Critical Policy - 5
JUSTICE REFORM - ADVANCED LEGAL SYSTEM

TRIALS BY JUDGE(S) ALONE

– Replacing the Jury System –

Section 80 of the Australian Constitution provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State, the trial shall be held at such place or places as the parliament prescribes.

A Divided Judiciary

Section 80 of the Australian Constitution became the subject of vigorous debate and legal argument in the many decades following federation. It had been framed by a drafting committee desperate to marry the British Westminster parliamentary system with the United States of America's system of Federalism and its Constitution.

In truth, s.80 of our Constitution is almost a copy – word for word – of that contained in the American Constitution. And this was not the only section of the Australian Constitution that was framed without the required forethought; leaving it to future generations to interpret and mould the intent of certain sections to suit circumstances at the time.

However, there were two schools of thought when interpreting the intent of s.80. The first was absolute, in that if a criminal offence was indictable (i.e. serious enough to impose a custodial sentence of at least 12 months) then the offender must be tried by a jury. Straight forward – clear cut – no argument. And in the words of Justice H.G. Higgins, a Justice of the High Court of Australia (1906-1929):

> "If there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment."

The second interpretation argued that s.80 was simply a procedural provision in that there was still the right of parliament to subject indictable serious offences to summary trials in which there is only a single judge or magistrate and no jury. And this conflicting view was best expressed by a former Chief Justice of Australia, Sir Garfield Barwick:

> "What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision."

Australia's Acceptance of Judge alone Trials

But it no longer matters that s.80 of the Australian Constitution was copied from the American Constitution, or that opinion is divided on the interpretation of that section, or that the Barwick CJ camp rendered s.80 a 'mockery, a delusion and a snare'. We are now well into the 21st Century and have already adopted **judge alone** trials (possibly thanks to Barwick CJ and others) which are conducted as a matter of course in Queensland, New South Wales, South Australia, Western Australia, and the ACT.

Admittedly, juries are only dispensed with when indictable offences do not fit the category of 'serious'; that is, murder, rape, abduction, etc. But even so, an accused who believes that justice cannot be delivered because of media publicity or complex

forensic findings may apply to have a judge alone trial. Two recent (2013) examples of this involved the judge alone murder trials of Simon Gittany (NSW) and Lloyd Rayney (WA). The latter was acquitted and left the court still innocent.

It is only a matter of time before juries are dropped from our criminal justice system altogether. And in the words of a prominent former barrister and recently retired (June 2014) Governor of Western Australia, Malcolm McCusker QC:

> "If you were charged with a crime and were innocent, would you like your fate to be decided by 12 people, chosen at random by lot, not qualified or experienced in assessing evidence, and no legal training? And who give no reasons for their decision, so that if they found you guilty, it would be extremely difficult to appeal?
>
> Or would you prefer the decision-maker to be a qualified judge trained and experienced in assessing evidence and the law, and obliged to give detailed reasons for his or her decision?"

A Federal Party government, in introducing an Advanced Legal System, will take the current concept of **judge alone** criminal trials and expand it to lock in the safeguards afforded by three judges sitting alongside Empanelled Experts.

Unanimous Verdicts (Weaknesses)

Putting aside the historical nature of trial by jury and our need to cling to tradition, it is well recognised that although the requirement of a jury to arrive at a unanimous verdict creates vigorous debate (i.e. better deliberation) and therefore less risk of convicting an innocent person, unanimity **also** creates:

(a) inordinate delays as the strongest dissenting jurors refuse (wrongly or rightly) to give ground to the majority, resulting in a hung jury and the enormous cost of a fresh trial with fresh jurors;

(b) inordinate delays as dissenting jurors are worn down, to the point of submission, by being cognisant of the cost of a fresh trial, time constraints on their personal lives, or simply by lacking the strength to stand up to the majority of jurors, or lacking the articulate ability to mount their arguments convincingly;

(c) capitulation by jurors who are too embarrassed to admit that they are incapable of understanding the forensic nature of evidence, or the legal arguments raised, or the confusing statements of expert witnesses, or the instructions of judges; or

(d) rapidly increasing stress levels resulting in flawed decision-making as the hours and days pass, or when a time limit of say four hours to reach a decision is imposed by the judge.

We must ask ourselves what happens to '**beyond reasonable doubt**', the fundamental tenet in criminal trials? Because if any one of the pressures or circumstances described above, forces or causes a juror to make a flawed decision which results in a guilty verdict, then the accused will have been found guilty while reasonable doubt still exists.

Majority Verdicts (Weaknesses)

It is strongly argued that by allowing only 10 out of 12 jurors to bring down a verdict (or even fewer than 10) then the jury system can be safeguarded against:

(a) the number of hung juries; (May God forbid that the individual decisions of jurors – conflicting decisions – has preserved the presumption of innocence by not being able to determine guilt beyond reasonable doubt.)

(b) rogue jurors; (The assumption here is that if one or two jurors are rogues then that flaw in the system can be overcome by praying that the other ten are not. Fundamentally, no flaw can be allowed when that flaw disallows a jury the right to deliver a verdict beyond reasonable doubt. And we are compelled to call 10 out of 12, reasonable doubt.)

(c) jurors being bribed or intimidated; (Do we simply hope that not all of the jurors will be got at? If so, we are backing a flawed system that cannot make a decision beyond reasonable doubt. One corrupted juror destroys this basic tenet.)

(d) compromised verdicts. (If two jurors succumb to pressure or bewilderment and capitulate to the advantage of the majority in order to grant a unanimous verdict, isn't that the same as two jurors standing their ground when only a 10 out of 12 majority verdict is required? Either way, the verdict is still compromised.)

In short, majority verdicts do not deliver justice beyond reasonable doubt; all that happens is that trial times are greatly reduced allowing courts to handle a stockpile of cases more expediently. It has nothing to do with justice.

Further Reasons for Trials by Judge(s) Alone

It is recorded that the jury system – sometimes comprising thousands of jurors and no judge – dates back to the 5th Century BC in Ancient Greece, and was at the heart of Athenian Democracy.

Yet it would take another 1,200 years for jury trials to be introduced into Britain by Welsh king Morgan of Glamorgan who decided that the number of jurors should equal the number of Christ's Apostles given that the judge was standing in as Jesus; a novel and irrational concept. But then, it was 725 AD.

Then, after little more than 400 years had passed, Kind Henry II of England decided to use the number 12 as being the number of "good and lawful men"; a jury charged with the responsibility of going into the community to uncover the facts – largely within land disputes – rather than listening to argument in court. And the introduction of divided courts – civil and criminal jurisdictions – along with the concept of a grand jury were also credited to Henry II.

But before going on with a further list of reasons why the jury system is no longer capable of delivering justice in the 21st Century, it must be re-emphasised that a Federal Party government would replace the jury system with Empanelled Experts who sit alongside not one, but three judges.

And both the prosecutor and defence counsel would have the right to question these experts before empanelling their individual quota; a quota of three experts each, and if it so happens that three of the experts to be questioned are accepted by both, then only those three experts will be empanelled and sit with the trial judges, and not the potential maximum of six.

'Snapshot of an Advanced Legal System' gives further details earlier in this Justice Reform policy. It is here that the term 'Judges Alone' is qualified as judges not relying on jury verdicts, but relying only on the combined and unanimous recommendations of Empanelled Experts who must provide their reasons for such recommendations. The verdict is delivered by the judges alone, and only they provide the reasons to support the verdict **along with** the recommendations of the Empanelled Experts. These reasons and recommendations can become the grounds for a possible appeal.

A Jury Comprising Our Peers

It is commonly accepted that the word 'peer' means a person who is equal to another in rank, status or merit. Yet there is no mechanism within our jury system that can offer an accused a guarantee that he or she will be judged by their peers. But putting that aside, there are many occasions when the backgrounds of the jury members are, by pure chance, aligned with those of the accused.

And provided these peers are not swamped by legalese and forensic evidence (to name just a few impediments) there is a fair chance of arriving at a verdict that delivers justice, but not otherwise.

However, the fundamental flaw still remains. There is no mechanism within our criminal justice system that seeks to match the competencies, experience, and backgrounds of prospective jurors with those of the accused. It is just a game of chance.

Professionals Very Often Exempt from Jury Service

But being judged by our peers is only one part of this game of chance known as the jury system. If we are unfortunate enough to be judged by those who lack our own areas of specific competence, experience and background, our next best hope – and some may say, the better hope – is to be judged by a jury peppered with jurors of obvious intellect, no matter what their backgrounds.

Unfortunately, the vast majority of professional people – medicine, engineering, the sciences etc. – are quick to furnish reasons why they cannot devote time to jury service; reasons that are most often accepted, thereby precluding them from an identifiable intellectual pool. And it is impossible to know if Mary Jones (listed as a housewife) was, in fact, a former computer programmer, neurosurgeon, physicist, or has a naturally high IQ. And even if we did know there is no way of guaranteeing that she, or anyone who is identified as intellectual, will be empanelled on the jury. Once again an accused runs the risk of being dammed unjustly by intellectually less capable jury members.

No Background Checks on Jurors

And you would need to be psychic to know if a prospective juror harboured biases that have been entrenched through personal experiences, or has undetectable minor disabilities that have been there since birth.

The effects of rape, sexual abuse as a child, physical abuse through parental alcoholism, intellectual impairment, the witnessing of violent crime, degrees of autism, depression (the list goes on) can all affect the ability of a juror to impartially evaluate the evidence and the character of the accused.

This game of chance is looking more and more like the spinning of a roulette wheel and nothing like justice.

Jurors Not Empanelled Randomly

All prospective jurors are drawn from the electoral roll by lot. And that's fair. Many will then ask to be excused because of personal and professional reasons and others will be excused, once empanelled, because they are known to the accused, relatives of the accused, or are in knowledge of circumstances that would bias their judgment.

But before being empanelled, the prosecutor and the defence counsel will be able to identify – albeit briefly – which person they wish to empanel. This is done by quickly

sizing up the outward demeanour of the prospective juror and the description of that person, whether housewife, electrician, brick layer, businessman, etc.

Naturally, in a case involving a child sex offender, the gender and age of jurors will be important. The prosecutor will be keen to stack the jury with women who look like mothers or are obviously old enough to be mothers. Whereas, the defence counsel may wish to select young single women and young unmarried men.

Smart legal practitioners will not allow prospective jurors to be empanelled randomly. They will each have the right to object to any of those people before the oath or affirmation is taken if they feel uneasy about a person's suitability. And those objected to – challenged or stood by – will not be empanelled. But no matter how skilfully the randomised nature of jury selection can be overcome by perceptive manipulation, luck will continue to play its part.

Reluctant Jurors

And if any woman thinks that a cotton print frock and thongs will eliminate her from being selected, or any man believes that work boots, dirty jeans and rolled up shirt sleeves will get him out of jury service, think again. Up until they step into the courtroom they have never seen the accused and know nothing about the alleged offense. It could be that they are dressed appropriately.

But the point being made here is, irrespective of attire, many people dread the thought of being a juror, but simply do not have a strong enough argument to excuse themselves. And so, they sit mindlessly throughout the trial and mindlessly through jury deliberations, at the end of which they cast their votes in whichever direction will fast-track the termination of their duty.

And how many juries are made up of one, two, three or more reluctant starters? Nobody has the stats and nor is it important. It is only important to know that it can happen each time the wheel is spun.

Insufficient Knowledge of Forensic Findings

Forensic experts are required within a host of arenas. We have forensic accounting reports prepared by forensic accountants in cases of embezzlement and fraud; forensic engineering reports prepared by forensic engineers in cases of patent infringement, patent and product theft; forensic pathology reports prepared by forensic pathologists to identify the manner in which a person died; the list goes on.

Courts have long since realised that it is not possible for lay jurors to understand the often mind-bending jargon and complexities within forensic reports. And for this reason, an accused can apply to be tried by a single judge. But this is not the norm.

Within a Federal Party government it would be the Empanelled Experts, sitting alongside three judges, who would address forensic reports emanating from whichever of the sciences (or industries) are embraced by the case.

In the interim, we can only stumble through, knowing that juries will be tested time and time again as they are forced to understand evidence well beyond their knowledge.

Media and IT Influences

'Trial by media' is a well-known expression and one that only a few trial judges take on board. There is a belief that judges can somehow instruct or encourage jurors to leave the perceptions created by media, at the courtroom door.

And if electronic and print media have not shaken the unbiased thinking of a prospective juror then Facebook, Instagram, LinkedIn and Google will tip the balance sufficiently to cement the guilt (normally) of any accused in the mind of that juror; and that's before a trial has been announced, let alone the damage done by adverse coverage that so often occurs during trial.

However, media, along with complex forensic evidence may give an accused the right to avoid a jury and apply for a judge alone trial. But there are no guarantees. And it's not a 50/50 chance. If you call 'heads', you must be prepared to accept that the rules of the game may be loaded in favour of 19 tails for every one head. The gambling goes on, with the guilt or innocence of all accused hanging in the balance.

Juries Not Required to Give Reasons?

To be asked to make a decision, and not be asked to give reasons for that decision, simply highlights another major flaw in the criminal justice system. Or is it that we ordinary mortals are being humoured by the judiciary. A little like having a pet dog at your feet. It's comforting to be able to demonstrate that the people are an integral part of delivering justice when in reality the dog is there to be given a good swift kick if it makes a wrong decision.

So, if you were a judge, you would have 12 people to take the blame for a wrong verdict; why on earth would you want to spoil things by asking jurors for their reasons. Those reasons could be used by prosecutors and defence counsel to appeal the verdict, and more importantly reasons which could discredit a judge who has already read the inconclusive and highly emotive deliberations which have more than likely defied the evidence and an understanding of law.

The judge not only stands to make a goose of himself by letting the jury's reasons through in the first place, but leaves every criminal trial open to appeal on potentially countless grounds of erring in fact and in law.

No... the jury system remains unsteadily in place to convince us that justice lies firmly in the hands of the people; a cosmetic stance beneath which there is no substance or rational argument for the continuation of this farce.

However, a Federal Party government would endorse that the delivery of justice is the domain of the people, but people with specialist skills - Empanelled Experts - who sit alongside three judges who understand how to apply law even if they do not understand the science, complexities and nuances underpinning the evidence, as so often happens.

Jury System of Benefit to Lawyers and Judges

In Australia, it is widely held that up to 40 percent of criminal trials, involving wealthy known criminals, deliver not guilty verdicts which release these criminals back onto the streets. And this occurs not just because of the incredible number of weaknesses in our jury system, but also because of the high profile skills of law firms and defence counsel who are paid inordinate sums of money to get their accused clients off.

If you have ever seen a barrister skilfully confuse a jury with false but plausible argument (i.e. sophistry) and then watched a high flying drug dealer and known killer walk free, you would be sickened at the sight. But then comes the premium brand scotch – bottle after bottle – as defence lawyers and counsel congratulate themselves in chambers. And the backslapping does not stop there.

The end result has allowed the judge to avoid making a decision that will now give the legal practitioners involved an even higher profile; which means higher fees in the

future. But it also means that the client (accused) is free to continue pouring more and more money into the legal profession.

The judge has very effectively washed his hands of the case by allowing the jury (not himself) to reach a decision (verdict). For without a jury, the judge would have been obliged to put the accused out of circulation for many years.

And so, the game of using juries as scapegoats – juries who are also traditionally reluctant to convict; such is human nature – is a game that continues to prosper the coffers of the legal profession, and absolve the judiciary of any wrongdoing.

By introducing an Advanced Legal System, a Federal Party government would be ensuring that fewer than five percent (5%) of known criminals are acquitted, not the 40 percent that currently exists.