A guaranteed right to trial by jury at state level?

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This article discusses recent changes to the rules regarding juries in Queensland, in particular, providing for more judge-only trials and allowing majority jury verdicts in almost all cases. These changes generally mirror changes made in other Australian jurisdictions. The article critiques these changes, in the context that many jurists have commented on the importance of juries in our criminal justice system. The High Court has commented on the undesirability of different grades of justice applying in our federal system; it is argued that given there is some guarantee of jury trial for federal offences and the same should apply to state offences, the level at which most of the criminal law in Australia sits. There is support for such a 'draw-down' of principles from the federal to state level in the United States jurisprudence. The article draws on literature supporting the importance of jury trials to perceptions of the 'quality' of decisions as to guilt or innocence, and to public confidence in our criminal justice system. The fact that at least one juror is not convinced of the accused's guilt may also suggest the existence of reasonable doubt, yet these laws provide for a conviction on a majority verdict. Arguments in favour of majority verdicts are also considered.

Introduction

Recent Queensland legislation amending some legal rules regarding juries raises issues of the nature of any right a citizen might possess to have matters alleged against them heard by a jury, and what the content of such a right might be. Section 80 of the Commonwealth Constitution provides some guarantee of the right to trial by jury, but this is only for federal offences, and the right has been interpreted very narrowly to date.[1] This article introduces the Queensland changes, which mirror changes in other jurisdictions, and notes the great importance of jury trials in our justice system, evidenced by history and the comments of a range of jurists. The article then explores whether the High Court might one day decide that a guaranteed right to trial by jury might exist at state level, given the reality that most criminal offences in Australia are offences against state, rather than federal, law. While the

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1 Another view is that the High Court of Australia expressed the right in *Cheatle v R*, 1993, in broad terms — for example, the requirement of unanimity, the fundamental nature of the right, and so on.

most recent reforms have occurred in Queensland, the issues raised are national in character, given that most states have legislated to limit the use of juries and accept majority verdicts in most circumstances.

As will be shown, there is precedent in *Kable v Director of Public Prosecutions*, 1996, for the High Court 'drawing down' principles from one level of our federal system to another, as there is in the United States. In addition, the article will point to studies that highlight doubts about the desirability of majority jury verdicts, in light of the traditional criminal standard of proof beyond reasonable doubt. The fact that a unanimous verdict cannot be reached might be evidence that reasonable doubt exists. The High Court of Australia, in discussing s 80, has itself explained the fundamental importance of unanimous, rather than majority, verdicts. If the 'drawing down' argument is not accepted, another means by which the right of an accused to a jury trial at state level can be protected is by arguing that jury trial is a fundamental common law right, which cannot be abrogated by statute.

The most recent changes are contained in the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld). New s 614 of the *Criminal Code 1899* (Qld) allows either the prosecutor or the accused to apply to the court for an order that the trial (on an indictable offence) be heard by a judge without a jury. New s 615 allows the court to make such an order if it thinks it is in the interests of justice to do so. However, if the prosecution applies, the accused must consent to it. If the person is not legally represented, the court must be satisfied that the accused properly understands the nature of the application.[2]

Relevant factors include:

- whether the trial, because of its complexity, length or both, is likely to be too burdensome to a jury;
- if there is a real possibility that a juror would be threatened or assaulted contrary to s 119B of the Code; or
- if there has been significant pre-trial publicity that may affect jury deliberation.

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2 An order for a trial by judge alone cannot be made if an accused is charged with two or more offences that are to be tried together, unless the order is made for all charges. Similarly, if there is more than one accused, any order made must apply to all of them. A judge sitting without a jury may make any findings and render any verdict that a jury could have made or given and any such finding or verdict has, for all purposes, the same effect as a finding or verdict of a jury.

In the recent case of *R v Clough*, 2008, these factors were considered in relation to an application from an accused for a trial without jury. The contentious issues were likely to be whether the accused was suffering from a mental disease at the time of the killing, and the interaction between the accused's use of drugs and any mental disease — specifically, whether the combination led him to kill his wife. The judge considered that this particular question, involving complex and expert psychiatric evidence, justified the making of a no-jury order in that case. The case demonstrates that it could be argued that the changes confer a right on the accused, as opposed to taking it away.

The Explanatory Notes state that the Act's intention is to 'insert a new chapter division for judge alone trials for *most* criminal proceedings in the higher courts' (emphasis added).[3]

The new 2008 Act amends the *Jury Act 1995* (Qld) to provide for some jury verdicts to be majority rather than unanimous, reflecting the practice in other jurisdictions.[4] Unanimous verdicts will still be required in murder trials; where the offence is causing injury or making threats to a state government employee in relation to their functions; or where there are only 10 jurors at the time of the verdict. In relation to other offences, if the jury has deliberated for at least eight hours (sometimes more if the judge orders) and can't reach a unanimous verdict and the judge believes that further deliberation probably won't lead to a unanimous verdict, the judge can ask the jury to reach a 'majority verdict'. That verdict will be deemed to be the verdict. Majority verdict means, if there are 12 jurors, that 11 agree, or, if the jury consists of 11 jurors, that at least 10 agree.

Importance of jury trial

We must first remind ourselves of the fundamental importance of the right with which we are dealing. Much has been written over the centuries in relation to this. This material has been alluded to in an earlier article (Gray 2006) and the discussion is summarised more briefly here. Some trace the right back to the Magna Carta;[5]

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3 The provisions are apparently based on similar legislation operating in Western Australia.

4 See, for example, s 55F of the *Juries Act 1977* (NSW); s 46 of the *Juries Act 2000* (Vic); s 57 of the *Juries Act 1927* (SA); and s 43 of the *Juries Act 2003* (Tasmania). There is no provision for majority verdicts in the *Juries Act 1957* (WA); *Juries Act 1967* (ACT); or *Juries Act* (NT). Unanimous verdicts are required for Commonwealth offences: Cheatle.

5 Article 39 of which states that 'no freemen shall be taken or imprisoned except by the lawful judgment of his peers or by the law of the land'.

others argue that it existed prior to this in France and was adopted by King Henry II in 1166 (Maitland 1968, 122; Helmholz 1983, 613). The right appears in the body of the American Constitution, as well as the Bill of Rights.[6]

The importance of a right to trial by jury has been referred to by Lord Atkin as 'ingrained … in the British constitution and in the British idea of justice' (House of Lords 1916) by Lord Devlin as 'the lamp that shows that freedom lives' (1966, 164), by Blackstone as the 'grand bulwark of English liberties' (1876, 343) and by Deane J as reflecting a 'deep seated conviction of free men and women about the way in which justice should be administered, [reflecting] the history of the common law as a bulwark against the tyranny of arbitrary punishment' (*Kingswell v R,* 1985, at 268).

The United States Supreme Court in *Duncan v Louisiana,* 1968, emphasised that country's protection of the right:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. 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 or biased or eccentric judge. [At 156.]

De Tocqueville observed that the jury mechanism placed the direction of society in the hands of the governed, and that sovereigns who chose to govern by their own authority had, in order to do so, set out to destroy or enfeeble the institution of jury (De Tocqueville 1835, 382–83). This is not surprising, in the context of some historical cases where juries, much to the displeasure of the government of the day, returned 'not guilty' verdicts (*Bushell's Case,* 1670, at 135; *Lilburne,* 1649, at 1270). Juries of the representative character we know today were introduced to Australian colonies only after much lobbying and dissent (Gray 2006, 72–73).

In other words, then, the right to jury trial is a fundamental one that has been recognised for many centuries, on many continents. It is not a desirable extra; it goes to the heart of the criminal justice system and the confidence that the public has in the justice system, and provides a needed protection against the arbitrary or unfair exercise of power — as recognised by eminent jurists across many centuries and in a range of jurisdictions.

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6 Article 3 and the Sixth Amendment to the United States Constitution.

Guarantee at federal level

Of course, s 80 of the Constitution provides some kind of guarantee of the right to trial by jury in respect of federal offences where the trial is to proceed 'upon indictment'. The key question is whether there are any limits on the ability of the federal Parliament to state that proceedings are to proceed other than by indictment. In other words, are there some trials that must of necessity — given the seriousness of the charge, for example — proceed by way of indictment? Or could the federal Parliament require that a criminal process for any charge, however serious, proceed other than by indictment — that is, summarily? The section has been interpreted by the High Court so that, in effect, the federal Parliament can decide whether or not a person accused of a particular federal crime is entitled to a jury by defining the proceeding as one to proceed upon indictment or summarily. In other words, there is no minimum content of the concept of trial by indictment and no requirement (at least by a majority of judges) that charges carrying a certain maximum period of imprisonment must be proceeded with upon indictment (*R v Archdall,* 1928). The section might be read otherwise than literally in order to secure the right as a fundamental one from interference by the government, rather than depending on the whim of Parliament for its continued status.

Other academics (Simpson and Wood 2001, 95; Coper 1987; Willis 1986; Stellios 2005a) and some judges (for example, Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex Parte Lowenstein,* 1938, at 581–582) have expressed their disquiet at such a narrow interpretation of what could be an important guarantee. My earlier writing also favoured a broader interpretation of s 80 as a guarantee in respect of federal offences (Gray 2006). The same territory will not be revisited here, but this discussion forms the context in which the suggestion of a guarantee at state level in this article operates.

The High Court's views on different 'grades of justice' at federal and state levels

We must first recognise that there is nothing express in the Queensland Constitution, or the constitution of any state or territory in Australia, that would forbid a court from hearing a criminal trial without a jury. Of course, there is no express right to jury trial in this state, despite the long struggle to obtain a right to have criminal matters heard in colonies by juries (Bennett 1961, 463; Chesterman 1999, 69; Evatt 1936, 64). This may be because those who wrote the federal Constitution assumed that trial by jury, which existed in the colonies at least for 'serious' offences, would continue post-federation (Gray 2006, 86). The High Court has accepted that, by the time of federation, trial by jury existed in all Australian colonies for the trial of all serious criminal offences (*Cheatle* at 549).

However, there also is no express separation of powers between the Parliament, the executive and the courts in state constitutions (*Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations*, 1986, at 372). Nevertheless, the High Court in *Kable* drew down the concept of separation of powers expressed in the Commonwealth Constitution to state courts, at least those invested with federal jurisdiction. It did so partly based on arguments about the impermissibility of different 'grades of justice' within a federal system. As Gaudron J observed, a feature of the Australian court system is its provision for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth, and there were limits on the extent to which state Parliaments could enact laws about state courts:

> There is nothing anywhere in the Constitution to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament … Once the notion that the Constitution permits of different grades or qualities of justice is rejected, the consideration that State courts have a role and existence transcending their status as State courts directs the conclusion that Ch III requires that the Parliaments of the States not legislate to confer powers on State courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth. [At 103.][7]

The integrity of the courts depended on their acting in accordance with the judicial process and on maintenance of public confidence in the judiciary. Public confidence required that the courts acted consistently and that their proceedings be conducted in accordance with rules of general application. Public confidence could not be maintained in a judicial system not predicated on equal justice (*Kable* at 107).

Public confidence has been alluded to in the context of jury trials by Deane J in *Kingswell*. His Honour claimed that a system of criminal law could not be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments were comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just (at 301). The existence of a jury increased the chance that the citizens would accept the court's decision more readily than if it were from a judge or magistrate who might be, or might be portrayed as being, 'over-responsive to authority or remote from the

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7 Similar comments are made by the judge in *Leeth v Commonwealth*, 1992, at 498–499. In *Nationwide News Pty Ltd v Willis*, 1992, at 75, Deane and Toohey JJ confirmed their view that the three levels of government in Australia did not operate in an isolated fashion, but in an overall national context. Section 68 of the *Judiciary Act 1903* (Cth) is discussed presently.

affairs and concerns of ordinary people'.[8] It was for the benefit of the community as a whole. Brennan J in *Brown v R,* 1986, called it 'the community's guarantee of sound administration of criminal justice' (at 197).

In a similar vein, in *Leeth v Commonwealth,* 1992, several members of the High Court spoke of the concept of equality before the law. Deane and Toohey JJ spoke of the 'essential or underlying theoretical equality of all persons under the law and before the courts' (at 488). While differences in procedural laws, rules and practices could be tolerated consistently with the equality doctrine (at 490), a law that resulted in a disproportionality between sentences based on the state in which an offender was convicted was not consistent with the principle (at 490). Gaudron J agreed that 'all are equal before the law' (at 502). The idea of equality before the law is clearly an aspect of the rule of law, and Dixon J has confirmed that the rule of law underlies the Constitution:

> [The Constitution] is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. [*Australian Communist Party v Commonwealth,* 1951, at 192.]

A learned academic has claimed of these developments that the reasoning of Deane and Toohey JJ could also be applied to state laws, since the underlying rationale would apply in that context as well (Zines 1994, 183).

It is difficult to see why this reasoning of Deane and Toohey JJ is not applicable to state laws as well as federal laws. If fundamental rules of the common law were regarded as intended to limit federal power under the Commonwealth Constitution, the same reasoning seems to apply to the power given under state constitutions. Wheeler agrees that having two streams of criminal procedure in Australia would be an unattractive proposition (1997, 278).

In a related development, members of the High Court in *Dietrich v R,* 1992, have declared there is a right to a fair trial, either entrenched in the Constitution (Deane J at 326 and Gaudron J at 362) or as part of the common law (Mason CJ and McHugh J at 299 and Toohey J at 353). This may impact on a right to jury trial, since others have acknowledged the links between a fair trial and the use of a jury: 'it is widely recognised that the presence of a jury helps to ensure that minimum standards of fairness are met' (Hope 1996, 180).

8 *Kingswell* at 301.

United States support for draw-down of principles from federal to state level

Members of the High Court have referred to United States jurisprudence in the rights area. Our express right to trial by jury was based on the American equivalent (*Cheatle*, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ at 555). In declaring that Australian citizens had a constitutional right to a fair trial according to law, Mason CJ and McHugh J in *Dietrich* referred to international instruments conferring a right to a fair trial, including Art 14 of the International Covenant on Civil and Political Rights, and the 'due process' clause of the Fifth and Fourteenth Amendments to the United States Constitution. It is appreciated that a right to a fair trial does not equate with a right to a jury trial; the point is merely that in discussing rights protections, there is precedent for the Australian courts considering international principles.

As discussed, the High Court in *Kable* in effect drew down the principle of separation of powers that exists in the Commonwealth Constitution at Commonwealth level, so that it applied to state courts — at least those capable of exercising federal jurisdiction. This was noteworthy because the principle of separation of powers is not part of state constitutions pursuant to which state courts are established. This was necessary to avoid the spectre of different grades of justice, where one set of rules would apply in respect of state courts exercising state jurisdiction, and different rules would apply in respect of state courts exercising federal jurisdiction. The court was not prepared to countenance such a possibility in an integrated court structure contemplated by Australia's federal arrangements.

The drawing down of rights from one level of government to another evident in the *Kable* reasoning was not novel. The United States Supreme Court did the same thing 30 years earlier in *Duncan,* fortuitously also a case involving jury trial. At issue there was a Louisiana law limiting jury trials only to capital cases, or offences for which hard labour could be imposed. The question arose whether rights contained in the United States Constitution, including the right to trial by jury, applied to the states. The suggestion was that the Fourteenth Amendment, which denied a state the ability to 'deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws', might require this result. Past cases had found that rights contained in the Constitution did not apply to the states (*Barron v Baltimore,* 1833) and that trial by jury was not necessarily a requirement of criminal due process (*Maxwell v Dow*, 1900).

Seven members of the court declared the Louisiana provision to be invalid, as inconsistent with the United States Constitution. In other words, they extended the right to trial by jury to the states.

The joint reasons referred to other decisions that had applied rights in federal proceedings to rights protected from state action (for example, *Powell v Alabama*, 1932; *In Re Oliver*, 1948; *Gideon v Wainwright*, 1963; *Malloy v Hogan*, 1964; *Pointer v Texas*, 1965). Courts that did this did so in cases involving rights considered to be 'fundamental principles of liberty and justice', or rights 'basic to our jurisprudence'. The court was satisfied that jury trial met this test:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they likely to be tried in a federal court — would come within the Sixth Amendment's guarantee (145) … a general grant of jury trial for serious offences is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. [At 157–158.]

There are clear links between the equal protection jurisprudence of the United States Supreme Court and the doctrine of equality before the law espoused by members of the High Court of Australia.

Unless this draw-down also occurs in Australia, anomalous results will follow. One specific example might suffice. Both the Commonwealth and state governments have passed legislation dealing with terrorism. Legislation at both levels provides for preventive detention of those suspected of terrorist activity, and contains strict limits on the ability of someone so detained to communicate with the outside world. They may contact a lawyer, who is also subject to strict communication limits. For example (though all states have counter-terrorism legislation), s 64 of the *Terrorism (Preventative Detention) Act 2005* (Qld) makes it an offence for a lawyer to disclose that their client is being detained under the preventative detention regime, punishable by a maximum two-year jail term. Section 105.41 deals with the same issue in respect of a person detained under the *Anti-Terrorism Act (No 2) 2005* (Cth), creating a virtually identical offence punishable by a maximum five-year jail term. Presumably, such a charge would be heard by a jury, given that s 4G of the *Crimes Act 1914* (Cth) defines an indictable offence as one punishable by a maximum jail term exceeding 12 months, unless a contrary intention appears in the legislation containing the offence. It does not.

The anomalous position thus arises that in relation to essentially the same offence, if the accused is charged under the state provisions, they may or may not have a jury hear the matter, depending on what the interests of justice might require, and the views of the prosecutor and accused. If the accused is charged under the Commonwealth provisions, a jury will hear the matter. If the accused is charged under the state provisions, a majority verdict will now be acceptable, given the new provisions and

the fact that the exceptions would not apply. If the accused were charged under the Commonwealth provisions, the verdict would need to be unanimous, given the High Court decision in *Cheatle.*

With respect, that is exactly the 'different grades of justice' of which Gaudron J spoke in *Kable*. It makes no sense and cannot be justified on any intellectually defensible grounds. Of course, the fact that the maximum punishment happens to be less at the state level than at the federal level has no bearing on the position, given that even if the maximum penalty was more than five years in Queensland, the position would not change. The fact that jury trial is guaranteed at one level of government, but not at another level, in respect of the same offence is, with respect, bizarre and undermines confidence in the judicial system. As the High Court has observed in another context:

> Section 68 of the Judiciary Act (dealing with jurisdiction of State and Territory courts in criminal cases) fulfils an important role in ensuring that federal criminal law is administered in each State upon the same footing as State law and avoids the establishment of two independent systems of justice, this being the object which lies behind the grant by the Constitution of power to invest state courts with federal jurisdiction. [*Murphy v R,* Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ at 617.][9]

Arguments in favour of unanimous verdicts

History of unanimity

The High Court in *Cheatle* stated that at least since 1367 (*Anonymous Case,* 1367), jury verdicts were required to be unanimous. This may have been due to the nature of jury trial in the early days, including trial by compurgation and when jurors were witnesses.[10] However, in more modern times the requirement for unanimity came to be seen as an important protection of the citizen's right against wrongful conviction (*Cheatle* at 551). The High Court in that case considered that by 1900 the requirement

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9 Of course, s 68 provides jurisdiction to state courts in respect of offences against Commonwealth law, but this Act is subject to constitutional requirements, including s 80.

10 *Cheatle* at 550; the United States Supreme Court in *Apodaca v Oregon*, 1972, offered four reasons for the development of a unanimity requirement, including: (a) to compensate for the lack of other procedural protections; (b) as a leftover from trial by compurgation; (c) because ancient juries were taken to have personal knowledge of the facts, and there was only one set of facts; and (d) because in medieval times consent was needed to bind the community: *Apodoca* at 407.

of unanimity was an 'essential feature' of the institution of juries (at 552). It remained in the public interest that verdicts be unanimous (at 562), and the High Court required that where the s 80 protection applied, the verdict be unanimous.[11]

According to this reasoning, it is suggested jury verdicts should also be required to be unanimous at state level. If it be in the public interest that verdicts be unanimous federally, why would there be any different public interest at state level? If the requirement for unanimity is an important protection of the citizen's rights against wrongful conviction federally, it must be important at state level also. The High Court describes the aspect of unanimity as an 'essential aspect' of juries at the time of federation. I would not be prepared, and the High Court should not be prepared, to allow this essential aspect to be tampered with at state level. To do so would introduce (or perpetuate) the idea of different grades of justice in Australia which was such anathema to the judges in *Kable*.

Studies on majority vs unanimous verdicts

Many studies over the years have considered the efficacy of majority jury verdicts compared with the requirement of unanimity.

In Nemeth's study (1977) with students at the University of Virginia, students were allocated to jury 'groups' to consider evidence in relation to a murder trial. Half were asked to return a unanimous verdict and half were asked to return a majority verdict. The researcher found that majority groups took less time to settle on a decision, often without any change in vote from first impressions. Those surveyed who participated in majority decision-making reported being less satisfied, less certain of their verdicts, and less influenced by others' arguments (see also Saks 1997; Hans, Mott and Munsterman 2002). Members of the minority were less likely to believe that their concerns were taken into account. Members of a majority verdict could remember less of the evidence than those on a unanimous jury (Nemeth 1977).

In a similar study involving actual jurors, jurors were assigned to a mock jury, again with some instructed to reach a unanimous verdict and others a majority verdict. The study found that majority verdict juries spent less time discussing the case and more time voting (Hastie, Penrod and Pennington 1983; Kassin and Wrightsman 1988; compare Glasser 1997). There was less response to the concerns of minority

11 Compare the position in the United States, where the Supreme Court has narrowly decided (5–4) that unanimity is not required: *Apodaca*. The need for unanimity has recently been confirmed in Canada: *R v Pan*, 2001.

jurors because their votes were not needed in order to reach a result. This led to the researchers concluding that 'the unanimous rule appears preferable to majority rules because of the importance of deliberation thoroughness, expression of individual viewpoints and protection against sampling variability effects of initial verdict preference'. In *Cheatle*, the High Court found that unanimity promoted deliberation and improved the likelihood that each jury member would be heard, reducing the risk of hasty or unjust verdicts (at 553). Hans et al (2003) concluded that:

> The nonunanimous jury is unacceptable. It weakens and inhibits jurors who are in the voting minority; it breeds closed-mindedness; it impairs the quality of the discussion, and it leaves many jurors unsatisfied with the final verdict.

Juries not required to reach unanimous verdicts have reported taking fewer polls (Davis et al 1975; Kerr et al 1976); debate the evidence more quickly and less thoroughly (Hans et al 2003); and recall less evidence (MacCoun 1989). Deliberations where a unanimous verdict was required involved more robust argument and required more voting rounds (Miller 1985; Kaplan and Miller 1987; Nemeth 1977; Thompson, Mannix and Bazeman 1988; Saks 1997).

This is supported by other psychological testing concerning an individual placed in a group situation and faced with a simple matter of fact in the immediate environment. All other members of the group are asked to express their view of the fact, and that it should be incorrect. The individual being tested is asked to express their view. The question is the impact on the individual of hearing a unanimous wrong view expressed by others in the group. The researchers found that most individuals being tested voted with the erroneous majority at least some of the time, in defiance of what they perceived themselves, due to the mental pressure to conform with the view expressed by all of the others (Sasch 1956; Latane and Wolf 1981; Reichelt, 2007).

Two economists found that 'when eventual verdicts are considered, a unanimous jury rule tends to lead to more accurate verdicts compared with nonunanimous rules' (Neilson and Winter 2005). A New Zealand study focused on the importance of jury deliberations, finding that of those jurors surveyed, 22 per cent changed their mind from their initial view to their final decision (Young, Cameron and Timsley 2000; Sandys and Dillehay 1995; Kalven and Zeisel 1966). This is important in light of Hastie's finding that jury deliberations, not surprisingly, were maximised when a unanimous verdict was required. The New Zealand Law Commission discussed a case where the researchers believed that a questionable verdict would have resulted had the majority of members on one jury prevailed. In another case studied, the judge agreed with the view of the minority jurors (New Zealand Law Commission 1999).

Summing up the research on the question of majority vs unanimous verdicts, the New South Wales Law Reform Commission said:

> It would appear from the research to date that juries required to make unanimous decisions consider the evidence more carefully and thoroughly, and report higher levels of juror confidence in the ultimate decision, than juries operating a majority verdict system. Where a verdict must be unanimous, the views of each juror must be considered, allowing those in the minority to be included in the decision making process, and encouraging groups to spend more effort on problem solving. [New South Wales Law Reform Commission 2005, 37.]

The Commission recommended retaining the requirement for a unanimous verdict:

> Allowing the views of one or two jurors to be disregarded, and the majority view to carry the day, potentially strikes at the very strength of the jury system: being the fact that all jurors can discuss, assess and reconcile their differing views to reach a common conclusion beyond reasonable doubt. [2005, 56.]

This research suggests that majority verdicts tend to be of lesser reliability than unanimous verdicts, and so are bad policy. While it is true that law based merely on bad policy is not unconstitutional, a court must be concerned with the reliability of jury verdicts because this has the potential to affect public confidence in the judicial system, and the judicial system relies on public confidence to function effectively. This issue is now considered in more detail.

Public confidence in the system — communitarian function of the criminal jury trial

Of course, it is essential that public confidence in our criminal justice system be retained (Gleeson 2002; Kenny 1999; Baylis 1991; Handsley 1998; McLachlin 2003; Woods 2007). In this context, juries play an important role. The right to trial by jury is not merely a right of an individual. This fact led a majority of the High Court of Australia in *Brown* to deny that an accused could waive the right to trial by jury, in a case in which s 80 might otherwise require it (at 201 per Deane J and 208 per Dawson J). The High Court in *Cheatle* emphasised the representative character and collective nature of the jury (at 552–553).

De Tocqueville also noted this aspect of jury trial:

> The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority (and) invests the people, or that class of citizens, with the direction of

> society … The jury invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society … I look upon it as one of the most efficacious means for the education of the people which society can employ. [De Tocqueville 1835, 334–37.]

As did Nemeth:

> The considerations involved in unanimity versus non-unanimity in jury deliberations are not simply whether or not the actual verdicts are significantly altered … What may well be altered is the belief on the part of the jurors that they have deliberated until all persons have agreed, that they feel that the verdict was appropriate, and that they have a sense that justice has been administered. If the jurors themselves feel that these values have not been implemented, the very important symbolic function of the trial by jury may suffer, not only for the jurors themselves, but for the community at large. [Nemeth 1997, 56.]

In *Powers,* 1991, Justice Kennedy concluded that jury service 'preserves the democratic element of the law' and was, 'with the exception of voting, for most citizens … their most significant opportunity to participate in the democratic process' (at 407) (*Balzac v Porto Rico,* 1922, at 310; Harris 1995). The involvement of citizens in the decision-making process will often engender the citizen's respect for the decision, and the legal system more broadly (*Taylor v Louisiana,* 1975, at 530; *R (MG),* 1996, at [34]; Jordan 2002; Law Reform Commission of Canada 1980; Sankoff 2006).

That this is the case is no mere assertion. Researchers have quantified the change in perceptions of the criminal justice system that can occur through an individual's involvement in such as system. For example, Matthews, Hancock and Briggs found that of those surveyed who had performed jury service for the first time, 43 per cent left jury service with a higher level of public confidence in the court system than they had beforehand (2004, 8). These researchers also documented that 58 per cent of jurors surveyed found that participation on a jury had improved their understanding of a criminal trial, which itself leads to greater confidence in the criminal justice system. American studies have also found that support for the courts increases if the individual has had recent court experience (Kritzner and Voelker 1998; Cutler and Hughes 2001).

A large Australian study involving more than 1700 individuals found that on several indicia, those who had acted as empanelled jurors reported substantially greater confidence in the criminal justice system than those who had not. For example, of empanelled jurors, 45 per cent reported feeling more confident about

the criminal justice system following jury service. The percentage of respondents who were confident in the capacity of judges was about 85 per cent of those who had served on juries, compared with 45 per cent in the general community. Those who were confident in the efficiency and fairness of the criminal justice system also differed greatly — 60 per cent of those who had participated on a jury believed this, compared with 20 per cent of those who did not participate on a jury. The average confidence level in the criminal justice system was 70 per cent for those who had served on juries, and 25 per cent for those who had not (Goodman-Delahunty et al 2007).

Given these comments, there is obvious concern with amendments that seek to (further) reduce the use of juries to hear criminal charges in state courts, as the new Queensland legislation does and as has occurred in other states. These changes, at least potentially, reduce the power of the people over community affairs, minimise the democratic elements of society reinforced by the use of juries, reduce the educative function that jury service can provide, and reduce citizens' respect for criminal law decisions and the legal system more generally.

Beyond reasonable doubt and standard of proof

Of course, the prosecution must prove the alleged charge against an accused beyond reasonable doubt (*Woolmington v Director of Public Prosecutions,* 1935, Viscount Sankey at 481). There have been different formulations of the meaning of this concept, including a solicitude for certainty (*Green v R,* 1971, Barwick CJ, McTiernan and Owen JJ at 33), moral certainty (*Brown,* Barton ACJ at 585), abiding conviction (*Victor v Nebraska,* 1994, O'Connor J at 6) and where the probability is so high that the contrary cannot reasonably be supposed (*Martin v Osborne,* 1936, Dixon J at 375); see also Bates (1989). Nesson (1979) argued that more than 96 per cent certainty is required, while Cohen (1980) found more than 99 per cent was necessary, as did Williams (1979). However it be expressed, all confirm the very high standard required. This might also suggest that a jury verdict should be unanimous, given that the fact that one or more jurors believe that the prosecution has not proven its case might suggest reasonable doubt (Drabsch 2005, 18). The link was expressed by the High Court in *Cheatle:*

> The common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely that a person accused of a crime should be given the benefit of any reasonable doubt … a verdict returned by a majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict. [At 553; New South Wales Law Reform Commission 2005, 42.]

In this light, provisions that allow majority verdicts could potentially undermine the procedural safeguards inherent in the beyond reasonable doubt standard of proof. The fact that at least one juror is not completely satisfied of an accused's guilt might be evidence that reasonable doubt exists. It is submitted that, in such cases, a guilty verdict is not a safe one.

Trial by jury as a common law right

Accepting that the right to jury trial was firmly entrenched in the common law at the time of federation, this article must also consider the controversial question of the extent to which the common law can or should protect rights, and whether there are limits on the extent to which statute law can override fundamental common law rights.

This issue was canvassed by the High Court of Australia in *Union Steamship Co of Australia Pty Ltd v R,* 1988. In rejecting the suggestion that the words 'peace, welfare and good government' were words of limitation (Killey 1990), the court nevertheless canvassed other possibilities:

> Whether the exercise of … legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system and the common law, a view which Lord Reid firmly rejected in *Pickin v British Railway Board*, is another question which we need not explore. [Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ, at 10.]

Deane and Toohey JJ are on record as having decided that federal (and possibly state) legislative power was subject to fundamental principles of the common law (*Leeth* at 486–487; *Nationwide News Pty Ltd v Willis,* 1992, at 69). Mason CJ in *Theophanous v Herald and Weekly Times Ltd,* 1994, agreed with these judges that the ultimate protection of important rights was found in the common law (at 126–127).

These tantalising comments mirror the interesting comments made about the issue by Sir Owen Dixon in his extra-judicial writings:

> The principles of the common law with respect to the interpretation and operation of a statute may be supposed to account in great measure for the form and method of modern legislation. The form and the method that are established imply real limitations. A rhetorical question may be enough to make this clear. Would it be within the capacity of a parliamentary draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one? [Dixon 1957, 241; Wait 2001, 57.]

It seems clear that Dixon's answer to this question would have been 'no'. Dixon spoke of the common law as a jurisprudence 'antecedently existing into which our system

came and in which it operates' (Dixon 1957, 240). He believed that the common law was the source of the authority of the British Parliament (242), and as a result that constitutional questions had to be resolved in the context of the whole law, including the common law (245). His thoughts are expressed further in the *Communist Party* case, where in discussing Australia's constitutional arrangements, he said that they were framed in accordance with many traditional conceptions, including the rule of law (193, quoted in *Kartinyeri v Commonwealth*, 1998, Gummow and Hayne JJ at 337).

Perhaps the leading historical case supporting the proposition that there are some common law rights so fundamental that Parliament cannot override them is the one commonly known as *Dr Bonham's Case,* 1609, where Coke claimed:

> And it appears in our books that in many cases the common law will controul acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will controul it and adjudge such act to be void. [At 652.]

It may be then that the right of any parliament, federal or state, to pass legislation, including amendments to jury rights, is subject to some deeper common law rights, which the High Court must recognise and enforce. The theory then would be that states derive their authority to pass legislation from the Commonwealth Constitution, and the Constitution is subject to the antecedent common law, including the long-recognised right to trial by jury, at least for some offences.

Arguments against the requirement of unanimity

The main arguments against unanimity, or in favour of majority verdicts, focus on the fact that the likelihood of a hung jury is higher when unanimous verdicts are required than in the case of majority verdicts (Buckhout et al 1977; Kerr et al 1976; Debus 2005; New South Wales Law Reform Commission 2005, 27; Kalven and Zeisel 1966). Some associate hung juries with expense and inconvenience (Queensland Law Reform Commission 1985, 122; Chikarovski 2000, 8309). The 'hang rate' for jury trials has been estimated in one Australian study at 10 per cent of trials in which a jury is used (Salmelainen, Bonney and Weatherburn 1997). It is said that the introduction of majority verdicts would reduce the risk, and associated cost and delay, associated with a hung verdict. There is also the argument that a requirement of unanimity creates difficulty when one irrational juror holds out on the others — the so called 'rogue' juror.

The research that has considered the extent to which the percentage of hung trials will reduce with majority verdicts compared with unanimous ones suggests that there

may be some slight reduction in hang rates (Kalven and Zeisel 1966; Baker, Allen and Weatherburn 2002). However, it should not be thought that most trials hang because of a single juror or two jurors — there is evidence that of hung trials, less than 50 per cent involve just one or two jurors dissenting from the minority view. Salmelainen, Bonney and Weatherburn (1997) conclude that the administrative benefits of majority verdicts would be 'modest'. They found that if majority verdicts were introduced, the amount of court time saved would be 1.7 per cent if up to two dissentients were allowed, and 1.1 per cent if a maximum of one dissentient was allowed. Thus, the research supports some savings to be made with the introduction of majority verdicts, compared with requiring unanimity.

On the other hand, as the New South Wales Law Reform Commission (2005) states, the fact a juror is in the minority in their assessment of guilt or innocence does not necessarily mean they are 'irrational', 'rogues' or anything else. The Commission cites a New South Wales politician who, in calling for the introduction of majority verdicts, pointed to a recent case where the result was apparently 11–1 in favour of guilty in the jury room. The politician said in Parliament that 'it is obvious that the attitude of that one juror was completely irrational. He was not concerned with the evidence'. In fact, at the re-trial the jury unanimously voted to acquit the accused (2005, at 9). While it is dangerous to generalise from specific instances, the case does help make the point that a dissenting juror is not necessarily being unreasonable or obstructive, and by introducing majority verdicts we increase the risk that an innocent person is jailed. Researchers have commented that further research should be undertaken as to why juries hang, and it has not been proven that they result, or usually result, from irrational or rogue jurors (Cameron, Potter and Young, 2000, 202). As the Law Reform Commission acknowledged, the hang rate may not necessarily mean the system is in danger or in need of reform. There may be good reasons why members of the jury have different opinions (2005, 44).

Some researchers have claimed that it is not necessary, in order to prove guilt beyond reasonable doubt, that the verdict be a unanimous one. These researches claim that if the evidence is 'strong enough' — for example it has been corroborated — then something less than jury unanimity might be satisfactory to meet the required criminal standard (Maher 1988; Johns 2005; Burton Bass, Davidson Gesser and Stephan Mount 1979).[12] There is substantial debate as to the precise meaning of 'beyond reasonable doubt', with some research finding that juries have a different conception than that of

12 Burton Bass et al concluded that 'we should not, in all circumstances, remain convinced that a 99 per cent probability equates to an abiding conviction to a moral certainty (or beyond reasonable doubt). Yet our courts do appear to remain so convinced' (361).

judges, and a substantial percentage of jurors believed that a 70 per cent probability of guilt might be sufficient to prove guilt beyond reasonable doubt (Simon and Mahan 1971).[13] This research would support an argument that the beyond reasonable doubt standard is consistent with majority verdicts.

The author acknowledges that the jury system is far from perfect. Various bodies have suggested changes to or are currently researching various processes concerning jury deliberations, including physical conditions, dynamics within the jury room, financial aspects of jury service, information given to jury members, the handling of pre-trial publicity, and directions to jurors (New South Wales Law Reform Commission 2005; Goodman-Delahunty 2007; Matthews, Hancock and Briggs 2004) with a view to further improving outcomes. These matters are not dwelled on here. There were particular difficulties with juries in the earlier stages of white settlement in Australia, including unrepresentative juries and racist juries. However, for the reasons given above, the author concludes that jury trial is and should remain a fundamental part of the criminal justice system in Australia. Problems with the jury system identified above can and should be addressed in ways other than phasing out or greatly restricting jury use, or by changing the unanimity requirement.

Conclusion

Accepting that there has been a long history of non-use of juries where the offence with which the accused has been charged is relatively minor, including at the time of federation, I would respectfully adopt the suggestion of Deane J in *Kingswell*, based on past British experiences and pre-federation practices, that a trial for any offence for which the maximum penalty is greater than one year's imprisonment, *whether a federal or state offence*, should be heard by a jury. This is consistent with the starting presumption in the *Crimes Act 1914* (Cth) s 4G, and was also recommended in the *Report of the Advisory Committee on Individual and Democratic Rights under the Constitution* (Constitution Commission 1987, 45). The verdict should be unanimous. This might be an appropriate balance between, on the one hand, the fundamental right of a citizen to be judged by their peers — a system which has been shown to produce better 'quality' decision making and improve public confidence in the

13 They found that 26 per cent of jurors would be satisfied that the criminal standard had been met with a probability of guilt of 70 per cent, compared with 20 per cent satisfied with a probability between 70 and 90 per cent, and 54 per cent satisfied with a level above 90 per cent. This contrasted sharply with the attitude of judges, of whom only 4 per cent would be satisfied that the criminal standard had been met with a 70 per cent probability, 33 per cent would be satisfied with a 70–90 per cent probability, and 63 per cent would require probability above 90 per cent.

criminal justice system — with, on the other hand, the acknowledgement that the use of juries increases costs and that hung juries, which are a higher risk with unanimous verdicts than majority verdicts, do involve expense (regardless of the reasons for the hanging). This approach would also avoid the spectre of different grades of justice, against which the courts have spoken previously.

In the context of considering s 80 of the Constitution, the High Court in *Cheatle* made clear that at the time of federation, and for hundreds of years prior to that in other nations, a jury verdict was required to be unanimous — this was an essential aspect of jury deliberations. It is not just merely bad policy to change this; it has the potential to undermine public confidence in the judicial system. If it is necessary at federal level that verdicts be unanimous, it should, when most criminal offences in Australia are at state level, be necessary at that level. In addition, the fact that at least one juror is not convinced beyond reasonable doubt of the guilt of the accused might well suggest the presence of reasonable doubt. The use of a jury is too important to be left to the whims of Parliament. ●

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