practices of criminal procedure generally to provide machinery to identify the essential elements in issue and avoid the unnecessary attendance of witnesses or production of exhibits at the trial itself and unnecessary delays and interruptions to the trial before the jury.

We have considered this matter at some length. In the process we have had regard to numbers of proposals for rules establishing and governing pre-trial procedures. On the face of them some of these have much to recommend them. Among such is the experimental scheme introduced, in October 1974, at the Central Criminal Court in England. The rules relating to this experimental procedure are set out as Appendix 27 to the Law and Procedure Volume of the report of the Philips Commission (H.M.S.O. Cmnd. 8092-1). The scheme includes fairly elaborate rules for pre-trial hearings in Chambers and public hearings in Court designed to narrow the issues, avoid waste of time and unnecessary appearance of witnesses.

In other jurisdictions less complicated rules have been proposed. However, in each case, the difficulty lies in the practical application of suggested innovations. This difficulty is aptly expressed in a comment by the English Lord Chancellor's Department upon the scheme referred to in the first paragraph above. Paragraph 4 of the appendix referred to reads as follows:-

> "It is difficult to assess the proportion of cases in which a pre-trial review would produce worthwhile savings. To be worthwhile, the savings achieved on preparation and trial work must naturally exceed the additional cost of the review itself. On this basis, the proportion of cases in which worthwhile savings would be achieved is likely to be relatively small. For example, in the first six months of

> 1978, 23.5 per cent of all contested trials in the Crown Court lasted for less than three hours, and 70 per cent lasted for less than nine hours. Some savings might be achieved if a two-day case (approximately ten hours) were reduced to one day or even 1.5 days, but these would be small given the cost of the pre-trial review itself. Consequently, it is probably only in cases likely to last more than two days that the pre-trial review would generally be an economic proposition, as the daily sums of money involved are greater and there is a real possibility of significanty savings in time."

The dilemma proposed by the Lord Chancellor's Department has proved to be a very real one as advised to one of our members who earlier this year spoke to members of that Department in the course of a visit to London. The information he there received indicated that considerable practical difficulties had arisen in the day to day operation of the scheme. In general terms it was not working well nor living up to expectations. This situation has been subsequently confirmed by the Full Time Member of the Commission when he spoke to the Lord Chancellor's Office when in London recently. The position has, if anything, deteriorated.

However, apart from the English experience quite a number of other jurisdictions, pressed with the urgent need to eliminate delays and unnecessary costs in trials have made, or considered, proposals for some kind of pre-trial procedure. The major problem is to arrive at a system which will effectively narrow the issues for trial by the jury so as to save time and expense yet not create other expensive and delaying procedures which would defeat the object of the exercise. The difficulty is to establish machinery that is at once effective yet simple and flexible.

Among other overseas jurisdictions which have undertaken extensive research on the subject and advanced tentative proposals are the United States and Canada. In the case of the former the American Bar Association and the United States National Advisory Commission On Criminal Justice Standards and Goals have both publishec exhaustive and detailed subjects on the matter. In Canada, in 1974, the Law Reform Commission published its Working Paper on Discovery recommending extensive prosecution disclosure to the defence, the abolition of committal proceedings and a formal pre-trial discovery procedure. Scotland is another jurisdiction which has been active in this field. The United States and Canadian reports both recommend extensive discovery provisions and fairly elaborate pre-trial procedures but do not seem to this Commission to be jurisified in Queensland.

In Australia, also much work has been done in the area and various recommended for reform advanced. In some cases new procedues have been adopted. In South Australia, in 1981, amendments were made to both the Criminal Law Consolidation Act, 1935, and the Rules of the Supreme Court Criminal Jurisdiction to provide for pre-empanellment and pre-trial proceedings. The latter provide for quite formalised pre-trial conferences presided over by a Judge who is not necessarily the Trial Judge. The amendment to the Act which provides for certain questions of law being determined before the jury is empanelled is, we believe, an important one and we shall refer to it again.

In the A.C.T., also in 1981, a directions hearing system was established by Rules of Court in the Supreme Court of the A.C.T.. The essence of that system is a hearing at which the Judge puts a series of questions to the Crown and to the defence. The questions forming the agenda for such a hearing are appended to this report as Annexure D.

In Victoria, in 1984, a similar approach to the problem was adopted as that in South Australia. Firstly, by an amendment to the Crimes Act (Vic.) (new s.391A) provision was made for the trial court, after arraingment but before empanellment, of the jury to "...hear and determine any question with respect to the trial of the accused person which the court considers necessary to ensure that the trial will be conducted fairly and expeditiously. Secondly, by two identical sets of pre-trial procedure Rules, one for the Supreme Court and one for the County Court, provision was made for pre-trial hearings. In a Schedule to the Rules provision is made for a similar menue of questions as in the A.C.T. proceedings. These are appended hereto as Annexure E.

In the light of all these activites, and despite the discouraging lack of success with the English scheme, we believe that it is critical that some steps be taken to minimise costs and delays by narrowing the issues to be tried by the jury. We see much merit in the A.C.T. and Victorian pre-trial procedures involving the agenda of questions designed to isolate and overcome, where possible, problems of evidence and procedure which may be the source of delays and additional costs at a later trial. However, in Queensland, we already have the situation of a Judge being in charge of listing criminal trials as envisaged by the A.C.T. and Victorian amendments. That being the case it is the opinion of the Commission that, rather than enact a formalised procedure or create a formalised occasion upon which to put the questions referred to, the same end can be achieved just as effectively, and more simply and less expensively, by enabling the listing Judge, at his discretion, to make the same or similar enquiries.

However, we do not believe that even that innovation is adequate to meet the prolems of delay and inconvenience. Further steps are needed to be taken to avoid some of the more critical causes of delay on trial such as, for example voir dire hearings on the admissibility of evidence. As a positive step towards this end we recommend an amendment to the Criminal Code which would insert a section in terms similar to s.285a of the South Australian Criminal Law Consolidation Act and s.391A of the Victorian Crimes Act. Modified to adapt to the Queensland sitution it would be in the following terms:

Proposed Amendments to Criminal Code

596A(1) A Court before which an indictment has been presented may, if it thinks fit, hear and determine any question relating to the admissibility of evidence, and any other question of law or procedure, including the matter of discovery by the parties, afecting the conduct of the trial before the accused person is arraigned or a jury empanelled.

(2) The Court may direct counsel for the Crown and the defence to confer either in or out of th presence of the Court for the purpose of deciding whether any step should be taken or sought to be taken under subsection (1).

(3) The trial is deemed to begin and the accused person is deemed to be brough to his trial upon the commencement of proceedings referred to in subsection (1).

(There would need to be a consequent amendment to section 594. At the beginning of the second paragraph of that section it would be necessary to inser the words "Subject to the provisions of subsection (3) of section 596A...")

We are of the opinion that, coupled with our recommendations as to streamlining committal proceedings, and the introduction of majority verdicts in the trial of indictable offences, these fairly modest adjustments to criminal procedure could result in significantly reducing waste of time and expense, without jeopardising the rights of the accused.

MAJORITY VERDICTS

The penultimate matter for consideration under this reference is the question whether the present requirement in Queensland of unanimity of decision by criminal juries should be maintained or should be replaced by majority verdicts as is the case in England and some other Australian States.

In real terms this can only be a policy decision as we have seen that no empirical assistance can be derived in this area from the statistics available.

So far as Queensland is concerned, this subject was exhaustively considered by the Law Reform Commission in 1977 (as part of an exercise on proposals to amend the practice of Criminal Courts). At the stage of the Working Paper (QLRC W19) the Commission recommended that the Criminal Code be amended to provide for majority verdicts. The machinery to effect this was the introduction of a new section 625A into the Criminal Code. However, in the interval between the working paper and the publication of the Final Report (QLRC 27), the Commission changed its mind and indicated that it did not persist with the proposal. In the Working Paper, in the course of considering figures relating to disagreements, the Commission said:-

> "In 1976, one criminal trial in a District Court lasted some 25 weeks. Fortunately, a verdict was reached in that case. If there had been a disagreement by the jury at the end of a trial of this length, the consequences could have been serious. The reputation of the jury system would have been damaged if the decision of ten of the jurors could not then have been taken to conclude the case. We believe that it would generally be better to take the verdict of ten jurors in such circumstances rather than to insist upon a new trial in an attempt to achieve unanimity."

In the course of giving its reasons in the Final Report for withdrawing its proposals to provide for majority verdicts, the Commission said:-

> "Developments might occur in the future that make such a change desirable. However, until they do occur or until there is a strong prospect that they will occur, we are unable to recommend that the change be made."

We believe that developments have occurred which now tip the scale in favour of majority verdicts. These are the incidence of a number of long, complex and highly publicised trials which have occurred since the Commission's previous report dealing with majority verdicts. These have highlighted the serious difficulty that may occur, from the point of view from the community as a whole, from the insistence of majority verdicts where such complex or highly publicised trials are involved. We have in mind specifically the Russell Island case, the Gallagher trial and, to a lesser extent, the trial of Mr Justice Murphy and the Maher case.

In these trials the juries considered their verdicts for long periods. We are presented with a picture of the juries operating under immense pressure desperately endeavouring to arrive at a unanimous verdict. Trial Judges in these situations are placed in an extremely difficult position in their endeavour to balance the interest of the community in the resolution of the trial and the accused in a fair consideration of the case where the additional strain of having to arrive at what may amount to a forced unanimous verdict as imposed on the jury. The cost to the community of an aborted trial, and a re-trial are enormous whilst the added trauma upon the accused is also a matter of great concern. We believe that, in the context of present day trials, these are burdens that neither a community nor the accused should be expected to bear if they can be avoided. We are of the opinion that a change to majority verdicts will assist towards that end.

It is true in the Russell Island case there appear to be very particular circumstances which led to the discharge of the jury not the least being the particularly active role played by the sick juror in course of the trial. However, the jury had, at that stage, retired for over 13 days considering their verdicts. The possibility of a disagreement must have been a very real one. Had that occurred in a trial lasting some 20 months there is little doubt that the reputation of the jury system would have been seriously damaged. As it was, in circumstances that were far more sympathetic than a disagreement, the discharge of jury in that trial caused a storm.

In the Queensland Parliamentary Library, alone, there are at least 30 references to articles and discussions on the discharge of that jury. Numbers of them raised the question of the continued utility of the jury in the context of modern criminal trials.

In the Gallagher case a successful appeal was launched in the Court of Criminal appeal of Victoria based substantially on the pressures allegedly imposed by the Trial Judge on the jury to reach a unanimous verdict. The accused and the Victorian community are now faced with the trauma and expense of a new trial in the matter if the Government decides to proceed further.

In the Gallagher, Murphy and Maher trial members of the juries have spoken to the media detailing the pressures they were under to reach a unanimous verdict sometimes allegedly contrary to their personal convictions. This very activity is, in itself a most undesirable and reprehensible development.

Where, as happened in the Russell Island case the prospective cost of re-trial is so prohibitive that the re-trial is abandoned the community sees crime go unpunished by default. Whilst in some ways understandable this is both contrary to principle and completely inimical to the community's interest.

We are of the opinion that these events more than adequately tip the balance if favour of majority verdicts. We believe that consideration of justice and the overriding interest of the community in a speedy and final determination of serious criminal matters requires the taking of any reasonable step to achieve this. We believe that fairness to an accused demands no less. As we said the introduction of majority verdicts is a step towards this end.

Whilst there is no guarantee that a majority decision of 10 jurors would entirely obviate a disagreement in such a case it must considerably lessen the possibility of that event. In the circumstances we now believe that the Commission's recommendation in QLRC W19 should be adopted and a new section 625A be inserted in the Criminal Code.

The analysis of the arguments for majority verdicts by the Commission in 1977 were so thorough that there is no point served by advancing new ones. Accordingly, that part of QLRC W19 dealing with this subject is cited in full, together with a draft of the proposed amending section. We approve the arguments, and decision, and recommend the draft section.

"PART IX - MAJORITY VERDICTS

The proposed new s.625A of the Criminal Code, set out in the Draft Bill, would allow majority verdicts to be given at criminal trials in Queensland in certain circumstances. Queensland has inherited from the English common law the rule that the verdict of a jury must be unanimous. The rule does not apply without exception to civil trials: Jury Act 1929-1976 s.42. However it continues to apply without any exception to criminal trials. The time has come, in our opinion, to review it.

It cannot be said that there is an overwhelming case for modifying the rule that the verdict of the jury at a criminal trial be unanimous. Nevertheless, the unanimity rule should be examined to ensure that the jury system remains in good standing within the community. There is nothing sacrosanct about the role played in juries in criminal trials. The jury system will remain only so long as the public has confidence in the way it works. Its survival in the long run may depend upon timely alterations being made to its method of working. In Queensland and elsewhere, an increasing emphasis is being placed on trial procedures that do not involve a jury. As an English commentator has remarked, one of the most significant developments in the administration of criminal justice over the last hundred years has been the extension of the trial jurisdiction of the lower courts: D.A. Thomas, "Committals for Trial and Sentence - the Case for Simplification" [1972] Crim.L.R.477. In the last three

years, the Queensland Parliament has itself increased the number of occasions when indictable offences may be dealt with summarily by Magistrates Courts. See the Criminal Code and the Justices Act Amendment Act 1975 and the Criminal Code Amendment Act 1976. There is no reason to suppose that the growth of lower-court jurisdiction has come to an end.

These developments are unexceptionable and probably inevitable. However they do call for a close examination of the jury system to see whether any changes are desirable. It would be a pity to see the jury system wither away by default.

The unanimity rule has been an ingredient of the common law for over 600 years. The reasons for its development in England are far from clear. Indeed, the opinion has been expressed that the rule arose more out of accident than by design : D.M. Downie, "And is That the Verdict of Your All?" (1970) 44A.L.J.482 at p.484. The desirability of such a rule would have been more evident in earlier times in England when there were many capital offences and the death penalty was frequently carried out. A reluctance to impose the sentence of death where there had been dissentients on the jury would be understandable. However, the death penalty was virtually abolished in England by the Murder (Abolition of Death Penalty) Act 1966. It seems to us significant that less than two years after the passage of this Act, the English Criminal Justice Act 1967, s.13 allowed majority verdicts to be given by juries in criminal proceedings. Thus the rule requiring unanimity came to an end in its homeland six centuries after it had come into existence.

This change in sentiment toward the unanimity rule is especially significant. Changes in the law of England need not necessarily be adopted in countries that still retain the English rules of law. However, the unanimity rule has been a characteristic feature of the English common law for centuries. It has never thrived in countries whose law is not derived from the common law. (Even in Scotland, majority verdicts have been permitted in criminal proceedings for many years.). The modification of the unanimity rule in England is a striking circumstance that calls for a re-examination of the rule elsewhere to see whether it is thoroughly in keeping with the times.

Changes in sentiment toward the unanimity rule have not been confined to England. Indeed the rule was modified by three Australian States before it was modified in England. South Australia allowed majority verdicts in criminal trials in 1927, Tasmania in 1936 and Western Australia in 1960. Significantly, in each of these three States capital offences were excepted from the general provisions relating to majority verdicts. In the United States, five years after the passage of the English Act, the Supreme Court in Apodaca v. Oregon (1972) 406 U.S.404 held that a state law that allowed a less than unanimous verdict in a non-capital proceeding did not violate the right to trial by jury specified by the United States Constitution.

It is true that expressions of opinion in favour of the unanimity rule have been made by well-known commentators and jurists. H.V. Evatt said "Where there is a dissent in an important criminal case, it is almost impossible to expect silence upon the question after the verdict is pronounced. In other words the dissenters will probably state openly what their opinion is." R.G. Menzies said "When you have a unanimous verdict given by a jury in a proceeding by the Crown against a citizen it induces in the minds of the ordinary citizens a feeling of confidence in the administration of the law, and that is worth a great deal to society. When you depart from that and 10 people out of 12 find

a man guilty or innocent you build up a world of uncertainty and speculation." However these views were expressed in 1936 when capital punishment was still an important feature of the criminal law in Australia. See "The Jury System in Australia" (1936) 10 A.L.J. Supplement p.49. We suggest that they should not be given the same weight today that they were given then. The same may be said of the views expressed by P. Devlin in his book Trial by Jury (1966). He wrote (at p.57) :

> The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissentient were overruled. Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming.

However, this was written at the end of the long era of capital punishment in Britain before the changed circumstances could assert themselves. As things turned out, majority verdicts were introduced in England only one year after this was written.

From the practical point of view, the most important argument in favour of majority verdicts is that they will reduce the number of cases where jury disagreement prevents a verdict being given. In calendar years 1974, 1975 and 1976, 4.1 per cent of criminal trials in the Queensland Supreme Court and District Courts ended in disagreement by the jury. Although this percentage is relatively small, the absolute number of trials that were thus rendered futile during these three years was 51, a substantial figure. Moreover, criminal trials vary greatly in length. In 1976, one criminal trial in a District Court lasted some 25

weeks. Fortunately, a verdict was reached in that case. If there had been a disagreement by the jury at the end of a trial of this length, the consequences could have been serious. The reputation of the jury system would have been damaged if the decision of ten of the jurors could not then have been taken to conclude the case. We believe that it would generally be better to take the verdict of ten jurors in such circumstances rather than insist upon a new trial in an attempt to achieve unanimity.

A rule that allows less than unanimous verdicts will not eliminate jury disagreements altogether. American statistics suggest that majority verdicts of the kind we contemplate would reduce the number of disagreements by about 45 per cent : Kalven and Zeisel, The American Jury (1966), p.461. Nevertheless, this would be a substantial reduction, especially if it includes a number of complex and protracted trials. With the ever increasing complexity of modern life, it is likely that such trials will increase in number in the years to come. It is important that the jury system should be able to cope with them. If the jury system cannot meet the needs of a more complex world, the jurisdiction of courts functioning without juries is likely to grow.

Details of the Proposed New s.625A

(1) Subsection (1) permits a majority verdict to be taken provided it has been agreed upon by not less that ten of the jurors and provided the other conditions specified are met. In our opinion, the agreement of at least ten jurors should be necessary in all cases. Generally, a criminal trial is had before a jury of twelve : Jury Act 1929-1976 s.17; Supreme Court Act of 1867 s.25; District Court Act 1967-1976 s.63. Where the twelve have not agreed upon a verdict, subs. (1) would allow the decision agreed upon by eleven or ten of them to be

taken as the verdict. It must also be noted that a criminal trial may proceed though the original number of twelve jurors has been reduced by the death of a juror or the incapacity of a juror to continue to act, provided that at least ten jurors remain : Criminal Code s.628. Where a trial proceeds with eleven jurors, who have not agreed upon a verdict, subs. (1) would allow the decision agreed upon by ten of them to be taken as the verdict.

We have not allowed for a majority verdict where a trial proceeds with only ten jurors. In such a case, a unanimous verdict would be necessary. In England and South Australia, the decision of nine jurors may be taken as the verdict where the trial has proceeded with ten jurors : Eng. Juries Act 1974 s.17 (which now contains the provisions formerly contained in the Criminal Justice Act 1967 s.13); S.A. Juries Act 1927-1976 s.56. In Western Australia and Tasmania, the agreement of at least ten jurors is always necessary : W.A. Juries Act 1956-1976 s.41; Tas. Jury Act 1899 s.48.

(2) Subsection (2) provides that the Court shall not accept a majority verdict unless the jury have had such period of time for deliberation as the Court thinks reasonable having regard to the nature and complexity of the case. The Court shall in any event not accept such a verdict unless it appears that the jury have had at least two hours for deliberation. Such a provision is necessary to ensure that a majority of ten, once formed, does not ignore the arguments of the minority. Our provision is derived from the English Juries Act 1974 s.17(4), which slightly modified the earlier provision of the Criminal Justice Act 1967 s.13(3). In South Australia, Western Australia and Tasmania the time prescribed for deliberation is specified as at least four hours, three hours and two hours (in ordinary cases) respectively.

(3) Subsection (3) excludes from the general majority verdict provision the verdicts of guilty of treason, murder and the crimes defined in the second paragraph of s.81 and in s.82 of the Criminal Code. For each of these offences, the Criminal Code specifies the penalty of imprisonment with hard labour for life, which cannot be mitigated or varied under s.19 of the Code. We have reached the conclusion that a person ought not to be convicted of any of these offences upon a majority verdict.

However, the matter is debatable. Somewhat analogous provisions are to be found in the legislation of South Australia, Western Australia and Tasmania though not that of England (above). It is not necessary to make provision for capital offences. Capital punishment was abolished by the Criminal Code Amendment Act of 1922 of the Queensland Parliament and, in relation to the laws of the Commonwealth, by the Death Penalty Abolition Act 1973 of the Commonwealth Parliament."

New s.625A. The Criminal Code is amended by inserting after section 625 the following section:-

"625A. Number of jurors required to agree on verdict

(1) Where the jury on the trial of an accused person have retired to consider their verdict and have not arrived at a unanimous verdict, the decision agreed upon by not less that ten of the jurors shall, subject to this section, be taken as the verdict given by the jury

(2) The Court shall not accept a verdict given by virtue of subsection (1) unless it appears to the Court that the jury have had such period of time for deliberation as the Court thinks reasonable having regard to the nature and complexity of the case; and the Court shall in any event not accept such a verdict unless it appears to the Court that the jury have had at least two hours for deliberation.

(3) Subsection 9(1) does not apply to -

(a) a verdict that the accused person is guilty of the crime of treason or murder or any of the crimes defined in the second paragraph of section 81 and in section 82; or

(b) any special finding upon which the accused would be convicted of any such crime.

(4) For the purposes of this section the term "verdict" includes any special finding made by a jury."

Amendment of s.626. Section 626 of The Criminal Code is amended by omitting the words "cannot agree as to the verdict to be given" and substituting the words "is unable to give a verdict".

Confidentiality of Jury Deliberations

Little need be said at this time by way of introduction to this topic. The deplorable activities of the media in interviewing jurors after the conclusion of the Murphy, Gallagher and Maher trials, followed by the sensational printing of the comments of some jurors, have seriously disturbed most people concerned with the administration of the criminal law and the preservation of the criminal jury. At a recent International Criminal Law Congress held in Adelaide these activites were almost universally condemned by a highly representative body of judges and practising criminal lawyers. The objection to publication of anything that transpires in the jury room was perfectly put by Lord Widgery C.J. in delivering the judgment of a Divisional Court in the case of Attorney-General v. New Statesmen [1981] 1 Q.B.1 where, at oo. 9-10, referring to references to this matter by members of the Court of Appeal in Ellis v. Deheer [1922] 2 K.B. 113, His Lordship said:

> "As the observations of these judges demonstrate, there are powerful arguments against breaching the secrets of the jury room. Serious consequences may flow from an approach to a juror, particularly after a trial which has attracted great publicity, followed by the publication of an account of what the juror had said about the discussion in the jury room. if not checked, this type of activity might become the general custom. If so, it would soon be made to appear that the secrecy of the jury room had been abandoned, and if that happened, it is not beyond the bounds of possibility that trial by jury would go the same way.
>
> The virtue of our system of trial by jury lies in the fact that, once the case is over and the jury has returned its verdict, the matter is at an end".

This problem has concerned most jurisdictions, giving rise to considerations for remedial legislation. In summary form the following paragraphs describe some of the approaches.

1. Canada

The relevant provision of the Criminal Code as enacted in 1972 is:-

Every member of a Jury who, except for the purposes of

(a) an investigation of an alleged offence under subsection 127(2) in relation to a juror; or

(b) giving evidence in criminal proceedings in relation to such an offence

discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.

A report entitled The Jury published in 1982 by the Canadian Law Reform Commission contained the following recommendation:

37. Every juror who discloses any information relating to the proceedings of the jury when it was absent from the courtroom, that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction, unless the information was disclosed for the purpose of:

> (a) an investigation of an alleged offence under this Act in relation to a juror acting in his capacity as juror, or giving evidence in criminal proceedings in relation to such an offence, or
>
> (b) assisting the furtherance of scientific research about juries which is approved by the Chief Justice of the Province.

In that Commission's view:

> "There is a dearth of scientific information about jury decision-making. If we are to continue to learn about the jury, and how it reaches its verdict, such information might be important. The exception will be used only to assist valid, scientific research and only with the permission of the Chief Justice of the relevant province.

It does not appear there has been any legislative action to put this recommendation into effect.

2. America

Some of the following information was derived from two articles by Professor Enid Campbell which appeared in(1985) 9 Crim. L.J. at pp.132 et seq and pp.187 et seq.

In the United States, post-verdict interrogation of jurors outside the courtroom has been sought to be controlled in two ways: by court-imposed regulation and by canons of professional ethics.

Any attempt at legislation to prohibit absolutely the interrogation of jurors after verdict is generally assumed contrary to the free speech guarantee of the First amendment to the Constitution which reads:-

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In Landmark Communications Inc. v. Virginia 435 U.S. 829 (1978), a case whose factual setting is strikingly analogous to the situation of jury-room disclosures, the court held that the first amendment forbids criminal punishment of strangers to confidential judicial disciplinary proceedings for the publication of truthful information about the proceedings. The mere determination by the legislature that such publications tended to impair effectiveness of and diminish public confidence in the process did not suffice to show a clear and present danger.

In Haeberle v. Texas International Airlines F. 2d Vol 739, p.1019 (1984) the Court of Appeals heard an appeal against an order denying an attorney leave to interview jurors in order to learn about the basis for their adverse verdict. The Appeals Court said (p.1021):

> "We have repeatedly refused to denigrate jury trials by afterwards ransacking the jurors in search of some new ground, not previously supported by evidence for a new trial.
>
> Weighty first amendment interests may be harmed by inhibiting the flow of information from jurors to public. To protect those interests we declared the denial of leave for a reporter to interview jurors unconstitutional in In re Express-News Corp 695 F 2D 807 (1982). That court observed: 'The public has no less a right under the first amendment to receive information about the operation of the nation's courts than it has to know how other govenment agencies work.

> Other countervailing considerations may under proper circumstances outweigh the press's instrumental first amendment rights. Among these considerations are the accused's sixth amendment right to a fair trial and the juror's interest in privacy and protection from harassment'."

According to Professor Campbell, op.cit. at p.193, United States courts have asserted an inherent jurisdiction to prohibit interrogation of jurors except by their leave and subject to their leave and subject to their supervision. In addition there are twenty-six federal districts where the courts' perogative to supervise the interview process has been codifed in local court rules, some of which require that the party requesting the interviewer show "just cause". It is not entirely clear whether unauthorised interrogations could be punishable as contempt of court because any such orders would attract First Amendment considerations.

Professor Campbell also discusses the second method of control mentioned previously, viz, canons of professional ethics. She stated, op.cit. p.199 that these do not condemn post-trial interrogation of jurors outright or limit the kinds of circumstances in which lawyers may properly approach jurors after verdict. They direct only that such inquiries shall not be conducted in a manner calculated merely to harass or embarass the juror or to influence his actions in future jury services.

In Haeberle's case (supra) the Appeal Court agreed with the District Court's implicit conclusion that the Attorney's interests were not merely balanced but plainly outweighed by the juror's interests in privacy and the public's interest in well adminstered justice.

It would therefore appear that if an action for contempt were brought following revelations in a post-verdict interview made without infringing any of the juror's rights, the First Amendment would probably be invoked by the journalist and his newspaper.

3. Australia

The position in Australia now is as it was in England prior to the Contempt of Court Act 1981. That position is as held by the Court of Appeal in Attorney-General v. New Statesman and Nation Publishing Co. Ltd. [1981] 1 Q.B.1, namely;

> "In order to establish that publication after trial of a juror's disclosure of jury-room secrets was a contempt it was necessary to show that the disclosure tended or would tend to imperil the finality of jury verdicts, or to effect adversely the attitude of future jurors and the quality of their deliberations".

There have been at lest two cases in Australia in which disciplinary proceedings have been taken against solicitors who approached jurors after a verdict, or after the jury had been discharged, with a view to discovering what had happened in the jury room. These cases were Ex parte Hartstein, In re a Solicitor (Smithers, J. 4/6/71, unreported) (see 46 A.L.J. p.369) and Prothonotary v. Jackson [1976] 2 N.S.W.L.R. 457. Professional misconduct was not established in either case but the actions of the solicitors were held to have been highly improper. The author of the article on 46 A.L.J. p.369 wrote that a notice used to hang on the door of a jury room in the old Supreme Court building in Brisbane part of which quoted the following remarks made by Stanley, J. in R v. Williams on 23.1.1962:

> "The general rule is that no juryman is entitled to reveal to anybody at any time what went on in the jury room ...After the jury is discharged, the general rule is that the jury members are under a high and strict duty to maintain inviolate the secrecy of the jury room."

4. England

a. Common law and prior to 1981

According to A History of English Law Holdsworth Vol. 1 at p343:

> "In Edward III's reign, a grand juryman who had revealed matters which had come before him in that capacity was indicted for felony and one of the judges thought that he might have been indicted for treason."

In the course of his judgment in Attorney-General v. New Statesman and Nation Publishing Co. Ltd., supra, Lord Widgery, C.J. referred to the dicta of Lord Hewart C.J. in R v. Armstrong [1922] 2 K.B. 555 at 568-9 wherein the action of a newspaper in publishing revelations by a juryman was described as improper, deplorable and dangerous. With those dicta, His Lordship said every juryman ought to observe the obligation of secrecy which is comprised in and imposed by the oath of the grand juror. The dicta concluded:

> "It is a matter of supreme importance that no newspaper and no juryman should again commit the blunder, to use no harsher word, which has disfigured some of the reports relating to matters connected with the trial of this case."

Halsbury's Laws of England (4th ed.) Vol 26 in the section dealing with Juries has in paragraph 647 reference to a notice which appears in every jury retiring room at the Central Criminal Court which reads:

> "To members of the Jury. Her Majesty's judges remind you of the solemn obligation upon you not to reveal, in any circumstances to any person, either during the trial or after it is over, anything relating to it, what has occurred in this room while you have been considering your verdict."

b. Since 1981

The Contempt of Court Act 1981 (U.K.) was enacted (inter alia) to protect the confidentiality of jury deliberations. The relevant section (s.8) is as follows:

(1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

(2) This section does not apply to any disclosure of any particulars -

> (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or
>
> (b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,

or to the publication of any particulars so disclosed.

(3) Proceedings for a contempt of court under this section (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it.

In their article "The effect of the Contempt of Court Act on research on Juries" (1981) 145 J.P. 575, McConville & Baldwin wrote:

> "It was the Government's original intention to introduce a clause to the Contempt of Court Bill which would make it a criminal offence to disclose (or to solicit for the purpose of publication) statements or opinions expressed inside the jury room. But it was recognized that, where such disclosures did not reveal the identity of the case in uestion or identify the jurors concerned, no offence would be committed. This meant that accredited reseachers would be allowed - as it appears they have been allowed in the past - to seek the views of jurors about particular cases, provided that publication of the results did not in any way breach the anonymity principle.
>
> A last minute amendment to the clause was, however, made in the House of Lords to the effect that any disclosure by individuals of what takes place inside the jury room, whether the case is identified or not, will henceforth constitute contempt, was carried despite the vigorous protestations of the Lord Chancellor."

In Borrie and Lowe's Law of Contempt (2nd ed.) 1983 at p.249 it was said:

> "Although there are powerful arguments for pressuring complete secrecy of jurors' deliberations there seems force too in the assertion that an institution which represents the very cornerstone of the English Legal System ought to be open to reasonable scrutiny and accountability."

Despite the reservations expressed in the last two comments we are of the opinion that the confidentiality of the jury's deliberations should be totally protected. Accordingly we recommend that legislation in terms similar to section 8 of the English Contempt of Court Act 1981 (minus the reference to Scottish proceedings) should be introduced into the Criminal Code. This could very simple and effectively be done by inserting a new section 122A, in the English terms, after section 122 which deals with corrupting and threatening jurors. We so recommend.

JURY ACT 1929-1981

8. Exemption. (1) The undermentioned persons are exempt from serving on any jury, and their names shall not be inserted in any jury list, and they shall not be summoned as jurors:-

(i) Members of the Executive Council;

(ii) Members of Parliament;

(iii) Judges; members of the Land Court;

(iv) Ministers of religion; officers of the Salvation Army who are lawfully authorised to celebrate marriages; monks, nuns and other members under vows of any religious community which requires its members to be under vows and postulants for membership of such a community;

(v) Barristers-at-law, solicitors, and conveyancers, and their clerks;

(vi) Officers of His Majesty's navy or army or of the defence force of Australia on full pay;

(vii) Medical practitioners, dentists, pharmaceutical chemists, nurses, nursing aides and physiotherapists, all being duly registered or enrolled and in actual practice and members of any Ambulance Transport Brigade within the meaning of the Ambulance Services Act 1967-1975;

(viii) University professors and lecturers, registrars of universities, inspectors of schools, schoolmasters and schoolteachers actually employed as such, directors, principals, registrars and academic staff of colleges of advanced education, and principals, secretaries and instructional staff of rural training schools;

(ix) Permanent heads within the meaning of the Public Service Act 1922-1976 and any other persons who hold an office or a position in the public service of Queensland that is equal to or higher than such a permanent head;

(x) Persons employed in the Department of Justice;

(xa) Persons employed in the Prisons Department of the Probation and Parole Service;

(xb) Persons employed in the Police Department;

(xi) Masters and crews of vessels actually trading, and pilots duly licensed;

(xii) Mining managers and engine-drivers, all being actually employed as such;

(xiii) Officers of Parliament, household officers and servants of the Governor, the Chairman and other members of The Totalisator Administration Board of Queensland, and officers of the Parliamentary Commissioner for Administrative Investigations;

(xiv) Members of Local Authorities;

(xv) Commercial travellers actually employed as such, and journalists bona fide actually employed in court reporting, and buyers, managers, and other persons who by reason of their employment in a primary industry are frequently required to travel outside the relevant jury district to remote places;

(xvi) Persons who are blind, deaf, or dumb, or are of unsound mind or are otherwise incapacitated by disease or infirmity;

(xvii) Female persons who have informed the sheriff, as prescribed by this Act, that they desire to be exempt from serving on any jury and whose exemption thus obtained continues in force as prescribed by this Act;

(xviii) Aircraft pilots regularly employed as such on Australian aircraft used in a public aerial transport service;

(xix) members of a Fire Brigade provided and maintained pursuant to section 9 of the Fire Brigades Act 1964-1973;

(xx) Such other persons as are exempted from service on juries by the Governor in Council by Order in Council published in the Gazette.

(2) The Governor in Council may from time to time by Order in Council -

(i) Exempt any person, or any persons included in any class of persons, specified in the Order in Council from service on juries; or

(ii) Revoke or modify the exemption from service on juries prescribed in respect of any persons, or persons included in any class of persons, by an Order in Council under this subsection or by any provision of paragraphs (i) to (xix), both inclusive, of subsection one of this section.

An Order in Council under this subsection may limit the exemption from service on juries, or the revocation or modification of the exemption from service on juries, thereby prescribed to the time, or place, or time and place therein specified, and subsection one of this section shall, with respect to such an Order in Council, apply with and subject to all such adaptations as are necessary to give effect to any limitations specified therein.

Every Order in Council made under this subsection shall be published in the Gazette, and thereupon shall be judicially noticed and such publication shall be conclusive evidence of the matters contained therein.

While an Order in Council under this subsection remains in force any rule of court made in pursuance of section fifty-one hereof applies subject thereto and accordingly such a rule shall be of no effect to the extent to which it is inconsistent with such an Order in Council.

Every Order in Council under this subsection shall be laid before Parliament within fourteen sitting days after the publication thereof in the Gazette, if Parliament is in session, and if not, then within fourteen sitting days after the commencement of the next session.

If Parliament passes a resolution of which notice has been given at any time within fourteen sitting days after any such Order in Council has been laid before Parliament disallowing the same, that Order in Council shall thereupon cease to have effect, but without prejudice to the validity of anything done in the meantime or to the making of a further Order in Council.

(3) A female person may, at any time (except while she is required to attend as a juror at the Court upon any day of the sittings in question of the Court) and from time to time by writing under her hand, inform the sheriff that she desires to be exempt from serving on any jury.

Upon receipt by the sheriff of such a writing the informant shall be exempt and, for so long as such exemption continues in force, shall continue to be exempt from serving on any jury within the jury district within which she was hitherto liable to so serve and within every other jury district within which she may thereafter be shown by the rolls or other records for the time being kept in accordance with the Elections Act 1915-1971 to reside.

An exemption obtained pursuant to this subsection shall continue in force for the period specified in the writing informing the sheriff as aforesaid and, if such a period is not specified, shall continue in force until the informant otherwise indicates as prescribed by subsection (6) of this section.

(4) Upon receipt by him of a writing referred to in subsection (3) of this section the sheriff shall forthwith strike out (but not obliterate) the name and other particulars of the informant from such of them the current jury list, the prospective jurors' list and the panel of jurors intended to be summoned as contain the informant's name and shall take all steps necessary to ensure that the informant's name does not, during the period her exemption continues in force, appear in a jury list, a prospective jurors' list or a panel of jurors intended to be summoned made or completed for his jury district after the date of the receipt by him of such writing.

(5) Where it appears to the sheriff that an exemption of a female person obtained pursuant to subsection (3) of this section is likely to continue to the next ensuing completion by the Principal Electoral Officer of a relevant roll or record in accordance with the Elections 1915-1971 or is of indefinite duration he shall notify that officer in writing that the female person in question is exempt from serving on any jury and the period of such exemption and thereupon the Principal Electoral Officer shall take all steps necessary to ensure that during the period of such exemption the name of the female person in question is not indicated by him or by the prescribed officer to the sheriff as the name of a person apparently qualified, and not exempt, to serve as a juror.

(6) A person exempted for an indefinite period from serving on any jury pursuant to subsection (3) of this section may, at any time, inform the sheriff by writing under her hand that she no longer desires to be so exempt and, if she does so, shall furnish to the sheriff such particulars as he may require of her for the purposes of this subsection.

If the sheriff is satisfied that the person in question is otherwise qualified and liable to serve as a juror he shall forthwith notify the Principal Electoral Officer that she is no longer exempt from serving on any jury and thereupon the Principal Electoral Officer shall take all steps necessary to ensure that such person's name is indicated on the copy (furnished by him or forwarded by the prescribed officer to the sheriff) of the relevant roll or other record completed or made next after the receipt by him from the sheriff of such notification as the name of a person apparently qualified, and not exempt, to serve as a juror.

As amended by Act of 1956, 5 Eliz. 2 No. 6, s.2; Act of 1967, No. 16, s.5; Act of 1972, No. 35, s.5; Act of 1976, No. 39, s.8; Act of 1978, No. 78, s.2.

ANNEXURE "B"

SCHEDULE 3.

PERSONS INELIGIBLE TO SERVE AS JURORS

1. Any person who is or has at any time within the last ten preceding years been -

   (a) a judge of the Supreme Court or of the County Court or the holder of any other judicial office;

   (b) a duly qualified legal practitioner;

   (c) employed by a duly qualified legal practitioner in connexion with the practice of the law;

   (d) a minister of religion, monk, nun or other vowed member of a religious community;

   (e) in receipt of a salary provision for which is or was made in the annual appropriations of the Attorney-General;

   (f) the Chief Commissioner of Police the Director-General of Social Welfare or the Chief Electoral Officer;

   (g) employed under the direction and control of the Chief Commissioner of Police or the Director-General of Social Welfare or in the Police Department or under the direction and control of the Chief Electoral Officer;

   (h) an honorary probation officer;

   (i) a justice of the peace;

   (j) employed as a Government shorthand writer licensed court reporter or in connexion with any court recording service.

ANNEXURE "C"

(Recommendation 2)

Section 2. Exemptions from Jury Service

(1) Prospective jurors may be exempt from serving on a jury if:

(a) they adhere to a religion or religious order which renders service as a juror incompatible with the beliefs or practices of the religion or order;

(b) serving as a juror will cause them serious hardships or loss to themselves or to others who are immediately relying on them;

(c) their serving as a juror would cause their employers exceptional hardship;

(d) serving as a juror would be contrary to the public interest because they perform essential and urgent services of public importance which cannot reasonably be rescheduled or cannot reasonably be performed by another and which are not ordinarily performed by another during their absence on vacation;

(e) they are 65 years of age or over.

(2) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other evidence whether the prospective juror should be excused from jury service.

(3) A person who is excused from jury service pursuant to paragraphs 2(1)(b), (c) or (d) shall have his or her name placed on the jury panel for the following year.

ANNEXURE "D"

4.186. At the A.C.T. directions hearings the following questions form the agenda for proceedings:

1. Has the indictment been presented by the Crown?
2. Has a copy of the indictment been received by the representatives of the accused?
3. Is there likely to be any change in the indictment sought?
4. Is there to be any challenge to the indictment and, if so, what is the nture of that challenge?
5. Is the accused present?
6. Does the accused adhere to his/her plea of not guilty?
7. Is there any possibility of a change of plea?
   This question need not be answered if it is though inappropriate to answer it.
8. Has counsel been briefed?
9. Has there been a conference between the Crown Prosecutor and counsel or solicitor for the defence?
10. Has the Crown any fresh evidence in respect of which no proof of evidence has been furnished to the defence or is it proposed to call any such fresh evidence?
11. Have the real issues been defined between the parties?
12. Is there any agreement as to the admission without formal proof of any scientific or expert evidence?
13. Is there any difficulty about photographs or plans and formal proof of them?
14. Can agreement be reached as to the maximum number of photographs which need to be tendered?
15. Does perusal of the depositions (or any additional statements furnished) indicate any likelihood of objections to evidence the Crown proposed to lead at the trial?
    If yes, can those objeections or any of them be the subject of some consideration now?
16. Are there any admissions the accused is presently prepared on advice, to make?

17. In respect of any admissions which the accused presently is unprepared to make, is it appropriate that these admissions be made in writing?
18. Is/are there any agreed excusion(s) from any record of interview?
19. May any documents which have been subpoenaed and in respect of which no objection to production is taken be inspected and copied?
20. Are there photocopies available of all documents proposed to be tendered?
21. Has there been discussion as to the need for the presence at Court of corroborating witnesses?
22. Are there any special circumstances concerning the plea which the accused wishes to make?
23. Is any special plea proposed?
    If yes, it is desirable that it should be filed not less than 7 days prior to the hearing.
24. Are there any special circumstances not adverted to above?
25. Is there any change in the estimate of the length of the trial previously given?
26. Are there presently available speedy means of communication with the accused?
27. Is there presently any difficulty relating to instructions of any kind from the accused?

ANNEXURE "E"

INFORMATION FOR THE PARTIES

1. You will be notified by the Prothonotary of the Supreme Court of the date and time for the pre-trial hearing.
2. At a pre-trial hearing the Judge may ask the following questions and counsel (or the accused if he is unrepresented) will be expected to be able to inform the Court in relation to the following:

    1. Has the presentment been filed?
    2. Has a copy of the presentment been received by the accused or his representatives?
    3. Is any amendment of the presentment likely to be sought by the prosecution?
    4. Are further particulars of the presentment likely to be sought by the accused?
    5. Is there to be any application to sever the presentment and if so, what is the application likely to be?
    6. Is there to be an application for a separate trial by any and which accused?
    7. Does the ccused presently intend to plead Guilty or Not Guilty to any and which count(s) in the presentment?
    8. Is there any posibility of a change of plea?
    9. It is intended there will be a conference between counsel for the Director of Public prosecutions and counsel for the accused?
    10. Does the prosecution propose to call any additional evidence?
    11. Has the prosecution notified the accused and/or his represenatives of any additional evidence and if it intends to do so when is it proposed to furnish a proof of evidence?

12. What is the probable length of the trial?
    (a) Prosecution estimate.
    (b) Accused estimate.
13. Is any point of law or of admissibility of evidence likely to be raised before the trial commences? If yes, of what duration are the matters to be raised likely to take?
14. Does the accused or the prosecution intend to raise a special issue? E.g. unfitness to plead, change of venue.
15. Does the accused intend to raise a special plea? E.g. Lack of jurisdiction; sutrefois convict; sutrefois acquit etc.
16. Does the accused intend to rely upon an alibi not yet disclosed in conformity with the Crimes Act?
17. Do the parties anticipte any problems as to the availability of witnesses? If yes, give details.
18. (a) What admisions of fact are sought by the accused?
    (b) Is the accused prepared to make the admissions sought or any of them?
    (c) What admissions of fact are sought by the accused?
    (d) Is the prosecution prepared to make the admissions sought or any of them?
19. Does any difficulty arise about photogaphs or plans and formal proof of them?
20. Is any order sought for the inspection of prosecution exhibits or other evidentiary material in the possession of the prosecution as to which a question may arise in the course of the trial?
21. Is any order sought for the preservation or detention of any document or thing relating to the trial?

DRAFT BILL

NO. OF 198

A Bill to Amend the Criminal Code, the Jury Act 1929-1982 and the Justices Act 1886-1982 each in certain particulars.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

1. Short title. This Act may be cited as the Criminal Code and Other Acts Amendment Act 1986.

2. Commencement.

3. Arrangement. This Act is arranged as follows:-

PART II - AMENDMENTS TO THE CRIMINAL CODE

4. Principal Act. This Part shall be read as one with the Criminal Code.

5. New Section 122A. The Criminal Code is amended by inserting after section 122 the following section:-

"122A Confidentiality of jury's deliberations. (1) Subject to subsection (2) below, any person who obtains, discloses or solicits any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceeding is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

(2) This section does not apply to any disclosure of any particulars -

(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict; or

(b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings;

or to the publication of any particulars so disclosed.

(3) Proceedings for an offence under this section shall not be instituted except by or with the consent of the Attorney-General or on a motion of a court having jurisdiction to deal with it."

6. **New Section 596A.** The Criminal Code is amended by inserting after section 596 the following section:-

"596A. Determination of Questions of Law before arraignment. (1) A Court before which an indictment has been presented may, if it thinks fit, hear and determine any question of law or procedure, including the matter of discovery by the parties, affecting the conduct of the trial before the accused person is arraigned or a jury empanelled.

(2) The Court may direct counsel for the Crown and the defence to confer either in or out of the presence of the Court for the purpose of deciding whether any step should be taken or sought to be taken under subsection (1).

(3) The trial is deemed to begin and the accused person is deemed to be brought to his trial upon the commencement of proceedings referred to in subsection (1).

7. **Amendment to section 594.** Section 594 of the Criminal Code is amended by inserting the words "Subject to the provisions of subsection (3) of section 596A..." before the words "The trial" at the beginning of the section paragraph of that section.

8. **New section 600.** The Criminal Code is amended by omitting the present section 600 and substituting the following section:-

"600(1) When a person has been committed by a justice for sentence for an offence he may, nevertheless, by notice in writing to the authorities prescribed in section 126 of the

Justices Act to receive depositions, not less than seven clear days before the day of the first sitting of the court at which he is to appear as aforesaid, withdraw his plea of guilty and substitute therefor a plea of not guilty: Provided that in such case any Judge presiding over such court may adjourn or postpone the trial to such day as he thinks proper.

(2) Thereupon the defendant -

(a) If committed to appear for sentence, shall be deemed to have been committed for trial, and the warrant of commitment shall be construed accordingly;

(b) If admitted to bail to appear for sentence shall be deemed to have been admitted to bail to appear for trial, and any recognizance or other undertaking (whether in writing or otherwise), by whomsoever entered into, in connection with the admission to bail, shall be construed accordingly".

9. New section 625A. The Criminal Code is amended by inserting after section 625 the following section:-

"625A. Verdict of Majority of Jurors May Be Taken (1) Where the jury on the trial of an accused person have retired to consider their verdict and have not arrived at a unanimous verdict, the decision agreed upon by not less than ten of the jurors shall, subject to this section be taken as the verdict given by the jury.

(2) The Court shall not accept a verdict given by virtue of subsection (1) unless it appears to the Court that the jury have had such period of time for deliberation as the Court thinks reasonable having regard to the nature and complexity of the case; and the Court shall in any event not accept such verdict unless it appears to the Court that the jury have had at least two hours for deliberation.

(3) Subsection (1) does not apply to -

(a) a verdict that the accused person is guilty of the crime of treason or murder or any of the crimes defined in the second paragraph of section 81 and in section 82.

(b) any special finding upon which the accused would be convicted of any such crime.

(4) For the purposes of this section the term "verdict" includes any special finding made by a jury."

10. **Amendment of section 626.** Section 626 of the Criminal Code is amended by omitting the words "cannot agree as to the verdict to be given" and substituting the words "is unable to give a verdict."

PART III - AMENDMENTS TO THE JURY ACT

11. **Principal Act and citation as amended.** (1) In this Part the Jury Act 1929-1982 is referred to as the Principal Act.

(2) The Principal Act as amended by this Part may be cited as the Jury Act 1929-198 .

12. **Amendment of section 8.** Section 8 of the Principal Act is amended by omitting sub-sections (1) and (2) of section 8 and substituting the following sub-sections:-

(1) Ineligibility (or Persons Ineligible to Serve as Jurors). The following persons are ineligible to serve as jurors. (a) Any person who is or has at any time within the last ten preceding years been -

(i) a judge of the Supreme Court or of the District Court or the holder of any other judicial office;

(ii) a duly qualified legal practitioner;

(iii) employed by a duly qualified legal practitioner in connection with the practice of the law;

(iv) a minister of religion, monk, nun or other vowed member of a religious community;

(v) in receipt of a salary provision for which is or was made in the annual appropriations of the Attorney-General;

(vi) the Commissioner of Police, the Director-General of Welfare Services or the Principal Electoral Officer;

(vii) employed under the direction and control of the Commissioner of Police, the Director-General of Welfare Services or in the Police Department or under the direction and control of the Principal Electoral Officer;

(viii) an honorary probation officer;

(ix) a justice of the peace;

(x) employed as a Government shorthand writer licensed court reporter or in connection with any court recording service.

(b) Any person who -

(i) is unable adequately to see hear or speak;

(ii) is intellectually defective or mentally ill within the meaning of the Mental Health Services Act 1974-1984;

(iii) an incapacitated person within the meaning of the Public Trustee Act 1978-1981;

(iv) is unable to read or write;

(v) has an inadequate knowledge of the English language.

(2) Exemptions (or Exemptions from Jury Service). (a) Prospective jurors may be exempt from serving on a jury if:-

(i) serving as a juror will cause them serious hardships or loss to themselves or to others who are immediately relying on them;

(ii) their serving as a juror would cause their employers exceptional hardship;

(iii) serving as a juror would be contrary to the public interest because they perform essential and urgent services of public importance which cannot reasonably be rescheduled or cannot reasonably be performed by another during their absence on vacation;

(iv) they are a senior male person or a female.

(b) A person who is exempted from jury service pursuant to paragraphs (a)(i), (ii) or (iii) above shall have his name placed on the jury panel for the following year.

13. **Amendment of section 12.** Section 12 of the Principal Act is amended by omitting from the last line of subsection (1)(b) and (2)(b) the comma after the word "serve" and the words "and not exempt from serving,".

14. **Amendment of section 24.** Section 24 of the Principal Act is amended by inserting after subsection (4) the following subsection:-

"(4A) A person who applies in the form referred to in subsection (4) for exemption or excuse from service as a juror shall be required by the sheriff to verify either on oath or by affidavit or statutory declaration the grounds for his so seeking to be exempted or excused."

15. **Amendment of section 24A.** Section 24A of the Principal Act is amended by inserting after subsection (10) the following subsection:-

"(10A) A person who applies in the form referred to in subsection (10) for exemption or excuse from service as a juror shall be required by the sheriff to verify either on oath or by affidavit or statutory declaration the grounds for his so seeking to be exempted or excused."

16. **Amendment of section 32.** Section 32 of the Principal Act is amended by -

(a) omitting the second paragraph of subsection (1) from the word "Panel" to the word "aforesaid";

(b) inserting before subsection (1A) a new subsection (1AA) as follows -

"(1AA) Every person arraigned shall be admitted to challenge jurors peremptorily only in accordance with sections 33 and 35."

(c) amending the first paragraph of subsection (1A) by omitting all the words in the last line of the first paragraph after the word "arraigned" and substituting the words "a total number of 8".

17. Amendment of section 35. Section 35 of the Principal Act is amended by omitting the full stop after the word "eight" at the end of the second paragraph of sub-section (3) and inserting the following:-

", except where more persons than one are jointly arraigned in which case each of those persons may challenge peremptorily six jurors".

PART III - AMENDMENTS TO THE JUSTICES ACT

18. Principal Act and citation as amended. (1) In this Part the Justices Act 1886-1982 is referred to as the Principal Act.

(2) The Principal Act as amended by this Part may be cited as the Justices Act 1886-198 .

19. New section 107. The Principal Act is amended by inserting after section 106 the following new section:-

"107(1) Notwithstanding anything to the contrary in section 104, 108 or section 110A a person charged with an indictable offence may elect to stand trial by jury without a preliminary hearing being conducted.

(2) An election under sub-section (1) may be made at any time after the accused person is served under section 110A with copies of the statements of the witnesses proposed by the informant to be called for the prosecution together with copies or reproductions of any documents referred to in those statements which the informant proposed to tender in evidence.

(3) Every election under sub-section (1) shall be in writing in the prescribed form signed by the accused person who shall deliver the election to the clerk of the Magistrates' Court before which the charge is pending and shall deliver a copy to the informant.

(4) If the accused person is in prison when he wishes to make an election under sub-section (1) he may deliver the election and a copy thereof to the officer in charge of the prison who shall

forthwith cause the election to be sent to the clerk of the Magistrates' Court and the copy to the informant.

(5) On receiving an election under sub-section (1) the clerk shall place it before a justice as soon as possible.

(6) When the defendant next appears or is brought before the Court or a justice, the Court or justice, upon being satisfied that the accused person understands the nature and consequence of the election, shall formally charge him and direct him to be committed for trial, or as the case may be, for sentence at the next sittings of the Supreme Court or the District Court on the charge in the place nearest or most convenient to the place in which the Court or justice then is and shall commit him by warrant to prison until he is tried for the offence or until he is removed or discharged by due course of law or shall admit him to bail for trial.

(7) Where an accused person is directed under this section to be tried any statements or documents copies of which have been served on the accused person by the informant may be used in evidence upon his trial in all respects as if they were depositions taken and exhibits tendered upon the preliminary examination.

(8) Where an accused person is directed under this section to be tried the justices shall warn him that he may not be permitted at that trial to give evidence of an alibi or to call witnesses in support of an alibi unless he gives to the Crown Solicitor written notice in the prescribed form of that alibi and of those witnesses within the time prescribed by section 590A of the Criminal Code.

(9) If, having regard to the length of time which should elapse before a court of competent jurisdiction next sits at a place to which the defendant would in the absence of this subsection be committed to be tried, the justices are of the opinion -

(a) that it would be just that the trial of the defendant should be held at some other place before a court of competent jurisdiction, the justices may, with the prior consent in writing of the defendant (which consent shall be kept with the depositions of the witnesses), order him to be committed to be tried for the offence at such other place before such a court;

(b) that, by reason of the expense likely to be incurred in the keeping or preservation of any exhibit tendered in evidence upon the examination of witnesses and to be, or proposed to be, tendered in evidence at the trial of the defendant, the trial of the defendant should be held at some other place before a court of competent jurisdiction, the justices may order him to be committed to be tried for the offence at such other place before such a court."

20. **Amendment of section 110A.** Section 110A of the Principal Act is amended by -

(a) omitting subsection (4);

(b) inserting at the beginning of paragraph (b) of subsection (5) before the words "a copy" the words "not less than seven days before the day on which the preliminary examination of the accused person is to be taken...";

(c) inserting at the end of subsection (8) after the word "person" the words "...provided that either party shall only be obliged to have witnesses present for cross-examination where not less than forty-eight hours notice is given to the party required to have such witness present."

(d) inserting after subsection (14) the following subsection:-

"(15) If a statement referred to in paragraph (b) of subsection (5) is made by a person under the age of 21 years, the statement shall set forth his age and, if it is made by a person who cannot read, the statement shall be read to him before he signs it and the endorsement by the member of the

police force taking the statement shall state that the statement was read to the person before it was signed by him."

(e) inserting after subsection (15) the following subsection:-

"(16) In any committal proceedings, it shall, for the purposes of this part only, be presumed, in the absence of evidence to the contrary, that a date specified in a statement purporting or appearing to be the date of birth of the person who made the statement is in fact the date of birth of that person."

(f) inserting after subsection (16) the following subsection:-

"(17) In any committal proceedings the justice or justices may and, upon the application of one party with the consent of the other party, shall dispense with all or any of the requirements of subsection 5."

21. **Amendment of section 113. Procedure if defendant pleads guilty.** Section 113 of the Principal Act is amended by omitting subsection (1) and substituting the following subsection:-

"(1)(a) A person charged before justices with an indictable offence not punishable with penal servitude for life may, at any stage of the proceedings, plead guilty to the charge.

(b) When the defendant says he is guilty of the charge the justices, upon being satisfied that the accused person has freely made such plea, and understands the nature and consequences of the plea may there and then instead of committing the defendant to be tried as hereinbefore in this Act provided, shall order him to be committed for sentence before some court of competent jurisdiction, and, in the meantime shall by their warrant commit him to jail to be there safely kept until the sitting of that court, or until he is delivered by due course of law or admitted to bail as provided in the Bail Act."