LAW·COMMISSION
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Preliminary Paper 37 – Volume 1

JURIES IN CRIMINAL TRIALS
PART TWO

A discussion paper

The Law Commission welcomes your comments on this paper and seeks your response to the questions raised.

These should be forwarded to
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Preface

IN 1989 THE LAW COMMISSION was asked by the Minister of Justice to review procedure in criminal cases. This project is a continuing one. Its purposes are:

- to ensure that the law relating to criminal investigations and procedures conforms to the obligations of New Zealand under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi; and
- to devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

With these purposes in mind, the Law Commission was asked to examine the law, structures and practices governing the procedure in criminal cases, from the time an offence is suspected to have been committed until the offender is convicted, including but not limited to:

- powers of entry, search and arrest;
- diversion – principles and procedures;
- the decision to prosecute and by whom it should be made;
- the rights of suspects, and police powers in relation to suspects;
- the division of offences into summary and indictable offences;
- preliminary hearings and criminal discovery;
- onus of proof;
- evidence in sexual and child abuse and other special cases; and
- payment of costs to acquitted persons

and to make recommendations accordingly.

To deal comprehensively with the criminal procedure reference in a single report would be almost impossible. The Commission therefore decided to proceed with the reference by stages. A report on Disclosure and Committal (NZLC R14) was published in June 1990. An issues paper on the prosecution of offences was published in November of that year (NZLC PP12) followed by the *Criminal Prosecution* discussion paper (NZLC PP28) in 1997. The final *Criminal Prosecution* report will be published shortly. In 1992 the Commission published the *Criminal Evidence: Police Questioning* discussion paper (NZLC PP21), making its final recommendations in 1994 in *Police Questioning* (NZLC R31). There is also discussion of police powers in *Final Report on Emergencies* (NZLC R22) published in December 1991. A discussion paper on *The Privilege Against Self-Incrimination* (NZLC PP25) was published in 1996.

The Law Commission first considered juries in criminal trials in 1995 when we circulated the *Juries: Issues Paper* (October 1995) as a prelude to a larger discussion document. The issues paper asked which matters were of primary concern

to those who participate in, or work with, the system. The responses we received confirmed that the areas which form the subject of this paper need consideration.

This discussion paper is published in two parts, and the second part is in two volumes. The first part (*Juries in Criminal Trials: Part One*, NZLC PP32) was published in July 1998. This second part has been delayed because in 1998 work started on the juries decision-making research project undertaken by the Faculty of Law at the Victoria University of Wellington (through Victoria Link Limited) in conjunction with the Law Commission ("the Research"). The chief researchers were Warren Young, Neil Cameron, and Yvette Tinsley. The Research bears directly on matters raised in both parts of this discussion paper. A summary of the results of the Research is contained in *Juries in Criminal Trials Part Two: A Summary of the Research Findings* ("Findings"), a companion volume to this paper.

We have also been assisted by the many people who have commented on drafts of this discussion paper including Scott Optican, Senior Law Lecturer, University of Auckland and Robert Lithgow, Barrister. We are grateful for their assistance.

Until August 1997, Les Atkins QC was Commissioner in charge of the criminal procedure project with particular responsibility for the juries discussion paper and he prepared the initial draft of this paper. He has been succeeded by Tim Brewer ED. The Commission also acknowledges the work of several of its past staff members, Penny Webb-Smart, Janet Lewin and Susan Potter, in preparing research and draft chapters for Parts One and Two of this paper.

This paper does no more than discuss the issues and pose questions for consideration. It includes the Commission's provisional conclusions following research and consultation. Our provisional conclusions should not be taken as precluding further consideration of these issues.

Submissions or comments on this paper should be sent to Tim Brewer, Law Commission, PO Box 2590, DX SP23534, Wellington, by 31 March 2000 or by email to Louise Symons, Senior Researcher, LSymons@lawcom.govt.nz. We prefer to receive submissions by email if possible. Any initial inquiries or informal comments can be directed to Louise Symons: phone (04) 914 4808 or fax (04) 471 0959. This paper is also available on the internet at the Commission's website: http://www.lawcom.govt.nz.

Summary of questions

THE FOLLOWING IS A SUMMARY of the questions on reform options discussed in this paper.

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1
Introduction

1 THE RESEARCH CONDUCTED ON BEHALF OF THE COMMISSION is of considerable importance. It is unique in New Zealand and in the Commonwealth. For the first time, researchers have been able to systematically investigate how real jurors go about their task. They have opened a window into the jury room which has never been opened before. The Findings (contained in a companion volume to this discussion paper) will provide an invaluable reference for all those who work in trial courts. They also point the way to a number of simple reforms which could make the onerous task of jury service easier.

2 Jury service can be difficult, stressful and frustrating. Juries preside over trials of the most serious crimes we have, and must often hear evidence of the most disturbing kind. But many jurors report satisfaction with their service: it allows them to learn about how the criminal justice system operates and gives them an opportunity to perform an important civic duty. Jurors are overwhelmingly conscientious in their task, and very conscious of their responsibility. Clearly the experience of jury service is a cohesive force in our society for those who participate in it. Unfortunately, not everyone in our society does participate: it has been emphasised to us that many Mäori feel very strongly that juries are not representative of Mäori society, and that this contributes to a general feeling of alienation from the criminal justice system. It is a matter which urgently needs to be addressed.

3 In chapter 2, "Information and assistance before the trial", we point out that procedural and practical information is often not effectively conveyed to jurors before the trial, and we discuss ways of improving that. We look at how foremen are selected, show that the selection is often random and that foremen receive little guidance on how to fulfil their vital role, and we consider options for improvement.

4 In chapter 3, "Information and assistance at the beginning of the trial", we discuss the judge's opening remarks, the Crown opening, the defence opening, and the judge's final summing-up. This chapter highlights the fact that jurors are not passive observers who simply record information in their heads. Rather they are constantly interpreting what they hear and building a overall picture of the case. To do this, they need clear frameworks, and the judge and counsel must provide those frameworks. We suggest the more frequent use of written directions and aids to assist with this.

5 In chapter 4, "Presentation of evidence", we discuss the technical issues relating to pre-trial disclosure. Improvements to disclosure would decrease the volume of evidence that must go to juries and improve their efficiency. We discuss the difficulties which jurors have with the presentation of evidence and how this could be improved. We suggest that juries find charts and other written aids and visual representations very helpful, and that greater use should be

made of them. We also suggest that juries should receive a copy of the judge's notes (the typed transcript of the evidence).

6 In chapter 5, "Jury deliberation", we look at the deliberation process itself. Although jurors make a strong and conscientious effort to apply the law, seldom consciously departing from the law as they understand it to be, they do have difficulties in understanding the law. However, many misunderstandings are resolved through deliberation, and we suggest that improvements to the way evidence is presented and greater judicial assistance during deliberation would help to resolve these problems.

7 In chapter 6, "Failure to agree: majority verdicts", we deal with what is probably the most controversial issue relating to juries: should we allow majority verdicts or retain unanimity? The theory that majority verdicts are needed to overrule "rogue" jurors is not supported by the Research, and there is evidence to suggest that majority verdicts would not lead to significant savings. We suggest caution on this issue, but welcome debate.

8 In chapter 7, "Juror competency", we show that jurors are generally competent and impartial, but they do have some difficulties. The Research shows that some jurors have particular difficulty with assessing the credibility of witnesses, challenging the traditional view that juries are particularly adept at assessing credibility. There is also a practical problem of a minority of jurors not understanding English – despite the efforts currently made to identify such people before empanellment. There is little evidence of gender or cultural bias. We also re-open for discussion the question of the ability of juries to decide fraud and other complex cases. This was discussed in *Juries In Criminal Trials: Part One*, but opinions may now be reviewed in light of the Research.

9 In chapter 8, "The secrecy of jury deliberations", we discuss the laws which ensure that jury deliberations remain secret, which in New Zealand are based on convention and case law, not legislation. We ask whether this law should be codified.

10 In chapter 9, "The media and their influence on juries", we examine the law of contempt, which constrains media coverage of matters awaiting judicial determination. The Research shows that media publicity both before and during trials has little impact on jurors. The law in this area is criticised by journalists for being too vague. We ask whether the law should be codified, and if so, what test should be used to determine what can or cannot be published.

11 In chapter 10, "The experience of being a juror", we discuss the practical problems and concerns of jurors and how they could be addressed. The physical facilities provided for juries are quite simply not good enough. They need to be improved. Jury service can also cause problems with jurors' employment and business commitments, and there is a feeling that remuneration is too low. Jury service disrupts family and social routines, and we suggest that this could be alleviated if jurors were able to defer their service for a limited time. Counselling for jurors who find their experience too stressful is available, but it is rarely used and we seek submissions on improvements to increase awareness of its availability.

2
Information and assistance before the trial

INTRODUCTION

12 A JURY IS DRAWN FROM THE GENERAL COMMUNITY and selected at random. Its tasks are to decide what facts have been proved, to apply the law to those facts, and to return a proper verdict. How well juries perform these tasks is the underlying theme of this paper. It can be presumed that the better prepared jurors are for the jury experience, the more comfortable they will be in the role and, at least in the early stages of a trial, the more effectively they will contribute to the jury's consideration of the evidence. This chapter looks at information and assistance given to the jury before the trial starts, including information on how to select the foreman.[1]

JURORS' KNOWLEDGE PRIOR TO SERVICE AND THE JURY SUMMONS

13 It appears that most jurors have little prior contact with or knowledge of the criminal justice system, the way that a trial functions, or the exact nature of the task they are being asked to perform. The knowledge they do have is often vague or not useful (see Findings, 2.1–2.5). Thus the first real information that most jurors get about being on a jury is the *jury summons* and any accompanying information.

14 The current *jury summons* was designed as a result of proposals by the Courts Consultative Committee. This is a committee of judges, lawyers and officials, established in 1986 to advise the Minister of Justice on the operation of all aspects of the court system. In 1992, the Committee released a report that it had commissioned on becoming aware that some jurors were finding aspects of jury service unnecessarily onerous. The report, *Jurors' Concerns and the Jury System*,[2] reviewed the facilities, information and services provided to jurors.

15 In accordance with the Committee's proposals, several improvements were made to the quality and amount of information provided to jurors, and the

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[1] "Foreman" is the term used in the Juries Act and therefore we shall use it throughout this paper. The term "jury representative" is also sometimes used, for example, in the *Information for Juries* booklet.

[2] Courts Consultative Committee *Jurors' Concerns and the Jury System* (Wellington, 1992).

current *jury summons* was designed. The *jury summons* now includes standard information under the following headings:

- What is a jury?
- How was I chosen for jury service?
- What will I have to do as a juror?
- What types of case can a jury hear?
- Do I have to serve on a jury?
- How do I apply to be excused from jury service?
- How long is jury service?
- How long is each day at court and what about meals?
- When and where do I report?
- What payment do I get for serving on a jury?
- What should I wear?
- Is carparking provided?
- How can I get more information?
- What happens if I do not report to court?

It also contains instructions in six languages advising that a juror must have a good understanding of English, and it asks potential jurors to advise the jury officer if they do not understand English.

16 In most centres the *jury summons* is accompanied by information showing the location of the court, convenient parking, and a telephone number for jurors who want further information. There is some variation in the information provided by different districts, but all give in substance the information required. There is also considerable variation in the tone used, some districts retaining a formal style and others using a more informal style. (see Findings, 2.7 and 2.8)

17 On the basis of the Research, the Commission recommends minor amendments to the summons and the information accompanying it:

- to give more information on practical matters such as juror fees, parking, smoking policy, the fact that sitting hours may be altered and that there may be delays and, where relevant, that they may be required to stay overnight;
- to emphasise more strongly the need for jurors to understand English;
- to ensure that all districts use an informal and friendly tone; and
- to extend nationally the practice of some districts of including information on confidentiality, note-taking, asking questions, the role and selection of the foreman, and the deliberation process.

18 Another source of information for jurors is a Department for Courts booklet called *Information for Jurors*, which is intended to be given to jurors at the court.

19 The Department has also prepared an introductory video for jurors. It is six to seven minutes in length and includes:

- a welcome to jurors, thanking them for their participation;
- encouragement to jurors to express their views and concerns;
- a warning in several languages about the need to understand English;
- an enactment of the empanelling process from the juror's perspective;
- information on the various roles and responsibilities of people in the court;
- information on the stages of the trial;

- the obligations of jurors; and
- information on the interaction between the foreman and the jury.

20 Although it is intended that the booklet and the video are seen by all jurors, it is clear that a significant number of jurors do not see either (see Findings, 2.12–2.18). The reasons for this are largely practical: for example, not enough copies of the booklet to go around, or inadequate facilities for viewing the video. The booklet and video contain much useful information, and many of the questions that jurors in the Research indicated they wanted to ask are answered in them. Of those who did read the booklet or see the video, most found them very helpful.

21 It was apparent from the Research that there was a minority of jurors who found the responsibility of their task emotionally difficult (see Findings, 2.44, 7.11 and 10.16). This was particularly a problem in trials involving violent or sexual crimes, especially if jurors had themselves been victims of such offences. Other jurors felt uncomfortable because they found the requirement to sit in judgment on another person, and give a verdict that could so drastically impact on that person, a heavy emotional burden. Of course, such feelings are inevitable given the role of the jury and the fact that juries are used in the trials of the most awful crimes we have. There is probably little practical help that can be given in advance of the trial to assist jurors to prepare psychologically for their role. But we suggest that information could be given, possibly in the *Information for Jurors* booklet, acknowledging the problem and advising that in particularly onerous trials counselling can be made available after the verdict has been returned. We would welcome comment on this admittedly difficult area.

SELECTING THE FOREMAN

22 Once the jury has been empanelled, the judge briefly addresses them and then asks them to retire to select a foreman. The judge will usually outline the role of the foreman, stress that it can be a man or a woman, and suggest to the jury that in selecting someone, they might like to look for previous experience on a jury and/or experience of chairing meetings. The advice given seems to be fairly uniform but is not well recalled by jurors (see Findings, 2.49–2.50).

23 A jury meets as a group for the first time when it retires to select a foreman. The information given to the jury on the role and selection of the foreman in the booklet, the video, and by the judge, is very general indeed and is unlikely to assist jurors in either selecting an appropriate foreman or, indeed, understanding what the task of foreman involves. The *Information for Jurors* booklet, for example, devotes as many lines to the question of what the foreman is to be called as it does to the description of the process of choosing the foreman and the foreman's role:

> There are no rules on how you choose this person – it's entirely up to you. The jury's representative speaks in court on your behalf, and should be someone who can chair the jury's discussion in a fair and balanced way.

24 It appears that many jurors do not recall receiving any advice before the selection process takes place about the role of the foreman and how to select one (see Findings, 2.50). Those who do recall receiving this information recall receiving it from various sources: some from the judge, some from the court attendant, and only a few from the booklet and video.

25 Jurors are obliged to choose a foreman very quickly. It is made clear to them that the court is waiting. There is no time to introduce themselves in any detail or to deliberate. Given that the jurors do not know each other, the lack of consistent or detailed guidance on what the task of foreman involves and the pressure to decide quickly, the choice is inevitably almost random. Any indication of some relevant skill or a willingness to do the job is usually enough for nomination. Appearance and gender can also be significant in the choice (see Findings, 2.51–2.52).

26 Although in only two trials in the Research did jurors specifically attribute deficiencies they perceived in the foreman to either the selection process or the lack of information given to complete that process, it appears that in a significant number of trials the foreman is largely ineffective, and in a number of cases the decision-making process either produces errors or is unduly prolonged because of the foreman (see Findings, 2.54 and 6.23–6.32). This could be because the foreman either has no real understanding of his or her role, and so does not behave appropriately, or discovers that he or she is not suited to the role and is unable to fulfil it.

27 We suggest that jurors need considerably more information on the role of the foreman before they are asked to select one, more guidance in the selection of a foreman, and a reasonable period of time in which to make the choice. There should also be a brochure or poster in the jury room giving advice to foremen on how to discharge their functions. It could include:

- the foreman's responsibility to guide rather than dominate the discussion;
- the need to ensure that every juror has the opportunity to speak;
- what to do if a juror (including the foreman) behaves in an inappropriate manner towards other jurors (for example, harassing or intimidating them);
- what to do if the foreman is the dissenter in an otherwise unanimous jury;
- at what point in the deliberations to take a vote (see paras 122–123 below);
- communications with the judge, both during the trial and during deliberations (see paras 98–104 for a discussion of jurors' questions);
- how to identify when the jury is ready to reach a verdict, and how to facilitate the reaching of a verdict; and
- the appropriate language to be used in conveying the verdict (for example, some jurors might think that they can bring in verdicts conditional on a particular sentence).

28 We raise for consideration whether it is necessary for the foreman to be selected at the start of the trial. Would it be better for the foreman to be chosen once the evidence is concluded? By then, the jurors will have had a chance to assess each other's qualities. Any communication from or to the jury prior to a foreman being chosen could be through a court official.

29 Alternatively, if the practice of selecting a foreman at the start of the trial is to continue, we suggest that jurors would make a better choice if they had more time and guidance. Would it be better, for example, to have a standard

presentation to the jury about the role and qualities of a foreman, and then allow them a longer period, maybe up to an hour, to decide?

How can the information contained in the *Information for Jurors* booklet and introductory video be more effectively delivered to jurors?

Should a copy of *Information for Jurors* be included with every summons?

Should jurors be given more information about how the foreman should be selected and the role and tasks of the foreman?

If so, what should the information consist of?

Is it possible to better equip juries for the emotional impact of some trials? How?

Is it necessary to select the foreman at the start of the trial?

Alternatively, should more time and guidance be given in selecting a foreman?

What sort of guidance is appropriate?

3
Information and assistance at the beginning of the trial

INTRODUCTION

30 ONCE THE JURY HAS CHOSEN ITS FOREMAN, it returns to the Court and the name of the foreman is announced publicly. The indictment is then read, and the accused is formally put in the charge of the jury. The trial proper is ready to begin. From this time, the fate of the accused is in the hands of 12 members of the community who (probably) have only just met each other, are (probably) unfamiliar with the court process, and who (probably) are feeling almost as stressed by their situation as the accused. Clearly, anything which can reasonably be done at the beginning of the trial to assist the jurors to settle into their task should be done. That is the subject of this chapter.

THE JUDGE'S OPENING REMARKS

31 The judge begins by addressing some brief remarks to the jury before calling on the Crown to open its case. The judge's opening comments usually last for between 10 and 15 minutes. They generally cover a range of matters from basic housekeeping issues to, in some cases, a reasonably detailed discussion of what the specific case is about. Much of the information given at this stage, especially on housekeeping matters and the jury's role and function, is essentially repeating information in the booklet and the video (see Findings, 2.21–2.22).

32 Despite some criticisms, it is clear that the vast majority of jurors found the judge's opening instructions useful and informative (see Findings, 2.23–2.25). A few certainly commented on their repetitive nature (although this increases retention), and a number either did not hear them or did not focus on them properly because they were still coping with the shock and novelty of being involved in an actual trial, but this was not a common response. By and large, jurors responded best to judges who used their opening instructions to put them at ease, who addressed them directly and at least with the appearance of spontaneity, and made it clear that both the court and the court staff were concerned about and wanted to be responsive to their needs during the trial. Most judges did this well. It is significant that while a number of juries commented adversely on the way in which prosecution and defence counsel were seen as treating the trial as routine, no such comment was ever directed at the judge.

33 The extent to which judges at this stage dealt with the law varied. However, where the judge did give the jury even a minimal direction on the law in the case, jurors were appreciative of this and found it very helpful (see Findings,

2.25). This accords with overseas experience. Heuer and Penrod[3] conducted a field study with written and preliminary directions in 34 civil and 33 criminal trials in Wisconsin circuit courts. After the trials, judges, lawyers and jurors were asked to complete questionnaires designed to elicit whether written and preliminary directions (that is, directions before the evidence was taken as well as just before deliberations) increased juror comprehension, recall and satisfaction, and whether they reduced the length of deliberations. In relation to preliminary directions, the study found that:

- jurors reported that preliminary directions were helpful in evaluating the importance of various pieces of evidence and in applying the law to the facts. It was concluded that preliminary directions did assist the jury in evaluating the evidence according to the correct legal guidelines. The directions increased juror satisfaction with the trial process (pp 425–426);
- jurors recalled the judge's directions more frequently when they had received preliminary directions (p 424); and
- judges were asked whether preliminary directions were impractical because they did not learn what instructions to give until the evidence was given. Judges strongly disagreed with this statement. Judges also said they did not find giving preliminary directions to be disruptive to the trial process. (p 426).

34 A common criticism of preliminary directions is that, if given too early, they may not be relevant to the issues and may be too broad and difficult to apply. Judges cannot describe the facts before evidence is called, but they can explain the ingredients of a charge. It appears from the Research that the traditional theory that jurors are blank slates, passive observers who record information, is wrong. Jurors are constantly interpreting what they hear and need a clear framework to do so effectively (see Findings, 2.56–2.57).[4] Where frameworks, particularly written frameworks, are given, they are found to be helpful (see Findings, 3.7). Such materials include witness lists, chronologies, family trees, and summaries. A copy of the indictment, which is frequently given out, is also very useful.

35 We propose that judges should, in their opening remarks, introduce the legal concepts which are likely to be relevant in the trial. These would include the essential elements of the charges faced by the accused. Where possible, the judge should provide the jury with written copies of these preliminary directions.

Should judges give preliminary directions before the prosecution case commences, in addition to directions in the summing-up?

If so, what sorts of directions should be given?

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[3] Heuer and Penrod "Instructing Jurors – A Field Experiment with Written and Preliminary Instructions"(1989) 13 Law and Human Behaviour 409.

[4] Other researchers have drawn similar conclusions. See, for example, Pennington and Hastie "The Story Model for Juror Decision Making" in Hastie (ed) *Inside The Juror – The Psychology of Juror Decision Making* (Cambridge University Press, Cambridge (NY), 1993).

CROWN OPENING

36 The purpose of the Crown opening address is to tell the jury what the case is about and to put it into the context of the general law (such as the onus and standard of proof) and the charges. By the time the prosecutor finishes the Crown opening, the jury should have a clear idea of the facts the Crown intends to prove, the witnesses who will be called to prove them, and the way in which the facts, if proved, will establish the essential elements of the offences alleged. In practice, although the address is generally well received by juries, it is not always well recalled (see Findings, 2.34–2.37). This could be for a number of reasons, including the obvious one that the actual evidence in the trial "overprints" memories of the address. It is clear, however, that jury recall and comprehension is aided by access to written and tangible materials. Crown counsel should be encouraged, when opening the Crown case, to make available to the jury copies of the indictment, the list of Crown witnesses, and non-controversial exhibits such as maps, plans and photographs.

OPENING REMARKS BY THE DEFENCE

37 Section 367(1) of the Crimes Act 1961 provides:

> Upon the trial of any accused person, counsel for the prosecution may open his case and after such opening (if any) shall be entitled to examine such witnesses as he thinks fit; and the accused person, whether he is defended by counsel or not, shall be allowed at the end of the case for the prosecution, if he thinks fit, to open his case, and after such opening (if any) shall be entitled to examine such witnesses as he thinks fit.

There is case law confirming that section 367(1) precludes the defence making an opening statement immediately following the prosecution's: in *R v Joseph*,[5] Hammond J said that he doubted it could have been Parliament's intention to give the defence both the advantage of blunting the Crown's opening statement and the last word in the closing addresses.

38 Despite section 367(1), some judges allow defence counsel to make a brief opening statement. This happened in 3 of the 48 cases in the Research (see Findings, 2.29), and in other cases jurors indicated they would have appreciated an opening statement (see Findings, 2.30). Such an opening statement defines the issues without analysing the evidence. The invitation to defence counsel is issued by the judge, usually in the absence of the jury; whether the invitation is acted upon is counsel's choice.

39 An amendment to section 367(1) to allow a defence opening statement to follow the prosecution's opening has been approved by the Ministry of Justice and should be included in a future Statutes Amendment Bill. The advantages of giving the defence an express right to make a brief opening statement concerning the defence's version of the facts include:

- the issues at the trial may be more clearly defined, saving court time;
- the jury will be more aware from the outset of the points of contention. This should help provide a clearer "framework" for the jury, which the Research has indicated is much required (see above para 34); and
- the defence's cross-examination of prosecution witnesses may be given a

[5] [1994] 2 NZLR 702, 704.

context, making that part of the trial (which is often an area of confusion for jurors) more comprehensible.

40 The Commission supports the amendment of section 367(1). We do not believe that a defence opening statement following that of the prosecution would blunt the prosecution's address and cause unfairness. Rather, we see the issue as one of clarifying the position of both parties at a sufficiently early point in the trial to provide a meaningful context for what follows.

41 Defence counsel can, as of right, give an opening address to the jury at the close of the Crown case if they intend to call evidence. However, there is no requirement to give such an address, and defence counsel sometimes simply begin the defence case by calling their first witness. Jurors' responses to opening addresses by the defence at the end of the Crown case were mixed but not overly enthusiastic (see Findings, 2.38–2.41). The Commission does not recommend that there be any onus on the defence to open, as that would infringe the rights of the accused to put the prosecution to proof, and infringe upon the ability of counsel to conduct a case as they see fit.

THE JUDGE'S SUMMING-UP

42 Once both sides have presented their evidence, cross-examined the witnesses, and given their closing addresses, the judge will sum up the evidence and give directions to the jury about the relevant law:

> For many years it has been common in New Zealand for Judges summing up to juries to begin with a warning that they must decide solely on the evidence, putting out of their minds anything that they might have heard about the case outside the Court; to explain the onus of proof and the respective functions of Judge and jury; to explain the necessary legal ingredients of the offence or offences charged and to give any other necessary directions on the law; and in reviewing the evidence to summarise the contentions on each side. The order is not mandatory, but it is convenient and none of those steps can safely be omitted.[6]

43 Judicial directions are given, where appropriate, on such matters as:

- the value in assessing credibility from the demeanour, appearance and manner of a witness;
- the relevance of circumstantial evidence;
- the defendant's right of silence;
- the drawing of inferences;
- the jury's use of exhibits; and
- the nature and meaning of consent.

44 In the Research, jurors were overwhelmingly positive about the helpfulness and clarity of judges' summings-up (see Findings, 7.3–7.5). A few found them too technical or complex, or lacking in structure, but these criticisms were rare. Somewhat more jurors found the summing-up monotonous and boring; clearly a more lively and personal style, with plenty of eye contact, appeals more. Jurors were also inclined to find summings-up of more than 30 minutes too long, although clearly in complex cases longer summings-up are unavoidable (see Findings, 7.6–7.8).

45 To assist them, judges have access to what is known as a bench-book. This contains guidance on pre-trial applications and other procedural matters as

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[6] *R v Fotu* [1995] 3 NZLR 129, 138.

well as practice notes, advice on summing-up, and model directions. The current bench-book for New Zealand judges was produced in 1994 by judges of the High Court and District Court, with the assistance of the (then) Department of Justice. Parts of it have subsequently been updated, and it is currently being reviewed. The reviewers have been given a copy of the full report of the Research, and it will be taken into account in preparing the updated bench-book. Publication of the updated bench-book is expected shortly.

46 The Law Commission understands that judges make varying use of the bench-book. Some prefer to formulate their own instructions; others use the bench-book as a guide on substance but not on style; and yet others follow the model directions more closely.

47 In general, the New Zealand Court of Appeal's approach to jury directions has been to encourage brevity. For example, in *R v Smith*,[7] the Court commented on a lengthy instruction (on the meaning of the standard of proof) as follows:

> In this case the jury had already received a direction on standard of proof at the opening of the trial. There can be no objection to advising a jury at the commencement of the trial about the basic rules which govern all criminal trials, but the adoption of that course does not excuse the Judge from restating them in his summing up. In this instance the restatement of the advice about standard of proof, set out above, was as lengthy and more complex than the earlier direction, and in different terms, some of such vagueness as to invite questions as to their true significance. Its length is all the more regrettable in view of the full direction, in different terms, given at the commencement of the case. The shorter of the two suggested directions on this topic set out in the bench book provided to New Zealand Judges occupies less than three lines, the longer less than six lines. All that was needed by way of restatement could have been said in two or three lines.

WRITTEN DIRECTIONS

48 In their study of judicial directions,[8] Heuer and Penrod tested the effects of giving written directions to juries commencing deliberations. There were three perceived disadvantages:

- jurors could spend a disproportionate amount of time focusing on the directions, while neglecting the evidence;
- deliberation time might increase rather than decrease; and
- it might be time-consuming for the judge to produce written directions, and the judge would have to prepare these earlier in the trial.

The findings were that none of these potential disadvantages arose.

49 Heuer and Penrod also anticipated three advantages:

- with a written copy of directions at hand, jurors may better understand, remember and apply them, because they would be rereading what the judge had told them and could consume the material at their own pace;
- juror satisfaction with the trial process and the verdict may increase, as may their confidence that they are applying the directions correctly; and
- written directions might reduce deliberation time and reduce disputes over what the judge said or over how to apply the instructions.

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7 (16 November 1994) CA 123/94, 4.

8 Heuer and Penrod, above n 3.

As with preliminary directions, the findings were that jurors thought the written directions were helpful, although there was little tangible evidence of the benefit. Juror satisfaction with the trial process did, however, increase slightly with the provision of written directions. Deliberation time did not decrease, but having written directions did help settle disputes.

50 These results suggest that the perceived disadvantages of giving written directions to the jury are not borne out, but there was a slight increase in jury satisfaction and, more importantly, the written directions did help to settle disputes.

51 In the Research, there were six cases in which the judge provided a written summary of the law (see Findings, 7.59–7.60). Although the form of this varied, jurors who received it almost invariably found it helpful. A majority of those asked in the other cases whether they would have found such a written summary useful, replied that they would have, because:

- it was difficult to absorb all the judge's instructions at the time they were given, and a written summary could have been digested at a more leisurely pace back in the jury room;
- some jurors differed in their interpretation of what the judge said, even when jurors had themselves made notes; and
- some jurors felt that written instructions would have reduced deliberation time.

52 In two cases, in addition to written instructions, the judge gave the jury a flowchart to work through (see Findings, 7.61), which all the jurors found extremely useful.

53 These results indicate that the first two of Heuer and Penrod's perceived disadvantages were not borne out and are consistent with their findings. The third is inevitable; it will take some extra effort for a judge to prepare written instructions. However, as the judge already must prepare oral instructions, it seems unlikely that this will be an undue burden. Such instructions are most likely to be required in longer and more complex trials, in which very careful preparation of instructions is required in any event. Heuer and Penrod's three perceived advantages were borne out by the Research.

54 Another reason for providing written directions is the difficulty that some jurors have in understanding the law (see paras 126–128). Written directions, which can be referred to as required during deliberations, may well help to alleviate such misunderstandings.

Should the judge give the jury a written copy of his or her directions, or alternatively, a written summary of the key points in the directions?

THE CONTENT OF DIRECTIONS

55 Research in other jurisdictions has shown that jurors may experience difficulties in comprehending and recalling judicial instructions because of such factors as the use of legalistic language, insufficient explanation of the rationale behind directions, lengthiness and repetition, complex sentence structures, and directions insufficiently explaining the charge in lay terms. The Research supports the view that juries have real problems in comprehending some aspects of judicial instructions on the law (see Findings, 7.12–7.25).

56 The judicial bench-book was largely written by judges for judges. The main – although by no means the exclusive – focus in developing the directions it contains is likely to have been the need to express the substantive law correctly. The Law Commission does not propose mandatory uniform directions for judges; such directions would be prone to the major disadvantage that they could not be tailored to fit the individual facts of the case. The Research indicates that it is in some cases confusing or unhelpful when judges do use standard directions from the bench-book, particularly where the jury does not understand that the direction is standard and thinks it has a special relevance to the case (see Findings, 7.30–7.31). Having mandatory uniform instructions would probably produce similar problems.

INFORMATION ON JURORS' ROLES – THE FACT/LAW DISTINCTION

57 The function of the jury is to decide the facts and apply the law to those facts. The judge's function is to direct the jury on the law they are to apply. This requires identifying factual issues in order to give context to the directions on the law. The judge is careful in giving directions to make clear the distinction between the judge's function and the jury's function. Nevertheless, the distinction has, on occasion, created difficulty for judges,[9] and a New South Wales study has suggested that it also causes difficulties for jurors.[10] However, the Research revealed no indication of difficulty with the distinction.

58 The *jury summons* states that:

> In a criminal case the jury has to decide whether the person accused of a crime is guilty or not guilty. You have to listen carefully to the evidence and reach a verdict based on that evidence. If you find the defendant guilty, the judge decides the sentence.

59 In addition, the booklet *Information for Jurors* says*:*

> To put it simply, you decide on the facts and the judge's job is to deal with the law and make sure the trial is fair. . . . In the end, you will have to decide what happened and who you believe.
>
> . . .
>
> When it comes to the law you must follow the instructions of the judge, whatever your own views of it.

60 The danger is that juries could interpret remarks on factual issues by the judge as being directions on the law which they are bound to apply. Although the Research did not find evidence of this happening in New Zealand, the potential for difficulty cannot be ignored. We recommend that judges take care to emphasise the distinction both in opening comments and when summing-up.

61 Another possible means of reinforcing the distinction between factual and legal issues is the use of special verdicts for juries. Special verdicts require

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9 See, for example, *R v Clark* [1946] NZLR 522.

10 In Findlay *Jury Management in New South Wales* (Australian Institute of Judicial Administration Incorporated, Carlton South, Victoria, 1994), 78, the author comments that over 90 per cent of the jurors surveyed had been told by the judge or counsel that the jury was responsible for finding the facts of the case, but this figure dropped 10 per cent when jurors were asked whether they had understood the information.

jurors to answer a series of questions set out on verdict forms listing all the factual issues arising in the case. The aim is to guide jury decisions by identifying and grouping the issues. Special verdicts are sometimes used in civil cases in New Zealand, but not in criminal cases. They are sometimes used in civil proceedings in the United States and have been used in criminal proceedings in the United Kingdom, but only in the most exceptional cases.[11]

62 As noted in paragraph 52, in two cases in the Research the judge gave the jury a flowchart to work through to reach their verdict, and the jury found that very useful. Although this technique is similar to the special verdict, it is just a way to help jurors to work through the issues systematically while still reaching an ordinary general verdict.

63 The Commission is not aware of any enthusiasm for the introduction of special verdicts in New Zealand, but we welcome any submissions on the issue.

Should special verdicts be introduced? Would it be more useful to simply encourage the use of flowcharts where appropriate?

SUMMARY

64 The Law Commission proposes that judges should direct juries about the rules of the trial *before* evidence is presented and again in the summing-up at the end of the trial. We also believe that juries may be assisted if they were provided with written copies of the judge's directions or a summary of its key points. We seek views on this practice.

65 The Law Commission supports the proposed amendment to section 367(1) of the Crimes Act 1961, which will give the defence the right to make a brief opening statement following that of the prosecution. This will clarify for the jury which facts alleged against the defendant are conceded by the defence and which are not.

66 An understanding of the difference between facts and law is central to the jury's role in deciding the facts of the case on the one hand and applying the law as directed on the other hand. Information provided to jurors should elaborate on the distinction between facts and law. A possible option for reform is the use of special verdicts requiring jurors to answer a series of questions covering all the factual issues arising in a case. The Law Commission does not favour this approach; however, we seek comment on whether special verdicts should be considered.

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[11] Archbold *Criminal Pleading – Evidence and Practice* (1998 ed, Sweet & Maxwell, London) vol 1, 4-465–4-467; *R v Bourne* (1952) 36 Cr App R 125, 127.

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Presentation of evidence

INTRODUCTION

67 Trial by jury evolved and matured at a time when the principal method of communication was the spoken word. Literacy rates were low and trials were usually short. Jurors had to take in the evidence aurally and gain such assistance as they could from the demeanour of the witnesses. Today the visual media are ascendant. People are used to receiving information in short bursts via television and computer screens, with oral commentary reinforcing the visual message. The oral skills of previous generations remain largely with those generations. The exception is in the courtroom. In the courtroom jurors sit for days at a time *listening* to people talk. It is on their collective recollection of that talk, supplemented by such notes as they are able to take and their perceptions of the witnesses, that they base their verdict. Clearly, every effort should be made when presenting evidence to assist the jury by making the evidence as comprehensible as possible. This chapter examines the presentation of evidence.

PRE-TRIAL PREPARATIONS OF EVIDENCE

68 At the pre-trial stage, counsel should be endeavouring to sift the relevant evidence and identify points of agreement between the prosecution and defence which will not be disputed at trial. This happens now to a certain extent, but the adversarial nature of the criminal trial, and New Zealand's comparatively unregulated pre-trial disclosure arrangements, do not encourage improvements in this area.

PRE-TRIAL DISCLOSURE

69 Prior to 1988, the pre-trial disclosure required of the Crown was minimal. There was no general duty to make the written statements of witnesses or potential witnesses available to the defence, although as early as 1936 there was English authority indicating that there were disclosure obligations in respect of statements of evidence.[12]

70 As a result of the Court of Appeal's decision in *Commissioner of Police v Ombudsman*[13] in 1988, however, disclosure was broadened dramatically. The current position is that upon request under the Official Information Act 1982

[12] *Mahadeo v R* [1936] 2 All ER 813 (PC). Also, in 1976 the Court of Appeal held that where the police have interviewed a person who can give material evidence and the prosecution is not intending to call that person as a witness, the person's name must be made available to the defence, but only in truly exceptional cases would the prosecution be obliged to give the defence copies of such a person's statement: *R v Mason* [1976] 2 NZLR 122.

[13] [1988] 1 NZLR 385, 394.

or the Privacy Act 1993, the police must provide briefs of evidence, witness statements, and police job sheets so far as they include possible witness statements, except where this would prejudice the maintenance of the law or withholding is specifically permitted by some other provision of the Act. This applies whether the trial proceeds summarily or indictably.

71 The defence is not required to disclose any of its case prior to trial, with one exception: section 367A of the Crimes Act 1961 requires that, within 14 days after committal for trial, notification should be given of an intended defence of alibi. This only applies to indictable proceedings. It will remain in force if the Law Commission's draft Evidence Code[14] is enacted. The draft Evidence Code also proposes (at section 20) that written notice of a proposal to offer hearsay evidence in criminal proceedings be required, and this would apply to both prosecution and defence.

72 The law relating to pre-trial disclosure of evidence still lacks comprehensive legislative foundation: see the Law Commission's report *Criminal Procedure: Part One Disclosure and Committal*,[15] which made recommendations concerning this.[16] In addition, the Law Commission suggested that:

- discovery of expert opinion obtained by the defence and intended to be used as evidence at trial should be made at least 14 days prior to the trial (NZLC R14, para 110). A provision to this effect is contained in section 25 of the draft Evidence Code;
- the notification of intended use of the alibi defence should apply to both summary and indictable proceedings[17] (NZLC R14, para 115); and
- the alibi precedent should not be extended to other defences (for example, insanity, provocation, automatism, intoxication, self-defence, accident, and compulsion) (NZLC R14, para 113).[18]

73 The Commission did not consider that the advance disclosure of defences that the defence intended to argue would significantly improve the efficient flow of work in the courts. This view was based on advice from prosecutors that there are few cases in which the prosecution is not, in practice, capable of anticipating the defence's answer to the charge (para 114). In addition, the Commission thought that requiring defence disclosure of "positive" defences would be arbitrary, given the difficulty of distinguishing such defences from general defences. The Commission was also of the view that disclosure would create difficulties arising from the possibility that, prior to the presentation of the prosecution case, the defence might not know whether a positive defence should be raised (NZLC R14, para 112). The Commission noted that a need to give advice of alternate defences might weaken the defence case (NZLC R14, para 112).

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14 New Zealand Law Commission *Evidence: NZLC R55* (Wellington, 1999) vol 2.

15 New Zealand Law Commission *Criminal Procedure: Part One: Disclosure and Committal: NZLC R14* (Wellington, 1990).

16 The Commission's final Criminal Procedure report, which will be published shortly, will recommend that there should be a comprehensive statutory criminal disclosure scheme.

17 Again, there will be a further recommendation to this effect in the final Criminal Procedure report.

18 See also s 32 of the draft Evidence Code, New Zealand Law Commission, above n 14, which codifies the right of silence.

74 From the perspective of seeking ways to increase juror competency, the Commission nonetheless believes that there are potential benefits from greater defence disclosure, particularly with respect to expert evidence. These benefits are chiefly in terms of reducing the issues, and consequently the amount of evidence, put before the jury at trial.

75 The Commission notes that consideration is now being given by the Ministry of Justice to the enactment of new legislation on pre-trial disclosure. A particular objective of that reform should be to streamline the evidence for presentation to a jury.

Should there be a pre-trial disclosure regime for both prosecution and defence aimed at identifying for the jury the disputed issues?

If not, could issues be identified through some other process?

CASEFLOW MANAGEMENT

76 Caseflow management has developed since the Law Commission's 1990 report was published. Practices vary, but pre-trial conferences between counsel and the judge are now common.[19] The objective is to discuss the pleas that may be entered, obtain some agreement as to admissions and disputed areas, and allow realistic estimates of the trial's duration and the allocation of a trial date. District Court status hearings were piloted in Auckland in 1995 and 1996, and the system now operates in District Courts nationwide. Status hearings are currently used only in summary cases, but consideration is being given to extending them to indictable cases.[20] A status hearing is held after a plea of not guilty has been entered and, like a pre-trial conference, enables disclosure of evidence, clarification of facts in issue, and an opportunity for defendants to change their pleas if they wish.

77 The Law Commission views the developments in caseflow management as a positive move in the direction of increasing the efficiency of proceedings by narrowing the focus of the trial. However, in its Criminal Prosecution Report,[21] the Commission will recommend a national set of guidelines be established for the conduct of status hearings.

78 Overseas commentators have suggested that criminal proceedings could benefit from pre-trial caseflow procedures similar to those used in civil proceedings.[22] Means of reducing the areas of dispute, and thereby reducing the volume of evidence placed before jurors, require exploration. There are obvious linkages between pre-trial disclosure and caseflow management. Caseflow management

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[19] Pre-trial conferences in the High Court are governed by a Practice Note (LawTalk 343, February 1991, 7). The High Court and District Court criminal jury caseflow management systems are set out in Garrow and Turkington, *Garrow and Turkington's Criminal Law in New Zealand* (Wellington, Butterworths, 1991–) S345(c) and (d).

[20] *Report of the New Zealand Judiciary 1998* [Wellington, Department for Courts] 15.

[21] See above n 16.

[22] Schwarzer "Reforming Jury Trials" (1990) 132 Federal Rules Decisions 575, 578; Cecil, Hans and Wiggins "Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials" (1991) 40 American University LR 727, 766.

could be used to reduce the volume of evidence placed before juries. This, the Commission believes, would have positive consequences with respect to jury deliberation and failure to agree. The issue of reducing trial time is further discussed in paragraphs 139–144.

Should one objective of caseflow management be to streamline the evidence put before the jury?

PRESENTATION OF EVIDENCE

79 The Research shows that a significant number of jurors have difficulty concentrating on oral evidence, particularly in trials that last for more than two days, and difficulty recalling oral evidence (see Findings, 3.4–3.5). Many jurors take notes and find them very useful, often piecing together the notes of various jurors to fill in gaps in individual recall (see Findings, 3.6), but some problems do arise in relation to notes:

- Many jurors are inexperienced in note-taking and are not sure how to go about it. Some are overwhelmed by the novelty of being involved in a trial, and that hinders their ability to take notes, particularly at the start of the trial.
- Some people take voluminous notes and others take few or none. Where notes are available, jurors do use them extensively, so the view of the jurors who have taken the notes may predominate.

80 Some of the difficulties jurors have with oral evidence is due to the way it is presented to them. Non-sequential presentation of evidence is a particular problem (see Findings, 3.13(3)). As discussed in paragraph 34, jurors need a legal and factual "framework" to construct a coherent view of the case. Often the opening statements do not give them this. If evidence is then called in a way that does not fit with a natural narrative flow, not surprisingly jurors will be confused. Although witnesses cannot always be called in such a way as to preserve the narrative flow, the problem could be alleviated by:

- better efforts to provide a framework before evidence is called, by the Crown in its opening and perhaps by a defence opening; and
- making the jurors' need to hear witnesses in a coherent order a higher priority, even if that is not to the convenience of the witnesses.

81 More radically, there could be merit in calling some defence witnesses before the prosecution has closed its case. In particular, where there is expert evidence, calling the defence's expert immediately after the prosecution's.

82 Jurors also have difficulty with muddled and vague evidence from witnesses, and confusing questioning (see Findings, 3.13(1) and (2)). While the former is largely inevitable, the latter could be addressed by the profession.

Transcripts and other aids available during trial

83 The jury is usually given a copy of the indictment and exhibits and, sometimes, the relevant provisions of the Crimes Act, which can all be taken into the jury room.

84 During a criminal trial, evidence is often given of police interviews conducted with the defendant before arrest. Sometimes a defendant signs a written

statement, which is then provided in evidence and given to the jury when they deliberate, but frequently now interviews are recorded on videotape and transcripts made. It has become routine for juries to take such transcripts into the jury room.[23]

85 In those cases where written statements or transcripts were available to the jury, they were much used and found to be helpful (see Findings, 3.7(1)). However, there was some concern from jurors that it was unfair to get the defendant's statement but no written statement or transcript of evidence from the complainant.

86 The judge's notes – the typed record of all the evidence – is not given to the jury. Instead the jury may ask to have passages of the judge's notes read out in open court during the course of deliberations. Jurors are often not told at the beginning of the trial that they will not be given the judge's notes, and this can cause confusion if jurors assume they will be getting them (see Findings, 3.6).

87 The jurors in the Research expressed a strong wish to receive a copy of the judge's notes (see Findings, 3.9(1)). At present they do not receive a copy because it is believed that:

- jurors will become too absorbed in poring over the judge's notes and be distracted from issues of credibility and demeanour; and
- jurors will get sidetracked into details and deliberations will be prolonged as a result.

88 The Research suggests that these concerns are unfounded. Many juries already spend a lot of time trying to agree on a version of the evidence from the notes they have collectively taken, and search their own notes or the notes of others when they cannot recall a section of the evidence critical to the discussions. They also frequently need to have portions of the evidence read back to them. There is little reason to believe that they would pay much more attention to the judge's notes than they currently do to their own notes, and every reason to believe that the provision of a copy of the judge's notes, by eliminating the current sometimes lengthy arguments about what evidence has actually been given, would not only enable discussions to become more focused, but also reduce deliberation time. It is to be expected that jurors are becoming computer literate and could use a search facility in the jury room. The main difficulty in giving the jury a copy of the judge's notes is ensuring that they are accurate and the abbreviations intelligible. This could become the joint responsibility of judge and counsel, with the vetted notes being provided to the jury shortly after they retire to consider their verdict.

Should the jury be given a copy of the judge's notes of evidence?

If so, should this be a matter of course or only done in lengthy or complex trials?

Should the jury have access to a computer to facilitate search of the judge's notes?

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[23] *R v Szeto and Anor* (26 May 1999) CA 449/98 and CA 10/99, 6.

Other written aids and visual representations

89 The Court of Appeal has approved the use (including during deliberation) of charts and summaries supplementing oral presentation, where the complexity of the case warrants it. For example, in *R v Egden*,[24] the Court rejected the argument that a chart summarising the case against two defendants at trial was wrongly made available to the jury during the course of deliberations:

> The practice of using charts and summaries to supplement oral presentation where the complexity of the case so warrants is well established and has been sanctioned by this Court, most recently in *R v Moroney & Ors* CA 448/92, etc, 26 May 1993. We have no doubt that the present case was sufficiently complex to justify this course. Indeed without some such assistance the evidence of over 70 witnesses relating to some 20 different cars would have been extremely difficult for the jury to follow. It would have been preferable had there been a specific direction to the effect that the question whether any particular evidence was accepted remained a matter for the jury and that the chart was a summary of evidence presented, not evidence itself, see *R v Moroney & Ors* at pp 8–10. However, the way in which the Judge went through the information contained in the chart and his comments about conflicts of evidence as he did so would have left the jury in no doubt that it had to resolve disputed evidence for itself.

90 The Research shows that where such aids are used jurors find them very helpful (see Findings, 3.7). Visual representations (such as maps and photographs) are also invaluable. Although these aids are not always used as effectively as they might be, that is an issue of improving counsel's skills. Clearly such devices are useful and should be encouraged.

91 The Commission believes that written aids and visual representations should be used whenever they can accurately and efficiently encapsulate evidence put before the jury. It is significant that jurors in the Research emphasised that they would appreciate being given written summaries of the charges and key issues, explanations of legal terms (in relation to glossaries, see paras 108–109 below), witness lists, flowcharts and diagrams. Care, however, needs to be taken to ensure that in presenting charts to the jury, counsel or the judge do not cross the line between assisting the jury's comprehension and supplanting the jury's role by predetermining the issues.

Physical evidence

92 Physical evidence varies enormously, from large volumes of financial documentation in a fraud case to a murder weapon. In fraud trials, the physical evidence is indispensable. Sometimes it is not presented in the easiest or most accessible way, but that is a practical matter which can be improved on. Some physical evidence is of marginal value, and may add little to deliberations. But overall, physical evidence is useful to jurors.

Multiple charges

93 Particular difficulties arose when there were multiple charges, with jurors often being confused as to what evidence related to which charge (see Findings, 3.13(4)). This is really the same problem encountered in many trials, but amplified by the sheer volume of evidence and charges. In such cases written aids to comprehension are particularly important.

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[24] (17 February 1995) CA 211/94, 5.

Should greater use be made of charts and other similar devices to summarise evidence for juries?

Speed of evidence

94 In most jury trials, evidence is recorded by the judge's associate typing what is said into a word processor. It is clear from the study (see Findings, 3.10–3.12) that difficulties arise from the slow pace and the need for pauses made necessary by this method and that:

- many jurors found it not only irritating but distracting;
- a significant number of jurors found that it seriously impeded the trial process and their ability to concentrate on and follow the evidence;
- it had an adverse effect on the quality of evidence itself, by allowing witnesses too much time to gather their thoughts in cross-examination, so that their responses were not spontaneous; and
- it may have upset nervous witnesses, particularly children, so much that they did not answer.

Alternatives to stenographic recording

95 There are currently two alternatives to stenographic recording: Machine Shorthand Recording/Computer-Aided Transcription (known as the CAT system) and digital-audio recording. The CAT system was used in nine cases in the Research, and in those cases no adverse comments were made by any juror.

96 The Department for Courts has recently begun pilot use of digital-audio recording.[25] Like the CAT system, digital-audio recording allows evidence to be recorded at a natural pace of speech. The evidence is recorded and then the recording is electronically removed from the courtroom and transcribed by one or more court reporters in another room. The typed record is not available immediately, as stenographic and CAT notes are, but is usually available within the hour. Early indications are that the system works well in practice. These systems not only make trials easier for juries (and counsel), but also result in a reduction in trial times[26] (which is also to the jury's benefit).

97 The Department for Courts is continuing to develop both the CAT system and digital-audio recording. The results of the Research reinforce the need for ongoing development of these and other new technologies.

Asking questions during the trial

98 Jurors may ask the witnesses questions during the trial by forwarding the questions in writing to the judge, who determines whether the questions will be put. No statistics are available on the extent to which jurors ask the judge questions during the trial or deliberations, although we have the impression that questions are rarely asked during trial. In the Research, questions were asked during the

[25] "Evidence Recording" *Courtside* (Department for Courts, Wellington, July 1999) issue 16, 10.

[26] For example, in the recent three-month trial of Scott Watson, in which the digital-audio system was used, the judge estimated that the trial would have taken four months without that recording system: "Appeal to centre on 'fairness of trial'" *Evening Post* 13 September 1999, 1.

trial in six cases (see Findings, 4.16). A recent study in the English Crown Courts[27] suggests that jurors there ask questions more often, but still not very frequently. In the Research, the majority of jurors did not know whether they could ask questions during the trial (see Findings, 4.12). This is unsurprising as judges rarely make it clear to the jury that they may ask questions and the advice in the *Information for Jurors* booklet is not encouraging:

> The judge may also ask questions, and so may the jury, although this is most unusual. If you think it is essential, write out a question and give it to your representative to pass to the Judge. If the Judge agrees, the question will be put to the witness on your behalf. Listen to all the questions asked by the lawyers before you take the step of seeking to ask a question through the Judge.

In the Research, a large proportion of jurors wanted to ask questions. While some of their questions were irrelevant or inadmissible, in some cases their questions would have been useful. It is significant that, in five of the six cases where questions were asked, the questions were clearly relevant (see Findings, 4.16).

99 One reason why juries are discouraged from asking questions is because judges perceive that such questions would disrupt proceedings with irrelevant or inadmissible questions. Another is that the adversarial theory of justice holds that a trial should be conducted on the basis of the evidence both sides choose to adduce. However, counsel are not infallible. While they sometimes omit to explore an issue for good and considered reasons, sometimes they do so simply by omission or incompetence.

100 The issue of jury questions was considered by the Commission in its Evidence report,[28] where it was concluded that, if properly controlled, jury questions would promote the rational ascertainment of facts, which is one of the primary purposes of the draft Evidence Code. In a judge-alone trial, the judge routinely questions witnesses to clear up any uncertainties. The draft Evidence Code[29] would allow for the continued practice of jurors putting questions to witnesses through, and at the discretion of, the judge.

101 The following comments by an American judge, although no more than impressionistic, suggest that when exercised responsibly the ability to ask questions may enable the jury to participate in the trial more meaningfully and effectively:[30]

> I have allowed jurors to ask written questions of witnesses in almost all civil and criminal trials in the last ten years. The objections articulated by trial lawyers are expressed in the form of two basic assumptions: first, that allowing jurors to ask written questions will transform jurors from neutral fact-finders into partisan advocates; and second, that allowing jurors to have an unpredictable input into the interrogation process will disrupt the attorneys' trial strategy. While both of

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27 Zander and Henderson *The Royal Commission on Criminal Justice: Crown Court Study (Research Study No 9)* (HMSO, London, 1993) 213.

28 New Zealand Law Commission *Evidence: NZLC R55* (Wellington, 1999) vol 1, paras 443–444.

29 New Zealand Law Commission, above n 14, s 101.

30 Frankel "A Trial Judge's Perspective on Providing Tools for Rational Jury Decision-Making" (1990) 85 Northwestern University LR 221, 222.

these concerns are expressed in good faith, the reality of jurors asking questions fails to substantiate either of these concerns.

Asking questions during deliberations

102 Although more encouraging than when referring to asking questions during trial, the *Information for Jurors* booklet's reference to juror questions *during deliberations* does not give jurors any guidance on the kinds of questions it may be appropriate to put to the judge. For example, disagreement among jurors about the ingredients or meaning of the charge, or the judge's instructions, could in the absence of further guidance from the judge lead to a miscarriage of justice. The booklet says:

> If you have any questions that arise while you are in the jury room, your representative must pass these to the Jury Officer or Court staff. They are the only people permitted to help, and then only by passing messages out to the Judge. Questions about the law or the evidence must be in writing.

103 In the Research, questions were asked or requests made for evidence to be read back in 31 of the 48 trials. However, in a significant number of cases, the formality of asking questions put jurors off doing so (see Findings, 4.19–4.21).

104 The Commission believes that encouraging jurors to ask questions may enhance their comprehension of the case and decrease deliberation time, as well as increasing jurors' sense of involvement and satisfaction in jury service. We suggest that the *Information for Jurors* booklet could be modified to:

- advise the jury that it may, through the judge, ask a witness questions when aspects of the witness's evidence are not understood or when information which they believe to be relevant has not been elicited;
- give examples of the types of questions it may be appropriate to put to witnesses through the judge;
- advise that the jury may ask questions of the judge during deliberations, and these can be more wide-ranging, and may include, for example, clarification of legal instructions and the elements of the charge;
- explain how and when jurors can question witnesses through the judge; and
- explain that when the judge does not put a juror's question to the witness it is most likely because of limitations on certain questions imposed by the rules of evidence, rather than reflecting adversely on the questioner.

To what extent should the jury be encouraged to ask questions of the judge or of witnesses through the judge, both during the trial and during deliberations?

What information should be made available to jurors to enable them to do this?

How could the procedure for asking questions be made more user-friendly for jurors?

Expert testimony

105 There is increasing concern that the advances in forensic science and technology, and the complexity of statistics used to analyse evidence, mean that jurors are unable to fully comprehend technical and expert evidence. In the Research,

expert evidence was called in 19 of the 48 trials (see Findings, 3.14). This is not necessarily typical; the researchers were particularly seeking complex trials, and therefore this figure is possibly higher than average.

106 Although there were jurors who had difficulty understanding evidence, they were invariably in the minority (see Findings, 3.15). It appears that those on the jury who did understand were able to assist those who were having difficulty doing so. As with witnesses of fact, some of the difficulties jurors found with understanding expert witnesses were because the evidence was poorly presented with unnecessarily technical language and no use of visual aids. Significantly, although jurors placed considerable weight on expert evidence, they did appear to be capable of weighing it and, where necessary, rejecting it (see Findings, 3.17).

107 The Commission's provision, in respect of the advance disclosure of defence expert evidence, contained in section 25 of the Draft Evidence Code, would go some way towards overcoming the problem (see para 61).

What could be done to make expert evidence more comprehensible to jurors?

Glossaries of legal terms and concepts

108 One means of assisting juror comprehension is to provide jurors with a glossary of legal terms and concepts. The New South Wales Law Reform Commission rejected this approach and recommended:[31]

> Archaic terms and concepts should be eliminated from all communications to the jury. The jury should not be provided with a glossary of legal terms because this would encourage the use of legal jargon in jury trials.

Although we agree that legal jargon and inaccessible terms and concepts should be avoided, the reality is that they are unlikely to be completely eliminated. It was clear from the Research that jurors do have significant problems with legal terms (see Findings, 2.58). Therefore, we support the use of glossaries.

109 There is a (recently included) glossary of legal terms in the *Introduction to Jurors* booklet. However, it does not include any explanation of legal concepts arising commonly in trials. We propose that brief definitions of some concepts, such as burden of proof, admissibility and intent, should be inserted in the glossary, but recognise that this is no substitute for accurate judicial directions and explanations.

Should jurors be given a glossary defining legal terms and expressions?

If so, should it be of general application or one produced by the judge for the particular trial?

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[31] New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (Report LRC 48, 1986), para 6.31.

SUMMARY

110 Pre-trial disclosure and caseflow management are useful ways of sifting evidence so that when presented in court it aids greater juror comprehension and recall. The law relating to pre-trial disclosure of evidence is in need of a comprehensive legislative foundation, and the Commission notes that reform is now being considered. An objective should be to streamline the evidence presented to the jury. Any reform of pre-trial disclosure should take account of the effect on caseflow management and developments in that area. In the Commission's view there would be benefits from greater defence disclosure, in particular in relation to expert evidence. This view is expanded on in the Commission's proposal for the advance disclosure of defence expert evidence in section 25 of the draft Evidence Code.

111 Juries do have difficulties with the way that evidence is currently presented to them. The Commission suggests that they would be assisted by being given a copy of the judge's notes during deliberations and also by the greater use of devices, such as issues charts, which summarise evidence.

112 Information should be provided to jurors to explain when and how it may be appropriate for questions to be put to the judge or to witnesses through the judge, and to provide further guidance on how the foreman should be selected, and on his or her responsibilities.

113 We propose that information given to jurors should include a glossary of common legal concepts, such as the burden of proof, hearsay, admissibility, circumstantial evidence, and so on.

114 Advance disclosure of defence expert evidence has already been proposed in the Commission's Evidence report, and this would assist juries. The Commission seeks suggestions on what else could be done to make expert evidence more comprehensible.

5
Jury deliberation

INTRODUCTION

115 THE PURPOSE OF JURY DELIBERATION is to achieve unanimity, ideally by way of discussion and debate:

> A jury decision, however, is more than an average of the verdict preferences of six or twelve citizens who represent a variety of experiences. Ideally, the knowledge, perspectives, and memories of the individual members are compared and combined, and individual errors and biases are discovered and discarded, so that the final verdict is forged on the shared understanding of the case. This understanding is more complete and more accurate than any of the separate versions that contributed to it, or indeed, than their average. This transcendent understanding is the putative benefit of the deliberation process.[32]

116 Clearly this "transcendent understanding" cannot be realised without adequate opportunity for deliberation. But in the event of very lengthy deliberations, there may be concern that the resulting verdict has been achieved by a process of attrition rather than reasoned debate. If there is no resulting verdict, the deliberation process has failed. Lengthy deliberation and failure to agree are related, in that failure to agree will usually only be acknowledged after lengthy deliberation. But it is not clear that lengthy deliberation causes failure to agree.

THE PROCESS OF DELIBERATION IN JURY DECISION-MAKING

117 It has been suggested that deliberation is as much a matter of attaining unanimity, or the requisite majority, as producing the decision itself. Overseas research has indicated that a large proportion of jurors – maybe half – form an opinion prior to deliberations and do not change that opinion.[33] This suggests that the outcome in many cases is determined before deliberation.

118 The number of juries deciding other than in the direction of the initial majority is nonetheless significant, as is the number of jurors who do not ultimately decide according to their pre-deliberation preference. If jurors are persuaded during the course of deliberation, there is greater assurance of a correct result: mock jury studies have indicated that changes in view are likely to be genuine changes, rather than cases of jurors simply going along with the majority.[34]

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[32] Ellsworth "Are Twelve Heads Better Than One?" (1989) 52 (4) Law and Contemporary Problems 205, 206.

[33] See, for example, Simon *The Jury*: *Its Role in American Society* (Lexington Books, Toronto, 1980), 63.

[34] Simon, above n 33, 63.

119 Broadly, the questions confronting a jury during deliberation are:

- What was the evidence?
- What facts have been proved?
- What is the law?
- How should the law be applied to the facts?

120 There is scope for dispute among jurors in all of these areas, and the ready resolution of any of them can reduce deliberation time. The first and third questions are capable of resolution using the judge's notes, and through the availability of the judge to provide further directions.[35] However, the primary opportunity that the judge has to assist with these questions is the summing-up.

Impact of the judge's summation of the facts

121 After the defence closes its case, the judge sums up the case for the jury before it deliberates. The judge will outline the legal elements of each offence and any defences raised by the accused, and then summarise the evidence presented by prosecution and defence and their overall case (see paras 42–47 above). The Research indicates (see Findings, 7.26–7.29) that a judge's summing-up on the evidence appears to make little impact on jurors, who focus much more on the judge's directions on the law. There also seems to be some danger that some jurors perceive indications of the judge's view of guilt in such directions.

Jury resolution of factual issues

122 The way in which a jury deliberates may affect its decisions. Overseas jury research has identified two styles of jury deliberation: some juries discuss the evidence before taking a vote ("evidence-driven"), and others vote first ("verdict-driven" or "poll-driven"). Some research has suggested that evidence-driven juries spend more time talking about the important issues in the case, and bring out more facts, than poll-driven juries,[36] and that a poll-driven process is more likely to lead to entrenched positions. Judicial direction suggesting that juries might start their deliberation by discussion, and not take a vote too soon, could therefore be helpful.

123 The juries in the Research tended to follow one of these two styles of deliberation (see Findings, 6.1–6.9). The Research confirmed that there are difficulties in the poll-driven approach. First, it focused attention on divisions within the jury and encouraged jurors to call on minority voters to justify their views, rather than the jury discussing all aspects of the case. Second, the poll tended to be a substitute for a systematic discussion of the issues. However, the Research was unable to conclude that evidence-driven juries necessarily work better than poll-driven juries; rather the most important factor in effective decision-making is adopting a systematic structure for assessing the evidence and applying the law. This reinforces the need to:

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[35] In the standard direction juries are told they may, during the course of deliberation, request the reading of passages from the judge's notes and they may also request further direction as to the law. See also paras 102–104 above.

[36] See discussion in Ellsworth, above n 32, 215.

- provide juries with an effective framework from the beginning of the trial (see paras 34, 39 and 80);
- encourage the selection of a foreman who has the skills to follow a systematic structure (see paras 22–29); and
- provide guidance to the foreman and the jury on how to conduct deliberations.

124 Both the volume and the complexity of the evidence placed before juries have increased over the years. The increased availability of scientific, medical, psychological and psychiatric evidence, and the sophisticated accounting techniques which may require consideration in serious fraud trials, contribute to this. Such evidence, usually presented by experts, is difficult to convey in purely oral form. There are indications that, as the volume and complexity of evidence increase, so does the deliberation time.

125 There may be further ways in which the presentation of expert evidence can be simplified, aiding comprehension and reducing time taken. The facts on which an expert's opinion is based must be proved. The evidence presented to prove the facts may itself be complex and potentially confusing. Often at least some of this material is not in dispute. There is scope for the development of procedures by which the proof of at least some of the matters on which the expert relies (for example, and most basically, documents) may be dispensed with or completed before trial. Section 369 of the Crimes Act 1961 makes provision for admission of any fact alleged against the defendant, making proof of that fact unnecessary. The provision is voluntary, and it is our understanding that it is not extensively used. In the absence of incentives, its use is likely to remain limited.[37]

Jury resolution of legal issues

126 While juries are good at fact-finding, whether they have the ability to handle questions of law is less clear. The Research concluded that although jurors made a strong and conscientious effort to apply the law as they understood it to be, and seldom consciously departed from the law as they understood it to be (see Findings, 7.11), nevertheless there were widespread misunderstandings about certain aspects of the law (see Findings, 7.12–7.25). However, most of these errors were addressed by the collective deliberations of the jury. The researchers concluded that legal errors resulted in hung juries or questionable verdicts in 4 of the 48 trials, 2 of which were acquittals in respect of only a proportion of a large number of counts (see Findings, 7.25). Thus, in only two cases can misunderstandings of the law be said to have significantly affected the outcome.

127 The factors contributing to the misunderstandings are numerous, but among them must be jurors' unfamiliarity with legal concepts. If the applicable law in a trial is relatively simple, with a single accused facing a single charge, juror comprehension of the instructions may be expected. Where, however, there is more than one accused and each faces more than one charge, jurors will be asked to understand and apply:
- the burden and standard of proof;
- the elements of a number of offences;
- the law relating to parties;

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[37] See also paras 139–143 (Reducing trial time) and 76–78 (Caseflow management).

- the defence or defences available to a number of offences; and
- some of the rules of evidence.

128 The jury is asked to do this having, usually, been authoritatively given the law once and having been given no record of the directions. This is a great deal to ask, and may produce time-consuming disagreement or confusion. The jury might be greatly assisted by being given a written copy of the judge's directions (or its key points) or a flowchart to work through to reach the verdict (see paras 48–54).

FOREMEN

Characteristics of foremen

129 In the Research, it did appear that men are more likely than women to be selected as foremen (see Findings, 6.19), possibly indicating a gender bias. There was no evidence of ethnic bias, and only a slight tendency against those under the age of 29 (see Findings, 6.20–6.21). Employment and education status of foremen roughly mirrored those of other jurors (see Findings, 6.22). However, given the size of the sample, these figures are certainly not definitive. It is an area where further information is desirable but unlikely to be obtained, because the requirement for jury secrecy (see chapter 8) precludes it. In terms of the characteristics of successful foremen, (see Findings, 6.33–6.34), the men in the Research sample were more successful than women, and those in professional or skilled occupations or with university degrees were more successful than others.

The role of the foreman

130 It is clear that to be successful, especially in more difficult cases, a foreman needs to be a leader who actively facilitates and structures the discussions. The Research showed that there was a lack of understanding of the precise role of the foreman. Foremen who did not understand their role could be overbearing or even dictatorial (see Findings, 6.27), or could fail to provide the leadership needed (see Findings, 6.28–6.30). Sometimes other jurors would assist an inadequate foreman, but not always (see Findings, 6.31).

131 Difficulties can also arise if:
- the foreman is in the minority or the last person dissenting from an otherwise unanimous verdict (see Findings, 6.32). No direction is given on handling this situation; or
- the jury contains one or more unreasonably dominating individuals. While any random group will naturally include some confident and assertive individuals as well as some quieter ones, it is the job of the foreman to ensure that the more assertive ones do not dominate to an unreasonable extent, or intimidate others, and that all jurors have a chance to speak and be listened to respectfully. A minority of foremen in the Research sample did not have the skills to deal with the difficult task of containing overly dominating jurors, and that could lead in the worst cases to capitulation by minority jurors who did not have confidence in the verdict reached. (see Findings, 6.35–6.39).

132 Because juries necessarily contain people with varying abilities and temperaments, some difficulties are inevitable; however, the problems could

be lessened by more careful selection of the foreman (see paras 22–29 above), greater guidance on the role of foreman, and more extensive advice on how to structure deliberation.

Following empanelling, should the jury undergo a standard training session on the role of the jury and the foreman before retiring to choose their foreman?

THE LENGTH OF DELIBERATION: SOME TRENDS AND COMPARISONS

133 Currently, no statistics exist on the average length of jury deliberation in New Zealand, although there are figures on the overall length of trial, which show that trials are getting longer.

TABLE 1 LENGTH OF JURY TRIALS

	1992	1993	1994	1995	1996	1997	1998
District Court							
Trials heard	1712	1568	1900	1772	1438	1303	1466
Jury trial sitting hours	11 522	12 672	13 944	14 117	13 373	14 405	16 331
Average hours/ trial heard	6.7	8.1	7.3	8.0	9.3	11.1	11.1
High Court							
Trials heard	422	445	393	469	335	293	281
Jury trial sitting hours	8128	8513	7731	7764	6137	7055	7420
Average hours/ trial heard	19.3	19.1	19.7	16.6	18.3	24.1	26.4

Source: Data for 1992 and 1993 are from Justice Annual Statistics; all data except Jury Trial Sitting Hours for 1995 to 1998 are from Judiciary Annual Reports; data for 1994 and Jury Trial Sitting Hours data for 1995 to 1998 is from the Annual Returns of Business Reports.

Note: Trials heard for 1994 to 1998 include trials heard and trials removed on the day of fixture.

134 Despite the unavailability of statistical data on the length of deliberations specifically, there is an impression that deliberation time is also increasing.[38]

> Whereas at one time it was very much the exception for juries to remain out for more than an hour or two, or in the evening, jury retirements of many hours, often stretching well into the night, are now relatively common. In our observations a number of factors contribute: cases are more complex, the offending is more serious with the result that (for other reasons as well) the likely sentence is more severe; and the scrutiny and pressure to which the justice system is subject make juries more conscious of the possible consequences of their verdicts. In relation to sexual charges, changes in the law relating to corroboration mean there are many cases, of which the present was typical, where the jury is faced only with one person's word against another's. There are more trials involving a multiplicity of

[38] *R v Hapeta* [1995] 1 NZLR 6, 10.

charges and accused where the jury has to reach a number of verdicts. One aspect remaining immutable is the insistence on a unanimous verdict. While in the vast majority of cases juries still succeed in reaching one, unsurprisingly this is at the expense of longer retirements.

135 The English Crown Courts study confirmed that the length of deliberation is closely related to the length of trial.[39] The study also indicated that jury resort to majority verdicts increased with the length of trial. In trials completed in a day, 2 per cent of verdicts were majority verdicts. In trials lasting one to three days, the figure was 13 per cent, and in trials lasting over a week, 24 per cent.[40] This result may suggest that a longer trial tends to produce both a longer deliberation and a greater resort to majority verdicts. If so, the increased length of New Zealand trials would explain the perceived impression of longer deliberation times, and suggests that reducing trial time may reduce both deliberation time and hung juries.

136 The length of deliberations in the Research trials was recorded and appears to indicate that the length of deliberations depends less on the length of the trial than on the number of charges (that is, the more charges, the longer the deliberation). However, the size of the Research sample is too small for any statistically valid conclusion to be made on this point. Unfortunately, the Crown Court study did not link the number of charges to the length of deliberations; that appears to have been precluded by section 8 of the Contempt of Court (UK) Act 1981.[41]

LIMITING THE EFFECTS OF LENGTHY DELIBERATIONS

137 Decision makers in the criminal justice system – whether judge or jury – cannot be kept entirely free from pressure. It is nonetheless commonly accepted that a jury should reach its decision as free from pressure as is practically possible. Verdicts have been challenged, both in the media and by way of appeal, on the basis that the length of the deliberation, or the lateness of the hour at which the jury returned its verdict, created pressure on minority jurors to conform. On occasion such appeals have been successful.[42]

138 It is necessary to consider two issues: the causes of lengthy deliberation, insofar as they can be identified and acted upon prior to trial; and the steps currently taken to provide assistance during jury deliberation. With respect to the first, lengthy deliberation may result from factors other than disagreement. The number of accused before the court, the number of charges requiring consideration, and the volume of evidence to be considered, may all lengthen deliberation. The discussion to this point suggests that trial time – or the volume of evidence placed before juries – may have a particularly significant

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[39] Zander and Henderson, above n 27, 224–225. Juries took less than two hours to deliberate in 62 per cent of the cases, the average length of deliberation being 2.24 hours. Of those trials lasting half to one day, 57 per cent had deliberation times under one hour and 89 per cent under two hours. When the trial lasted three to four days, the jurors returned within two hours in only 26 per cent of the cases. When the trial lasted over two weeks, the jurors took more than four hours in 69 per cent of the cases.

[40] Zander and Henderson, above n 27, 162.

[41] Zander and Henderson, above n 27, xii–xiii.

[42] See, for example, *R v Hapeta*, above n 38.

role to play. It seems likely that, the more material there is to consider, the greater the potential for disagreement in that there is more to argue about and, when that is so, argument may become more complex and intractable.

Reducing trial time

139 A defendant is not required to indicate his or her intention to call evidence until the closure of the prosecution case. As a consequence, attempts to reduce the volume of evidence before trial must be directed primarily at the prosecution evidence.

140 A more efficient delivery of evidence that is not in dispute may occur at present in two ways. The first, as already noted, is by way of section 369 of the Crimes Act. The second is by reading depositions evidence or pre-trial statements to the jury. The use of this method arises sporadically rather than as a matter of course. A more systematic way to define issues, and to dispense with the necessity of proof of some matters, may be to introduce obligatory pre-trial defence pleading to prosecution allegations. This would need to be considered carefully because of the potential for undermining key concepts in our criminal law such as the right to silence.

141 The provision by the Crown of a set of allegations outlining the Crown case would provide a basis for meaningful pre-trial pleading by the defence. Encouraging defence compliance would be difficult, however, without an effective sanction in the event of a refusal to engage in such pleading. Given that legal aid plays a significant role in criminal proceedings, the threat of orders for costs would be unlikely to provide an incentive to engage in pre-trial pleading.

142 Alternatively, other current pre-trial procedures could be extended. Hearings of applications for interlocutory orders in respect of the admissibility of evidence[43] and call-overs have led to a marked decrease in time wasted during jury trials. Some judges use these occasions to actively inquire about, and encourage, the reading of witnesses' evidence (rather than giving evidence in person) or other concessions, but the practice is not universal.

143 In the sentencing process, it is an established principle that less credit will be given to factors in a convicted person's favour following a defended hearing than following a guilty plea. That approach may be capable of extension to consideration of the prisoner's approach to pre-trial pleadings. However, in the Commission's view, such a sanction is limited in effectiveness by:

- the inability to oblige a defendant to plead meaningfully, that is, by means other than a general denial;
- the restriction of its application to persons who are convicted; and
- a lack of precision in its application.

Should a system of pre-trial pleading to prosecution allegations be introduced to assist in the definition of issues and a reduction in the volume of evidence?

If so, what should the characteristics of such a system be?

Should there be more active judicial case management in indictable cases? What form should it take?

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[43] Under s 344A of the Crimes Act 1961.

144 In the absence of an incentive or sanction, the only option may be judicial scrutiny, on a pre-trial basis, directed at unnecessary evidence. This would be of limited effectiveness because of the judge's inability to determine the matters in dispute other than by the voluntary compliance of the accused or counsel. Such scrutiny could be incorporated into caseflow management.

Should judges scrutinise prosecution evidence for relevance as an aspect of caseflow management?

Assisting juries during deliberation

145 The length of deliberation has been the basis of appeals, on the grounds that juries have been left to consider verdicts too long, so that jurors can no longer apply calm and ordered minds to the issue. Courts have developed practices intended to provide juries with assistance before this point is reached.

146 The need to avoid any appearance of judicial partiality has traditionally limited assistance from the judge once deliberation has commenced, lest any verdict subsequently reached by the jury be tainted. There have, however, been changes in the judicial directions made in response to jury difficulty in England, Australia and New Zealand, and the variations in the responses require consideration.

147 The direction currently given to juries perceived to be in difficulty derives from that approved by the United Kingdom Court of Appeal in *R v Walhein*[44] in 1952. That direction, seeking to balance individual and collective responsibilities, was in the following terms:

> You are a body of 12 men. Each of you has taken an oath to return a true verdict according to the evidence, but, of course, you have a duty not only as individuals, but collectively. No-one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so.

148 In *R v Papadopoulos*[45] the New Zealand Court of Appeal approved a similar direction.

149 In 1988 in *R v Watson*,[46] the English Court of Appeal observed that the *Walhein* direction had become inappropriate following the introduction of majority verdicts in 1967, and criticised the second part of the warning, because it may put unreasonable pressure on jurors to express agreement with a view they do not truly hold, simply because it might be inconvenient or tiresome

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[44] (1952) 36 Cr App R 167.

[45] [1979] 1 NZLR 621.

[46] [1988] QB 690.

or expensive for the prosecution, the defendant, the victim or the general public.[47] The Court then formulated the following direction:[48]

> Each of you has taken an oath to return a true verdict according to the evidence. No-one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [ten of] you cannot reach agreement you must say so.

150 In *R v Accused*[49] the New Zealand Court of Appeal considered whether the New Zealand practice regarding directions to juries encountering difficulty should be modified following *Watson*. The Court considered that the appropriate direction should cover three important points:

- that following a failure to agree a new trial will ordinarily follow;
- that it is right to remind members of the jury that they have a duty to listen to and weigh one another's views, and that an honestly held view can be honestly changed as a result; and
- that no juror should change his or her mind merely for the sake of conformity or out of submission to pressure by other jurors; in the end no juror should vote against his or her conscientious view based on the evidence.[50]

The Court formulated the following direction:

> Members of the Jury:
>
> I have been told that you have not been able to reach a verdict so far. That sometimes happens, and it is no reflection on any of you. I have the power after you have been in retirement for four hours to discharge you from giving a verdict, but not unless and until I am satisfied that it should be done. Judges always hesitate to discharge a jury, because it usually means that the case has to be tried again before another jury and experience has shown that juries are often able to agree in the end if given more time.
>
> Each of you has sworn or affirmed that you will try the case to the best of your ability and give your verdict according to the evidence. It is important that you do your best to accept that responsibility and not pass it over to another jury. You are here as representatives of the community with the responsibility on behalf of the community of trying to reach a collective decision of all of you.
>
> One of the strengths of the jury system is that each member takes into the jury room his or her individual experience and wisdom and is expected to judge the evidence fairly and impartially in that light. You are expected to pool your views of the evidence and you have a duty to listen carefully to one another. Remember that a view honestly held can equally honestly be changed. So, within the oath, there is scope for discussion, argument and give and take. That is often the way in which in the end unanimous agreement is reached.
>
> But of course no-one should be false to his or her oath. No-one should give in merely for the sake of agreement or to avoid inconvenience. If in the end you

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47 *R v Watson*, above n 46, 696–697.

48 *R v Watson*, above n 46, 700.

49 [1988] 2 NZLR 46.

50 *R v Accused*, above n 49, 58–59.

> honestly cannot agree, after trying to look at the case calmly and objectively and weighing carefully the opinions of others, you must say so. If regrettably that is the final position, you will be discharged and in all probability there will have to be a new trial before another jury.
>
> Therefore I am asking you, as is usual in such cases, to be good enough to retire again and see whether you can reach a unanimous verdict in the light of what I have said.[51]

This direction is still commonly referred to as a *Papadopolous* direction, after the earlier case, and that is how we have referred to it throughout this paper.[52]

151 In the Research sample, *Papadopolous* directions (or a modified and briefer version) were given in 9 of the 48 trials (see Findings, 8.7). This seemingly high incidence might be affected by the sample bias towards lengthy and complex cases. The direction seemed to have mixed outcomes (see Findings, 8.9–8.14): some jurors felt pressured to come to a verdict and would compromise to do so; in some cases, the direction had a direct and positive result in that it helped to focus discussions; in others, it seemed to have no impact or even to make matters worse.

152 Any attempt by the judge to provide further assistance than a *Papadopolous* direction is unlikely to be helpful without a clear indication of the nature of the jury's difficulties. Some indication may be provided by jury questions, but in the absence of such questions, judicial inquiry would be necessary. On occasion such inquiries are made.[53] However, in deference to jury secrecy (see chapter 8) and the need to maintain judicial impartiality, such inquiries must be very general: usually as to whether progress is being made and/or whether any assistance may be required.

153 If the standard summing-up direction encouraged the jury to recognise difficulty and seek assistance promptly, that would lead to the earlier provision of *Papadopolous* directions, which would possibly enhance the effect of that direction. If the standard direction also encouraged the jury to state clearly the nature of any problem, the judge would then be able to provide more directed assistance to them. The Commission seeks comment.

During the course of deliberation, should there be active inquiry by the trial judge as to jury difficulty and the nature of any difficulty?

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[51] See also the model direction stated by Cory J in the Supreme Court of Canada case *RMG v R* (SCC 96–94, 24709, 3 October 1996) discussed by Robertshaw "Exhorting Hung Juries" [1997] Crim LR 805, 808. Cory J delivered the majority opinion of the Court (7:2), and drew on the principles in *R v Accused* [1988] 2 NZLR 46, and the Ontario Court of Appeal cases *Littlejohn and Tirabasso* (1978) 41 CCC (2d) 161 and *Alkerton* (1992) 72 CCC (3d) 184 (affirmed [1993] 1 SCR 468).

[52] In *Black v R* (1993) 179 CLR 44, the High Court of Australia gave consideration to the English and New Zealand decisions and adopted a more restrictive approach. However, the differences between the directions in *Black* and *R v Accused* are not major and, in the Law Commission's view, *Black* does not suggest any need for a change to the *R v Accused* formulation. As noted earlier, the amount of assistance which can be given to a jury encountering difficulty has been regarded as limited given that the trial judge must avoid any comment which might suggest a view as to the appropriate outcome.

[53] See, for example, *R v Sampson* [1989] 2 NZLR 288, 289 (CA) and *R v Hapeta,* above n 38, 8.

The length and hour of deliberation

154 Section 374(2) of the Crimes Act 1961 allows the trial judge to discharge the jury without verdict after it has deliberated for a period the judge thinks reasonable, provided that the period is not less than four hours. The provision of a minimum period is inevitably arbitrary, given that trials differ widely in length and complexity.

155 In 1978, the English Court of Appeal quashed convictions obtained at 10.30pm, on the basis that a verdict reached at that hour must be open to challenge.[54] Sixteen years earlier, the Privy Council dismissed an appeal from a verdict which had been returned at 1.35am.[55] Juries in New Zealand have been permitted to deliberate to much later hours. In 1989 in *R v Sampson,*[56] for example, the jury deliberated for thirteen and a half hours until 2.40am. The verdict was upheld on the basis that there were positive indications of jury attentiveness: requests for the provision of extracts from audio tapes; advice that five of the seven charges had been resolved; and the alert appearance of the jury as observed by the trial judge. The Court of Appeal was of the view that without these indications it was likely that a conviction obtained at such a late hour, and after such a lengthy deliberation, could not be safely sustained. Subsequently the Court has refused to uphold verdicts reached in similar circumstances where there were no positive indications of attentiveness.[57]

156 In *R v Hapeta*,[58] the Court of Appeal considered a case where final addresses had finished at 6.25pm on a Friday and a verdict to convict was obtained at 2.45am. The judge was trying to avoid a Saturday sitting, the option of the trial continuing on the Monday already having been ruled out. The Court found that the risk that a miscarriage of justice had occurred was sufficiently high to require the trial to be regarded as unsatisfactory. The Court also observed that juries are entitled to facilities appropriate to current conditions, that the jury rooms in the Wellington High Court were inadequate in size, and that this might have contributed to the jury's difficulties in reaching a verdict. The Research strongly confirms the inadequacy of juror facilities and the tension and pressure this can create for jurors (see Findings, 10.28–10.39).

157 Because of the variations which inevitably arise in trials relating to the number of accused, the number of charges, and the volume of evidence, there would in the Commission's view be considerable difficulty in attempting to regulate legislatively the length of deliberation. The provision of a maximum deliberation time would create an unacceptable degree of pressure as the hour approached. The hours between which the jury should work could be regulated without the creation of pressure, but this may involve a rigidity which judicial discretion avoids. The indications given in *R v Gill*[59] – that a reasonable hour to consider providing overnight accommodation would be 10.00pm or 11.00pm – should,

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54 *R v Sutton & Moore* [1978] Crim LR 442.

55 *Shoukatallie v R* [1962] AC 81, 89 and 92.

56 Above n 53.

57 See *R v Hapeta*, above n 38.

58 Above n 38.

59 (3 November 1994) CA 335/94, Eichelbaum CJ, Gault and Thorp JJ.

in the Commission's view, define the outer limits of the hours at which juries should normally continue to deliberate.

Should jury deliberation be permitted to continue after 11pm?

Jury sequestration

158 If deliberation is to be interrupted to enable jurors to sleep, the current practice requires that the jury be kept together and away from others. The reasons for this process of sequestration are the protection of the jury from outside influence and the preservation of jury secrecy. In the United States, sequestration is frequently employed for the duration of the trial: one reason for this is the more liberal approach taken there towards media publicity during a trial. Despite being more limited, sequestration of the kind employed in New Zealand – generally after deliberation has commenced – does disrupt jurors' lives. There have been few allegations of jury tampering or "nobbling" in New Zealand, although such allegations are not unknown.[60] If tampering is to occur it may do so during trial and prior to deliberation commencing, when sequestration of the jury overnight does not, in common practice, take place. In the absence of sequestration during the course of deliberation, the scope for making allegations of improper influence is wide and, once made, such allegations are not easily investigated against a background of jury secrecy.

159 The Commission is of the view that sequestration during the course of deliberation should continue.

Should juries continue to be sequestered during deliberation?

Are there circumstances in which sequestration during trial should occur?

Evidence of pressured decisions

160 Jury room secrecy, sustained by judicial unwillingness to receive affidavits from jurors describing what took place during deliberation, has in the past meant that evidence of pressured decisions is difficult to obtain. The Research indicates that some jurors do feel considerable pressure from other jurors to compromise (see Findings, 8.4). There are also practical considerations, such as the stress of inadequate facilities, which cause pressure. However, there is little evidence that these pressures lead to bad decisions.

161 In any event, pressure is part of the natural dynamics of group decision-making. In the Commission's view, before any change to the law to allow the Courts to inquire into such matters is contemplated, there would need to be clear evidence of a major problem. The Commission is not aware of any such evidence.

162 It should also be noted that the directions given to jurors by the trial judge are intended to ensure that jurors are aware that agreement should be genuine.

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[60] On 20 October 1996 the *Sunday News* reported allegations of tampering during the course of a trial in Palmerston North and anecdotal examples are given in the editorial "Jury Protection Vital" *New Zealand Herald*, 24 October 1997, A12.

The form in which the verdict is subsequently taken confirms this, providing an opportunity for any pressured juror to express disagreement:

> *Members of the jury, have you unanimously agreed upon your verdict?*
>
> Foreman's response.
>
> *Do you find the accused guilty or not guilty?*
>
> Foreman's response.
>
> Following the foreman's response, the registrar must then ask:
>
> *Are you all agreed, members of the jury?*

These procedures having been completed, each juror's understanding of his or her ability to express disagreement should be assured. However, an understanding of the position does not necessarily ensure that a dissenting juror would at that point speak. Jury polling is a final safeguard.

Jury polling

163 Polling is a process of asking each juror immediately after the verdict has been given to indicate his or her agreement with the verdict announced by the foreman. Sir Alexander Turner, former President of the Court of Appeal, discussed jury polling in an article written in 1979:

> The procedure of polling a jury is no novelty. It has been known to English Law at least since 1800, and probably for two centuries further back still. Sir William Hale, Chief Justice in Cromwell's time, refers to it in his *Pleas of the Crown*. There seems no case till now of its use in New Zealand. It is not, as might at first be thought, a procedure available to an accused person as of right, and amounts to no more than a power vested in the court, if thought fit, to call on the individual members of the jury to declare their unanimity. It may be thought that judges will not encourage counsel to request such a procedure unless their applications appear firmly grounded on special facts in the particular case.[61]

164 The procedure is one to be used in rare circumstances, at the discretion of the trial judge, when some ground may exist for doubting unanimity. When a jury is polled, jurors are not required to reveal their individual roles in the deliberation and, accordingly, the ability to poll a jury does not undermine jury secrecy. The option of polling should, in the view of the Law Commission, remain as a safeguard.

SUMMARY

165 The Research highlights the need for clear and structured jury deliberations in producing an accurate and unanimous verdict. The Commission suggests that judicial assistance as to the way in which jurors might approach deliberation, emphasising the need for structure in deliberations, and an evidence- rather than a poll-driven approach, would be useful.

166 The volume of evidence presented increases trial time and the potential for conflict. Longer trials tend to produce longer deliberation time and, in England, greater resort to majority verdicts. Trial time in New Zealand has increased since 1991 and there is a perception of increased deliberation time.

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[61] Turner "Polling the Jurors" [1979] NZLJ 155.

167 Requiring the accused to provide a pre-trial indication of evidence in dispute, by pleading to prosecution allegations, may be a means to the reduction of volume of prosecution evidence and trial time. However, the means to oblige compliance with such an approach are not readily to hand, and there are important constitutional issues to take into account. We seek submissions on this proposal. We also suggest that systematic judicial scrutiny of prosecution evidence for relevance, as part of caseflow management, may reduce the volume of evidence placed before juries.

168 The Law Commission also proposes that:

- Jury deliberation should not normally continue after 11.00pm.
- Sequestration of juries during deliberation should continue as a means of avoiding allegations of the exertion of influence on jurors.
- Jury polling should remain an option.

6
Failure to agree: majority verdicts

INTRODUCTION

169 OUR JURY SYSTEM REQUIRES JURORS TO BE UNANIMOUS in their verdicts. The underlying premise of the jury system is that, given honesty of purpose, the deliberation process will almost invariably result in unanimity and, by that fact, a safe verdict. The obverse of that coin is that, in the rare case where unanimity cannot be reached, honest dissent will prevent an unsafe verdict. However, the increase in jury deliberation time noted by the Court of Appeal in *R v Hapeta*[62] has been accompanied more recently by an apparent increase in the incidence of failure to agree – "hung juries". It is easy to see that if the incidence of hung juries rises to the point where the courts become clogged with retrials, the utility of trial by jury will be in serious question. This chapter looks at the phenomenon of the hung jury and whether the principle of unanimity of verdict should be retained.

THE RATE OF HUNG JURIES

170 In 1978, the Royal Commission on the Courts noted that from 1974 to 1976 the national average for failure to agree was 4.7 per cent of the total number of trials,[63] a figure comparable to other jurisdictions.[64] The Royal Commission, noting that the tradition of jury unanimity had been departed from in the United Kingdom and in several Australian states, observed that consideration of the abolition of the unanimity rule would be required if:

- there was proof that organised crime was inducing jurors to hold out for verdicts of not guilty; or
- the percentage of disagreements substantially increased.[65]

171 There is no evidence of the former, but there is now a perception that the percentage of disagreements is increasing. The following table shows the number of hung juries as a proportion of trials heard. However, the Department for Courts advises us that they consider these figures unsatisfactory because "hung juries" include all juries who are hung on a charge, whether they are hung on all charges or on just one of many. The Department for Courts' Jury Trial

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62 See above n 38.

63 Royal Commission on the Courts "Report of Royal Commission on the Courts" [1978] AJHR H2, para 368. The Report also noted that in Auckland from 1969 to 1977 inclusive the rate was 7.8 per cent.

64 For example, in Queensland from 1974 to 1976, inclusive, the rate was 4.1 per cent – Queensland Law Reform Commission *Working Paper on Proposals to Amend The Practice of Criminal Courts In Certain Particulars* (Working Paper 19, 1977) Part IX.

65 Royal Commission on the Courts, above n 63, para 373.

System, from which these figures were obtained, is not yet able to make that distinction, but the System is still being developed and it is hoped that by the time our final report is prepared that distinction will be possible.

TABLE 2 HUNG JURIES

	Hung juries	Trials heard (No.)	Trials hung (%)
District Court 1993	52	1 579	3.29
High Court 1993	19	437	4.35
Total 1993	71	2 016	3.52
District Court 1994	73	1 284	5.69
High Court 1994	23	392	5.87
Total 1994	96	1 676	5.73
District Court 1995	65	1 176	5.53
High Court 1995	29	366	7.92
Total 1995	94	1 542	6.09
District Court Jan–June 1996	40	494	8.12
High Court Jan–June 1996	14	135	10.3
Total Jan–June 1996	54	629	8.58
District Court June–Dec 1998	44	542	8.11
High Court June–Dec 1998	16	138	11.6
Total June–Dec 1998	60	680	9.86
District Court Jan–Aug 1999	54	665	8.12
High Court Jan–Aug 1999	20	137	14.6
Total Jan–Aug 1999	74	802	11.36

Source: Department for Courts

Note: The Department for Courts was unable to provide figures for July 1996 to June 1998 due to insufficient information.

172 Although the figures do not distinguish between partially and fully hung juries, we do know that a significant proportion of hung juries do result in retrials, and that these form a large proportion of all retrials. According to unpublished figures supplied by the Department for Courts, since the Jury Trial System came into operation in early 1997, there have been 196 retrials for which the outcome of the original trial has been recorded. (There were 15 for which the original trial outcome was not recorded. They were in the transitional period. Trial outcome is now recorded in all cases.) Of the 196 retrials, the outcomes of the original trials are listed in the following table.

TABLE 3 THE OUTCOMES OF RETRIALS FOLLOWING HUNG JURIES

No.	Per cent	Outcome
117	60	Hung jury.
47	24	Jury dismissed. (This usually happens because after the jury is empanelled one or more of the jurors is found to have some connection to a witness or other trial participant.)
30	15	Verdicts which were overturned on appeal.
2	1	Case dismissed.

Moreover, of 174 hung juries recorded between April 1997 and September 1999, 133 (76 per cent) have resulted in retrial or are currently awaiting retrial.

173 The reasons for the apparent increase in the failure of juries to agree have been the subject of speculation. The increase may be related to the increase in the length of trials since 1991, although it lags behind that. There have also been failures to agree in trials which, by reason of their subject matter, have attracted a high level of publicity.[66] Highly publicised failures to agree may have an effect on jurors in subsequent trials. The higher rate of hung juries in the High Court may possibly be connected with the greater seriousness of the charges and the consequentially higher level of publicity likely to be generated prior to trial.

174 Whatever the reasons, the increase may not represent a continuing trend. Caution is advisable in assessing both the need to change the law and the available options for reform. Certainly, however, hung juries do represent a considerable cost in both human and resource terms. The adversarial trial process may be at worst traumatic and at best wearing on the participants, whether they be accused, complainants or witnesses. The option most readily suggested in public discussion to remedy this increase in the rate of hung juries is the introduction of majority verdicts, displacing the unanimity presently required of all twelve jurors.

175 In the Research sample, five juries could not agree on any count in the indictment (that is, hung on all charges) and one jury was partially hung (that is, hung on some charges but able to give a verdict on others), a total of 12.5 per cent (see Findings, 9.1). This might, however, not accurately reflect the norm, because the sample was biased towards long and complex trials. The five fully hung juries are, however, instructive (see Findings, 9.10–9.13). In two cases, the researchers identified that the jury was hung because of a single juror who was acting irrationally (a "rogue" juror). These cases arguably support a call for majority verdicts; but it is notable that even in these cases other jurors had doubts, although those doubts were not properly addressed because the presence of the rogue juror made further discussion futile. So even if a majority verdict had been a possibility, it is not clear that either of these two juries would have been able to reach one. In the other three cases, the minority jurors had genuine and rationally based misgivings, so that a majority verdict could well have been wrong.

THE UNANIMITY PRINCIPLE

176 The requirement that all 12 jurors must agree can be traced with certainty to the fourteenth century. The fact that unanimity was required, however, provided no assurance that the unanimity arrived at was principled. Indeed, the rule gave rise to the coercion of jurors by such means as the deprivation of food and heat. It was not until the nineteenth century that it was finally established that unanimity must be achieved by the choice of the jurors, rather than as a consequence of pressure imposed upon them, and the ability of judges to discharge a jury unable to agree was confirmed.[67]

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[66] The case of John Barlow, who was convicted of the murders of Gene and Eugene Thomas in a third trial, the first two trials having resulted in hung juries, is the foremost example. See *R v Barlow* [1998] 2 NZLR 477.

[67] *Winsor v R* (1866) LR 1 QB 289, 305–306.

177 The unanimity rule, and its fundamental importance to the criminal justice system, has been confirmed on many occasions. The arguments in favour of unanimity are sometimes couched in emotive terms, and are interrelated, but may be distilled to the following:

- The unanimity rule underpins the burden and standard of proof in criminal trials. It reflects a central principle of the criminal law: that a defendant should be given the benefit of any reasonable doubt. It also increases the likelihood that guilty verdicts will be accurate.
- The rule encourages careful discussion and increases the likelihood of each juror participating and being listened to.
- The rule ensures that the representative character of the jury is implicit in the verdict, minimising any risk of bias.
- The rule increases community confidence in the verdict and in the criminal justice system.

178 Taken together these are powerful arguments. However, it is not necessarily the case that majority verdicts would be destructive of the values which the arguments embody. Indeed, any substantial majority could be said to promote these values. In a number of jurisdictions, majorities of 10:2 have been accepted as securing them. The United Kingdom abandoned the unanimity principle in 1967, substituting a system which allows for 10:2 verdicts if a unanimous verdict has not been reached and it appears to the court that the jury has had such period of time – not less that two hours – as the court thinks reasonable, having regard to the nature and complexity of the case.[68]

179 Queensland, New South Wales, and the Australian Capital Territory have retained the unanimity requirement. South Australia,[69] Tasmania,[70] Western Australia,[71] and Victoria[72] have introduced majority verdicts, although a decision of the High Court of Australia in 1993[73] established that the Commonwealth Constitution precludes a verdict of guilty on any basis other than unanimity where the alleged offence is one against the law of the Commonwealth. The basis on which majority verdicts were introduced in the state jurisdictions has varied. All but one of the states adopting majority verdicts have opted for a 10:2 majority; the exception is Victoria which has an 11:1 provision. Some exceptions to majority verdicts exist for the most serious offences, such as murder and treason. In Victoria, majority verdicts for all offences except murder and treason were introduced in 1993, and have been seen as so successful that it is intended to extend majority verdicts to all crimes.[74] In the Northern Territory, on the other hand, majority verdicts in criminal trials were abolished in 1983, although they are maintained for civil

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68 Juries Act 1974 (UK), s 17.

69 Juries Act 1927 (SA), s 57(1)(a) (but not for murder or treason).

70 Jury Act 1899 (Tas), s 48(2) (but not for murder, treason or a crime punishable by death).

71 Juries Act 1957 (WA), s 41 (but not for murder or an offence punishable with strict security life imprisonment).

72 Juries Act 1967 (Vic), s 47(1).

73 *Cheatle & Anor v R* (1993) 116 ALR 1.

74 Attorney-General of Victoria, Juries Bill Second Reading Speech, Victoria Parliamentary Debates, (Legislative Assembly) 27 May 1999, 1349.

juries.[75] The deliberation time required before a majority verdict is open to a jury also differs (see para 198 below).

THE ARGUMENTS AGAINST RETENTION OF THE UNANIMITY PRINCIPLE

Unanimity is often the result of attrition

180 It is sometimes argued that attrition – the wearing down of minority jurors by gradual exhaustion – operates in jury deliberation. Although the Research shows that considerable pressure is brought to bear on minority jurors, it is not clear that they are forced into verdicts by this pressure. If attrition, rather than reason, does push minority jurors towards verdicts, the effect of introducing majority verdicts may not be to do away with attrition but rather to reduce the amount of it required to produce a verdict.

Unanimity is an incentive to intimidate, corrupt or otherwise improperly persuade jurors

181 This was the ground most commonly advanced in England for the introduction of majority verdicts in 1967. Although the possibility of jury tampering always exists, there have been very few allegations of it in this country. Neither has there been any suggestion that attempts at tampering could not be dealt with by police inquiry.

Unanimity rule is undemocratic

182 This argument is met by two considerations. The first is that while the jury should be democratic in the way it is constituted – that is, it should be representative of the community – the jury has never been an institution intended to decide by way of simple majority. The second is that the will of both factions – the minority as well as the majority – is frustrated if no decision is reached. The proper functioning of the criminal justice system is not frustrated, as a new trial is the normal course. But the cost to the community in financial terms and in terms of time is increased.

Unanimity adds personal, resource and financial costs

183 This argument is inescapable. However, with respect to financial costs in particular, Lord Cooke's comment: "Inconvenience and expense should not be measured against justice" [76] applies.

Unanimity gives rise to compromise verdicts or hung juries

184 While the Research indicates that compromise verdicts are not infrequent, it is arguable that majority verdicts would not reduce the incidence of compromise verdicts as there will still be divisions of opinion within juries. Majority verdicts may simply mean that attempts to compromise start sooner, because one or two stubborn dissenters can be ignored as they are not required for the majority verdict.

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[75] Majority verdicts in criminal matters were repealed by s 4 of the Juries (Criminal Code) Amendment Act 1983 (NT); see also s 49 of the Juries Act 1980 (NT).

[76] Made in *R v Accused*, above n 49, 58, with respect to the *Walhein* direction.

185 The argument founded on compromise verdicts suggests that unanimity does not necessarily produce principled verdicts, that the unanimity rule should not be regarded as sacrosanct, and that it should not be retained if there are other reasons for change. An increase in hung juries may be such a reason, despite an inability to isolate the cause of the increase. Hung juries have recently been the cause of public and professional concern, and the recent apparent increase in their incidence provides, in the Law Commission's view, the strongest argument in favour of a change to majority verdicts.

REDUCING THE NUMBER OF HUNG JURIES BY MAJORITY VERDICTS: THE STATISTICAL EVIDENCE

186 The unanimity principle must inevitably increase the risk of hung juries. But experience in jurisdictions in which majority verdicts have been introduced suggests that, while the number of hung juries may be reduced, the phenomenon will not be eliminated. Frequently quoted American statistics suggest that 10:2 or 11:1 majority verdicts may reduce the rate of hung juries by 42 per cent.[77] The Australian experience is difficult to evaluate, as statistics in those states with provision for majority verdicts are sparse.[78]

187 A recent study of hung jury trials in New South Wales,[79] designed to assess the value of introducing majority verdicts, concluded that the introduction of majority verdicts would save less than 2 per cent of the time presently spent on criminal matters. The study found that, while approximately 10 per cent of criminal jury trials end with the jury hung on one or more charges, in most cases the introduction of majority verdicts would not have altered the outcome because:

- in the majority of cases where the jury was hung, the vote was evenly divided;
- only 33 per cent of cases involved one dissident voter. A further 10 per cent of cases involved two dissident voters; and
- while long trials are more likely to be hung, the Director of Public Prosecutions only proceeds to a retrial after a hung jury in about 57 per cent of cases.[80]

188 The study also found that juries are *not* more likely to be hung after a sexual assault trial than any other kind of trial.

189 English hung jury statistics are few. The 1991 Crown Court Study noted that there were no existing official figures, but provided estimates from court clerks, prosecution barristers and defence barristers which indicated a figure of 3–4 per cent.[81]

190 It is impossible to say how much effect the introduction of majority verdicts

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[77] Kalven and Zeisel *The American Jury* (Little Brown & Co, Boston, 1966) 461.

[78] This is the description used by the Litigation Reform Commission, Supreme Court of Queensland, *Reform of the Jury System in Queensland: Report of the Criminal Procedure Division* (Brisbane, 1993) 74.

[79] New South Wales Bureau of Crime Statistics and Research, "Hung Juries and Majority Verdicts", 20 October 1997, press release.

[80] Another reason was that 18 per cent of charges where juries were hung involved Commonwealth offences, which, under the Constitution, must be decided unanimously (*Cheattle & Anor v R,* above n 73).

[81] Zander and Henderson, above n 27, 159.

in this country would have on the incidence of hung juries. On the limited overseas information it might be less than dramatic. The inability to identify the reasons for the increase in hung juries other than in general terms makes this a question which cannot be answered with any certainty.

THE ARGUMENTS AGAINST MAJORITY VERDICTS

191 The arguments against majority verdicts centre on confidence in the result. There are, however, a number of facets to that issue.

Majority verdicts provide insufficient certainty of accurate results

192 The certainty of accurate results is clearly a goal of fundamental importance. The fact that a minority of one or two of the jury is not satisfied is said by some to indicate the presence of a doubt. Some proponents of majority verdicts point to the acceptance of majority decisions of judges, for example in the Court of Appeal, as an example of the willingness of the law to determine issues on a majority basis. But this is not a highly persuasive argument since these decisions are generally not decisions as to guilt in the criminal process and, more importantly, they are open to scrutiny because reasoning is provided. Those of juries are not, and unanimity provides an assurance comparable in effect to that provided by the accountability of judicial decisions. The preservation of jury secrecy will maintain the imperviousness of jury decisions to scrutiny and appeal, demanding the assurance of a high level of certainty in jury decisions.

193 Some research has suggested that a large proportion of jurors make up their minds before deliberation begins and do not change them.[82] The Research was broadly in line with these results: 22 per cent of jurors changed their mind as a result of deliberations, and a further 10.5 per cent reached a decision after being undecided (see Findings, 6.53). However, many jurors appreciated the chance to go through the evidence properly, maybe to confirm that their earlier view was indeed correct. They also derived comfort in gaining the agreement of all other jurors.

194 In the minority of cases, where juries do not ultimately decide in the direction of the initial majority but the overall jury position changes in the course of deliberation, the availability of majority verdicts would reduce the amount of deliberation and hence the opportunity for such a change to occur. Those jurisdictions opting for majority verdicts have sought to preserve the deliberation process by not allowing jurors to reach majority verdicts until a certain period of time has elapsed.

Majority verdicts compromise the criminal standard of proof

195 Both convictions and acquittals require unanimity. It is true that the unanimity rule underpins the criminal standard of proof required for conviction. However, the standard of proof is in no logical way dependent on the unanimity requirement. The argument does not acknowledge that having one or two

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[82] See paras 117–120 above.

jurors who are not convinced will not produce an acquittal. Neither does it acknowledge the possibility of pure perversity.

196 The argument is, however, strengthened by the approach taken in some jurisdictions, of introducing majority verdicts but continuing to require unanimity for the most serious offences (for example, in South Australia, Western Australia and Tasmania). However, as noted in paragraph 179 above, Victoria has recently decided to extend majority verdicts to the most serious offences. It is also noteworthy that, while in the United Kingdom there is no distinction among offences for the purposes of majority verdicts, the legislation introducing majority verdicts in that jurisdiction became law a year after the Murder (Abolition of Death Penalty) Act 1966. Similarly in the United States, the Supreme Court decided in 1972 that a state law allowing less than unanimous verdicts in non-capital proceedings did not violate the right to trial by jury specified in the Constitution.[83] However, for historical reasons unanimity is always required in federal jury trials.[84]

197 It would seem wrong in principle to adopt different approaches to the unanimity requirement according to the seriousness of the offence and possible penalty. The retention of unanimity for the most serious offences in some jurisdictions is a tacit acknowledgement that unanimity is closely linked to the burden and standard of proof, and to the need for certainty of accurate results.

The strength of jury deliberations is reduced by majority decisions

198 During our discussion of the role of deliberation in jury decision-making, we observed that juries appear to be competent fact-finders and that the process of deliberation is an important element in this. If a majority verdict is acceptable, the minority may be ignored, the role of deliberation may diminish, and the effectiveness of fact-finding may reduce. Majority verdict provisions in the United Kingdom and Australia attempt to overcome this by not allowing for majority verdicts until a period of time has elapsed: in Victoria the period is six hours; in South Australia it is four hours; in Tasmania and Western Australia three hours; and in the United Kingdom two hours with a discretion for the trial judge to extend it. These time limits are necessarily somewhat arbitrary, with the British approach allowing for variations to meet the characteristics of the trial. While such limits may create the opportunity for discussion and argument, they do not ensure that the minority will be listened to as the jury will inevitably be aware of its ultimate ability to return a majority verdict.

Unanimity maintains public confidence in jury decisions

199 Public confidence in jury decisions is important, affecting public support for the law and the legal system. The effective denunciation of criminal behaviour and community support for law enforcement may be compromised by public uncertainty as to the correctness of jury decisions. However, as we have noted earlier, the failure of jurors to reach verdicts may also affect public confidence.

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[83] *Apodaca et al v Oregon* (1972) 406 US 404.

[84] See discussion in *United States v Smedes* (1985) 760 F 2d 109, 111–112.

ISSUES REQUIRING RESOLUTION IF MAJORITY VERDICTS WERE INTRODUCED

200 If majority verdicts were to be introduced, a number of issues would require determination. They are:

- Should majority verdicts be available for both acquittals and convictions?
- What majority would be required? (11:1 or 10:2?)
- Should unanimity be retained for the most serious offences?
- Should majority verdicts be immediately available? If not, what period of deliberation should be required before a majority verdict becomes possible? Should this vary according to the number of defendants or the number of counts in the indictment?
- If a majority verdict is returned, should the size of the majority be publicly announced by the jury?

We consider these points in turn.

Acquittals and convictions?

201 Some submissions in response to our 1995 *Juries: Issues Paper* suggested that majority verdicts for acquittal alone should be considered, on the grounds that this would be consistent with the burden and standard of proof in criminal trials. However, this ignores the fact that it is already easier for a jury to agree unanimously on acquittal rather than conviction, because to acquit they only need a reasonable doubt as to guilt. If majority verdicts are to be introduced it must be on the basis that they produce safe verdicts. If they were introduced only for acquittals, that would indicate that they were unsafe and cast public doubts on acquittal.

What majority would be required?

202 The usual provision in other jurisdictions is a majority of 10:2. However, there may be little effective difference between 10:2 and 11:1 (see para 176 above). As already noted the state of Victoria has selected 11:1. The Victorian arrangement more closely reflects one of the arguments often put forward in favour of majority verdicts: that hung juries can result from the actions of one perverse juror. Further, it is arguable that perversity is unlikely to arise more than once on a single jury, and that the disagreement of two jurors goes some way to suggest the presence of a reasonable doubt.

203 There is no purely logical basis on which a distinction between 11:1 and 10:2 majorities can be made. However, the fact that most jurisdictions opting for majority verdicts have adopted the 10:2 position is persuasive: unanimity should only be abandoned if it is likely to produce benefits, and the 11:1 majority is likely to effect a lesser reduction in the number of hung juries than 10:2.

204 The trial judge's ability to discharge jurors also requires consideration. A trial judge can continue a trial with as few as 10 jurors without the consent of the prosecution and accused, and fewer if both the prosecution and accused consent.[85] What majority should be required in those circumstances? In the United Kingdom the majority required is 10 or 11 when 12 jurors deliberate, 10 with 11 jurors, and 9 with 10 jurors.[86] Similar patterns operate in the

[85] Crimes Act 1961, s 374(4A).

[86] Juries Act 1974 (UK), s 17.

Australian states and should, we propose, operate in New Zealand if majority verdicts were to be adopted.

Should unanimity be retained for the most serious offences?

205 We have noted that some jurisdictions retain unanimity for the most serious offences. We are unable to discern any principled argument in favour of such a course. If majority verdicts do not occasion a reduction in the standard of proof then, in the event of a change from the unanimity rule, the majority should be the same with respect to all offences.

Minimum deliberation times

206 We have identified the desirability of preserving opportunities for deliberation. The question may not be whether a minimum time is necessary, but how long it should be.

207 Trials vary according to the number of accused and the number of counts. Varying the minimum time in accordance with such matters would be complex and likely to produce error. In the United Kingdom the trial judge may determine the time; subject to an absolute minimum of 2 hours, it is a period the court thinks reasonable having regard to the nature and complexity of the case.

208 Such an approach would have the advantage of making it less likely that the majority simply wait out a known period without engaging in discussion. If majority verdicts were to be introduced, we would favour the adoption of this approach in New Zealand.

Disclosure of the size of the majority

209 In the United Kingdom, the size of the majority is disclosed by the jury on conviction but not on acquittal. We see merit in this approach. But such an approach limits the gathering of meaningful statistics. The Law Commission is of the view that on acquittal the figures should not be publicly announced but should be kept for record purposes.

Should majority verdicts be introduced?

If majority verdicts were to be introduced, should such verdicts be available for both acquittals and convictions?

Should the majority be 11:1 or 10:2?

Should unanimity remain a requirement for the most serious offences?

OUR PROPOSAL

210 The apparent increase in the rate of hung juries since 1986 provides a strong argument in favour of a change to majority verdicts. However, it may be that the increase is an aberrant one and will not be sustained. The Law Commission is of the view that if current rates of hung juries are substantially maintained, or increased, in the period prior to publication of our final report, majority verdicts should be introduced.

SUMMARY

211 The increase in trial and deliberation times has been accompanied by an apparent increase in the rate of failure to agree.

212 The unanimity requirement underpins the burden and standard of proof, promotes deliberation, ensures that the representative character of the jury is implicit in the verdict, and increases community confidence in the verdict. However, the trend in common law countries has been towards an acceptance of majority verdicts of 10:2 following a failure to obtain agreement.

213 The unanimity rule has been criticised as:

- promoting the wearing down of dissenting jurors by time and weight of numbers rather than by reasoned argument;
- creating an incentive to attempt to intimidate or corrupt;
- adding cost in personal, resource and financial terms; and
- giving rise to compromise verdicts and hung juries.

214 Statistical evidence from other countries concerning the effect of the introduction of majority verdicts of 10:2 is scarce, but it suggests that their introduction is likely to reduce the rate of hung juries.

215 The arguments against majority verdicts are that majority verdicts:

- provide insufficient certainty of accurate results;
- compromise the criminal standard of proof;
- reduce the strength of jury deliberations; and
- may reduce public confidence in jury decisions.

216 The Commission seeks views on the introduction of majority verdicts and, if majority verdicts were introduced, whether the majority should be 11 or 10. If majority verdicts were introduced, the Commission would favour:

- the application of the majority rule to both acquittals and convictions;
- the application of the majority rule to all offences;
- a minimum deliberation time of two hours with the trial judge able to extend the time; and
- the announcement of the majority by the jury in the case of conviction only, and the recording of the majority figure for statistical purposes in the case of acquittal.

7
Juror competency

INTRODUCTION

217 A JURY IS AN ORGANISM with 12 brains and 12 hearts and it is sometimes said that the organism has abilities greater than the sum of its components. There are some problems that can impair juror competency, although to a large extent they may be alleviated.

THE COMPOSITION OF JURIES

218 Empirical data from overseas studies on occupational groups and the educational levels of jurors suggest that the majority of jurors should be competent. In Findlay's *Jury Management in New South Wales*[87] over 50 per cent of jurors surveyed could be categorised as professional/executive, and between 35 and 40 per cent said they had received tertiary level education. In New Zealand, the Department of Justice study *Trial By Peers? The Composition of New Zealand Juries*[88] revealed that the occupational groups serving on the juries surveyed were similarly represented.[89] The characteristics of the respondents in the Research were broadly similar (see Findings, 1.9).

219 Findlay found that juror comprehension correlated with educational level and the length of the trial, and that comprehension varied considerably between jurors.[90] Jurors with higher levels of educational achievement understood more; and the longer the trial, the less, in general, jurors understood.

INDIVIDUAL JUROR COMPETENCE

220 There are practical problems in identifying juror incompetence in empirical research. For example, determining whether what appears to be difficulty in comprehension is due to the jurors' inability or due to the failure by counsel to present matters clearly. However, the Research revealed three areas of individual incompetence (see Findings, 3.18):

- eight jurors did not understand English well enough to participate properly, or at all. This is despite the clear requests in the jury booklet and introductory

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87 Findlay, above n 10, 61.

88 Dunstan, Paulin and Atkinson *Trial By Peers? The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995) 76.

89 The proportions were: Armed Forces – 0.5 per cent; Legislators, admin and managers – 9.6 per cent; Professionals – 9.3 per cent; Technicians and assoc professionals – 15.6 per cent; Clerks – 23.6 per cent; Service and sales workers – 16 per cent; Agriculture and fishery – 3.5 per cent; Trades – 9.6 per cent; Plant and machine operators – 9.7 per cent; Elementary occupations – 2.6 per cent.

90 Findlay, above n 10, 83.

video, in a number of languages, to advise court staff if jurors cannot understand English;
- in five cases there were one or more jurors who, through individual limitations, could not grasp the evidence; and
- in five cases involving technical evidence, individual limitations again impeded at least some jurors. These limitations seem to have contributed to perverse or compromise verdicts in two cases and a hung jury in a third (see Findings, 3.18(3)).

221 Particular features of proceedings which appeared to generate juror confusion and difficulties in recall and comprehension include:
- too much time being spent on matters not in dispute;
- unexplained adjournments and delays;
- the order of witness testimony and other evidence presented: the focus being the ingredients of the charge, rather than "telling a story" about the part each person played in the events surrounding the crime or chronologically unfolding the events;
- cross-examination: it not being readily apparent why certain questions were asked or why the answers were significant;
- real or perceived gaps in the evidence causing juror confusion and frustration; and
- scientific evidence.[91]

What more can be done to ensure that people with inadequate English language skills are detected before they are empanelled on a jury?

COMPETENCE OF JURIES IN FRAUD TRIALS AND OTHER COMPLEX TRIALS

222 In *Juries in Criminal Trials: Part One*, we asked whether some fraud trials are so complex they should not be tried by jury (paras 168–182) and whether other types of complex trials, such as those where there is complex scientific evidence, are not suitable for trial by jury (paras 183–189). Essentially, the arguments in favour of trying such cases by judge alone rather than by jury are:
- the issues are simply too complex for juries to cope with, and the huge volume of documentary evidence which is usually required in such trials overwhelms and swamps them; and
- such trials are long, sometimes three months or more, and it is unreasonable to ask citizens to serve as jurors for such a long period of time. It is too stressful, and interferes too much with their employment, business interests and personal lives.

223 These considerations must be balanced against the fundamental right to trial by jury.[92] An exception to that right for cases of serious fraud or other complex cases could be a dangerous precedent.

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[91] See generally Edmond and Mercer "Scientific literacy and the jury: reconsidering jury 'competence'" (1997) 6 Public Understand Sci 329 for an exploration of the competence of juries to assess scientific and technical evidence.

[92] New Zealand Bill of Rights Act 1990, s 24(e).

224 The Research indicates that although some juries did have particular difficulty in fraud trials, fraud and lack of comprehension were not necessarily associated, that is, some fraud trials posed no problem while some fraud trials did, and some non-fraud trials posed serious problems. While this suggests that fraud should not in itself be the criterion for a trial by judge alone, it must be remembered that none of the sample cases approached the length and complexity of such trials as the Equiticorp case.[93]

225 In *Juries in Criminal Trials: Part One,* we asked:

- Are some fraud trials so complex that they should not be tried by a jury? If so, what other options should be considered?
- Are certain other types of complex trials, for example, where there is complex scientific evidence, not suitable for trial by jury? If so, what other options should be considered?

226 We have received a number of helpful submissions on these issues, which we will discuss in detail in our final report. However, we invite further comment on these issues as opinions may now be reviewed in the light of the Findings.

Are some fraud trials so complex that they should not be tried by a jury? If so, what other options should be considered?

Are certain other types of complex trials, for example, where there is complex scientific evidence, not suitable for trial by jury? If so, what other options should be considered?

ABILITY TO ASSESS CREDIBILITY

227 A majority of cases in the Research turned partly or wholly on an assessment of the credibility of the accused or witnesses (see Findings, 3.20–3.25). In most cases, jurors appeared quite able to assess credibility on the basis of demeanour and consistency with other evidence. They were also able to take a balanced view of such evidence, not dismissing a witness out of hand because of some evasion or inconsistency. In a minority of cases, however, problems arose. First, a few jurors were unable to take a balanced view of discrepancies in oral evidence and rejected the evidence without due regard for independent evidence. Second, some jurors felt unable to accept guilt on the basis of an assessment of credibility in the absence of "hard" corroborative evidence. Of course, this could simply be an illustration of the standard of proof in action.

228 The routine instructions to jurors that in assessing evidence they should apply their common sense and experience of the world did not appear to assist them with credibility problems.

IRRELEVANCIES AND UNWARRANTED INFERENCES

229 There has been a considerable amount of overseas research on juror prejudice or bias in criminal proceedings. The applicability of the research to New Zealand has been assumed but is unproved, and caution is therefore required.

230 The Research considered whether gender or cultural biases appeared to influence

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[93] *R v Adams and Ors* (18 December 1992) unreported, High Court, Auckland, T 240/91.

jurors in their decision-making (see Findings, 3.26–3.28). There were four cases in which cultural issues relevant to the assessment of evidence occurred, but there is no indication that jurors approached these in a biased way. Although some felt handicapped by their ignorance of the other culture, they were certainly aware of cultural differences and tried to take them into account.

231 Although there were some examples of individual gender-based difficulties, it appears that these were not systematic and were overcome during the deliberation process. There were no systematic gender differences in the understanding and interpretation of evidence. This is relevant to the point raised in *Juries in Criminal Trials: Part One* (paras 194–198), where we asked whether trials involving sexual offences are more suitable for trial by jury or by judge alone. The Research indicates that juries are capable of dealing with such cases, and the prejudices or ignorance of individuals are overcome by the deliberation process.

232 The overseas research suggests that:

- outright juror prejudice is relatively infrequent and has a minimal effect on the ultimate verdict;
- jurors, performing their function of bringing community values into the justice process, are more likely to take account of sentiment or legal irrelevancies when the case hangs in the balance; and
- judges are, on the whole, less likely to excuse a defendant on the ground of extenuating circumstances.[94]

233 Although there is minimal evidence of outright juror bias, certain characteristics of jurors and the parties in proceedings can predispose individual jurors in one direction or the other. The overseas research findings indicate:[95]

- If jurors like the defendant, this may predispose them to acquit.
- Physical attractiveness (of witnesses or counsel) is generally an asset, except when there is no rational external reason for the defendant's actions – in which case the person may be judged more harshly, although the differences are very small.
- Authoritarian jurors appear to be most heavily influenced by the similarity of the defendant to themselves. If defendants have different values to the jurors, they will be judged more harshly.
- Jurors who assume responsibility for their own actions may be more punitive than those who attribute the cause of events to external factors.
- Jurors who wish to please the judge may be influenced by the judge's demeanour, and may attempt to decide the case in the direction in which they perceive the judge to be moving.

234 There is also research suggesting that juror decision-making will not always be influenced by the opportunity to review the evidence, and the exposure to other views, afforded by the deliberation process. A study cited by Simon[96] (see paras 117–118 above) found that 67 per cent of the jurors surveyed did

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[94] Elwork, Sales and Suggs "The Trial: A Research Review" in Sales (ed) *The Trial Process (Perspectives in Law and Psychology series)* (Plenum Press, 1981, New York).

[95] See Elwork, Sales and Suggs, above n 94, 25–27; Goldberg "Memory, Magic, and Myth: The Timing of Jury Instructions" (1981) 59 Oregon LR 451, 458–459.

[96] Above n 33, at 63–64.

not change their views as a result of the deliberations; 23 per cent were genuinely persuaded by the others; 7 per cent went along with the majority, probably because they wanted to avoid a hung jury, but afterwards indicated that they had a different opinion; and the remaining 3 per cent shifted their verdict in such a way that it was unclear whether they understood what was happening.

235 Research focusing on jury deliberations alone, as an indicator of whether and in which respects jurors make fair and competent decisions, should be approached with caution. It fails to take account of other aspects of the trial which will have an impact on the way the jury operates (for example, the competency of counsel, the judge's instructions, and the credibility of the witnesses). Nevertheless, the research does point to the desirability of jurors being advised to keep an open mind throughout the trial and deliberations, and to avoid declaring a committed position until all the evidence has been discussed.

236 The booklet *Information for Jurors* does attempt to address this:

> Discuss the case with other jurors before making up your mind about the verdict. Each of you must come to your own decision on the case, but only after the group has considered the evidence fairly.

LEGAL DIRECTIONS AND TERMINOLOGY

237 For jurors to perform their role of deciding the facts competently and impartially, they must understand, recall, and follow the judge's instructions. Research has suggested that jurors experience difficulties in all these areas.

238 The Research showed that a number of juries had real difficulties with legal terms and concepts such as "reasonable doubt" and "intent" (see Findings, 2.58). This is supported by Australian research,[97] which reveals that:

- over 50 per cent of the jurors surveyed understood legal terms and complex facts most of the time, but fewer than 20 per cent understood them thoroughly; and
- 43 per cent of jurors who only understood legal terms some of the time were involved in juries which convicted.

239 Commentators have identified features of instructions, and the language in which they are conveyed, which contribute to comprehension and recall problems:

- the use of legalistic language and the particular wording of definitions;[98]
- complex sentence structures (for example, double negatives, overuse of the passive voice, verbs converted into nouns, a succession of "loose" sentences);
- instructions which are not sufficiently tailored to the facts and are difficult to apply;
- lengthy and repetitious instructions;
- lack of understanding of the charge;[99]
- the absence of a written copy of the instructions, making juror recall in deliberations more difficult;
- the absence of explanations for departing from what jurors perceive to be

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97 Findlay, above n 10, 83.

98 Elwork, Sales and Suggs, above n 94, 37.

99 For example, in Findlay, above n 10, 78, a significant number of jurors indicated that they did not understand the charge.

common sense, which may obscure understanding or lead to deliberate rejection of the instructions;
- instructions given too late in the proceedings to provide a framework within which to sift and discard irrelevant evidence and rank or group the relevant evidence. In the absence of such a framework, jurors can experience difficulties in recalling the evidence, and may take account of irrelevant evidence or give too much or insufficient weight to particular evidence; and
- instructions not repeated.

SUMMARY

240 Jurors are generally competent and impartial in deciding the facts in criminal proceedings. However, problems impairing juror competency and impartiality include:
- varying educational and intellectual levels;
- consideration of unwarranted inferences and irrelevancies;
- role confusion;
- difficulties in comprehending legal instructions and terminology;
- problems arising from the way evidence is presented; and
- pressures to reach a unanimous verdict.

241 The proposals for improving the presentation of evidence discussed in chapter 4 are likely to assist in maximising jurors' abilities in these areas.

8
The secrecy of jury deliberations

INTRODUCTION

242 THIS CHAPTER CONSIDERS THE SECRECY that surrounds the deliberations of the jury during the time of those deliberations, on appeal, and after the trial is over. We examine the current laws which uphold the secrecy of jury deliberations, as well as overseas practice. We discuss the issues raised by the convention of secrecy and the options for reform.

THE REASONS FOR SECRECY OF JURY DELIBERATIONS

243 The main reasons for maintaining the secrecy of jury deliberations are to:

- promote free and frank discussion among jurors;
- prevent jurors being exposed to pressure from, or on behalf of, a defendant who is convicted;
- preserve the finality of verdicts; and
- avoid any temptation for jurors to capitalise on disclosures.[100]

We consider each in turn.

Promoting free and frank discussion among jurors

244 No juror should be deterred from expressing his or her independent opinion by fear of victimisation or undesired publicity if that opinion could later be disclosed:

> [Jurors'] participation should be in the certain knowledge that their own views may be expressed without fear of subsequent exposure, otherwise individuals, particularly the less forthright, experienced or confident, will be deterred from advancing opinions lest they be subsequently exposed to public criticism or ridicule.[101]

Avoiding exposure to pressure from a convicted defendant

245 The secrecy of jury deliberations protects jurors, after the verdict has been delivered, from abuse or assault by parties not favoured by the verdict. This is especially important when a jury decision is greatly affected by the opinions of one or two jurors, for example, leading to a hung jury when the majority of

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[100] See *R v Papadopoulos*, above n 45, 626. See also, generally, *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 45 (a decision of the Full Court of the High Court) and *R v Norton-Bennett* [1990] 1 NZLR 559 (CA).

[101] *Solicitor-General v Radio New Zealand Ltd*, above n 100, 54.

jurors thought the defendant not guilty. Secrecy also better allows jurors to reach verdicts which may be seen as "unpopular". This relates to the function of the jury as a safeguard against arbitrary or oppressive governments. Failure to provide protection from improper pressure or influences would be likely to discourage people from serving as jurors:

> . . . a jury is brought together by compulsion to perform a public duty, a responsible and often difficult task requiring the courage to speak up in the jury room and sometimes to contribute to a decision unpopular with at least some members of the community. The desired qualities will not be promoted or safeguarded if afterwards inquiries are permitted revealing the process by which diverging views and opinions were melded into the final unanimous verdict.[102]

Preserving the finality of verdicts

246 It has been said that "the uncertainty which would prevail if it were always open to a juror to say afterwards that he or she had not agreed is obvious".[103] The secrecy of jury deliberations means that verdicts cannot be appealed on the basis of the jury's reasoning, upon their acceptance of evidence, nor upon doubts expressed by jurors during deliberations. Secrecy preserves the finality of verdicts in the sense that they cannot be appealed against on grounds connected with the deliberations.

Avoiding the temptation to capitalise on disclosures

247 If jurors were able to comment openly and widely upon their deliberations, they may be tempted to do so for pecuniary gain, as has occurred in the United States. Such disclosures may undermine the finality of jury verdicts by providing material that may be thought to provide a basis for appeal. The disclosures may also compromise the privacy of other jurors.

THE CURRENT LAW

The origins and nature of the law of jury secrecy

248 The current situation is best described as a rule or convention created by case law rather than by statute. In *Ellis v Deheer*,[104] Bankes LJ expressed the principle as follows:

> It has for many years been a well accepted rule that when once a verdict has been given it ought not to be open to an individual juryman to challenge it, or to attempt to support it if challenged. I have spoken of this as a rule of law, but it has also been generally accepted by the public as a rule of conduct, that what passes in the jury room during the discussion by the jury of what their verdict should be ought to be treated as private and confidential.

249 The New Zealand cases (and in particular *R v Papadopoulos*)[105] show that the convention is upheld in New Zealand and covers the "lifespan" of a trial; from judicial advice at the start of a trial, to jurors not giving reasons with

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[102] *Solicitor-General v Radio New Zealand Ltd*, above n 100, 54.

[103] *R v Papadopoulos*, above n 45, 626.

[104] [1922] 2 KB 113, 118.

[105] Above n 45.

their verdict at the end, to evidence of deliberations being inadmissible on appeal, to contempt of court considerations post-trial. We now discuss the first three of these stages. Contempt is discussed in chapter 9.

Judicial advice to jurors at the start of a trial

250 The notion that the secrecy of the jury room rests on convention, rather than law, is reinforced by the fact that jurors in New Zealand are not required to take an oath of secrecy. The oath which is sworn by jurors states only that jurors will try the case to the best of their ability, and that they will give a verdict according to the evidence.[106]

251 Jurors are under no specific obligation to refrain from discussing their deliberations with others, beyond the warning usually given by the judge at the start of the trial that during the trial they should only discuss the case amongst themselves and not with any other person around the court or at home. There is no express caution concerning the period after the verdict has been delivered or when the trial is over.

Juries are not required to give reasons for their verdicts

252 Rules and conventions dealing with the secrecy of jury deliberations play a vital role in sustaining the fundamental principle that a jury's verdict is inscrutable:

> Juries are not required to give reasons, nor could they be expected to do so. It is not the reasoning that is significant, but the conclusion. Indeed jurors are free to reach their conclusion by different paths, a point commonly made by Judges in the course of summing up . . . Subsequent investigations focusing on the views of one set of jurors or the other are damaging to the system; not the least . . . because they misrepresent the basis of the jury system by focusing on jurors' reasoning. The system rests not on the process of reasoning followed by the jury, but on the community respect for their decision reached after a trial conducted in accordance with established procedures and principles.[107]

253 Although it is the jury's role to be the arbiter of facts, the jury gives a verdict without stating which facts it finds proven or not proven. In other words, again, reasons for verdicts are not required; and indeed, on the following basis they may be discouraged:

> [I]t does not logically follow that each of the members of the jury must base his or her individual conclusion upon the same reasoning as the others. Different members may individually be convinced beyond reasonable doubt of the guilt of the accused, by their individual acceptance of *different facts*. Circumstantial evidence has by some writers been likened to a rope composed of a number of cords, a sufficient number of which, taken together, may without the others support the burden of proof. Some jurors may find it supported by some cords, other jurors by others.[108]

On the other hand, if jurors are encouraged to apply a systematic structure for assessing evidence and applying the law (see para 123 above) they may be more likely to reach their decision by the same path, but even so there will still be cases where jurors follow different paths to the same conclusion.

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[106] Jury Rules 1990 (SR 1990/226), First Schedule, Form 2, Juror's Oath.

[107] *Solicitor-General v Radio New Zealand Ltd*, above n 100, 54.

[108] *Thomas v The Queen* [1972] NZLR 34, 41.

Inadmissibility of evidence of deliberations on appeal

254 In New Zealand, most appeals against conviction are brought under section 385(1)(c) of the Crimes Act 1961, on the ground that there was a miscarriage of justice. The well settled principle that evidence relating to jury deliberations is inadmissible[109] potentially limits the scope of the ground. Although not absolute,[110] this exclusionary rule of evidence is the foremost method by which the courts buttress the convention governing jury secrecy.

OVERSEAS PRACTICE

255 Some jurisdictions have legislated to ensure that jury deliberations are not disclosed, or to control the way in which any such disclosures may be made.

Australia

256 In New South Wales,[111] it is an offence to solicit information about jury deliberations from jurors or to harass jurors for the purpose of obtaining information. Information may be solicited for research purposes with the permission of the Attorney-General. It is also an offence for jurors to disclose information without the consent of the judge or coroner. In Victoria,[112] it is an offence to publish any statements made, opinions expressed, arguments advanced or votes cast during deliberation, or to solicit or obtain such information from a juror. There is an exception where the publication does not identify the juror or the proceedings.

United Kingdom

257 Section 8 of the Contempt of Court Act 1981 (UK) provides that it is an offence to obtain, disclose or solicit any particulars of statements made, opinions

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[109] *R v Papadopoulos,* above n 45, 626. This area of the law of evidence is discussed in an unpublished Law Commission research paper *Evidence of Judge and Jury* (July 1996), written as part of the evidence reference. The paper is available on request from the Commission.

[110] See *R v Tuia* [1994] 3 NZLR 522, 556 (CA).

> . . . there can be circumstances raising a sufficiently compelling reason to depart from the general rule. It is ultimately a question of balancing competing public interests: the public interest in protecting the confidentiality of jury deliberations as against the public interest in seeking to do justice in the individual case . . . In short, there are two circumstances in which the evidence of a juror can be put before the Court. The first is where the evidence relates to an issue extrinsic to the jury's deliberations. The second is where there is a sufficiently compelling reason to depart from the normal rule of confidentiality.

Examples where exceptions have been made include: where a file was mistakenly left in the jury room during deliberations (*R v Tuia*); where jurors did not agree with the verdict and the verdict was given out of their presence or hearing (*Ellis v Deheer* [1922] 2 KB 113); where a juror could not understand the language in which the trial was conducted (*Ras Behari Lal v King-Emperor* (1933) 50 TLR 1); and where jurors carried out their own investigations into the alleged crime (*R v Gillespie* (7 February 1989) CA 227/88).

[111] Jury Act 1977 (NSW), ss 68A and 68B.

[112] Juries Act 1967 (Vic), s 69A. This will soon be replaced by clause 76 of the Juries Bill 1999 which also prohibits the publication of such information. The Australian Capital Territory has similar provisions (Juries Act 1967 (ACT), s 42C) although unlike Victoria they do not allow publication or disclosure without identifying a juror or the relevant legal proceedings.

expressed, arguments advanced or votes cast by members of a jury during deliberations. The only exceptions are:

- in the proceedings in question, for the purpose of enabling the jury to arrive at its verdict or in connection with the delivery of the verdict; or
- as evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings, or in relation to the publication of any particulars so disclosed.

258 This provision has the effect of a blanket ban on any details relating to deliberations, but it has not in practice been entirely successful at "plugging" all information concerning jury deliberations.[113]

Canada

259 In Canada,[114] it is an offence for a juror to disclose any information relating to the proceedings of a jury when it was absent from the courtroom. The only exception is for investigations into, or prosecution of, alleged offences by a juror.

United States of America

260 American law is in marked contrast to the broad statutory reinforcements of jury secrecy found in Australia, England and Canada.

> American law on the subject is well-settled. A juror who discloses information about the in camera proceedings of a jury is not in contempt of court.[115]

261 News gathering is part of the freedom of speech guaranteed by the First Amendment to the United States Constitution. The right to gather news is not, however, absolute; it can be outweighed, for example, by the accused's right to a fair trial.[116] But any restrictions on the right are those permissible to prevent a substantial threat to the administration of justice.[117] But there are some restrictions: for example, a juror who declines an interview must not face repeated requests for the same information.[118] At least 26 federal districts have local rules which empower the court to supervise juror interviews. Judges may restrict the time and place of such interviews, but may not forbid them.[119]

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[113] For example, the foreman of a jury, which in 1979 had convicted four men of the murder of a young boy, later said publicly that he had changed his opinion and the jury had got it wrong. The foreman also commented upon the effect of certain police evidence upon the verdict, but was not charged under section 8 with contempt: *The Guardian*, London, UK, 1 November 1994, 2; *The Times*, London, UK, 27 July 1996, 7.

[114] Criminal Code (Canada), s 649.

[115] Campbell "Jury Secrecy and Impeachment of Jury Verdicts – Part 1" (1985) 9 Crim L J 132, 134.

[116] Findlay and Duff (eds) *The Jury Under Attack* (Butterworths, Sydney, 1988), 69; *Re The Express-News Corporation v Clift* (1982) 695 F 2d 807, 808–809 (5th Cir).

[117] *US v Harrelson* (1983) 713 F 2d 1114, 1116.

[118] *Harrelson* above n 117, 1118.

[119] Findlay and Duff, above n 116, 69.

ISSUES REQUIRING CONSIDERATION

Empirical research

262 The ability, or rather the inability, to do empirical research is directly related to the secrecy of jury deliberations. But for the convention of jury secrecy, the gathering of empirical material concerning the workings of the jury would be a relatively simple matter. The lack of empirical material means that many of the workings of the jury are unknown. For example, in New Zealand, the extent of participation in jury room discussions by Mäori jurors is unknown (see also para 329 below), and the ability of jurors to understand the testimony of expert witnesses or judicial directions is uncertain. The Research has provided valuable information in this regard, but it is necessarily limited. The project investigated just 48 cases, and while that is enough to get a good indication of trends, it is far from comprehensive. But for the convention of jury secrecy, academic research could be done much more easily, and the Department for Courts could widen the scope of its record-keeping markedly.

263 Any codification in this area should not exclude responsible academic research. The inability to carry out empirical research has been a particular issue in the United Kingdom. It has been said that section 8 of the Contempt of Court Act (1981) (UK) "precludes discussion and observation of a real jury verdict and thus renders much of the debate on the jury's function purely speculative".[120]

264 Calls have been made to amend section 8 to allow for academic research into the jury,[121] particularly in the wake of the 1993 Royal Commission on Criminal Justice.[122]

The finality of verdicts

265 The English Court of Appeal addressed the issue of finality of verdicts in *Attorney-General v New Statesman and Nation Publishing Co Ltd*.[123] In dismissing a contempt of court application against a newspaper, Lord Widgery CJ nevertheless observed:

> 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. In our judgment, therefore, any activity of the kind under consideration in this case which, to use the language of the Attorney-General's statement, tends or will tend to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their deliberations, is capable of being contempt. But that is not to

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[120] Darbyshire "The Lamp That Shows That Freedom Lives – Is It Worth The Candle?" [1991] Crim LR 740, 751.

[121] For example, "Didn't They Do Well?" (1992) 142 NLJ 1709.

[122] Zander and Henderson, above n 27, 2 and 188. Barred by section 8 from conducting research into juries' reasons for their verdicts, the Royal Commission stated that "such research should be made possible for the future by an amendment to the Act so that informed debate can take place rather than argument based only on surmise and anecdote". However, the Courts (Research) Bill, which would have repealed this section in relation to genuine research, was not enacted.

[123] [1980] 1 All ER 644.

say that there would be of necessity a contempt because someone had disclosed the secrets of the jury room.[124]

266 The need for the finality of verdicts must be balanced against the need to guard against possible miscarriages of justice. This balance was expressed by Lord Atkin in the Privy Council case of *Ras Behari Lal v The King-Emperor*:[125]

> It would be remarkable indeed if what may be a "scandal and the perversion of justice" may be prevented during the trial but after it has taken effect the Courts are powerless to interfere. Finality is a good thing but justice is a better.

Admissibility of evidence of deliberations on appeal

267 Clearly, the doctrine of jury secrecy gives rise to some fine distinctions as to what is admissible on appeal and what is not. However, information concerning jurors' confusion about their role and duty, or concerning the intimidation of jurors in the jury room, can be held to be inadmissible. The greater the proximity of the information to the actual jury deliberations within the jury room, the more likely it is to be inadmissible in order to uphold the convention of secrecy of jury deliberations.

268 An example of the practical difficulties which can arise with this rule can be seen in the English case *R v Schofield*.[126] After reaching a verdict of guilty on a charge of affray, one juror asked the court usher whether the jury could have asked a question of the judge. The jury had drafted a question asking for a definition of "affray" but had felt unable to hand it to the judge. Counsel argued on appeal that the Court should be prepared to receive evidence of what had happened in the jury room, to determine whether the conviction could be held to be unsafe because the jury had not understood the directions on the law. The only evidence sought to be admitted was of the conversation between the juror and the usher, which occurred outside the jury room and which indicated that the jury was having problems with its voting. The Court refused to accept this on the basis that, to give any meaning to the conversation between the juror and the usher, it would have to lift the veil of secrecy and enquire what had happened in the jury room. The Court would not permit this, and the appeal was dismissed.

EXISTING PROPOSAL FOR REFORM

269 In the draft Evidence Code[127] we have proposed a provision (at section 77) that:

> A person cannot give evidence about the deliberations of a jury concerning the substance of a proceeding except in so far as that evidence tends to establish

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[124] Above n 123, 649. That case was, however, decided before the Contempt of Court Act (UK) 1981 was passed: see Quinlan "Secrecy of Jury Deliberations – Is the Cost Too High?" (1993) 22 CR (4th) 127, 130–131.

[125] (1933) 50 TLR 1, 2 (PC). In that case murder convictions were set aside because one of the jurors did not understand the language in which the proceedings were conducted.

[126] Court of Appeal (UK), Criminal Division (13 October 1992) No 4527/Y4/91, Lord Taylor CJ, Hutchinson and Holland JJ.

[127] New Zealand Law Commission, above n 14.

that a juror has acted in breach of the juror's duty.

and commented:

> The intention of this section is to maintain the secrecy of jury deliberations, but at the same time allowing evidence to be given if a juror breaches his or her duty as a juror. Evidence about the substance of a jury's deliberation will be allowed if such evidence cannot be avoided in giving evidence about jury misbehaviour. This section does away with the distinction made in the common law that depends on whether the impropriety occurred within or outside the jury room.

Codification of jury secrecy rules?

270 Legislation on jury secrecy could clarify what aspects of a jury's deliberations are admissible or disclosable. Such legislation could detail the allowable exceptions to jury secrecy (for example, to cover miscarriage of justice and intimidation situations). Absolute secrecy is undesirable. Even the most comprehensive statutory prohibitions on disclosure and publication of jury deliberations, such as those in the United Kingdom and Canada, contain exceptions to allow, for example, the prosecution of bribery or threats made in the jury room. Legislation would also clarify, both for the media and for jurors, what constitutes contempt of court, and what contact is permissible, for example, with a consenting juror after trial.[128] Any codification should also exempt academic research; the Research summarised in volume 2 of this paper would have been illegal in the United Kingdom because of section 8 of the Contempt of Court Act (UK).

Should the law be codified to clarify the legal situation in relation to the secrecy of jury deliberations?

SUMMARY

271 The main reasons for maintaining jury secrecy are to:

- promote free and frank discussion among jurors;
- prevent jurors from being exposed to pressure from, or on behalf of, a defendant;
- preserve the finality of verdicts; and
- avoid any temptation for jurors to capitalise on disclosure.

272 Jury secrecy in New Zealand rests on convention rather than law: jurors are not required to take an oath of secrecy but are directed by the trial judge that the case should only be discussed with other jurors.

273 Jury verdicts are inscrutable, and (with some limited exceptions) evidence relating to jury deliberations is inadmissible on appeal.

274 Australia, the United Kingdom and Canada have legislated to ensure that jury deliberations are not disclosed.

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[128] See chapter 9, which deals with juror anonymity and secrecy in a media context.

275 In New Zealand, jury secrecy limits, but does not preclude, empirical research into juries.

276 The Law Commission proposes that evidence of jury deliberations concerning the substance of the case should be inadmissible, except evidence which tends to establish that a juror has acted in breach of their duty.

277 Codification of jury secrecy rules, detailing allowable exceptions concerning miscarriage of justice and intimidation situations, would provide clarification. We seek submissions on this proposal.

9
The media and their influence on juries

INTRODUCTION

278 MEDIA COVERAGE OF A MATTER which is awaiting judicial determination (*sub judice*) is constrained by the law of contempt. The objective is to ensure that the courts are not subjected to influences from outside the confines of the court process. This chapter addresses two aspects of media coverage: the shielding of potential jurors and juries from material which may prejudice deliberations while the proceedings are *sub judice*; and the protection of juries, and the deliberation process, from media access both during and after the trial.

279 In respect of the first aspect, the chapter identifies public interest factors and discusses the law of contempt with particular reference to:

- the test employed by the courts to determine whether a contempt has taken place; and
- the period over which restrictions should operate.

We consider reforms in England and suggested reforms in Australia.

280 The second aspect, the need to maintain jury secrecy and the anonymity of jurors, has been subject to suggestions of media encroachment in recent times. This will also be discussed with reference to overseas reforms.

International obligations

281 The Law Commission's criminal procedure reference requires consideration of obligations under the International Covenant on Civil and Political Rights. That states, at Article 14(1):

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order . . . or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

282 The Covenant strikes the balance between the right to a fair trial by an impartial jury (which includes the integrity and finality of verdicts) and the freedom of the media (to report on public proceedings of the justice system). This balance

is reflected in section 25(a) of the New Zealand Bill of Rights Act 1990, which provides:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) The right to a fair and public hearing by an independent and impartial court . . .

CONFLICTING PUBLIC INTERESTS

283 The events which give rise to criminal charges, the police inquiry which follows those events, the arrest of alleged offenders, and the trial of those persons, are matters which can arouse a high level of interest and strong feelings in the community. Media coverage of these events is to be expected, and a clear public interest is served by it. Section 14 of the New Zealand Bill of Rights Act 1990 provides that:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Crime reporting helps keep the community informed, so the public is aware of problems which require attention and is able to discuss them. Media reports may also enable the public to assist police inquiries, by providing information which may lead to the arrest and charge of a suspected offender or to the location of witnesses and exhibits.

284 On the other hand, there is also an overriding public interest in ensuring that the criminal justice system operates effectively and fairly, as reflected by section 25 of the New Zealand Bill of Rights Act:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) The right to a fair and public hearing by an independent and impartial court; . . . .
>
> (c) The right to be presumed innocent until proven guilty according to law.

285 The law of contempt protects the independence and impartiality of the trial process. Contempt has many aspects, but we shall consider only one – the control of publication of material which might prejudice trial by jury.

286 The law of contempt has been criticised as too vague and therefore not easily accessible to journalists who must attempt to comply with it:

> Contempt of court is in the nature of a criminal offence. It is unique in New Zealand in that it is a composite of statute law and common law; all other punishable wrongdoing in this country is purely statutory. Certain statutory provisions cover certain kinds of contempt [for example, the Crimes Act 1961, s 401; the Judicature Act 1908, s 56C; the District Courts Act 1947, s 112; the Summary Proceedings Act 1957, s 206], but they are limited, and the leading criminal statute, the Crimes Act 1961, makes it clear that the High Court retains as well its power to punish for anything that would have been a contempt at common law . . . [129]

Before considering the law of contempt as it affects trial by jury, it is necessary to consider the question of juror susceptibility to the influences created by pre-trial publicity.

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[129] Burrows and Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 270.

JUROR SUSCEPTIBILITY TO PREJUDICIAL MATERIAL

287 The Research shows that the impact of media publicity both before and during the trial is minimal (see Findings, 7.46–7.57). Jurors seemed quite able to recognise when media coverage of their trial was inaccurate (see Findings, 7.55), and to put media coverage aside. These results strongly suggest that the controls on media in New Zealand are sufficient to protect jurors and ensure a fair trial. Extensive research has also been undertaken in the United States in the last thirty years to assess the likely effect of pre-trial publicity on jurors, but this research is not uniform in its conclusion and its application to New Zealand must be treated with considerable caution.[130]

288 In a recent contempt case, the High Court has preferred not to rely on American research:

> Submissions were advanced based on research in the USA said to show that the risk of jury prejudice through pre-trial publicity, and in particular through knowledge of convictions, was exaggerated. No such change of perception has occurred in Australasia, and based on my own experience as a Judge I prefer the orthodox view.[131]

THE EXISTING CONTROLS ON PUBLICATION BEFORE AND DURING TRIAL

289 The courts have long recognised a public interest in the reporting of crime and judicial responses to crime. When a conflict arises between a fair trial and freedom of speech, the former has prevailed because the compromise of a fair trial for a particular accused may cause them permanent harm (for example, because a conviction has been entered wrongly), whereas the inhibition of media freedom ends with the conclusion of the legal proceedings.[132]

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[130] See R J Simon "Does the Court's Decision in *Nebraska Press Association* Fit the Research Evidence on the Impact on Jurors of News Coverage?" (1977) 29 Stanford LR 515, 528 for a summary of much of the research to that date:

> Experiments to date indicate that for the most part jurors are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning and greater detachment.

See also B C Schmidt, "Nebraska Press Association: An Expansion of Freedom and Contraction of Theory" (1977) 29 Stanford LR 431.

[131] *Solicitor-General v Wellington Newspapers Ltd* [1995] 1 NZLR 45, 48, per Eichelbaum CJ. See also McGechan J at 57. In considering the appeal of one of the newspapers in that case, the Court of Appeal noted (*Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 574):

> . . . there is limited New Zealand data as to the impact of media publicity on jury behaviour by which to test such matters as: (1) the effects of media coverage of criminal events on public beliefs and attitudes and their dissipation over time; (2) the effectiveness of judicial instructions to the assembled jury panel in eliminating prejudiced jurors; and (3) the effectiveness of judicial directions and jury deliberations in curing any prejudice resulting from pre-trial publicity about the case . . . And there is little guidance in published material as to the use of overseas social science data in plumbing New Zealand attitudes and the responses of New Zealand juries . . . But the absence of current empirical data to support a long-standing assumption embedded in public policy is not, in our view, adequate justification for shifting policy ground in favour of another approach which is also deficient in supporting policy data and analysis.

[132] See *Solicitor-General v Wellington Newspapers Ltd*, above n 131, 48.

290 To balance the competing considerations there must be a test to determine whether a particular publication amounts to contempt. In the context of jury trials the test appears to be:[133]

> [Whether] as a matter of practical reality the actions of the particular respondent caused a real risk, as distinct from a remote possibility, of interference with the administration of justice; here, specifically, interference with a fair trial. Risk is assessed not by the actual outcome but by the tendency of the publication, although subsequent events may form part of the evidence. While the meaning of publications is decided by the impression made on the hypothetical ordinary reasonable reader (or, in the case of radio, listener) the tendency is assessed by the Court.

The test was not challenged on appeal. The effect of this wording is essentially the same as that used by the Court of Appeal in *R v Coghill*[134] when, in assessing pre-trial publicity from a Bill of Rights perspective, the Court observed that in that case there had not been a "substantial risk" of prejudice.

291 It should be noted that the test measures tendencies rather than actual effects. An intention to commit contempt is not essential.

292 It is an argument in favour of codification that the application of this test is unclear and requires some knowledge of the criminal law. For example, if a reporter does not know that an accused's previous convictions cannot ordinarily be placed before a jury, the assessment of whether the publication of previous convictions would constitute a real risk of interference with a fair trial may produce a different conclusion to that reached by a reporter who is aware of the prohibition.

THE APPLICATION OF THE TEST OF CONTEMPT

The statements made

293 Statements published by the media may interfere with a fair trial in a number of ways. There are three broad categories, which cannot be regarded as closed:

- *Publication of material reflecting on the character or credibility of the accused*. Publication of such matters during the period when the matter is *sub judice* will amount to contempt.[135] Although the cases tend to be confined to comment on the bad character of the accused, comment favourable to the accused similarly amounts to contempt.
- *Reporting evidence and facts in dispute*. The media may, in the absence of suppression orders, report the evidence given at the taking of depositions and at trial. However, the presentation of a review of all or part of the evidence in a forthcoming trial will amount to contempt if it implies that the accused has committed the offence, particularly if it involves the publication of allegations of fact which are disputed.[136] Similarly the

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[133] *Solicitor-General v Wellington Newspapers Ltd,* above n 131, 47; the test was adopted in *Solicitor-General v TV3 Network Services Ltd and Anor* (8 April 1997) High Court, Christchurch, M 520/96, Eichelbaum CJ and Hansen J, 6–7.

[134] [1995] 3 NZLR 651, 662.

[135] See, for example, *Solicitor-General v Broadcasting Corporation of New Zealand* [1987] 2 NZLR 100.

[136] *R v Evening Standard* (1924) 40 TLR 833.

publication of photographs of an accused, in circumstances where it is apparent that a question of identity may be an issue, may be a contempt;[137] although whether identity is in dispute may be difficult to determine. The media may not predict the outcome of a trial, or make statements assuming the accused's guilt or innocence or the accuracy or inaccuracy of expected evidence.

- *Improper or inaccurate reports of court proceedings*. In this category are unfair or inaccurate reports, or reports involving publication of matters withheld from the jury.[138]

These categories can only be stated at a relatively high level of generality.

The circumstances in which the statements were published

294 Two considerations to be taken into account in determining whether there is a real risk of interference with a fair trial are:

- the length of time likely to elapse between the making of the statement and the trial. The longer the time, the greater the difficulty in proving a real risk of prejudice.[139] Delaying the trial to allow any prejudice to dissipate is an option, but the accused's right to be tried without undue delay[140] limits this. While the right to a fair trial is likely to be accorded greater weight by the accused than the right to a prompt trial, the abandonment of one right to protect another (which should not have been threatened) is clearly unsatisfactory; and
- the location of the publication of the alleged contempt. The network distribution of news stories in both the print and electronic media makes it likely that, in trials involving a high level of public interest, stories will be conveyed widely. This makes venue change less effective as a means of avoiding any resulting prejudice. But where stories are not widely disseminated, the publication of material in one city may be unlikely to effect perceptions in another.[141] Again, these considerations cannot be defined by resort to a clear formula which would render the application of the law readily predictable.

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137 *Attorney-General v Tonks* [1934] NZLR 140; see also *R v Daily Mirror* [1927] 1 QB 845.

138 *R v Evening Standard Co Ltd* [1954] 1 QB 578.

139 The Court of Appeal has expressed the view that it will be difficult to conclude that the influence of the article has survived the passage of time where the expected time lapse exceeds six or eight months: *Gisborne Herald Ltd v Solicitor-General*, above n 131, 571; see also *R v Coghill*, above n 134, 662.

140 New Zealand Bill of Rights Act 1990, s 25(b).

141 For example, in *Gisborne Herald Ltd*, above n 131, the Court of Appeal took the view that publication of prejudicial material in Gisborne did not create a real risk of prejudice in Napier, where the newspaper was not circulated. The number of people likely to be exposed to the publication will clearly be an important factor, as will the measure of prominence given to the story and the extent of any repetition.

The method of dealing with the contempt

Punishing the contemnor

295 Contempt proceedings arising from claimed prejudice to a fair trial are heard in the High Court, the District Court's jurisdiction in contempt matters being confined to contempt in the courtroom.[142] Proceedings may be taken against any person concerned with the making of the statement complained of, but in recent years they have usually been directed against the publisher (in most cases a body corporate). The penalty generally takes the form of a fine and orders for costs, although imprisonment is possible. There is a right of appeal.[143]

Protecting the trial

296 If a contempt does occur, the court may attempt to minimise the effect by:

- moving the trial away from the potential prejudice, by either changing the venue or delaying the trial. The effectiveness of geographical distance may, in the case of highly publicised matters, be limited by the national publication of the prejudicial material. But as noted above, the ability to fix a distant trial date is limited by the accused's right to be tried without undue delay. So the prejudicial effect of pre-trial publicity may not be effectively nullified by resort to venue change, or by the passage of time; and
- judicial warnings and directions given at the trial (for example, warning the jury that they must disregard what they have heard in the media).

REFORMS AND SUGGESTED REFORMS IN ENGLAND AND AUSTRALIA

297 The Contempt of Court Act 1981 (UK) was introduced to bring English law into conformity with the European Convention on Human Rights. Central to the legislation is the "strict liability rule",[144] which provides that conduct may be contempt regardless of any intent to interfere with the course of justice. The rule only applies to "publications",[145] and is directed only at publications which:

> [create] a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.[146]

298 The clarity of this legislation has been cast in doubt by recent expressions of concern as to whether lawyers can properly advise where the contempt line is to be drawn, and by calls for a Royal Commission to study the operation of the Act.

299 In 1987 the Australian Law Reform Commission, in a wide-ranging report on the law of contempt, concluded that the common law was too vague and should be replaced by specific statutory offences. It identified nine categories of

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142 District Courts Act 1947, s 112.

143 Crimes Act 1961, s 384.

144 Contempt of Court Act 1981 (UK), s 1.

145 "Publication" includes any speech, writing, programme included in a service, or other communication in whatever form, which is addressed to the public at large or any section of the public: Contempt of Court Act 1981 (UK), s 2(1).

146 Contempt of Court Act 1981 (UK), s 2(2).

"prescribed statements" capable of creating, by virtue of the influence they exert on jurors, a substantial risk that a fair trial might be prejudiced (for example, statements from which it can be inferred that the accused is innocent or is guilty of the offence, or that the jury should acquit or should convict, or that the accused had one or more prior criminal convictions, or that the accused has a good or bad character, either generally or in a particular respect).[147]

300 The Commission recommended that liability should only arise if:[148]

- within the *sub judice* period, a publication contained at least one of the prescribed statements;
- that statement, in the particular circumstances of the case, created a substantial risk that the trial would be prejudiced by virtue of possible influence on the jury; and
- the statement did not fall within any of the exceptions or defences outlined.

301 The proposed Australian provisions are detailed and complex. The nine categories of prescribed statements would provide greater guidance than the tests applied in England and in New Zealand, but there would be difficulties in application: for example, statements from which it might reasonably be inferred that the defendant has a good or bad character continue to involve what would be, in some cases, a difficult exercise of judgment. Furthermore, in assembling such prescribed statements, it is difficult to ensure that all categories of statement that may meet the test have been included. The categories may not, for example, cover the publication of photographs of the defendant when it is apparent that a question of identity may arise.

302 The criticisms made of the current law in New Zealand may arise not from the law itself but from the difficulty of applying any general test to the wide range of situations which arise. The reforms suggested by the Australian Law Reform Commission would provide greater guidance, but they may also increase complexity and lack the flexibility to cover situations not presently foreseen. They may not, therefore, resolve the difficulties which the media in New Zealand experience.

303 It is the Law Commission's view that any attempt to provide detailed statutory tests is likely to result in a level of complexity which would not clarify the task of journalists. If a change is to be made, a general test is preferable. The English "substantial risk that the course of justice will be seriously impeded or prejudiced" test and the Australian Law Reform Commission's proposed "substantial risk that a fair trial might be prejudiced" test do not appear to differ in substance from the New Zealand "real risk, as distinct from a remote possibility, of interference with a fair trial" test.

304 Arguably, codification is desirable to clarify the law for journalists.

Should the law relating to publication of trial information be codified?

If so, what is the appropriate test?

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[147] Australian Law Reform Commission *Contempt – No 35* (Australian Government Publishing Service, Canberra, 1987) 174.

[148] Australian Law Reform Commission, above n 147, 173.

THE PERIOD OVER WHICH THE RESTRICTIONS OPERATE

305 The period over which a matter remains *sub judice* is variable. Criminal proceedings generally commence either with the making of an arrest without warrant or with the laying of an information – a document alleging a criminal offence – at a court. The precise timing of these events, once they have occurred, may be ascertainable but is neither predictable in advance nor generally publicly known. In the leading case of *Television New Zealand Ltd v Solicitor-General*,[149] a man was shot in the head at close range. A homicide inquiry was launched, and the police issued a press release naming the victim and advising that they were urgently trying to find a Moses Shortland and his wife, that they believed Shortland was armed, and that he should not be approached. Television New Zealand planned to screen a short item which strongly implied that Shortland had shot the man. Shortland had not yet been apprehended. The Solicitor-General obtained an ex parte interim injunction preventing the screening, and Television New Zealand appealed. The Court of Appeal rejected the contentions, based on High Court of Australia authority, that the Court has no jurisdiction to protect a fair trial of proceedings while they are merely potential, whether imminent or not:

> In our opinion the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely the Court has inherent jurisdiction to prevent the risk of contempt of Court by granting an injunction. But the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial.[150]

306 It seems probable that the same test – the commencement of criminal proceedings being highly likely – would apply when determining the point at which contempt may arise, provided that it is publicly known that the commencement of proceedings is highly likely.

307 The point at which proceedings end is also unclear. A case is still *sub judice* after the trial has ended, because there might be an appeal. If there is actually an appeal, the case ceases to be *sub judice* when the appeal period expires and it is clear there will be no appeal.[151] The Crimes Act appeal period is 10 days from the date of conviction or, if the convicted person is not sentenced on the date of conviction, not later than 10 days after sentence, but this time may be extended.[152]

308 The sentencing process will often involve mention of any previous convictions. In the event of an appeal against conviction succeeding, a new trial will usually be ordered. Jurors at the new trial may have knowledge of prejudicial matters as a result of sentencing publicity, although the time elapsed between sentencing and any further trial is likely to be considerable. But the public interest factors of social denunciation of the offence and deterrence suggest that the sentencing

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149 [1989] 1 NZLR 1.

150 *Television New Zealand Limited*, above n 149, 3. The Court of Appeal held that in this case the proposed broadcast was not so factual or so detailed as to be likely to prejudice a fair trial. Also, it would be a considerable time before the trial. Therefore the injunction was rescinded.

151 See Burrows and Cheer, above n 129, 282.

152 Crimes Act 1961, s 388.

process should normally be open to full report. Although these may arguably be achieved without publicising details of any previous record, sentencing issues are often highly contentious: a full understanding of the sentencing factors, including the record of previous convictions, is necessary to avoid the appearance of inconsistency.

The *sub judice* period in England and Australia

309 The approach now adopted in the United Kingdom is to define criminal proceedings as active by reference to a clear point of commencement – such as arrest or the issuing of a summons – and a clear point of completion, such as acquittal or sentence. Proceedings become active again when an appeal is lodged, and they remain active until the appeal is disposed of. In the event of a new trial being ordered, the proceedings remain active.[153]

310 The current Australian approach to the commencement of the *sub judice* period also appears to be more precise in that it is tied to the actual commencement of proceedings, arrest, charge, or the issuing of a summons.[154] If proceedings have not been commenced, there can be no contempt. In relation to pre-trial and trial publicity, the Australian Law Reform Commission recommended[155] that the *sub judice* period should apply from the time when a warrant to arrest had issued or the defendant had been arrested or charges had been laid, and should extend until the person had been discharged, a plea of guilty had been accepted at the trial, the jury had delivered its verdict, or the prosecution had been discontinued. In the event of a successful appeal, the Commission proposed that the *sub judice* period should reapply once an order for retrial was made.

311 The *Television New Zealand Ltd* "commencement of proceedings is highly likely" test has the advantage of discouraging any attempt to allow the dissemination of prejudicial material by delaying arrest. The approach adopted in the United Kingdom and Australia (and the recommendations of the Australian Law Reform Commission) provide greater precision and certainty. The date on which proceedings are commenced may not be widely known or readily ascertainable, but if the matter is likely to attract public and media attention the time of the commencement will usually be known. The flexibility of the *Television New Zealand Ltd* test would ensure a greater measure of protection for the trial process, and allow protection to commence at an earlier point – although not markedly earlier, as the commencement of criminal proceedings is not normally delayed unless a suspect avoids apprehension. In that event, there is a public interest served in the dissemination of information which might lead to that person's apprehension.

312 The Law Commission favours the "commencement of proceedings is highly likely" test. It protects fair trial values, which should, in the Commission's view, prevail for the period prior to trial. The end of the *sub judice* period should be defined by the end of the appeal period or, if an appeal is filed

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[153] Contempt of Court Act 1981 (UK), Schedule 1.

[154] See Australian Law Reform Commission, above n 147, 150; *James v Robinson* (1963) 109 CLR 593.

[155] Australian Law Reform Commission, above n 147, 173–174.

during the appeal period, the *sub judice* period should end when the appeal is finally disposed of.

When should the *sub judice* period start and finish?

PROTECTING JURY ANONYMITY

Identification of jurors

313 In some jurisdictions it is an offence to publish material which may lead to a juror being identified.[156] New Zealand legislation contains no such provision, but it does restrict access to jury lists by persons other than the registrar and his or her staff.[157] The legislation also restricts inspection of the jury panel prior to trial: parties to the proceedings may not obtain a copy of the panel from the registrar earlier than five days before the commencement of the week in which a case is to be tried.[158] The court may allow any other person to obtain a copy during the same period. This protects jury anonymity prior to the trial to some degree and, by doing so, limits the opportunity for the exertion of influence. There is, however, no specific prohibition of the publication of material that may lead to the identification of a juror or prospective juror. Moreover, the name of the foreman is always disclosed in open court once he or she is selected.

314 Prohibiting publication of the identity of a juror would have limited effect, in that both the prosecution and the defence must be aware of the names of persons on the panel for the purpose of the selection process. Even if that were not so, the ability to observe jurors during the course of trial would render anonymity largely ineffectual in many of the centres in which jury trials take place. Those involved, or in some way associated, with the proceedings may have the greatest motive to attempt to influence jurors or potential jurors. But trials attracting extensive publicity can give rise to strongly held opinions amongst the general public as well, and both potential jurors in advance of trial and jurors during trial may be subjected to comment if identified.

Should the publication of material which may lead to the identification of a juror be an offence?

Secrecy of deliberations

315 As discussed in paragraphs 254 and 267–268 above, the courts will not receive evidence by jurors of jury deliberations in support of an appeal. But the deliberation may nevertheless be of interest to those involved in the trial in

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[156] For example, Jury Act 1977 (NSW), s 68 and Juries Act 1967 (Vic), s 69(1A).

[157] Juries Act 1981, s 9(6).

[158] Juries Act 1981, s14. See further chapter 9 of New Zealand Law Commission *Juries in Criminal Trials: Part One: NZLC PP 32* (Wellington, 1998) which discusses current law and practice, and options for reform in relation to jury vetting.

terms of their understanding of what produced the verdict. In trials which arouse a high degree of public interest, interest in jury deliberations may also extend beyond the parties and, in the absence of legal restraint, the media could be expected to meet that interest.

316 Although the topic is not the subject of statutory provision, the common law affords some protection against investigation and exposure of jury deliberations. In *Solicitor-General v Radio New Zealand Ltd*,[159] a journalist contacted a number of jurors in a trial which had taken place almost a year earlier. The defendant had been tried and convicted for murder. A year after the trial, the body of one of the victims had been found. The journalist sought comment from a number of jurors and some of these comments were broadcast on radio. The High Court held that contempt had been proved under two headings:[160]

- the approach to jurors and the attempt to elicit information about the jury's deliberations, including the reasoning on which the verdicts were based; and
- the subsequent broadcast of the information.

Reform options

317 Jury secrecy has been buttressed by legislation in the United Kingdom, New South Wales and Victoria. The provisions prohibiting disclosure employed in the Contempt of Court Act 1981 (UK) are drawn widely: it is a contempt to obtain, disclose or solicit particulars of statements made, opinions expressed, arguments advanced or votes cast, by members of a jury in the course of their deliberations. Similar legislation is in force in New South Wales, Victoria and Canada (see paras 256 and 259 above). The Law Commission's view is that, in light of the rationales which support the maintenance of jury secrecy, no sufficient justification has been advanced for liberalising media access to jurors. However, any legislation in this area should preserve the ability to conduct responsible academic research (see paras 262–264 above).

318 Some of the journalists to whom we have spoken consider the inability to approach jurors to be unclear and excessively restrictive. They report uncertainty as to how far journalistic inquiry can go in seeking material from jurors. The tenor of their suggestions is that there is scope for the drawing of clearer and less restrictive lines.

Should legislation define the extent to which jurors can be questioned about their deliberations, and impose a penalty where those limits are breached?

SUMMARY

319 The law of contempt constrains media publication of material which might prejudice trial by jury. Material published before trial may be prejudicial because the safeguards applying to the receipt and consideration of evidence in a court

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[159] *Solicitor-General v Radio New Zealand Ltd*, above n 100.

[160] *Solicitor-General v Radio New Zealand Ltd*, above n 100, 57.

cannot be assumed to have been applied to it. Two significant public interests, the freedom of expression and the right to a fair hearing by an independent and impartial court, may conflict.

320 The Research indicates that current media publicity has little if any effect on juries.

321 The law of contempt has been criticised as vague and excessively restrictive of media freedoms. The test employed with respect to publicity prior to or during the trial is "whether as a matter of practical reality there is a real risk, as opposed to a remote possibility, of interference with a fair trial". In applying the test the following must be considered:

- the statement itself; and
- the circumstances in which it was made, including:
  - proximity to the trial in terms of place and time; and
  - the extent of the publicity in terms of size, prominence and the audience reached.

322 Restrictions on media freedom in favour of a fair trial are not permanent restrictions. The means of protecting the trial itself are limited to:

- establishing either geographical or chronological distance between the prejudicial comment and the trial, these remedies being limited in turn by wider dissemination of news stories and the defendant's right to be tried promptly; and
- judicial warnings and directions, which may be of limited effect.

323 It is not clear when the *sub judice* period, during which restrictions on publications operate, commences and ends. The *Television New Zealand Ltd* case suggests that the period commences when criminal proceedings become highly likely.

324 The criticism that the law of contempt is vague arises partly from the difficulty in accessing judge-made law, and partly from the unavoidable use of a general test which is necessary to facilitate coverage of a range of possible contempts. With respect to the claim that the law is excessively restrictive, the perceived faults are:

- in the definition of the *sub judice* period; and
- in the wording of the current test.

325 The period during which restrictions on publication apply could be shortened, and made more precise, by the definition of a period which:

- commences with arrest or the laying of an information or complaint; and
- concludes, if no appeal is filed, with the expiration of the time for filing an appeal.

The Law Commission favours defining the beginning of the sub judice period with the current "commencement of proceedings is highly likely" test, and defining its end as the end of the appeal period.

326 The Juries Act 1981 preserves juror anonymity to some degree by restricting access to jury lists and the jury panel, but there is no statutory prohibition on

publication of the names of prospective jurors and jurors. Such a provision would protect the privacy of jurors and render jurors less open to the exertion of influence.

327 The secrecy of jury deliberations could be protected by a broad prohibition of the kind contained in the Contempt of Court Act 1981 (UK). More limited protection may be maintained by a more specific approach. The Law Commission favours a broad prohibition on the disclosure of jury deliberations. However, any legislation should preserve the ability to conduct responsible academic research.

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The experience of being a juror

328 IN *JURIES IN CRIMINAL TRIALS: PART ONE* (CHAPTER 2), we discussed the functions of the jury in criminal trials. We concluded that the jury plays an important role in legitimising and maintaining public confidence in the criminal justice system; it allows members of the community to bring a diverse range of perspectives, personal experience, and knowledge to bear in individual cases; and it acts as the conscience of the community and as a safeguard against arbitrary or oppressive government.

329 The overwhelming majority of jurors in the Research sample found their experience positive in some way (see Findings, 10.2–10.4). They gained a greater understanding of the criminal justice system and felt satisfied at having done their civic duty. Clearly the experience of jury service is a cohesive force in our society for those who participate in it. It is therefore of particular concern that not all New Zealanders are participating equally. In *Juries In Criminal Trials: Part One* (chapter 7), we discussed Mäori under-representation on juries. In November 1998, the President of the Commission and two Commissioners attended a hui at Owae Marae in Waitara to discuss the Juries paper generally and the problems of Mäori representation in particular. It was emphasised to us that many Mäori feel very strongly that juries are not representative of Mäori society, and this contributes to a general feeling of alienation from the criminal justice system. The Research recorded the ethnicity of respondent jurors but did not address any specific questions to Mäori or other ethnic minorities. Issues affecting Mäori representation (including the exclusion of persons who live in rural areas, which has a particular impact on Mäori, who are more likely than non-Mäori to live in rural areas)[161] will be dealt with more fully in our final report.

330 Although jurors felt positive about their experience, many also had a number of concerns, which might be alleviated to at least some extent. Many felt unprepared for their task, and many perceived themselves as bystanders rather than participants in the trial. A minority also feel marginalised and resentful (see Findings, 4.1–4.3). Some of the jurors' concerns have been covered in other parts of the paper, but the following require particular attention.

EXCESSIVE DELAYS

331 Delays are inevitable in the trial process, and most jurors accept that (see Findings, 4.4). The introduction of pre-trial conferences in the High Court and the High Court and District Court criminal jury trial caseflow management

[161] See New Zealand Law Commission, above n 158, paras 288–289.

systems (see paras 76–78 above) were intended to reduce delays, but clearly they cannot be eliminated entirely.

332 Jurors appear to have been particularly critical not of the fact that there are delays, but of excessive delays during the trial, the failure to inform them of the reason for the delay or how long it might take, and in some cases, the fact that they were made to go to the jury room during *voir dire* discussions, rather than these discussions being held in the judge's chambers (see Findings, 4.5–4.7). This is clearly a point which can only be dealt with by individual judges being aware of jurors' feelings and taking what steps they can in the circumstances, for example by explaining the reasons for the delay as far as possible.

PHYSICAL FACILITIES

333 It was clear both from direct comments made by jurors and also from general discussions about deliberations that physical facilities in most courts are simply inadequate. A detailed discussion is contained in the Findings, 10.28–10.39. Particular problems were:

- jury deliberation rooms being too small, airless, too hot or cold, or lacking in natural light;
- inadequate provision for smokers during deliberations;
- jurors not having access to the jury room during breaks, so having no private space;
- inadequate toilet facilities; and
- inadequate refreshments and no water for jurors in the court.

334 Although these matters have been highlighted before,[162] they clearly continue to be a serious problem.

EMPLOYMENT PROBLEMS

335 A significant number of jurors had difficulties with their employment as a result of jury service (see Findings, 10.42–10.45). Many jurors had to fit in work requirements outside court hours and came under considerable pressure from employers.

336 The Holidays Act 1981, which provides for annual leave and sick leave, makes no provision for leave for jury service. We are aware of employment contracts which, for example, provide that employees must use their annual leave entitlement for jury service, and further, that the employee must pay any juror fees they receive to the employer. There is also no statutory protection for jurors whose employment is compromised by jury service. In Victoria, consideration is being given to the enactment of an offence of terminating or prejudicing employment because an employee is, was or will be absent from employment on jury service.[163]

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[162] See Courts Consultative Committee *Jurors' Concerns and the Jury System* (Department of Justice, Wellington, 1992).

[163] Juries Bill 1999 (Vic), cl 82.

337 There is also a perception among jurors that rates of payment are too low.[164] This was a particular problem for the self-employed. There is no way to ascertain how many people avoid jury service for this reason, but the threat of a $300 fine for non-attendance cannot be a real deterrent to those who earn good contract rates, and in any event fines are in practice not imposed. A large proportion of jurors summonsed do not appear.

TABLE 4 PROPORTION OF SUMMONSED JURORS WHO ATTENDED JURY SERVICE IN 1998

District	Jurors summonsed (No.)	Attendance (No.)	Attendance (%)	Non-attendance (No.)
Auckland District Court	28 900	5076	18	23 824
Auckland High Court	19 708	3340	17	16 368
Hamilton District Court and Hamilton High Court (Combined)	28 540	5599	20	22 941
Wellington District Court	17 098	3931	23	13 167
Wellington High Court	9262	1793	19	7469
Christchurch District Court and Christchurch High Court (Combined)	19 509	5316	27	14 193

Source: Department for Courts. Data are from manual returns from courts and JMS (Jury Management System).

However, there is no way to know how many of these refuse to serve because of the low pay as opposed to other reasons (for example, summons are no longer sent by registered post, so jurors who have changed address may simply never receive them).

Is there a need for legislation to provide for paid leave for jury service, or to provide protection for jurors whose employment may be compromised by jury service? How should this be done?

Are rates of jury payment too low?

Should there be a flat rate of payment or should payment be linked to actual loss?

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[164] The fees payable to jurors are set out in the Second Schedule to the Jury Rules 1990 (SR 1996/141, Amendment No. 2). From 1 July 1996, jurors' daily fees increased to:

For the first five days, $25 for up to three hours; $50 for more than three hours; $70 if attendance is required after 6.00pm but before 9.00pm; and $100 if attendance is required after 9.00pm;

For the sixth and subsequent days, $35 for up to three hours; $70 for more than three hours; $100 if attendance is required after 6.00pm but before 9.00pm; and $140 if attendance is required after 9.00pm.

DISRUPTION TO FAMILY AND SOCIAL ROUTINES

338 Potential jurors can be excused from service if that person's family commitments or other personal circumstances are such that attendance would result in undue hardship or serious inconvenience to that person or any other person. Despite this, jurors had difficulty with childcare (see Findings, 10.46). However, this is unavoidable. Family commitments are a ground for excusal from a jury[165] so that people who are seriously inconvenienced on this basis may be excused.

339 In Victoria, an interesting solution has been proposed to minimise the disruption to jurors' lives. Clause 8 of the Victoria Juries Bill 1999 provides that a potential juror may ask to have their service deferred for up to twelve months. While such a provision would necessitate extra work for court staff, it would allow jurors to choose a convenient time to serve, and possibly reduce the large number who currently fail to appear when summonsed. We invite comment on this, and also on how deferral would work in practice: for example, how long should jurors be able to defer for? Should they be able to defer only once, or more than once? Should they have an automatic right to defer, or should it be subject to the Registrar's discretion?

Should jurors be able to defer their service? How would this work in practice?

TRANSPORT

340 A minority of jurors complained about the cost of transport or the lack of parking (see Findings, 10.48). The Jury Rules 1990 allow the payment of the actual cost of public transport, the cost of travelling by taxi (but only in "special circumstances, where the Registrar thinks fit") and, if no public transport available and no allowance made for a taxi, 38c per km. That, however, will not cover the cost of city parking, and many people are unaccustomed to the use of public transport.

SECURITY

341 There is some concern about the practice of jury lists, which contain jurors' full name, occupation and address, being given to the defence. Defence counsel are obliged to disclose the list to their client, and indeed must do so for the practical purpose of identifying if there is anyone on the list who their client knows. For the reasons discussed in paragraphs 313–314 above, juror anonymity is very difficult to achieve in practice.

NEED FOR COUNSELLING

342 Some jurors find their experience very stressful (see Findings, 10.13–10.22). This can be because:

- they have to make such an important decision about someone else's life and are very aware of the huge responsibility they bear;
- they feel intimidated by the accused or the accused's family and friends;
- evidence raises issues from jurors' own lives that are upsetting, such as

[165] Juries Act 1981), s 15(1)(b).

memories of sexual abuse or violence;
- deliberations can be emotionally charged; and
- in some cases, the nature of the evidence, and physical exhibits, can be inherently distasteful and distressing.

343 Many jurors can deal with these stresses in their own ways, but a significant minority cannot. In 16 cases in the Research, jurors would have appreciated a support or counselling service (see Findings, 10.23). While this figure may be disproportionately high because of the concentration of complex and high-profile cases in the sample, it reflects a clear need. On a number of occasions, jurors being interviewed for the Research were visibly upset and tearful, and were anxious for an opportunity to discuss their experiences. In other words, they used the interview as a debriefing or counselling session. It should, however, be noted that the interviews were in most cases conducted immediately after the trial, when jurors had not yet had a chance to relax and put the experience behind them.

344 Counselling is available to jurors. The *Information for Jurors* booklet (which, as discussed at paragraph 9 above, many jurors do not see) says:

> Occasionally a jury will hear a particularly distressing case. If you want some help after the trial, please feel free to tell Court staff. They can arrange for confidential counselling to be made available.

If a juror requests counselling, they will be referred to a private counsellor, and this service is paid for by the Department for Courts. Normally, no offer of counselling is made beyond that in the booklet, but in particularly stressful cases, or if it appears to court staff that the jury is having difficulties, a further offer will be made. We do not know how many jurors accept counselling: there is no national co-ordination and the Department for Courts does not account for it separately. However, we are advised that counselling is rare.

345 We suggest that greater efforts could be made to inform jurors that counselling is available if required.

What changes, if any, should be made to make jurors aware of the availability of counselling services?

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Preliminary Paper 37 – Volume 2

JURIES IN CRIMINAL TRIALS
PART TWO

A summary of the research findings

By Warren Young, Neil Cameron
and Yvette Tinsley

November 1999
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Preface

This is a companion volume to the Law Commission's discussion paper *Juries In Criminal Trials: Part Two.*

The most significant research conducted on jury trials in New Zealand before this project was *Trial by Peers? The Composition of New Zealand Juries*, a report by the then Department of Justice. The aim of that research was to provide baseline data on the composition of New Zealand juries.[1] The survey sample in *Trial by Peers?* consisted of those people summoned for and attending jury service at all District and High Courts throughout New Zealand, in trials starting during the period of 13 September to 8 October 1993. A questionnaire was completed by potential jurors asking them to specify their ethnicity, gender, occupation, employment status and date of birth. Court staff provided information about which people were challenged or stood by.[2] In response to the findings of the initial jury composition survey, further qualitative research was conducted by interviewing a range of judges, court staff, and defence and prosecution counsel.[3]

The Commission first considered juries in criminal trials in 1995 when we published the *Juries: Issues Paper*. The issues paper asked which matters were of primary concern to those who participate in, or work with, the system. In a submission on the issues paper a committee of High Court Judges proposed that research should be undertaken into the New Zealand jury system. The Commission proceeded to explore that option.

In 1997, the Commission agreed to collaborate with the Victoria University of Wellington Faculty of Law (through Victoria Link Limited) in undertaking a research project on jury decision-making. The principal researchers were Warren Young, Neil Cameron and Yvette Tinsley of the Faculty of Law. This volume contains a summary of that research and has been prepared by the principal researchers. The summary has been used to inform the Commission's discussion paper *Juries In Criminal Trials: Part Two*, and will be used in the final report to be published by the Commission in 2000.

The deliberations of juries in individual cases have traditionally been protected from outside scrutiny to prevent interference in the decision-making process and to protect jurors against possible intimidation.[4] The questions to jurors in this research departed, to some extent, from that tradition because they focused

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1 Dunstan, Paulin and Atkinson *Trial by Peers? The Composition of New Zealand Juries* (Department of Justice, Wellington, 1995), 20.

2 *Trial by Peers?* above n 1, 41–42.

3 *Trial by Peers?* above n 1, 93–94. Appendix I of *Trial by Peers?* fully explains the methodology of the survey and interview research.

4 The reasons for jury secrecy are discussed in chapter 7 of the discussion paper *Juries in Criminal Trials: Part Two.*

on both individual juror perceptions and the dynamics of the jury decision-making process in individual trials. However, in our view this approach was ethically and legally justified.

The issue of communicating with jurors was considered in *Solicitor-General v Radio New Zealand*.[5] Radio New Zealand had sought to ask jurors about their reaction to the discovery of new evidence after a trial and whether, if this new evidence had been available, their verdict might have been different. Holding them in contempt, the High Court noted that Radio New Zealand's behaviour was likely to injure the administration of justice by removing the protection of confidentiality from jury deliberations and by weakening community confidence in jury verdicts. It also indicated that before any approaches to jurors are made, the matter should be drawn to the attention of the court.

There is, however, nothing in the *Radio New Zealand* case which precluded the type of juror interview used in this research. There is nothing in this summary of findings which could enable any individual trial or juror to be identified. No subsequent publication using the results of the research will identify any individual trial or juror. Each presiding judge consented to the inclusion of each trial within the sample. The researchers carefully explained to each responding juror the purposes for which the information was sought and the protections which were in place to ensure that the nature of individual jury deliberations would not be publicised.

A number of other procedures were established to ensure that the methodology was appropriate and to minimise the risk that any information about an identifiable case would get into the public domain:

- An Advisory Committee was established, with representation from the judiciary and other agencies funding the research. It oversaw the research and had the right to veto any methodology or questioning that had the potential to jeopardise the anonymity of the jury deliberation process.
- The researchers collecting the data identified the trials, and the districts in which they occurred, by code numbers and that list of codes has been kept separate from the raw data during the period of analysis and writing up, and will be destroyed at the conclusion of the research.
- No interviewing data recorded the names and addresses of any individual juror, so it is not possible for any person other than the interviewer to identify the juror to whom an interview form relates.
- The data has been analysed and written up in such a manner that no individual trial can be identified.
- The raw data is being kept secure.

Given that the anonymity of jurors and of trials was scrupulously protected, in our view the interests of justice were not jeopardised and will ultimately be enhanced.

This project has been fully supported by the Courts Consultative Committee and funded jointly by the New Zealand Law Foundation, the Ministry of Justice, the Department for Courts and the Legal Services Board. The Commission and the principal researchers are extremely grateful for that support, without which the research would not have been possible.

[5] [1993] 10 CRNZ 641.

In addition, thanks are due to many other people who provided extensive co-operation and assistance. Particular mention should be made of the support of the then Chief Justice Sir Thomas Eichelbaum and the Chief District Court Judge Ron Young, who gave permission for the research to be carried out; the judges who presided over the trials used in this study, and who gave permission for their trials to be used and agreed to be interviewed; the many jurors who gave their time in lengthy interviews; the counsel and court staff who were unfailingly helpful; and the interviewers Justine Cornwall, Vicki Culling and Venezia Kingi, who did a superb job of collecting the data upon which this report is based.

1
The nature and purposes of the study

INTRODUCTION

1.1 DESPITE THE FACT THAT THE JURY is now used in less than one per cent of all criminal cases, it is still commonly regarded as the cornerstone of the criminal justice system. It is also an institution which has commonly prompted strong and polarised views. While this has fostered a considerable literature on the jury, remarkably little effort has been expended in finding out how juries actually work and whether they really do serve the functions or suffer from the failings which supporters and opponents of the institution allege. Equally, although law reform bodies have frequently discussed the right to trial by jury, little consideration has been given to ways of improving the jury trial process itself.

1.2 Traditionally, the scope of jury research has been limited by legal restrictions which have meant that researchers have not been able to observe jury deliberations at first hand and have been greatly restricted in what they can ask jurors afterwards. As a result, although there is a considerable body of overseas research literature, it has had severe limitations. There is a small amount of research which has been able to tap the attitudes and behaviour of actual jurors, but it has principally been confined to the United States, and its applicability to New Zealand is open to question. The legal culture, the politics of criminal trials, the attitudes and behaviour of judges and counsel, and the procedural rules all differ so significantly that comparisons between the two jurisdictions are fraught with difficulty.

THE OBJECTIVES OF THE STUDY

1.3 The research which is the subject of this report was designed to address this gap in the literature by conducting empirical research on jury decision-making which could be used to inform the Law Commission's consideration of the jury system and the need for reform. More specifically, the objectives of the research were:

- to examine the extent to which, and the way in which, jurors individually and collectively assimilate and interpret the evidence and identify the issues in the case;
- to identify the problems which jurors experience during the trial process;
- to assess the extent to which jurors individually and collectively understand and apply the law, and to investigate how their perception of the "law" modifies and influences their approach to the "facts";
- to explore the processes used by the jury to reach a decision, including their strategies for resolving disagreement and uncertainty;
- to identify the impact and effects of pre-trial and trial publicity on the

attitudes and responses of each individual juror to the case he or she is dealing with; and
- to describe jurors' reactions to, and concerns about, their experience as a juror.

METHODOLOGY

Sample of cases

1.4 Over a period of nine months during 1998, we took a sample of 48 jury trials from a number of urban and provincial courts throughout New Zealand. The breakdown of the sample was as follows:
- There were 18 High Court trials and 30 District Court trials.
- The trials ranged in duration from half a day to five weeks and three days.
- The trials covered offences ranging from murder to attempted burglary.

1.5 Two points about the nature of the sample should be noted. First, so far as practicable, we included all the "high profile" jury trials that occurred in the sample period, so as to maximise the collection of information on the impact of publicity upon jurors. Secondly, we deliberately selected a significant number of lengthy fraud trials, and other potentially complex cases, so that we could better identify the particular difficulties confronted by jurors in such cases.

Data collection

1.6 Data were collected by four complementary methods:
- We provided written questionnaires to all potential jurors upon their arrival at court at the beginning of a week in which a trial selected for our sample was scheduled to commence. These asked jurors whether they knew anything about two or three of the cases scheduled for that week (including the case selected for the sample) and, if so, the source of that knowledge.
- In order to identify the legal and factual issues in the trial, we observed the initial stages of the trial, obtained a copy of the notes of evidence, observed the closing addresses of counsel, and observed and tape-recorded the summing-up.
- After a jury retired to consider its verdict, we interviewed the judge about his or her view of the case, the performance of counsel and what his or her own verdict would have been.
- Subject to their consent, jurors in each trial were then interviewed as soon as possible after the conclusion of the trial in which they had been involved. The interviews were semi-structured and addressed a wide variety of issues, ranging from the adequacy and clarity of pre-trial information and jurors' reactions to the trial process through to their understanding of the law, their decision-making process, the nature of and basis for their verdict, and the impact of pre-trial and trial publicity.

THE SAMPLE OF JURORS

1.7 From a potential interview sample of 575 jurors, we interviewed 312 jurors, or an average of 6.5 jurors (54.3 per cent) per trial. Our experience suggests that five or six interviews per trial were sufficient to provide an accurate and consistent picture of the deliberation process. Overall, therefore, we can be

confident that the information we obtained provided a fairly reliable picture of the decision-making processes employed in most trials.

1.8 Since we did not record the socio-demographic characteristics of the jurors who were not interviewed, we cannot be certain that the characteristics of our sample were similar to those of the jurors as a whole or that their views and concerns were representative. However, there are two reasons why it appears unlikely that their responses are unrepresentative. First, we compared the characteristics of the jurors in the trials where we interviewed eight or more jurors with the characteristics of jurors in the trials where we interviewed five or less jurors, and found no significant differences between the two groups. Secondly, we compared the characteristics of our sample with the characteristics of jurors nationally reported by the Department of Justice in 1995.[6] Where comparative information was available, our sample had a slightly greater proportion of women than the national sample, and a greater proportion of people in employment. This may suggest some biasing effect resulting from our response rate (although the figures relate to different time periods), but in other respects our sample did not differ significantly from the national figures provided. Overall, therefore, we are of the view that there was unlikely to be any biasing factor resulting from the socio-demographic characteristics of the jurors we interviewed.

THE CONSENT OF PARTICIPANTS

1.9 The employment, socio-economic status, and educational qualifications of the jurors interviewed were as follows:

TABLE 1.1 AGE OF RESPONDENTS

	Number	Percentage
20–29	65	20.8
30–39	77	24.7
40–49	80	25.6
50–59	65	20.8
60 and over	23	7.4
No response	2	0.6
Total	312	100.0

TABLE 1.2 GENDER OF RESPONDENTS

	Number	Percentage
Male	127	40.7
Female	184	59.0
Unknown	1	0.3
Total	312	100.0

[6] *Trial by Peers?* above n 1.

TABLE 1.3 ETHNICITY OF RESPONDENTS

	Number	Percentage
Mäori	33	10.6
Päkehä	243	77.9
Other European	17	5.5
Pacific Islander	4	1.3
Other	14	4.5
No response	1	0.3
Total	312	100.0

TABLE 1.4 EMPLOYMENT STATUS

	Number	Percentage
Employed	252	80.8
Unemployed	17	5.5
Student	8	2.6
Beneficiary	10	3.2
Home Duties	11	3.5
Retired	14	4.5
Total	312	100.0

TABLE 1.5 SOCIO-ECONOMIC STATUS

	Number	Percentage
Higher professional	32	10.3
Managerial	100	32.1
Clerical	58	18.6
Trades	62	19.9
Semi-skilled	21	6.7
Unskilled	12	3.8
Student	19	6.1
Unknown	8	2.6
Total	312	100.0

TABLE 1.6 EDUCATIONAL QUALIFICATIONS

	Number	Percentage
No tertiary qualification	134	42.9
Polytechnic/trade qualification	107	34.3
Undergraduate qualification	37	11.9
Postgraduate qualification	33	10.6
Unknown	1	0.3
Total	312	100.0

1.10 The selection of any trial for the research was dependent upon the consent of the presiding judge, who was usually contacted some days before the trial for this purpose. Prosecuting counsel were always advised of the selection of a trial for the research in advance as well, and in a couple of cases where sensitive issues were likely to arise during the trial, both their consent and the consent of defence counsel to the inclusion of the trial were also sought.

1.11 Interviews with jurors were also conditional upon their informed consent, which was sought at each stage of the process. In particular, it was emphasised to jurors that their participation was entirely voluntary, that their responses would be anonymous and that findings would be published in a form which would not enable any particular trial or juror to be identified.

THE LIMITS OF THE STUDY

1.12 There are a number of potential limitations inherent in the methodology we employed. In the first place, our data are primarily derived from the responses of jurors during interview. As a result, we are primarily reliant on self-reports by jurors on their levels of comprehension, behaviour and decision-making processes. These perceptions, of course, may not have been accurate. Nevertheless, we were able to make some assessment of the extent to which these distortions in perceptions existed. We were able to compare the responses of individual jurors with the collective accounts of the actual deliberations of the jury and the types of issues discussed. We were thus able to identify the problems which were common to a substantial number of individual jurors in the sample, and to assess the impact of those problems upon both the collective decision-making processes of the jury and the outcome.

1.13 Secondly, it was possible that jurors deliberately underplayed the influence of certain factors on their behaviour because they were aware that it was contrary to the directions of the judge. Again, we were often able to draw inferences from other responses and findings about the extent to which this was likely to be the case.

1.14 Thirdly, there was sometimes a problem with the passage of time between the trial and an interview. In such cases, the memories of jurors inevitably dimmed, so that they were often able only to provide vague information about issues such as the key legal elements of the offence. It was in these cases impossible to assess whether this resulted from a lack of comprehension at the time of the trial or a difficulty in recall.

1.15 Fourthly, it is possible that the jurors who agreed to be interviewed did so for reasons which may have biased their responses and made them unrepresentative of the jurors as a whole. We cannot assess the extent to which this occurred or the possible impact it had.

1.16 Finally, it is possible that knowledge that the research was taking place may occasionally have influenced the behaviour of jurors themselves. In some cases, where the fieldworker was the only person in court observing the opening and closing stages of the trial, it was impossible to hide from the jury the fact that their trial was part of the research. The impact of this upon their behaviour is unknown, although no juror mentioned it during interview.

2
Informing and preparing jurors for their role

SOURCES OF INFORMATION AND JURORS' RESPONSES TO IT

Prior knowledge and experience of jurors

2.1 MOST OF THE JURORS INTERVIEWED had no previous experience of jury service. However, 20 per cent of respondents had served on a jury previously and a further 17 per cent had been summoned. In addition, 24 per cent had some other contact with or experience of criminal trials in general, a small proportion had legal qualifications or experience, and a slightly larger group (20 people – six per cent) had previous convictions. Although the remaining 39 per cent of jurors reported no significant prior experience of the trial process, only four per cent said that they had no prior knowledge of the system at all.

2.2 The picture changes if we look at the prior experience of juries rather than jurors. Of the 48 cases, 33 (69 per cent) had one or more jurors in the interview sample who had previously sat on a jury. In all but two trials, at least one juror who had at least been summoned for jury service appeared among those interviewed. Furthermore, in the smaller centres it was not at all uncommon to find two or three jurors on a jury who had served previously – often on a number of occasions.

2.3 With the exception of those who had served previously or who had been called but challenged, the majority of jurors interviewed expressed considerable ignorance about the system and the nature of the job. Many jurors were surprised, even shocked, by the pressures and responsibilities involved in jury service. Most jurors described their sources of knowledge as consisting of firstly the media, films and novels; secondly, friends with experience or knowledge of the criminal justice system; and thirdly, simply general knowledge. This information was rarely specific and in only a very few cases did jurors say that they had received any clear prior information on what to do and what would happen.

2.4 From the data it is difficult to assess the significance of jurors' prior knowledge, or of jurors' assessments of their knowledge, as helpful or not. While most of the jurors who ventured an opinion on the value of their prior knowledge described it as helpful, this group was nevertheless very much the minority. Over 60 per cent of jurors either did not respond to this question or indicated that their prior knowledge was unhelpful.

2.5 Although not common, there were a number of cases in the sample in which one or more of the jurors saw lack of emotional preparation for the nature of

their task as a real problem; they were simply unprepared for the responsibility of being asked to judge another person's life. Indeed, in one case a juror's reaction to the nature of the task, and unwillingness to undertake it, seems to have at least contributed to a hung jury. This may indicate a need for emotional as well as factual preparation.

The summons and accompanying information

2.6 The first contact which most jurors have with the system is the receipt of a jury summons with accompanying information about the nature of jury service.

2.7 In all districts, information accompanying the summons deals with basic questions about the nature of the jury, what a jury does, how jurors are chosen at the court, sitting hours, and the fact that jurors get paid for attendance. In most but not all districts jurors are warned in a number of languages that they need to be able to understand English in order to serve. Beyond that, there are two distinct models for the amount of background information given on the nature and rules of jury service. In some districts jurors are simply told the size of the jury, that the jury hears the evidence and reaches a verdict with guidance on the law from the judge, and that they hear cases involving a criminal charge. In a few districts, however, considerably more background information is given.

2.8 Districts also vary considerably in the amount of information that they give jurors about practical matters such as payment and parking. Material from the different districts also varies considerably in tone, with some districts relying much more on the summons format and on instructions to jurors, and others using a more informal and appreciative style.

2.9 Most of the jurors in our sample (82 per cent of those who replied) said that the information contained in the summons was helpful. A few specifically commented that it was very useful. However, of the main sources of pre-trial information, the summons was the one that they were least enthusiastic about.

2.10 It is unclear how far this lack of enthusiasm is due to deficiencies in the information given, problems in the way it is delivered, the fact that jurors do not read it properly, or simple lack of recall. While a few jurors commented adversely on the tone of the summons, which was seen as demanding and abrupt, most simply accepted it for what it was and there is nothing to indicate that the way in which the information was delivered affected the willingness of jurors to read or absorb it.

2.11 Many jurors clearly saw the summons as just a summons and not part of an informational process. It is unclear how much can or should be done to improve either the content or impact of its informational component. It would certainly be desirable to standardise the information that different centres send out. In addition, more information about such things as the likelihood of delays, early and late sittings, and the lack of facilities for meals, etc, might enable jurors to be better prepared for the mechanics of jury service.

The information booklet and video

2.12 On arrival at court, jurors assemble in the jury assembly area (in courts where there is one) where the booklet *Information for Jurors* is supposed to

be available. The booklet is supplemented by a short video. Jurors do not get personal copies of the booklet.

Information for Jurors booklet

2.13 A significant number of jurors had either never seen the booklet or had not read it. Of the jurors who were asked if they found the booklet helpful, 50 per cent offered no opinion and just under half of these (that is, 23 per cent of all respondents) said specifically that they had not read it. It may well be that many of the others had also either not seen the booklet or only glanced at it briefly.

2.14 Reasons for not seeing or reading the booklet varied. While some jurors did not read it because they had been on juries before and felt they had all the information they needed, most did not read it either because there were not enough copies to go round or because they did not see it at all. In addition, in a few cases jurors said that they did not read it because there was too much else going on at the time, or they just could not be bothered.

2.15 Those jurors who had read the booklet and had an opinion on it generally commented very favourably, with 63 per cent describing it as very helpful and only seven per cent as not helpful.

The video

2.16 Two versions of the video were in use at the time of our survey. Unfortunately our responses do not enable us to differentiate between them. In two of the court centres in our sample, the video was never shown. In a few other cases jurors did not see the video, because they arrived late, because there were other things going on in the jury assembly area at the time or because space constraints meant they could not see the monitor. As a result, 22 per cent of our respondents said that they had not seen it. Overall, 72 per cent found it helpful or somewhat helpful and only four per cent found it not helpful.

2.17 Ninety-five per cent of the jurors who actually saw the video responded favourably to it, albeit not quite as enthusiastically as they did to the booklet. However, as with the booklet, it is evident that arrangements for viewing it were often far from satisfactory, with even one or two recently built court buildings suffering from design problems in this regard.

2.18 Clearly both the booklet and the video were well regarded by those jurors who saw them. However, the way in which this information was delivered meant that a significant number of jurors did not have access to it. At the very least, copies of *Information for Jurors* should be made available to jurors individually, and additional copies should be placed in the jury room for later reference.

Instructions and assistance by court staff

2.19 Most of the jurors interviewed recalled receiving some instructions and assistance from court staff, with 62 per cent of those who responded finding the information they received very helpful and 29 per cent somewhat helpful. Only 11 jurors described it as not helpful, and only one as very unhelpful.

2.20 From the few adverse comments that jurors made on their contacts with court staff, the main concern seemed to be with the timeliness and content of

information rather than with attitude or manner. Much of the concern was produced by a perceived lack of information on delays. While it is clear that in a few cases jurors were kept in the dark unnecessarily, in most cases there is probably little the staff can do, either because jurors are not able to be given specific information about the reasons for the delays or because it is impossible to predict their likely duration.

The judge's opening instructions

2.21 Once the jury has selected the foreperson (see para 2.48ff), the judge commences the trial proper with some brief opening instructions. This usually lasts for between 10 and 15 minutes, and generally covers a range of matters from basic housekeeping issues to, in some cases, a reasonably detailed discussion of what the specific case is about. Much of the information given at this stage, especially on housekeeping matters and in relation to the jury's role and function, is essentially repeating information in the booklet and the video.

2.22 In most cases, the opening instructions cover the basic mechanical details relating to the trial (for example, likely duration, sitting times, the order of events, and personnel), outline a number of fundamental jury "rules" (for example, the role of the judge and jury, confidentiality, sticking to the evidence, and keeping an open mind), explain the burden and standard of proof, and note any special features of the trial (for example, that screens are to be used). Beyond that, judges vary considerably in what they cover. In particular, there is little consistency in the extent to which advice is given on such things as note-taking, access to the judge's notes of evidence, and asking questions, and in the extent to which judges rehearse the charges and provide a preliminary explanation of the issues they raise.

2.23 Two-thirds of our respondents described the judge's opening comments as very helpful; a quarter said that they were somewhat helpful; eight per cent could not remember them; and only two per cent expressed any negative comment. Only a handful of jurors indicated that they would have liked the judge to cover more material or suggested that they found the comments confusing or superfluous.

2.24 Jurors responded best to judges who used their opening to put them at ease, who addressed them directly and at least with the appearance of spontaneity, and who made it clear that both the court and the court staff were concerned about, and wanted to be responsive to, their needs during the trial. Judges were usually seen as doing this well.

2.25 The few critical comments we recorded related either to judges' perceived failure to provide an initial outline of the case or to parts of the opening which were seen as confusing or misleading. Thus, a number of jurors wanted rather more information on the case they were to hear, and in particular, would have liked some sort of legal framework which they could have used to organise the evidence as it emerged. Indeed, where judges did give the jury even a minimal description of the legal structure of the case, jurors were appreciative of this and found it very helpful. The only other critical comments came from a few jurors who had wrongly interpreted the judge's opening instructions as saying that they would be getting a copy of the judge's notes, and from some other jurors who complained that they had not been told about asking questions during the trial.

2.26 In general, it would seem to be desirable to try and ensure more comprehensive and consistent opening instructions from the judge, especially in relation to issues (such as note-taking, access to the judge's notes, and asking questions) which are of immediate relevance to the trial and which jurors may not have focused on in the earlier material provided in the booklet and video. Where possible, it would certainly help many jurors to have an initial outline from the judge of at least the legal structure of the case (see para 2.58).

The Crown and defence openings

2.27 The judge's opening instructions may introduce the jury to the details of the case they are to hear. The bulk of this task, however, usually falls to Crown counsel in the formal opening of the prosecution case.

The Crown opening

2.28 Usually the Crown's opening address sets the scene, both legally and in terms of the factual narrative, by providing a detailed explanation of the charge or charges, and summarising the evidence of the witnesses whom the Crown proposes to call, the exhibits that will be introduced, and the arguments that will be made. Crown counsel also invariably repeat the judge's description of the burden and standard of proof, and sometimes also cover the jury's role as trier of fact, how they should approach the evidence, and the need to use their common sense and experience to assess the credibility of witnesses. Prosecutors endeavour to present the basic case information in an even-handed and dispassionate way, while at the same time making clear the Crown's view of the facts. In most of the cases in our sample, the prosecutor also supplied the jury with copies of the indictment and occasionally with lists of exhibits and lists of witnesses keyed to the relevant charges. In a couple of cases, the prosecutor also outlined the likely defence case.

The defence opening

2.29 Some trial judges permit the defence to make a brief opening statement immediately following the Crown opening. In our sample, this occurred in three of the 48 cases, all cases where the facts were undisputed and the issue concerned the inferences to be drawn from those facts – in one case whether the accused was insane, and in the other two whether drugs were possessed for sale or supply.

2.30 Although jurors were not specifically asked whether it would have been useful to have a defence opening at the commencement of the trial, in five cases a number of jurors indicated that this could have assisted them considerably. Comments in these cases emphasised the confusion caused by jurors' lack of knowledge of what the defence was likely to say, difficulties in assessing the Crown evidence when they were unsure what they were looking for, and the general waste of time involved in listening to evidence that the defence was ultimately not going to dispute. In two other cases, although no jurors commented on the fact, it is likely that a concise defence opening early in the case could have alleviated some of the problems faced by the jury, and helped them to focus on the matters really at issue. Nevertheless, the problems in these cases were probably not the result simply of the absence of an early opening statement from the defence. In some at least, there was also a failure by the Crown to make the actual issues clear.

2.31 Generally, the defence opened at the conclusion of the Crown case. In a few cases, this consisted simply of general statements about the role and task of the jury and the burden of proof. Most counsel, however, went further and provided a brief explanation of the applicable law and an outline of the evidence that was to be called and its relationship to the Crown case. Moreover, the defence was much more likely than the prosecution to include comments on the need of the jury to keep an open mind, judge the facts dispassionately, and avoid reading anything into the fact that the accused had not made a statement to the police or was not going to testify at the trial.

Defence failure to open

2.32 In ten cases, the defence did not make an opening statement. In three cases, counsel then proceeded to call evidence, but in seven cases no defence witnesses were called and the case proceeded directly to the closing addresses. Although one of these cases was described by the judge as offering little or no prospect of acquittal, it was not clear that this was so in the general run of such cases. Nevertheless, seven of the ten cases resulted in conviction, two resulted in conviction on well over half the charges, and one resulted in a hung jury.

2.33 In three of the ten cases, the jury commented adversely both on the lack of any formal statement of the defence case and on the failure to call witnesses. Two rather different sorts of reaction emerged. On the one hand, in the absence of a clearly articulated defence case, some jurors felt that they were less able to reach a decision. In one case this may have produced, or at least contributed to, a hung jury. In some cases it may instead have resulted in acquittal or compromise verdicts based on concerns about the burden of proof. At the least, it probably unduly prolonged jury deliberations in a number of cases. On the other hand, some jurors responded to the absence of a clearly articulated defence case by assuming that the accused was guilty and that counsel's efforts were simply window dressing which they need not take too seriously. In either event, the response was unpredictable.

Jurors' reactions to the Crown and defence openings

2.34 In 31 of the 48 trials, at least one juror said they could not recall either the Crown opening or the defence opening or both. Although it occurs earlier in the trial, jurors were more likely to recall the Crown opening than the defence. In three cases, jurors attributed their lack of recall to the confusion and shock of finding themselves on a jury, but in most cases it seems that the opening addresses simply did not stick in some jurors' minds. It is unclear whether this is due to lack of impact at the time, or whether it has more to do with the lapse of time between the opening addresses and interview and/or the increasing irrelevance of the opening addresses as the trial progressed. In a few cases, jurors certainly commented on the lack of impact of particular counsel, but this was not common and was probably not the explanation in most cases.

2.35 Eighty-seven per cent of the jurors who expressed a view responded positively to the Crown opening, and there were no cases in which all the jurors who expressed a view agreed in describing the Crown opening as poor. Indeed, in only 13 trials did any of the jurors make any negative comments.

2.36 In commenting positively on the Crown opening, most jurors described counsel as making the case clear, explaining the law, and outlining where the case was

going. Some also commented favourably on the perceived fairness and impartiality of Crown counsel in setting out the case for them. Negative comments came from a few jurors in a small number of cases who found the Crown's opening simplistic, insubstantial or unduly negative.

2.37 The fact that jurors were generally appreciative of the Crown opening, and found it useful and informative, gives no real indication of its likely effectiveness in informing and guiding the jury's deliberations. A small number of jurors certainly commented that they found the Crown opening convincing, either because of its style and content or because it was the first complete discussion of the case they had heard. But jurors also generally recognised that this was only part of the story and that the impact of the opening statement was likely to be only temporary.

2.38 In contrast to the Crown opening, jurors tended to react more negatively to the opening statements from the defence. Of those jurors who expressed a view, only 66 per cent were positive. In four trials all the jurors who expressed a view commented negatively, and in 17 of the 38 trials in which there was a defence opening at least one juror commented negatively. Even when jurors were positive about defence counsel's opening, they tended to be rather less enthusiastic than they were about the Crown's. There were only four cases in which jurors could be described as having been enthusiastic about the defence opening, and this generally related more to the style of the opening than to the substance.

2.39 Furthermore, when jurors expressed adverse reactions to the defence opening, these reactions tended to be more adverse than their negative reactions to the Crown. They were more likely to evaluate counsel in personal terms, for example, according to whether they thought they would want to be represented by that lawyer themselves. Jurors were also more inclined to see defence counsel as not believing in their own case or not being really interested in it (see further chapter 5). They were also perhaps a little more likely to focus on the physical characteristics and mannerisms of defence counsel than those of the Crown counsel. As with the Crown opening, only a few jurors actually said that they found the defence opening convincing or that it had an impact on their thinking.

2.40 In only a couple of cases did jurors say that the defence opening had made them think differently about the Crown case. Conversely, while jurors in a number of cases saw the defence opening as adding little to their understanding of the case, in only one trial did they suggest that it was actively confusing.

2.41 Overall, then, jurors generally appreciated the Crown opening and found it to be a useful introduction to the case. While they were less appreciative of the defence opening, it was generally well received also. In a significant minority of cases, however, either the opening statements between them failed to set up the issues clearly for jurors, or the lack of a defence opening left jurors without what they regarded as an adequate grasp of the case.

THE SIGNIFICANCE OF JURORS' LACK OF INFORMATION

2.42 The material discussed so far has suggested a number of problems with specific sources of information and with the ways in which some of that information is delivered to the jury. There are, however, a number of more general points

about the information that jurors do and do not receive which transcend the problems with individual sources:

- In spite of the information they receive, many jurors still have difficulty adapting to the unfamiliar process of the trial and to the nature of their task as jurors.
- The information which jurors receive relating to both the selection and the role of the foreperson is problematic and inadequate.
- While jurors currently receive a considerable amount of information and assistance intended to familiarise them with the trial process and their role, they receive considerably less material specifically designed to prepare them for their central task: the assimilation, processing, and reconciliation of complex legal and factual information.

Jurors' lack of familiarity with the process

2.43 In the early stages of the process, jurors were exposed to a considerable amount of basic information. Although a significant proportion of jurors missed some of this information, most described what they did receive as helpful or very helpful, and only a quarter of the jurors interviewed said that they wanted more information. Nevertheless, even when they absorbed the information they were given, a significant number of jurors were still hampered in their task by their basic lack of familiarity with the process. This took a number of forms.

Being unprepared

2.44 A number of jurors were clearly surprised at the trial process and at aspects of the task of being a juror. A few jurors expressed that surprise in terms of feelings of inadequacy. Others noted specifically that they were unprepared for the responsibility involved in reaching a decision and for the effect that this could have on the parties. In a few cases, this seems to have caused real distress and may have affected the outcome of at least one trial. A number of jurors also expressed surprise at the boredom and slowness of the trial process. They had not been prepared for the delays, the repetition, or the ponderous manner in which evidence was given and recorded, and some found it hard to adapt.

Confusion and an inability to absorb proceedings

2.45 A significant number of jurors took an appreciable time to get over their surprise and shock at being on a jury and to focus on the opening stages of the trial. Both the judge's opening comments and the Crown opening went unheard by some jurors and were largely unattended to by others. In 20 of the 48 cases, one or more jurors commented on their failure to absorb material during the early part of the trial due to this settling-in process. On the other hand, it should be stressed that these feelings of shock and confusion, although reported by a significant number of jurors, were still confined to the minority. Most jurors did not express any problems of this sort, and indeed, a few commented on the clarity and transparency of the process.

Misinterpretation of routine courtroom procedures

2.46 As a result of their inexperience, a number of jurors became confused and misinterpreted routine courtroom procedures. In most cases this was trivial, although some jurors found their misinterpretation embarrassing. In other cases

it was more serious. In one case, for example, a juror commented that neither he nor a number of other jurors took adequate notes on some of the evidence, because they did not understand how the evidence was going to be given or that each witness would appear just once. He was expecting evidence to be given in a "story" format with key witnesses recalled to add to the story as it unfolded.

2.47 Most of the matters mentioned here are fairly minor and are unlikely to have a significant effect on the overall operation of the jury. Furthermore, they are difficult to deal with in advance. Providing jurors with rather more opportunity and encouragement to seek clarification, especially from court staff, may be the most that can be done.

Selecting the foreperson and the foreperson's role

2.48 Once the jury is empanelled, the judge instructs the jury to retire to select a foreperson. This is the first time that the jury has met as a group.

2.49 In three of the ten jury districts in our study, jurors received brief information on this process in the material accompanying the summons. This process is also covered in the booklet and the video, and the judge generally repeats it when instructing the jury to retire. However, it simply tells jurors that any one of them can be selected and that the task is to chair the deliberations and act as spokesperson. Judges sometimes add that in selecting a foreperson, jurors might like to consider those with prior experience of sitting on a jury or of chairing meetings. However, in only 12 of the trials in our sample did any member of the jury recollect receiving instructions of this sort from the judge. In a further 15 trials, at least one jury member recollected receiving some advice to this effect from the court attendant.

2.50 There was considerable disagreement amongst jurors over whether they had received information on the selection of the foreperson and the source they had received it from. Thus, while 75 per cent of the jurors who responded said that they had received no advice on either the role of the foreperson or how they might go about selecting one, in 54 per cent of the trials at least one juror recalled getting advice. Of the 25 per cent who said that they had received advice, most nominated either the judge or the court attendant or both as the source of this information, with only a few referring to either the booklet or the video.

The selection process

2.51 On average, the juries in our sample took four minutes to select the foreperson. Few actually discussed it, and in only a few cases did more than one candidate emerge. In nine of the 48 trials, jurors commented adversely on the process, emphasising both the time pressures they faced and their lack of information. Jurors in these trials wanted more time to discuss the decision, get to know each other, and make a rational choice. Some also wanted information on what the job involved and what qualities they should be looking for. However, in only two trials did jurors specifically attribute the deficiencies they perceived in the foreperson to either the way the selection process was managed or a lack of guidance on how to go about it.

2.52 It is difficult to avoid the conclusion that for many juries, with only a hazy idea of what the task involves and what prior experience is likely to be relevant to it, and under considerable pressure from the court and the court staff to make a

rapid decision, virtually any indication of interest in the job or of some relevant skill is sufficient to seal the nomination. Not surprisingly, selection relied very heavily on people volunteering for the task: in 31 of the 48 cases in our sample, at least one juror described the foreperson as having volunteered for the job. In a number of other cases the foreperson, while not described as volunteering, clearly played a dominant part in the selection process and was evidently not averse to being selected. Nevertheless, numerous other reasons for selecting a particular foreperson were given by jurors, even in those trials where the foreperson clearly volunteered. While some of the reasons given could be seen as having some rational connection to the task (for example, previous experience as a juror or on committees, occupation and educational background), many were unrelated to any valid measure of suitability (for example, appearance, being seated at the head of the table, speaking first, having a surname beginning with "A", and being male on a predominantly female jury).

The role of the foreperson

2.53 Jurors received limited or no guidance on what the task of foreperson involves. At the most, they were told that the foreperson acts as spokesperson for the jury in court, delivers the verdict, presides over the deliberations, and should ensure that every member of the jury gets the chance to have their say. Judges and court staff typically described the task to jurors in terms of chairing a meeting. From our data, this advice may be misleading; as discussed in chapter 6, running an effective jury deliberation often requires more than just good chairing.

2.54 There were a number of trials in which the foreperson was largely ineffective, producing errors in deliberations or unduly prolonging them (see chapter 6). In some cases at least, this was either because the foreperson had no real understanding of the role they should play or because they discovered that their previous experience, either on another jury or in committee work, did not in fact assist them in doing the job. Indeed, a number of jurors commented on the lottery element in the selection process, which was exacerbated by the lack of clear prior knowledge of what the role involved. This suggests that the process for selecting forepersons needs to be reviewed:

- Currently juries receive minimal information on how they should go about selecting a foreperson and on the qualities that are needed for the task. More information can and should be supplied on both these questions.
- The process is rushed and takes place before jurors have had any opportunity either to get to grips with the task they face or to get acquainted with one another. More time needs to be made available to those juries who want it, and consideration should be given to postponing the selection of a foreperson until later in the trial. (This would require an amendment to the Juries Act 1981.)
- The advice which judges and court staff currently give on the role of the foreperson is inadequate, if not positively misleading. Consideration should be given both to providing formal guidance and/or training to forepersons once selected, and to providing jurors in general with some understanding of what an effective deliberation process should involve.

Preparing jurors to process information

2.55 Little guidance is given to assist jurors in the assimilation, processing and reconciliation of the complex legal and factual information with which they

are about to be confronted. Indeed, generally it is only in the Crown opening that they get detailed material on the legal issues and their first, partial, view of the factual evidence of which they will be expected to make sense. Furthermore, this material is presented to them within a particular framework which may fit only very imperfectly with the way in which they actually process information.

2.56 Most of the preliminary information supplied to jurors, and the standard instructions given at the start of the trial, reinforce the traditional view of jurors as recipients of information who only form a judgement on the material with which they are presented at the deliberation stage. Thus jurors are told of the importance of keeping an open mind throughout the trial and of not making up their minds until after the judge's summing-up at the conclusion of all the evidence. It is only at that point that jurors should or can attempt to construct an overall picture of the case. The structure of the criminal trial reinforces this notion; opening statements, whether by the judge or counsel, rarely provide a comprehensive picture of the stories that are to be told by the evidence and, as will be discussed more fully in chapter 3, evidence is often called in an order which owes more to chance or to the needs of parties than it does to the inner logic of the story that counsel is trying to tell. Even if witnesses are called to recount the story in a logical sequence, this sequence cannot be delivered in narrative form and is interrupted and confused by the process of questioning and cross-examination.

2.57 It is clear, however, that jurors do not in fact process information in this way. Instead, they actively process the evidence as it emerges, evaluating it and attempting to fit it into an evolving story which makes sense to them. In deciding what aspects of the evidence to commit to memory or to make notes on, jurors are engaged in an interpretative process which belies the instructions that they are given at the commencement of the trial. While this does not mean that jurors approach the case with closed minds or with a preconceived view of how the case is likely to develop, it does suggest that the initial frame which jurors adopt in order to construct their "story" is important. It is this frame which enables jurors to select from and interpret the evidence as it begins to emerge. Although jurors are willing to change the story as new elements are introduced, this is inevitably based on their understanding of the earlier evidence, which in turn is the result of the process of filtering and interpretation that has already taken place dictated by their earlier frame. What this suggests is that jurors' ability to absorb, make sense of, and evaluate evidence may be considerably enhanced by concerted efforts to provide them with a more coherent factual framework in the early stages of the trial and with a clear outline of the legal structure into which the facts must be fitted.

2.58 There are a number of ways in which jurors could be better prepared for the task of processing and evaluating the evidence:

- *The indictment.* Most juries receive copies of the indictment during the Crown opening, either individually or as a body. Others may get a copy after the summing-up. Jurors generally find the indictment very useful, especially in setting up the issues and providing them with a focus. Copies of the indictment should be provided to jurors as a matter of routine at the commencement of the trial.

- *A written summary of the charges.* Even where they are given a copy at the start of the case, the indictment on its own is often not of much assistance to

jurors. In at least two of our trials, jurors also received a brief written summary of the applicable law from the judge before the Crown opening. This was seen by the jurors in those trials as extremely useful. In another trial, the jury asked the judge for a copy of the law relating to the defence of insanity and found this, together with a list of witnesses which they had also requested, to be very useful in dealing with the evidence. It is difficult to see why juries in all cases should not be supplied with a plain English summary of the legal elements of the charges at the commencement of the trial.

- *Summarising the key issues.* In most cases, the indictment plus an explanation of the relevant law should enable juries to identify the key issues in the particular case. Where this is not so, further explanation may be necessary. In one case, for example, the jury received a copy of the indictment and were clearly directed on the relevant law but seemed to have largely failed to focus on the key issue in the case, which was whether the accused had acted with dishonest intention. A clear written statement of this issue at the beginning of the case may have helped to avoid this confusion.

- *Agreeing on and outlining the facts.* Jurors sometimes found it difficult to process the factual information they were receiving because they lacked a coherent framework for doing so. Indeed, the lack of a clear factual narrative at the outset, and especially of one which pinpointed the areas in dispute by including the defence "story", was in some cases an important part of the difficulties jurors faced.

  While this clearly raises wider disclosure issues, it is worth considering whether it might be desirable for either the Court or counsel to provide more of an agreed factual framework for the jury at the start of the case. It was clear to us that in many of the trials in our sample, it would have been possible not only to clearly identify the basic issues in a non-partisan way in advance, but also to provide a general indication of what the basic factual arguments were to be. While it may have been difficult or unwise to disclose the details of the defence at such an early stage, the basic outline would not have been problematic.

  The development of pre-trial conferences or status hearings in the indictable jurisdiction could provide the basis for presenting juries with clear, agreed preliminary outlines of the cases they are to hear.

- *An early defence opening.* Jurors were highly appreciative of the early defence opening in the three cases in which it occurred, and would clearly have benefited from one in other cases. Solely from the point of view of enhancing the jury's understanding of the case and its ability to process subsequent evidence, there would be considerable benefit in routinely allowing the defence to make such a statement. This would, however, require an amendment to section 367 of the Crimes Act 1961.

- *Explaining legal terms.* In addition to a plain English explanation of the charges, juries should sometimes also receive more detailed explanations of the meaning of key terms. In a number of trials, juries clearly had difficulty with concepts and terms which were fundamental to the charge or to their job but which remained largely unexplained, presumably because judges and counsel saw them as ordinary notions which the jury should interpret in line with common understandings in society. On the other hand, many jurors saw the

notions in question, such as "reasonable doubt", "intent" and "negligence", as involving legal concepts and having some special meaning which they were expected to apply.

- *Witness lists and details*. In a number of trials, the jury received lists of the witnesses who were to be called by the Crown. In at least one other trial, they asked for a list and were given it. However, there were also trials in which the absence of such a list caused the jury considerable difficulties and at least extended the duration of deliberations.

  It would seem to be elementary that, in cases involving multiple charges and/or accused persons, lists of witnesses with their relevance indicated should be given to the jury. Indeed, it is difficult to see why one should not be given to the jury in every case.

- *Flowcharts, diagrams and other aids.* Where the location and visual evidence is important juries generally receive maps and photographs which they find very useful. Such material is less forthcoming where, for example, relationships and chronology are significant. In two cases in our sample, jurors commented that if counsel had supplied them with a flowchart showing the alleged chronology at the start of the evidence, it would have made the task much easier. However, except in multiple fraud cases, this seems to be rare. Again, it would seem to be elementary that wherever a visual aid could assist the jury, counsel should be encouraged to provide it.

3
The trial process

3.1 THE RESEARCH IDENTIFIED FOUR BROAD TYPES OF PROBLEMS which jurors experienced in assimilating and assessing the evidence presented during the trial:

- The form in which evidence was presented frequently affected juror comprehension, recall and assessment of the evidence.
- In a significant number of trials, some individual jurors appeared to lack the competence to engage in a proper assessment of the evidence they heard.
- A number of jurors experienced difficulty in assessing credibility. In particular, when confronted by an absence of "hard evidence" to prove guilt, some jurors were reluctant to assess credibility or draw inferences from indirect or circumstantial evidence.
- There were occasionally gender and cultural issues which affected the individual assessment of evidence, although these were almost invariably overcome by the collective deliberation process.

THE FORM IN WHICH EVIDENCE WAS PRESENTED

3.2 The problems which individual jurors confronted in comprehending and absorbing evidence during the trial were generally attributable not so much to any personal incapacity as to the way in which evidence was presented to them. There were four particular difficulties in this regard: the impact of oral evidence, the speed of evidence, the clarity of evidence, and the problems posed by expert and other technical evidence.

The impact of oral evidence and the limitations of existing measures to supplement oral evidence

3.3 Few jurors have experience in assimilating a large quantity of factual information delivered orally. The emphasis upon oral evidence in the trial process arguably does not fit with modern forms of communication and learning, and undoubtedly impairs juror comprehension of the testimony they receive.

Problems of concentration and recall

3.4 In the first place, a number of jurors experienced difficulties in maintaining concentration, especially during long trials: in 11 of the 48 trials at least one juror, and sometimes up to a half of those interviewed for a particular trial, volunteered that they or other jurors experienced difficulty in concentrating. These difficulties were exacerbated when the oral evidence was boring or presented in a boring fashion, was confusing or repetitive, or involved lengthy technical evidence.

3.5 A second reported consequence of the fact that testimony was in oral form was that jurors had difficulty in recalling the details of it during deliberations. Such

difficulties were reported to have occurred in 21 trials, and were particularly acute where the evidence was confused or contradictory, or where the sequence of events was unclear. They were also particularly likely to arise where there was more than one complainant and a number of charges: jurors reported that they got the stories between complainants mixed up; that they mistook names, dates or times; and that they sometimes had difficulty in recollecting what evidence related to which charges. The fact that jurors had significant difficulty in recalling evidence or in agreeing about what testimony had been given was reflected in the fact that they requested that evidence be read back to them in 16 trials.

Note-taking

3.6 Jurors generally attempted to mitigate concentration or recall problems by taking notes with the pens and paper routinely provided to them for the purpose: in 41 trials at least 50 per cent of our respondents took notes, and in aggregate, 234 out of 312 (75 per cent) did so. Of those who took notes, 83 per cent used them during deliberations, and 94 per cent of these found them useful as a memory aid to keep track of and to recall the key points of witnesses, times and dates, and the sequence of events. Juries also collectively used their notes to piece together the evidence or to resolve disagreements about what had been said. However, notwithstanding the prevalence of note-taking and its reported usefulness, there were a number of factors which reduced its effectiveness in mitigating problems of concentration and recall:

- The advice which jurors received on whether they should take notes, and the extent to which they should do so, was variable and generally inadequate. Beyond discouraging jurors from writing verbatim accounts, judges and court attendants usually gave virtually no guidance about the sort of information which they should note down. Jurors frequently criticised this lack of guidance. Many interpreted the comment that they should be careful to listen to and observe witnesses as meaning that they should avoid taking notes as far as possible; they frequently reported that this "didn't prove to be true" and that they regretted not having taken more notes. They also often noted that they or other jurors in their case were handicapped by their lack of experience in note-taking and did not know how to go about the task.

- Partly as a consequence of the lack of guidance on note-taking, the amount of notes taken by jurors varied enormously. Not surprisingly, jurors with sparse or no notes tended to defer to those who had taken extensive notes when the evidence needed to be clarified, or disagreements about what was said needed to be resolved. Indeed, they were often grateful that others had a record of evidence upon which they could rely. Nevertheless, their reliance upon the notes of others not only reduced their ability to participate meaningfully in the discussions, but also allowed other jurors the opportunity to dominate and to impose their own version of events and structure upon the deliberations. Thus the reliance upon note-taking as the primary means of addressing the limitations of oral testimony undoubtedly contributed to uneven participation in jury deliberations, and may have led to the version of events favoured by one juror, on the basis of their own selective recording of the evidence, being used as the basis for decision-making.

- The potential danger which the jury confronted in relying upon the notes of one or two jurors was illustrated by the fact that the notes which some jurors

discussed turned out to be an inaccurate record. Because of this, juries not infrequently found that there were discrepancies in their notes and that they could not agree about what particular witnesses had said.

- Juries were rarely specifically told that they would not be receiving a written copy of the judge's notes. Indeed, many assumed that since the judge and counsel were receiving copies of the judge's notes as they were being transcribed by the stenographer, they would also receive a copy at the commencement of deliberations. As a result, some jurors took no notes at all and some took fewer notes than they would otherwise have done.

Written and visual aids

3.7 Jurors received a wide range of written and visual material as an aid to oral evidence. This material fell into four categories:

(1) In 13 cases, the jury received a copy of the accused's written statement to the police, a transcript of the videotaped interview with the police or a copy of the police officer's notebook recording the accused's oral answers to questions put to him or her by the police officer. Jurors invariably found such material to be useful, especially when the accused had not given evidence. They often made extensive use of such material during deliberations, particularly as a means of working out the sequence of events, resolving ambiguities or conflicts in the evidence, or identifying contradictions in the accused's story. Nevertheless, three juries did express some reservations about their access to and use of such statements: in two cases they felt that the emphasis placed upon the accused's statement in the jury room was one-sided and that, without the complainant's initial statement to the police or a transcript of her evidence, they weighed up and analysed the accused's story and the sequence of events put forward by him in much more detail than they were able to do in relation to the complainant; and in the third case they simply decided that the accused was a "compulsive liar" and that the video transcripts were not sworn evidence and were unreliable.

(2) Exhibits comprising physical evidence were entered into evidence in 32 trials. Jurors generally appreciated having such exhibits; they particularly found copies of documents relating to financial transactions in fraud trials an extremely valuable – indeed, a virtually indispensable – aid to their understanding of the case. Nevertheless, there were a number of factors relating to physical exhibits which reduced their effectiveness as an aid to decision-making:

(a) Apart from fraud trials (where copies of documents of financial transactions were always provided to the jury either at the outset of the trial or when evidence relating to those documents was being given), jurors did not usually receive the exhibits, and thus did not get the opportunity to look at them at close range, until they retired to deliberate. Some jurors noted that as a result, the exhibits did not assist them in following or comprehending the evidence at the time it was being presented.

(b) Sometimes physical evidence in the jury room prompted jurors to become detectives and to reach unsubstantiated conclusions during

deliberations. In one case, for example, they tried to discern whether the handwriting on two cheques which the accused denied writing belonged to her.

(c) Items used for the purposes of assault (such as guns and knives) sometimes proved to have mere curiosity value which, if anything, distracted jurors from their deliberations: they tended simply to play with them rather than to refer to them in deliberations or to draw any significant conclusions from them.

(d) The relevance of exhibits was not always made clear to jurors, as a result of which they had difficulty in fitting them with the rest of the evidence.

(e) Finally, documents relating to financial transactions were not always adequately organised or related clearly enough to the charges. For example, sometimes volumes of exhibits were arranged according to the nature of the exhibits rather than according to the particular counts in the indictment. As a result, jurors sometimes found they had to sort out for themselves which exhibits related to particular counts.

Overall, access to exhibits relating to physical evidence generally proved useful. However, they were sometimes unnecessary or even counter-productive, and in those cases where they were essential to proper comprehension of the evidence, they were not always presented at the right time or to best effect.

(3) Visual representations of physical evidence or the scene of the crime (including photographs, floor plans and maps) were the most common supplement to oral evidence, being used in 33 trials. In 29 of these, an overwhelming majority of jurors found the visual representations helpful. Sometimes they simply served as a visual reminder of things or helped them to visualise the scene, which aided their recall. Just as frequently, visual aids such as photographs and maps were actively used during deliberations to resolve ambiguities in the evidence or to assess the credibility of particular witnesses. Moreover, in four cases one or more jurors criticised the fact that visual aids of this sort were not provided and said that they needed more assistance to put things into visual perspective.

Notwithstanding the use to which visual representations such as photographs were put, jurors were again frequently critical of the time at which or the way in which these aids were provided. First, as with exhibits of physical evidence, there were at least three cases in which they were not provided with the photographs, plans or maps until deliberations, which significantly reduced the effectiveness of such aids in enabling them to follow and assess the evidence. Secondly, photographs and maps were sometimes presented in an inadequate form, without any indication of their scale or direction.

(4) Other written or visual aids (such as flowcharts, diagrams, schedules of documents, overhead projectors and whiteboards) were employed in 11 trials. Such aids were not always used to best effect. For example, some jurors could not see the whiteboard or the overhead projector because the material on it was too small. Nevertheless, despite such defects in presentation, jurors generally found written or visual aids of this sort a significant help in mitigating the problematic effects of oral testimony.

3.8 In summary, while both note-taking and a variety of exhibits, photographs and other visual representations were extensively used, there were a number of obvious problems with, and criticisms of, their use, which militated against their effectiveness in alleviating problems of comprehension and recall of oral testimony. Moreover, most testimony was still given in oral form without the assistance of written or visual aids. Much could be done to improve the comprehensibility and recall of evidence without undermining the fundamental structure within which evidence is currently provided. Most jurors would clearly have appreciated more consistent guidance on note-taking, the provision of exhibits (especially copies of all written documentation) at the time at which they were entered as evidence, and the systematic use of written summaries and chronologies, whiteboards, overhead projectors and other visual aids to bring the evidence together into a coherent form. It seems likely that the use of such devices would do much to alleviate the problems of concentration and recall reported by jurors.

3.9 In addition, two other options for reform to address the difficulties of oral testimony were mentioned in a number of trials:

(1) Although we did not specifically ask the question, 30 jurors in 17 different trials volunteered the view that the judge's notes in full should have been made available to them.

(2) Jurors occasionally expressed puzzlement that they did not receive the statements of crucial witnesses in writing, especially when they had access to written statements provided by the accused. It is arguable that an increase in the use of written evidence would affect the trial little in terms of spontaneity and the assessment of reliability. Indeed, even when the evidence of witnesses is contentious and needs to be tested through cross-examination, it may be that substantial portions of the evidence which involve factual detail could be much more effectively introduced in written form and read by the jury before the appearance of the witness.

The speed of evidence

3.10 The difficulty which jurors experienced in absorbing oral evidence was exacerbated by the fact that, in the vast majority of trials, the traditional system of verbatim recording in court by a stenographer was employed, thus requiring witnesses to talk at typing speed or to pause for the stenographer to catch up. Almost all of the jurors who commented on this were critical of the system of recording evidence, and variously described it as "cumbersome", "ponderous", "a bit laboured", "absolutely shocking", "pathetic", "a wee bit unnerving", and "inefficient".

3.11 Jurors also identified a number of more specific difficulties with the speed of delivery of evidence which affected either the quality of the evidence itself or their own ability to assimilate it:

- Jurors repeatedly commented on the fact that the frequent pauses in the evidence, which were required to enable the stenographer to catch up, broke the continuity in the evidence and gave it a disjointed flavour, so that jurors were inclined to become distracted, bored or inattentive.
- More importantly, jurors often felt that the manner in which evidence was delivered had a marked adverse effect on the quality of the evidence, either by interrupting the witness's train of thought, so that they lost track of what

they were saying, or by allowing witnesses time to gather their thoughts, reducing the likelihood of a spontaneous and unguarded response.

- A few jurors also found that the process of recording itself, and the fact that they were anticipating the next pause in the evidence, broke their concentration.

3.12 Overall, therefore, a significant number of jurors found that the transcription of evidence seriously impeded the trial process and their own ability to concentrate on and assimilate the evidence.

The clarity of evidence

3.13 A substantial number of individual jurors reported that they experienced difficulty in disentangling and making sense of the evidence because of either the nature of the evidence itself or the confusing and unsatisfactory way in which it was presented to them. A number of reasons for this difficulty emerged:

(1) Some cases were difficult to comprehend simply because the evidence itself was vague, muddled, confusing and contradictory.

(2) Many jurors found the evidence unsatisfactory because of the way in which prosecution or defence counsel conducted their case. For example, the questioning by counsel (especially defence counsel) was often described as "poor", "difficult to follow", "confusing" and "fumbling", as a result of which jurors found it difficult to determine where lines of questioning were going or what they were trying to achieve. In fact, one or other counsel was criticised on this sort of ground in 17 trials. Jurors often coped with the confusion engendered by poor questioning by attaching little weight to the evidence elicited.

(3) As suggested above (para 2.57), jurors from the outset of the trial are generally constructing versions of the incident, or "stories", to make sense of the evidence which they are hearing. They are constantly searching for a narrative or "frame" which fits with their experience of the world; and they are selectively assimilating and interpreting evidence, as the trial proceeds, to fit within the "frame" they have created. The difficulties which jurors confronted in that process were two-fold. First, evidence was frequently given in a manner and sequence which was inconsistent with, or impeded, the formation of a story or narrative: evidence in relation to a particular stage of the narrative or a particular issue in dispute was not all dealt with at the same time. Secondly, even though jurors were willing to change the story they had constructed in the light of evidence presented by the defence, their new "story" was inevitably based on a partial recollection of the earlier evidence, which was determined by the process of filtering and compartmentalisation dictated by their earlier frame.

There are a number of possible options for addressing these problems, some of which we have already discussed:

(a) More systematic attempts to provide jurors with both a legal and a factual frame at the beginning of the trial, within which they can place evidence: namely through defence pleadings to identify the issues in dispute; through regular opening addresses by the defence at the commencement of the trial; or through an informal agreement between

counsel on the issues which the judge can present to the jury in his or her opening instructions.

(b) Calling defence witnesses before the prosecution has concluded its case, where the nature of the evidence warrants it – for example, where expert witnesses for each party are giving evidence on the same issue and there would be benefits in hearing their evidence together.

(c) The provision of more evidence in written form before cross-examination of any witnesses, so that jurors can take into account more than one narrative when they are constructing their factual "frame" and listening to cross-examination.

(d) The provision of a copy of the judge's notes, so that jurors have a complete record as a basis for refreshing their memory.

(4) Jurors routinely encountered problems in assessing evidence in multiple-charge trials. In particular, they found it difficult to identify what evidence related to which charges. This problem arose in at least 11 trials involving multiple counts. Although this may have been in part attributable to the personal limitations of individual jurors, and their inability to analyse and differentiate complex information about a range of similar events, it was at least as much a consequence of the way in which the case was conducted: too many charges were brought; insufficient effort was made to distinguish the various charges for the jury; or the presentation of the evidence did not link it explicitly enough to the charge to which it related. These difficulties could have been alleviated both by the severance of counts into two or more trials, when large numbers of complainants were involved, and by more strenuous efforts on the part of the prosecution to link evidence to particular counts, both in the course of oral testimony and through the greater use of written schedules and summaries.

The impact of expert and other technical evidence

3.14 Expert evidence of some sort was introduced in 19 trials. In 13 of these, none of the jurors said that they had any difficulty with the technical nature of the evidence. They were particularly appreciative of technical or specialised evidence (such as medical or psychiatric evidence) which was presented to them in simple language, free of jargon and unduly technical detail.

3.15 In a minority of trials, however, expert evidence and other highly specialised evidence did pose problems for jurors. It was not always easy to assess whether these problems were attributable to defects in the nature or presentation of the evidence or to the jurors' inability to comprehend and absorb it. Nevertheless, our own assessment of the evidence in trials where jurors reported problems suggests that their problems were frequently caused, or at least exacerbated, by the unduly complicated and sometimes ponderous way in which the evidence was delivered. Indeed, this applied to five of the six trials involving expert evidence where problems arose. A number of experts presented their evidence in dry technical language, without adequate explanation of jargon or the use of clear diagrams or other visual aids. Thus jurors struggled to concentrate upon and take in the evidence, and sometimes failed to follow the explanations that were provided. However, it has to be said that such problems in comprehending and absorbing expert evidence

were, with two exceptions, reported by only two or three jurors at most in each trial; the problems were not critical to their overall understanding of the case; and the expert evidence was ultimately clarified either by testimony from other experts or by other jurors during deliberations.

3.16 In some cases, where difficulties experienced by jurors were attributable to the inherent complexity of the case rather than deficiencies in the presentation of the evidence, their difficulties might have been ameliorated or overcome if the nature of the transactions or procedures to which the evidence related had been explained to them in a factual way before the evidence itself was presented.

3.17 It is possible that juries may be unduly influenced by expert evidence which they do not have the background to evaluate properly. In one case, the expert's qualifications seemed to have impressed, and perhaps blinded, the jury and led at least some of them to accept his evidence uncritically. In all other cases, the jurors were clearly willing to weigh up expert evidence and decide for themselves what weight to attach to it. They sometimes spoke in highly complimentary terms of the way in which an expert had presented his or her evidence, but still rejected some or all of the expert's conclusions. Conversely, they sometimes criticised the expert's manner but still found the evidence convincing. There were also some cases where the jury concluded that the expert evidence simply lacked credibility and they accordingly rejected it.

INDIVIDUAL JUROR COMPETENCE IN THE ASSESSMENT OF EVIDENCE

3.18 It was difficult to ascertain from our interviews with jurors the extent to which they lacked the competence to engage in a proper assessment of the evidence. Nevertheless, it appeared that in at least 14 trials there were some individual jurors who lacked the capacity to comprehend the evidence. The reasons for their incapacity fell into three categories:

(1) Eight jurors in seven different trials for whom English was a second language either said themselves that they had failed, or were reported by others to have failed, to comprehend the evidence fully because they did not understand some of what was being said. In some instances, this drastically reduced their ability to follow the evidence and participate effectively in deliberations.

(2) There were five trials in which one or more individual jurors were reported by others to have suffered from intellectual or other limitations which impeded their grasp of the evidence, even in relatively straightforward cases.

(3) There were five trials involving the presentation of technical evidence, sometimes of a highly specialised nature, which individual jurors did not have the knowledge or experience to cope with. Of these five cases, three were fraud trials involving multiple counts, two of which lasted for three weeks or more. In these cases, the transactions and procedures which were the subject of the charges were frequently beyond the common knowledge and experience of most of the jury. Moreover, the evidence was often inherently tedious and necessarily presented in a monotonous way, which led to difficulties in concentration. It was also supported by large quantities of written documents with detailed figures, which juries did not have the time to make sense of during the trial, and often found difficult to relate to the evidence during deliberations.

Limitations in the ability of jurors to understand the evidence at least contributed to perverse or compromise verdicts in two cases, and a hung jury in a third.

3.19 Although these findings suggest that fraud trials pose a particular problem, three additional points should be noted: not all of the fraud cases in the sample were lengthy or complicated, even when they involved multiple counts; of the five fraud cases which did involve relatively complex evidence, two seemed to pose no difficulty for the jury; and not all of the cases involving inherently complex issues which jurors found difficult to comprehend were fraud cases. Thus, while our data lend some support to the view that at least some individual jurors (and occasionally the jury collectively) lacked the competence to grapple with complex technical evidence, fraud was not the defining characteristic of such cases. Any reform to remove from juries cases which they are likely to have difficulty in dealing with would therefore need to be based on criteria other than mere offence category or number of counts.

PROBLEMS WITH THE ABSENCE OF HARD EVIDENCE

3.20 Juries were routinely instructed at the commencement of the trial, and often again during the closing addresses of counsel and the judge's summing-up, that they should focus on the demeanour of witnesses in order to assess their credibility. In practice, most jurors showed no reluctance to assess credibility. Only nine (18.7 per cent) of the verdicts were based primarily upon independent evidence which did not require any real evaluation of the credibility or reliability of the testimony of the parties directly involved; 17 (35.4 per cent) were based partly upon credibility and partly upon the support lent by independent circumstantial or other "hard" evidence; and 14 (29.2 per cent) were essentially based on an assessment of the credibility of the accused or witnesses alone.

3.21 Jurors generally assessed the credibility of the evidence carefully from both the content of the evidence and the way in which the witness acted in the witness box. Witnesses who seemed to be frank, forthright and genuine, and who gave consistent evidence, were believed and were generally relied upon. In contrast, witnesses who contradicted themselves, were defensive or evasive, or became annoyed with cross-examining counsel, were generally regarded with suspicion and as a result frequently disbelieved.

3.22 Nevertheless, the fact that witnesses contradicted themselves or were proved to be telling lies did not necessarily mean that their evidence as a whole was rejected. In determining whether they should be believed or disbelieved, jurors in the main were prepared to look at all of the surrounding evidence, including any reasons there might be for their lies or contradictions. In some cases, they recognised that a witness was fudging the evidence, either because they were acting in self-preservation or because they were covering for someone else. Because the consequent lies and contradictions were explicable in these terms, they accepted other aspects of the testimony where it was consistent with other surrounding evidence.

3.23 In a minority of trials, however, individual jurors, and in some instances the jury as a whole, clearly found the assessment of credibility problematic. In this respect, there were two quite different sorts of difficulties. First, in two of the trials where the verdict was essentially based on credibility alone, and in one trial where it was based partly on credibility, it appears that some jurors were unduly influenced by discrepancies in the complainant's testimony, which led

them to reject the prosecution case without regard for independent evidence about the nature of, or reasons for, the accused's actions. Secondly, jurors were frequently frustrated when they did not get definitive evidence – especially what they described as "hard evidence" – to enable them to assess the versions of events presented by the witnesses for prosecution and defence. In some of these cases, even when they were satisfied that a complainant was telling the truth, and said that they were sure of the guilt of the accused, they often looked for tangible evidence to verify their view and felt that, in the absence of that, the charge could not be "proved".

3.24 Judges routinely instructed juries during the summing-up that in assessing the evidence they should apply their common sense and experience of the world. However, this did not usually resolve jurors' problems in assessing credibility. In a couple of cases, the judge's instruction was used by a majority of jurors to persuade the minority that hard evidence was not actually required. In other cases, however, it was interpreted to mean that the judge thought that there was actually little evidence on which the jury could convict.

3.25 In summary, credibility did not pose a problem for most jurors. However, in two cases, undue weight was placed upon a perceived lack of credibility, and in 11 other cases, the absence of other direct "hard evidence" to prove guilt led to a reluctance to assess credibility and to draw inferences from indirect or circumstantial evidence. Judicial directions on the drawing of inferences and the need to apply common sense and life experience generally appeared to make little difference to this.

THE IMPACT OF GENDER AND CULTURAL ISSUES IN THE ASSESSMENT OF EVIDENCE

3.26 There were only four trials in which cultural issues relevant to the assessment of evidence emerged. Jurors in their interviews with us gave no indication that they approached those issues in a mono-cultural or biased way. They were generally conscious of the possibility of cultural differences and tried to take them into account in assessing the evidence. However, some jurors did feel handicapped by their ignorance of the way in which responses to particular situations varied from one culture to another.

3.27 So far as we could discern, there were no systematic gender differences in the understanding or interpretation of the evidence. There were a couple of cases in which individual male jurors expressed strongly sexist views about either their fellow jurors or the nature of the case. Apart from these isolated examples, there were really only four cases in which there was a more general gender split in the approach to the case within the jury, but these were overcome in deliberation.

3.28 In general, therefore, gender and cultural issues arose only infrequently during trials. Where they did so, they did cause some problems for individual jurors' understanding and interpretation of the evidence, but these problems were almost invariably overcome during the deliberation process.

4
The participation of jurors in the trial process

4.1 A SIGNIFICANT NUMBER OF JURORS FELT UNPREPARED for the experience of being a juror, found court procedures and rules unfamiliar, and were unsure how they could have their queries or concerns addressed. As a result, they felt marginalised during the trial and perceived themselves to be bystanders rather than participants in it. While many simply accepted this as the nature of the process and were unaffected by it, a minority were clearly frustrated by the sense of powerlessness it engendered. This not only affected their sense of satisfaction with the experience of being a juror, but also had the potential to undermine their confidence that justice had been done.

4.2 The most concrete manifestation of this feeling of marginalisation was fairly frequent criticism of the physical amenities and practical services provided for jurors (see chapter 10).

4.3 The perception that they were bystanders rather than participants in the process was also reinforced for some jurors in four other respects:

- a belief that delays, for legal argument or other reasons, were excessive and that adequate and timely information about the reasons for, and likely length of, these delays was not provided;
- a feeling that they were being given an incomplete picture of events because counsel and the judge were withholding important information from them, usually for reasons which they did not understand;
- a perception that it was impermissible or inappropriate to ask for or seek clarification of issues during the trial itself; and
- a perception that responses to their questions during deliberations were unduly formal and inhibiting, which discouraged some from asking questions even though they were uncertain about, or disagreed on, aspects of the law or the evidence.

EXCESSIVE DELAYS

4.4 Most jurors accepted at least some delays as an inevitable part of the trial process. In particular, they recognised that delays for legal argument were necessary from time to time to determine whether evidence was relevant and admissible. However, some found that the delays were frustrating and affected their concentration. Others, while recognising that the legal arguments were none of their business, were still curious and speculated about what was going on.

4.5 More importantly, in 18 trials at least, some jurors were highly critical of the number and length of delays, believing that they were excessive and time-wasting and demonstrated disorganisation. In particular, they felt the delays showed a lack of proper respect to jurors, some of whom were busy, conscious of the value of their time, and anxious to get back to work.

4.6 Other jurors were strongly critical of the fact that they were told neither the reasons for the delays nor how long they might last for. While the reason for a delay often could not be given in detail, it was usually the case that some advice in general terms could have been provided without prejudice to the accused. Similarly, more effort could have been made to keep the jury informed about the likely length of the delay.

4.7 In most instances where the trial was delayed for the purposes of legal argument, the jury were taken out to the jury room so that the legal argument could take place in court in their absence. A small number of jurors felt that this was disrespectful, and would have preferred legal argument to be done in chambers.

WITHHOLDING INFORMATION

4.8 In 16 trials, at least some jurors formed the view that evidence was deliberately being withheld from them. As a result, they felt that the story they were trying to construct on the basis of the evidence was incomplete. Sometimes they saw this as a deliberate tactic of counsel to stop a line of questioning before it elicited answers which might damage their case. On other occasions, they perceived that information which they suspected to be both relevant and known to counsel and the judge was being deliberately withheld from them for reasons which they did not quite understand.

4.9 At least in part, the perception of many jurors that they were not getting the full story arose because they perceived the trial in inquisitorial rather than adversarial terms. That is, they saw the trial process and their role in it as being to uncover the whole truth, including the surrounding circumstances, rather than to assess the versions of events presented by the parties. They were therefore frustrated when they did not get definitive evidence which would enable them to do that. Some of the gaps they perceived were simply background which might have helped to bring the incident to life but would not necessarily have assisted them in determining the relevant facts in relation to it. Other perceived gaps related to information which was simply unknown or could only have been provided by persons who were unavailable or unwilling to act as witnesses. However, in some cases jurors' perceptions that relevant evidence was deliberately being withheld was correct: counsel either avoided a particular line of questioning for tactical reasons or did not introduce evidence because, while relevant, it was inadmissible for other reasons.

4.10 Generally, the fact that there were perceived gaps in the evidence did not matter. Most jurors simply accepted that they had to work with, and confine themselves to, the evidence available to them. Nevertheless, in a small minority of cases it did have a significant impact in three different ways:

- When there was a debate about the admissibility of evidence which led to its exclusion, juries often idly speculated about what that evidence might have been; and a couple of jurors noted that this actually tended to focus the jury's mind on that issue, so that they attached more weight to it than they would have done if the evidence had actually been admitted.
- There were three cases in which the perceived gaps in the evidence led the jury to draw unjustified or speculative conclusions which did influence their deliberations.
- Whether or not jurors were in fact influenced in their deliberations or verdict by perceived gaps in the evidence, that perception nevertheless led some of

them to feel that they were marginalised in the process, and so their experience was frustrating rather than satisfying.

ASKING QUESTIONS AND SEEKING CLARIFICATION DURING THE TRIAL

4.11 Juries are entitled to ask questions during a trial, to clarify issues about which they are uncertain, or to fill gaps in the evidence presented. However, judges in their opening instructions only infrequently mentioned that jurors could do this (see para 2.22), and when they did they focused on the procedure for asking questions during deliberations rather than during the trial itself. The jury booklet does indicate that the jury may ask questions during the trial, but says that such questions are "most unusual" and focuses exclusively on the right to ask questions directed to particular witnesses – rather than, for example, questions seeking clarification from counsel or of the judge's comments.

4.12 A majority of those who responded said that they were not told whether or not they could ask questions. Moreover, a few of those who said that they were told seemed to have got the information wrong: seven said that they were told that they could not ask any questions until deliberations; and three that they could ask questions by putting their hands up.

4.13 Not only did the vast majority of jurors believe that not all relevant information was extracted from witnesses and that ambiguities in their evidence were not always adequately explored (see para 4.8), but as many as 79.2 per cent of jurors said that they wanted to ask one or more questions during the trial.

4.14 When jurors were asked why they had not asked questions, a few indicated that it was because they recognised that their questions were in fact irrelevant or otherwise inadmissible, and a significant number said that their concerns had been addressed by other jurors or by evidence presented later in the trial. Some did not ask questions because they were intimidated by the courtroom environment; did not know what sorts of questions they could ask or how to phrase them; did not know the procedure for asking; or felt the procedure (which required them to write down the question and pass it to the foreperson, who then read it out to the judge) to be too cumbersome. But by far the most common reason for not asking questions (40.9 per cent) was that they thought that this was the lawyers' job and that they were not permitted to ask.

4.15 One reason why judges and court staff discourage jurors from asking questions and expect them to play a passive role in the trial is because of a perception that they would otherwise unduly disrupt the trial by raising irrelevant questions or seeking inadmissible or prejudicial material. We were unable to reach any definitive conclusion about the extent to which the questions jurors wanted to ask were relevant to the issues in the trial.

4.16 In those cases where an assessment of relevance could be made, a number of questions which jurors wanted to ask were essentially irrelevant. On the other hand, it is clear that in many of the cases where jurors wished to ask questions, they would have been significantly assisted by doing so. Counsel did not always ask questions clearly; witnesses often did not give all of the evidence relevant to the case properly or fully; and jurors did sometimes identify relevant issues which had been overlooked or deliberately omitted by counsel. Thus in eight trials, some of the jurors' questions were to clarify evidence already provided,

which would have probably enhanced their comprehension and proper assessment of it; and in seven other trials, the questions they wanted to ask were additional to (rather than merely clarifying) evidence already provided and were at least partly relevant to the issues in dispute. In addition, in five of the six cases where questions were in fact asked, they were clearly relevant to the issues in the case.

4.17 Another reason why jurors are discouraged from asking questions is that the traditional model of adversarial justice holds that a trial should be conducted essentially on the basis of the evidence which prosecution and defence choose to adduce, on the assumption that they are in the best position to determine what information is most relevant to their respective cases. Even the judge is generally required to intervene only to clarify a question put by counsel or an answer given by a witness. It is not the role of either judge or jury to pursue a line of inquiry which counsel, either for tactical reasons or because of incompetence, has not pursued.

4.18 However, as our data make clear (see para 5.25ff), counsel do not always present their cases adequately and jurors do sometimes want to ask questions which have at least the potential to enable a more reliable assessment of the evidence to be made. It is therefore difficult to see how the ideology of adversarial justice, in its pure form, serves the interests of justice. Where other participants in the trial process believe that they require further information which may be available from witnesses in the court, they should arguably be able to seek it.

ASKING QUESTIONS AND HAVING EVIDENCE READ BACK DURING DELIBERATIONS

4.19 After summing-up, the judge advises the jury that if they wish to ask any question during deliberations, or require any portion of the evidence to be read back to them to refresh their memories, the foreperson should give a written note to that effect to the court attendant who will relay the request to the judge. In that event, the court is reconvened, the jury is brought back into the courtroom, and the question is answered or the evidence read in the presence of the accused and counsel.

4.20 Juries asked questions or requested that evidence be read back in 31 trials. A number of jurors expressed surprise at the formality involved in putting questions to the judge. Partly because of this and partly from a fear that they might look foolish, nine juries either sought no clarification of issues about which they were concerned or asked fewer questions than they might otherwise have done.

4.21 The reluctance of many juries to ask questions during deliberations meant that they sometimes deliberated and reached a verdict without resolving their uncertainties about key legal issues in the case.

CONCLUSIONS

4.22 In light of jurors' feelings of marginalisation and their resultant frustration (see para 4.1), it appears that the treatment of jurors, and the role they play, in the trial process needs reconsideration.

Delays

4.23 There is clearly a need to keep jurors better informed about delays. Sometimes, where the trial is interrupted for legal argument in the absence of the jury, the nature of that argument simply cannot be divulged to the jury without prejudice to the trial itself, but even in those instances, more could be done to keep the jury informed of the likely length of the delay, and they could be given a general explanation of the reasons for the delay.

Asking questions during trial

4.24 There is some force to the argument that juries need to be given more opportunity to ask questions about the evidence during a trial. There are three ways in which this might be achieved:

- At the conclusion of each witness's evidence, jurors could be invited to ask the witness questions arising from that evidence. This would require the judge to intervene if the question was for any reason inappropriate. It might also cause difficulties for witnesses if questions were put in an inappropriate or unclear form.
- Jurors could be invited to put their questions to the judge, either orally or in writing, with the judge then having the discretion whether or not to put those questions to the witness.
- Alternatively, jurors could be invited to indicate to counsel issues which they would like further explored, leaving it to counsel to decide whether those issues should be explored, and if so, the form which the questions should take.

Asking questions during deliberations

4.25 Juries do not always have the confidence to bring queries they have during deliberations to the judge's attention. It would seem sensible at the end of the judge's summing-up to allow juries to identify any issues about which individual jurors have concerns and to raise those with the judge before deliberations commence (see also para 7.62). Just as importantly, however, the process by which juries ask questions arguably needs to be made more informal and relaxed. Obviously, questions and answers need to be provided in the presence of counsel, but the present practice of reconvening the court leads a significant number of juries to believe that asking a question will be a nuisance and impose on the judge and counsel, and that they should therefore try to work the matter out for themselves.

5
Jurors' perceptions of judges and counsel

5.1 JURORS WERE ASKED SPECIFIC QUESTIONS about their perception of counsel's performance in opening and closing the case and in examining and cross-examining witnesses, and about the impact which counsel's performance had on their attitudes to the case. In addition, they were asked about the content of the judge's opening and closing instructions and any judicial rulings made during the trial. The impact of the summing-up is discussed in more detail in chapter 7.

5.2 As with their responses in other areas, jurors varied considerably in their reactions to both the judge and counsel. Within each jury views were frequently polarised, and individual jurors often responded differently to counsel at different stages of the trial. This diversity of views was complicated by the fact that in many of our interviews only a minority of the jurors made comments on any one specific aspect. Nevertheless, many of our respondents had a lot to say – especially on the performance of counsel – and a number of common themes emerged which are significant for the discussion of how juries respond to evidence and to the way in which it is presented, and of the likely impact of the performance of the judge and counsel on jury verdicts. At a more mundane level, many of the comments suggest ways in which both judge and counsel can better meet the expectations of jurors and make their task easier and less stressful.

5.3 Jurors were generally very appreciative of the judge and tended to comment specifically on the way in which he or she sought to put them at their ease, meet their needs, and explain the case to them. Counsel, too, generally evoked a positive response, although jurors were much more likely to be critical of them – especially of defence counsel.

THE JUDGE

5.4 In 28 cases, at least one juror commented on the judge's performance. In 18 of these, all comments were overwhelmingly positive. In ten cases, at least one juror noted what was seen as a problem with the judge's handling of the case or with some specific aspect of his or her response to the jury or with their treatment of counsel.

5.5 Not surprisingly judges who made eye contact and who seemed to be friendly, polite and sensitive were rated highly by jurors. In addition, jurors were generally very appreciative of and had confidence in judges who took the trouble to explain evidence which was unduly obscure, asked counsel to rephrase questions where their relevance was unclear, and intervened to cut short unduly long, tedious or irrelevant evidence. Jurors also commented favourably on judges who they regarded as well organised and as dealing with issues concisely and clearly. Such comments were generally made in relation to the summing-up, but jurors were also appreciative of these qualities at earlier stages of the trial.

5.6 On the other hand, in three cases jurors commented unfavourably because the judge seemed grumpy, irritated or dismissive of their questions; one judge was described critically by two jurors as being pro-prosecution and pressuring them for a guilty verdict; and jurors in two cases found the judge's explanation of the law very confused and confusing. Such comments were, however, rare and juries were by no means unanimous in making them.

THE OVERALL PERFORMANCE OF COUNSEL

5.7 From our interviews it was impossible to disentangle jurors' comments on individual counsel. Overall assessments of performance are accordingly based on an overview of jurors' comments about all counsel appearing for either the Crown or the defence in any particular case. In two multiple accused cases, however, it was possible to isolate juror assessments of counsel for two of the accused and these have been counted separately. In one case in which the accused represented himself, jurors' comments about the conduct of the defence have been eliminated. Hence, overall, comments have been recorded on 48 Crown counsel and 49 defence counsel.

Assessing overall performance

5.8 Jurors' reactions to counsel and the way in which the particular case was presented varied considerably – both between jurors and for the same jurors during the course of the trial. Also, different juries reacted in different ways to similar situations. For example, some juries commented adversely on defence tactics which they saw as deliberate attempts to confuse them, while others simply accepted that such tactics were part of the defence job and, if done well, should be praised. Nevertheless, in most trials there was a reasonable level of agreement on the general performance of counsel and on the aspects of it that merited criticism or praise. Of the 97 counsel commented on, only 13 produced clear overall differences of opinion among jurors as to the general merits of their performance.

5.9 In general, jurors reacted more favourably to the Crown than to defence counsel. In over half the cases, Crown counsel was regarded as having performed to a good or excellent level. In contrast, defence counsel was regarded as excellent in only one-third of the cases. Jurors were also more likely to disagree about the defence than about the Crown.

5.10 How far jurors' views are an accurate assessment of counsel's performance is unknown. It may be that jurors' assessments depend partly on the merits of the case being presented, and that the defence case is more likely to be perceived by jurors as weak. It may also be that the way in which the criminal trial is organised, and the reactive position in which many defence counsel are inevitably placed, mean that defence counsel simply runs a much higher risk of being seen as ineffective. Consistent with this, jurors who responded negatively to the defence tended to describe counsel as disorganised, asking the wrong questions, reacting to the Crown case rather than developing a positive case of their own, failing to produce a coherent story, chasing irrelevancies or simply "nit-picking" at the prosecution evidence. Some jurors, albeit only a minority, recognised that the nature of defence counsel's job meant that it was often difficult to avoid being seen in this way. However, defence counsel's perceived inadequacies cannot be fully attributed to the nature of their job. As we will discuss below, defence counsel was also much more likely than the Crown to be

seen as uninterested, lacking commitment, and resigned to losing. In addition, the defence was more likely to be seen as lacking basic legal skills in the presentation of evidence and the cross-examination of witnesses. In other words, while the negative views which a number of jurors held about defence counsel may partly be due to features of the case or the defence situation (which may be beyond the control of counsel), this does not explain all of their reaction by any means.

Comparisons between counsel

5.11 In 16 cases, juries rated the performance of Crown and defence counsel as roughly equal. In half of these cases both counsel were regarded as performing at a high level, and in only a quarter of these cases were the reactions to both predominantly negative. On the other hand, in 17 cases the jury's predominant view was that one party was markedly superior to the other.

5.12 From our data it is impossible know how the "actual" performances of counsel compare, or to assess the impact of these performances, or of jurors' perceptions of them, on the final verdict. Nevertheless, the data do suggest a possible relationship between jurors' perceptions of counsel's performance and their verdict. Of the six cases where the defence was regarded as excellent and the Crown as predominantly poor, two resulted in complete acquittals, one produced a hung jury, one produced an acquittal on grounds of insanity, one produced an acquittal on all but one of a large number of charges, and one resulted in the accused being convicted on two-thirds of the charges. Conversely, of the 11 cases where the Crown was regarded as excellent and the defence as poor, eight resulted in convictions on all charges, one resulted in convictions on the majority of charges, one resulted in convictions on one major charge and two alternative counts, and one resulted in a hung jury. There were no complete acquittals.

Agreement between judge and jury

5.13 Judge and jury agreed in their general assessment of counsel in the majority of cases. However, the reasons given for the assessment were often dissimilar, with jurors being more likely to rate counsel on personal attributes and judges tending to focus more on technical issues. In addition, judges were much more likely than jurors to assess counsel's performance positively, although often the judge's comments suggested simply that counsel who was regarded by the jury negatively was either "competent" or had handled an impossible situation as best they could. The few cases in which the judge commented negatively on counsel but the jury reacted positively were cases in which the judge noted errors of judgement and preparation which went unnoticed by the jury. Where jurors based their assessments more on legal skills (or the lack thereof) than on presentation, the judge was more likely to express similar views.

SPECIFIC FEATURES OF COUNSEL'S PERFORMANCE

5.14 Juror assessments of the performance of counsel generally identified two interrelated sets of criteria. Firstly, a significant number of jurors reacted negatively to counsel whom they saw as presenting poorly in court. This covered such things as appearing to be hesitant, lacking energy or confidence, appearing to be uninterested or unconvinced by the case they were endeavouring to present,

failing to establish eye contact, treating the jury like schoolchildren, or being glib, smart or arrogant. Defence counsel were significantly more likely than prosecutors to be criticised by jurors as lacking in presentational skills.

5.15 Secondly, jurors often criticised counsel for what they perceived to be a lack of basic legal skills. Lawyers were described as disorganised and unprepared, confused and/or confusing, asking repetitive and irrelevant questions, not asking the right questions, failing to identify and address the basic issues, and generally failing to present a coherent and convincing case. In 17 of the cases in our sample, a significant number of jurors commented adversely on the way in which counsel for one or both parties led evidence or cross-examined witnesses. As with matters of presentation, Crown counsel were generally more highly regarded in terms of such skills.

Style and presentation

5.16 Jurors responded positively to counsel who came across as committed to their case; presenting the case and examining witnesses in a vigorous and interesting style (often providing a modicum of drama); seeking to achieve a positive rapport with the jury; and being professional without losing their humanity.

Commitment

5.17 In a number of cases, counsel were seen as unconvinced of their client's innocence, simply going through the motions, resigned to or uncaring about the outcome of the case, or simply appearing to be detached or uninterested. Jurors sometimes identified counsel's apparent lack of interest in the case or in the client as being because it was "just another job" or was a legal aid case, or because they had other, more important, cases to do. Impressions of this sort were generally conveyed to the jury by a lacklustre examination of witnesses, failing to pay attention to proceedings, an apparent lack of preparation, or obvious time-wasting and irrelevancy. Crown counsel were less likely to be perceived in this way but were certainly not immune from it.

5.18 On the other hand, there were a number of cases in which the jury commented favourably on counsel who seemed to be very committed to their case and/or to believe implicitly in the innocence of their client, even where the evidence was strongly against them.

The conduct of the case

5.19 Overall, jurors found the cases that they were involved in very interesting and intriguing. They also tended to find that the byplay between lawyers in the courtroom added interest. As long as counsel were not seen as "badgering" witnesses, vigorous examination, passion and the odd dramatic flourish or a touch of flamboyance kept the jurors' attention engaged and were positive points in favour of the lawyer concerned. Conversely, in a significant number of cases jurors commented strongly on the boredom engendered by counsel. While this was often linked with what they saw as a lack of legal skill, it was also seen as a matter of presentation – lengthy, monotonous and sometimes inaudible addresses, the use of inappropriate and unduly complicated language, a ponderous or largely static mode of delivery, and excessive reliance on notes.

Achieving rapport with the jury

5.20 Jurors also commented on the overall attitude displayed by counsel and the extent to which counsel was able to establish a rapport with them. Thus counsel's performance was to some extent assessed in terms of their success in drawing the jury into the proceedings, whether they "talked down" to or patronised the jury and/or witnesses, and whether they came across as trustworthy, believable people. Establishing eye contact, avoiding "lecturing", not appearing smart or smug, and being courteous to both witnesses and the jury were all part of achieving such a rapport.

Professionalism

5.21 Jurors generally expected counsel to behave in a professional manner. Thus those who engaged in obvious ploys in an attempt to win the sympathy of the jury, or who were seen to be relying too much on emotion or "unprofessional" attacks on witnesses, tended to attract a negative response.

5.22 One attribute of professionalism which was commented on by a number of jurors was fairness. Crown counsel in particular were described as fair and impartial in a number of cases – both in the Crown opening and in the examination of witnesses. On the other hand, although most jurors saw aggressive cross-examination as a legitimate part of the trial, and often clearly enjoyed the drama of it, in a number of cases it was seen as having degenerated into "badgering". While in most cases this was seen as an example of poor cross-examination technique, in a few cases jurors regarded it as essentially unfair and unprofessional. This was more likely to happen where the witness was young or otherwise perceived as vulnerable.

Legal skills – putting the case and examining witnesses

5.23 Jurors' assessments of counsel's legal skills were often at least partly conditioned by their assessment of the strength of the case being presented. However, the weakness of the case was rarely the whole story. Counsel who the jury recognised had little to go on could still be seen as skilful and effective and getting the most out of what the case had to offer.

5.24 In most cases, jurors assessed counsel's skill in terms of two major variables: the clarity with which the case was presented and the witnesses examined; and the extent to which counsel presented or extracted from witnesses what jurors thought was the "full story". Jurors tended to react more positively to Crown counsel on both these elements.

Confusion, irrelevance and lack of organisation

5.25 In 20 of the 48 cases, jurors described at least one of the parties as confusing or poorly organised or as pursuing irrelevant or peripheral lines of questioning. In a lot of cases, the confusion felt by the jury was based on the apparent lack of a clear storyline or logical sequence in the evidence. Although Crown counsel, by virtue of opening the case, had a natural advantage here, they were by no means immune from such criticisms.

5.26 Although jurors sometimes recognised that confusion and irrelevance were not counsel's fault – and a few even saw them as a valid tactical ploy – this was rare. In most cases, jurors attributed counsel's failure to present a clear, logical and concise case to inexperience, lack of basic skills and preparation, or a lack of interest. While in many of these cases the judge described counsel's performance as competent and the questions asked as valid, or the best possible in the circumstances, in three cases the judge also commented on the confusing and irrelevant nature of counsel's performance. Although in a number of cases the jury commented appreciatively on the way in which the judge intervened to clarify confusing questions, this only occurred in a small number of cases. In general judges were reluctant to intervene. Indeed in one case, the judge commented strongly to our researcher on the emotive nature and lack of relevance of aspects of the Crown evidence but took no action to control it.

5.27 It is likely that in a number of cases the verdict was influenced at least in part by the perceived failure of counsel to clearly identify and address central issues in the case, and to set out their argument in a clear and logical way. In some cases this seems to have been part of a deliberate defence strategy. Even where the verdict was not ultimately conditioned by confusions introduced during the trial, the difficulties experienced by the jury were likely to have unduly prolonged the deliberation process and certainly made the whole experience more stressful for individual jurors.

5.28 This raises three questions:

- Is the deliberate creation of confusion, as a device for obscuring the "real" issues in the case and distracting attention from the Crown case, a legitimate part of defence counsel's function? If not, how should it be controlled?
- More generally, should judges intervene more frequently than they do to establish the relevance of particular lines of questioning, clarify any confusion or ambiguity in questioning, and ensure that evidence is presented in as comprehensible a form as possible?
- To what extent should jurors themselves be encouraged to intervene and ask questions to clarify confusing evidence and establish its relevance? (See para 4.24.)

Extracting the evidence

5.29 Although a few jurors commented approvingly on counsel who asked questions simply designed to extract the facts that they (counsel) wanted extracted, jurors in 29 of the 48 cases criticised one or both counsel for not presenting the "full story". As with other aspects of their performance, defence counsel were most likely to be criticised in this regard. While some jurors accepted that there could be good reasons why the full story could not emerge, most of those who commented attributed it to the fact that counsel was unskilled in examining witnesses, badly prepared, disorganised, or lacking in experience.

5.30 As discussed in more detail below (para 6.10ff), some jurors who felt they had been denied the full story tended to fill the gaps with speculation. Others wasted considerable time and energy arguing about the significance of the perceived gaps. In some cases, the story that the jury wanted fleshed out was undoubtedly

largely irrelevant. In others, an opportunity for the jury to ask questions may well have been beneficial.

THE PERCEIVED IMPACT OF COUNSEL'S PERFORMANCE

5.31 The data noted above (para 5.12) and the variety and strength of views expressed by jurors certainly suggest that, for many of them, counsel's performance is likely to have had at least some impact on decision-making. Not surprisingly, however, when asked specifically about the impact of counsel on their thinking, most jurors denied any major influence, referring instead simply to the general strength of the case presented, to specific pieces of evidence, or to the fact that counsel "made them think" or "raised a doubt".

5.32 Nevertheless, in 14 cases a significant proportion of the jurors indicated that one or both counsel had an important impact on their thinking, over and above the impact of the evidence they called in the case. Sometimes a good or bad performance by counsel simply confirmed their views of the merits of the case. However, in five cases one or more jurors drew clear distinctions between counsel and indicated that they saw this as impacting significantly on their view of the case. Where this happened, their comments tended to stress the importance of both presentation and basic forensic skills.

6
The decision-making process of the jury

THE STRUCTURING OF DELIBERATIONS

6.1 PREVIOUS RESEARCH ON JURY DECISION-MAKING has postulated two basic forms of deliberations:

- *evidence-driven*, which begins by identifying and discussing the evidence and the issues in the case before any vote is taken; and
- *poll-driven* or *verdict-driven,* which begins by taking a poll and then focuses on eliminating the differences of opinion amongst jurors which emerge from that poll.

It has been suggested that evidence-driven deliberations promote more effective decision-making, since they are likely to be less divisive, to keep jurors working together and to produce more thoughtful discussion.

6.2 With the exception of one trial where it was impossible to determine the sequence of events, jurors' deliberations fell into three broad categories:

- In 13 trials, the jury began their deliberations by taking an immediate formal or informal poll.
- In a further 13 trials, the jury began with a brief and fairly cursory discussion of the issues in the case or the applicable law, followed rapidly by a poll.
- In the remaining 21 cases, the jury had a relatively full discussion of the evidence before taking a vote.

6.3 It was very difficult to determine from the interviews how many polls were taken by each jury. In 12 trials, the researchers were simply unable to determine even the approximate number of polls taken. For the remainder, about 40 per cent took only one or two polls. At the other extreme, over 25 per cent involved six or more polls, and in a few trials involving a large number of counts, jurors reported between 40 and 70 polls.

6.4 In the vast majority of cases, votes were taken by a show of hands or on the voices. In a few of these cases, one or more jurors suggested that the vote should be taken by secret ballot, but the rest of the jury rejected the idea. However, in four cases the jury proceeded by way of secret ballot, believing either that jurors who had declared their position publicly at the outset might be reluctant to alter their view or that dissenting jurors might otherwise be put under too much pressure. In one of these cases, the consequence was that a juror never acknowledged to the group at any stage that she was the dissenting juror, did not articulate to the others the basis for her concern, and ended up agreeing to a verdict which was questionable on the evidence.

6.5 Juries which took initial polls often worked tolerably well, but there were two problems associated with them. First, at least some of the juries took early polls

because they had little idea how to go about their deliberations or where to begin. The poll was a substitute for a structured and organised approach to the issues, thus running the risk of entrenching the initial division of opinion within the jury before the facts were clear in everyone's minds and the law fully understood. Secondly, an initial poll, by focusing on the difference of opinion within the jury, often dictated subsequent procedure, which revolved around getting minority jurors to specify the issues which concerned them, so that they could be persuaded to change their minds. Thus deliberations could become a process of attrition rather than a structured assessment of the evidence in the light of the legal elements of the offence.

6.6 Nevertheless, the description of juries which take initial polls as "poll-driven" and those which discuss the evidence first as "evidence-driven" is based on an overly simplistic and false dichotomy. Many juries which took an initial poll did not let themselves be dictated to by that poll and methodically applied the law to the available evidence. In contrast, some juries which did not take an initial poll were in fact disorganised, inefficient and essentially lacking in focus or direction.

6.7 The most important factor in determining the effectiveness of jury decision-making (assessed by reference to both juror perceptions of the way in which they performed and the extent to which their discussions focused on the salient issues and reached a justifiable verdict) was not how they started but rather the extent to which they adopted a systematic structure for assessing the evidence and applying the law. At least 14 juries can be regarded as highly successful in these terms. They used a variety of methods:

- Some based their discussions on their notes of the judge's summing-up on the law, identifying the key legal elements and working through them methodically by reference to the evidence to satisfy themselves that all elements of the offence had been proved.
- In two cases where the judge had provided a written list of questions, they used this to structure discussions and went through the questions in sequence.
- In one case, the jury used the judge's summing up to construct a flowchart of the law on the whiteboard and worked through the diagram, making decisions on each question until they reached their verdict. They also used a summary of the evidence which one juror had written out before the deliberations commenced.
- Other juries structured their deliberations more around the evidence than the law, focusing on the issues in dispute and identifying where the differences in evidence between one witness and another lay. This method also worked well.

6.8 At least six juries systematically discussed the evidence and attempted to identify key issues while the trial was in progress. While this method carries a danger of prejudgment, it is arguable that such a danger only arose where the jury collectively attempted to form a view of the case as a whole while the trial was in progress. Discussions involving just the identification and summation of key pieces of evidence and an initial assessment of the credibility of that evidence did not in themselves lead to prejudgment, and they made the subsequent deliberations much more efficient and more focused.

6.9 At the other extreme, there were a number of trials where deliberations were unstructured, disorganised and inadequately facilitated. As a result, the jury often

floundered: they neither focused on the legal elements of the offence in a systematic fashion nor methodically worked through the evidential issues in dispute.

THE EXTENT TO WHICH JURIES REMAINED FOCUSED ON THE ISSUES

6.10 During most deliberations, individual jurors occasionally mentioned evidence or speculated about possibilities which were of marginal relevance to the key question to be decided. For example, they speculated about why the accused pleaded guilty to lesser charges but not guilty to more serious ones, assuming that this was an indication of guilt; they speculated about the families of both accused and victims; and they made assumptions about the accused's criminal record.

6.11 In most cases, these speculations did not significantly affect the length of deliberation time, and the jury soon returned to the real issues. In a few cases, however, the jury got sidetracked onto irrelevant or tangential issues in a more profound way, and as a result experienced difficulties in focusing on the main issues in the trial and wasted significant amounts of time debating irrelevant issues. In a couple of cases, this led to a perverse verdict or hung jury.

SPECULATION AND USE OF INFORMATION ABOUT PREVIOUS CONVICTIONS

6.12 In 17 of the 48 trials, jurors were actually told whether or not the accused had previous convictions. In seven of these trials, they learned from defence evidence that the accused had no criminal record, but in the other 10, they were told both that the accused did have previous convictions and the nature of those convictions.

6.13 In the remaining 31 trials, one or more individual jurors speculated about whether or not the accused had a criminal record in almost every trial. In a number of cases, their speculations were based upon factors which were indicative of a prior record or previous involvement with the police. In other cases, however, the assumptions which jurors made were much more dubious, and were based on such things as demeanour, lifestyle, marital status and ethnicity.

6.14 In 18 of the 31 trials in which information about previous record was not provided, individual jurors brought their speculations to the attention of other jurors during deliberations. However, jurors typically said that when assumptions about previous record were raised, the jury as a whole noted that they were not really relevant and as a result they did not attach any weight to them or derive any conclusions from them; to the extent to which they were mentioned, they were in the nature of idle speculation.

6.15 By the same token, well over half of those who did not receive information about the accused's previous criminal record said that they would not have wanted it. The reasons given for this view were that it would have been unfair; that the accused was not being tried on his or her previous convictions; that it would have clouded their view of the evidence; and that such information would have prejudiced their decision.

6.16 Some support for the proposition that jurors genuinely thought that information about previous convictions was usually unfair, and that they made a conscious

effort to put it to one side, can be found in their comments in the 10 cases in which they were informed of the accused's previous convictions. In only three of these cases did any of the jurors admit to attaching significant weight to it in reaching their verdict, and even then, only a minority of jurors in each trial did so. In five other cases, the jurors were adamant that the information was simply irrelevant to their decision. More significantly, in the remaining two, the introduction of evidence about the accused's criminal record seems to have been counter-productive and alienated the jury, because it was seen as unfair or a sign of prosecution desperation.

THE CHARACTERISTICS OF THE FOREPERSON

6.17 Of the 39 forepersons interviewed, 28 per cent had served on a jury, a further 15 per cent had been summoned, and five per cent had been called but challenged. Only two of the forepersons had had previous contact with the criminal justice system as an accused, but a further 18 (38 per cent) had had contact with the criminal justice system in some other capacity.

6.18 We recorded the gender of all forepersons in the sample and we also obtained other socio-demographic information in respect of the forepersons whom we interviewed. We were thus able to compare the characteristics of forepersons with those of the sample as a whole. Of course, we only interviewed a little over half of the jurors in the trials we covered, and we cannot be certain that they mirrored the characteristics of the jurors who for one reason or another could not be interviewed. However, as we have noted (para 1.8), there was no significant difference between the characteristics of jurors in trials where only a small proportion were interviewed and those where the vast majority were interviewed. We have no reason to believe, therefore, that the interviewed jurors were in any way unrepresentative of the total population of jurors in our sample of trials.

6.19 In terms of gender, 59 per cent of interviewed jurors were women, compared with only 42 per cent of forepersons, suggesting that men were more likely to put themselves forward or be selected as forepersons.

6.20 The proportions of Mäori, Pacific Islanders and Europeans who acted as foreperson were not substantially different from the proportions in the sample as a whole, so that there was no evidence of ethnic bias in foreperson selection.

6.21 The vast majority of forepersons were aged 30–59. There was a slight tendency for those aged 20–29 to be under-represented, but otherwise the proportions in each age group were as expected.

6.22 The majority (32 people – 82 per cent) were employed , five were self-employed, one was unemployed, and two were beneficiaries. There was also a fairly even split between those with and without tertiary education. Again, in both of these respects forepersons roughly mirrored the characteristics of the sample as a whole.

THE ROLE OF THE FOREPERSON

6.23 Forepersons varied considerably in the way they performed their role, with some proving to be much more successful than others in guiding and facilitating the deliberations. Their success seemed to have a significant impact upon not only the coherence but also the length of the deliberations.

6.24 In essence, success in the role of foreperson rested on the extent to which the foreperson was able to bring some coherent structure to the discussions: some

kept the discussion focused and orderly and performed their role with diligence and skill; others, while making an attempt to "chair" the meeting, did not have the skills to direct the deliberations and saw themselves as simply "one of the group". In the latter cases, other jurors often took over the role of the foreperson by guiding and structuring discussion.

Forepersons with strong facilitation and organisational skills

6.25 Where the foreperson structured deliberations well, there was general satisfaction with their performance. This was all the foreperson had to do in relatively straightforward cases, but in a few cases their leadership skills were tested by obstructive jurors or complex evidence. In these cases, jurors generally felt that the foreperson had led the group well when the evidence was discussed and applied to the law in a focused, orderly and segmented fashion; when everyone was given an opportunity to speak; and when breaks were taken if discussion got heated. Use of the whiteboard and firm insistence on ground rules were also appreciated.

6.26 Forepersons who attempted to structure and guide the discussions were more likely to be successful in their endeavour when they had a likeable personality, leading other jurors to feel that they were "easy to talk to", "had an open style", "maintained a sense of humour", did not antagonise any difficult jury members, and kept discussions "cordial and friendly".

6.27 In structuring the deliberations, forepersons had to strike the right balance between being too directive and too "low-key". In a number of cases, the comments of other jurors suggest that forepersons did not get the balance right and, in their attempts to structure the deliberations, became a little too "dictatorial" – being overtly directive, dominating the discussion too much, or disregarding the wishes of other jurors. This was a particular problem for at least some jurors in four cases in our study, two of which deliberated for two or more days. The problem manifested itself in three ways:

- In two cases, the foreperson was reluctant to approach the judge with questions, even when other members of the jury requested that he or she do so.
- In one case, which was complex and involved over three and a half weeks of evidence, the foreperson, who was described by one of the jurors as "power crazy", attempted to exercise control but in a way which clearly seems to have alienated other jurors, so that her attempts to keep discussions on track failed.
- There was one case in which the foreperson, with the collusion of other jurors, deliberately manipulated events to bring pressure to bear on a dissenting juror. She made it very clear to the dissenting juror that she was not prepared to have a hung jury. She refused to permit a number of issues which the dissenting juror raised to be explored, believing that it might prevent the jury from reaching a verdict, and she adopted a number of other overtly manipulative strategies to get the juror to change her vote.

Forepersons who were "just one of the group"

6.28 When forepersons saw themselves as chairing the meeting and acting as a mediator, but otherwise being "just one of the group", they were not generally effective in their role. Some of these forepersons had the necessary "people" skills for the job, giving everyone a chance to have their say and allowing only

one person to speak at a time. But they lacked leadership skills, and their failure to structure the order in which points were raised, and to organise the way in which evidence was discussed, led to deliberations which were disorganised, lacking direction and, in the perception of other jurors, even "chaotic".

6.29 Where forepersons failed to take responsibility for structuring deliberations, other jurors could become quite frustrated, and this was exacerbated where forepersons were under the illusion that they had performed their role satisfactorily. As with the problems caused when the foreperson became too dominant, disappointment with the foreperson's lack of leadership could result from differing expectations about the function of a foreperson. For example, in one case the foreperson saw herself as a mediator, bringing the jury back on track and ensuring that quiet jurors had their say. By contrast, other jurors saw her as ineffective at controlling discussions, which became "chaotic".

6.30 In these sorts of cases, unless another juror took over, other jurors often became quickly frustrated; the deliberations tended to degenerate into a "free for all" and to go off on tangents or around in circles; they were often unnecessarily prolonged; and, although they generally ended up with a supportable verdict, they did so in a decidedly haphazard and unsatisfactory way.

Other jurors step into the breach

6.31 In a number of cases, the problems posed by ineffective forepersons were overcome, or at least ameliorated, by other jurors who stepped in to assist or displace them. This, however, did not always introduce the necessary structure into the process. Success depended upon both the attributes of the intervening juror and the extent to which other jurors accepted his or her de facto leadership role. It was also likely to be dependent upon the attitudes of the forepersons themselves. In five cases, forepersons seemed to be under the illusion that they had performed their role satisfactorily, leading them to the conclusion that they were in no real need of assistance from other jurors. If other jurors attempted to take over in such cases, confusion and conflicting and contradictory attempts at control were likely to ensue.

6.32 Even if forepersons otherwise had a degree of effectiveness, this could be severely blunted if they found themselves in a minority during deliberations. Where the foreperson was placed in this position, it was difficult to direct the flow of deliberations, because the jury was likely to be firmly focused on why there was dissenting opinion and how they could change that. This put any dissenting juror in a vulnerable position, and was at odds with the facilitation and leadership aspects of the foreperson's role.

The socio-demographic characteristics of successful forepersons

6.33 Significantly, the skills possessed by successful forepersons did not seem to depend on any prior experience as a juror: of the ten forepersons who seemed to be the most effective, only one had previously served on a jury, whereas two of the least effective forepersons had done so.

6.34 We also examined the characteristics of successful forepersons by comparing them on a range of socio-demographic factors with the 16 forepersons who clearly struggled in the role and failed to keep the jury properly focused on the task.

This comparison produced the following findings:

- There was a marked gender difference. Of the ten successful forepersons, eight were male and two were female. In contrast, of the 16 unsuccessful forepersons, six were male and ten were female.
- There were no age differences between successful and unsuccessful forepersons.
- It seems unlikely that the skills of successful forepersons were derived from direct occupational experience. More generally, however, there was a discernible difference in the occupations of each group. Of the ten successful forepersons, nine were in professional or other skilled occupations. In contrast, of the 16 unsuccessful forepersons, three were unemployed or beneficiaries and a further five were in unskilled occupations.
- By the same token, there were differences in the educational qualifications of the two groups: whereas half of the successful group had a university degree, only 20 per cent of the unsuccessful group did so.
- There were no clear ethnic differences.

THE EMERGENCE OF DOMINANT JURORS

6.35 There were inevitably different levels of juror participation in all cases. Generally this could be attributed to the natural blend of different personalities and did not involve undue dominance. In a few cases, however, jurors did dominate to the point where others felt that the eventual verdict was affected. Juror dominance could result in pressure to make a decision (see chapter 8) and in intimidation. Jurors in six cases reported feeling intimidated, and more generally dominant jurors who significantly affected the deliberation process were evident in 20 cases.

6.36 Undue juror dominance generally arose when the foreperson did not properly structure deliberations. Where deliberations were allowed to go ahead in a random and unstructured fashion, juror dominance was uncontrolled and jurors who were naturally reserved could be silenced. Indeed, the vacuum created by an ineffective foreperson could easily be filled by strong personalities who took control of and dominated, rather than facilitated, the deliberation process.

6.37 In four cases, it appears that deliberately intimidatory jurors were given a fairly free rein, refusing to discuss things rationally, making adverse comments about other people's opinions, insulting them personally, and monopolising the process. This caused other jurors to feel intimidated, uncomfortable about expressing their views, and under considerable pressure to reach a decision consistent with the view of the dominant jurors, who were usually in the majority. In other cases, intimidation was not specifically mentioned by jurors but was implied through their responses to some of our other questions.

6.38 Dominant jurors often affected the eventual verdict, because they were the ones who put their point across most forcefully. Where the dominance was at a fairly low level, some jurors felt that there were positive results, because "the more dominant jurors were able to look at things from another angle and explain that to the other jurors", and they often brought things back on track when the jury went off on a tangent.

6.39 However, in a couple of cases juror dominance went much further; they totally overpowered the quieter ones to the point that their decision "was made for them" by "four or five people in the room". Moreover, in some other cases, as we have noted, while dominant jurors did not completely overpower the rest of

the jury, they were nevertheless given a fairly free rein and steered discussions in the direction they pleased. The skills required to control a determined and vocal juror were simply not possessed by most forepersons, and they were given no advice from the court on strategies for dealing with such situations.

THE NEED FOR ADVICE FROM THE COURT

6.40 Our study illustrates that many jurors who end up as forepersons do not arrive at court equipped with the skills required to facilitate, focus and structure discussion, particularly in cases where there is complex or emotive evidence or a difficult juror. Indeed, many of the jurors who volunteered to be the foreperson had little idea about what was expected of them or how to structure deliberations or deal with personality problems.

6.41 The jury should be given more advice about how to structure their decision-making. In particular, a number of jurors said that they would have benefited from guidance on what to do when deliberations became unstructured and heated.

6.42 Similarly, there is a need for greater guidance on the role of foreperson. This should be given before the foreperson is selected, to minimise the chance of choosing someone who lacks the skills for the job. At the moment, the decision is largely random (see para 2.52). If juries were given longer to make their decision and more information about how to go about it, it would give them a chance to assess who they thought was most suited to the job, and reduce later difficulties and tensions caused by differing views as to the role of the foreperson.

6.43 Once the foreperson has been chosen, the court should ensure that they are given support in performing their role and access to information about facilitation techniques, including advice on how to structure discussion if they themselves are in the minority. They should also be given advice about the amount of pressure which can appropriately be exerted on minority jurors for the sake of reaching agreement.

6.44 Even where the foreperson did have good knowledge of group decision-making and facilitation techniques, they would have appreciated validation of their approach from the court, and general advice about the role of the foreperson would also inform other jury members of what to expect.

METHODS OF RESOLVING DISAGREEMENT

6.45 The juries in our study adopted a number of strategies in order to reach agreement on specific issues and on their eventual verdict. More than one of these methods was used in the vast majority of cases.

General discussion

6.46 One of the most common strategies for resolving disagreement was to carry on discussing the issues in a general way. In some cases, new angles on the evidence emerged from continued discussion which served to convince jurors to take a different stance. However, this relied on jurors staying calm and the foreperson facilitating well. Because many juries featured neither of these conditions, the common result of prolonged discussion was instead that juries either went around

in circles or resolved matters through grinding dissenting jurors down or cajoling them to accept the majority view in a battle of wills.

Focusing on minority jurors

6.47 Another common approach was to move from general discussion to a focus on the minority jurors, asking them to articulate why they did not agree with the majority. Where a dissenting juror had overlooked evidence, their presentation of their view sometimes prompted the majority to outline more clearly the basis for their own position, which could prove to be an effective way of resolving disagreement. Sometimes, too, the dissenting juror's statement of their position exposed the fact that they had no rational basis for their view. More often, however, there was a general belief that "if 11 people think one thing then they must be right", and the focus was on changing the minds of dissenting jurors rather than revisiting contentious aspects of the evidence with an open mind. Moreover, the focus on dissenting jurors could lead the majority to adopt dubious practices: one jury were so determined to reach a verdict that they knowingly presented incorrect information to the last dissenting juror, while another prevented the dissenting juror from having a break in order to get her to agree with the majority.

Compromising

6.48 Where juries reached an impasse but were determined to come to a verdict of some kind, compromise was a common method of appeasing both the minority and majority. Indeed, as we will discuss more fully in chapter 9, compromise verdicts occurred in five trials, with jurors indulging in "horse-trading" to produce guilty verdicts on some charges and not guilty verdicts on other charges.

Eliminating irrelevancies

6.49 In six cases where disagreement resulted from the introduction of irrelevant considerations into deliberations, the jury attempted to bring the discussion back to relevant evidence.

Asking questions, having evidence read back, and reviewing exhibits

6.50 In 31 of the 48 cases, the jury approached the judge to ask a question, replay a video or have evidence read back to them. This was almost always useful in clarifying issues and dispelling or confirming doubt. A similar result was achieved by referring to the notes jurors had taken and by refreshing their memories through a review of the exhibits they had taken into the jury room with them.

Approaching evidence in a new way

6.51 As well as reviewing evidence through the judge or by way of their own notes, jurors also attempted to look at the evidence they had from a new angle or use a different structure for their discussions. In some cases this worked well, because a different approach to a question or a piece of evidence relieved the tension and allowed the jurors to see things from a new perspective. Using the whiteboard

to assess the issues and the legal requirements of charges, rather than using open discussion, served to clarify thoughts, refresh memories and bring some structure to deliberations.

Taking a break

6.52 Another method of relieving tension was to take a break or leave a contentious issue until people had calmed down enough to revisit it. Taking a short break worked well, but leaving difficult issues until last could cause problems.

THE VALUE OF DELIBERATIONS

6.53 Seventy jurors (22 per cent) in 26 (54 per cent) cases changed their mind during deliberations from their initial view, and a further 33 (10.5 per cent) in 16 (33 per cent) cases reached a decision after being undecided. For most other jurors, confidence was gained in the decision they had already arrived at through confirmation of their view by other members of the jury.

6.54 The value of deliberations varied from juror to juror, depending in part on whether they had changed their minds during deliberations and how difficult those deliberations had been.

6.55 A small number of jurors found deliberations unhelpful. They saw the deliberation process to be a waste of time, which sometimes added to rather than resolved confusion. Some of these jurors were convinced of the validity of their initial view of the evidence and simply saw the deliberations as a means of expressing their opinion and persuading other jurors to accept their own position. In two cases, however, deliberations were not seen to be helpful because they increased the jurors' confusion and produced a hung jury.

6.56 The vast majority of jurors, however, found deliberations helpful in enabling them to share notes, clarify evidence, hear other perspectives on the case, and have their own views discussed and confirmed or challenged. Over half of these jurors either changed their minds completely during deliberations or made up their minds after initially being undecided. For the rest, while the deliberations did not really shape their view in any way, the process was still found to be useful as a means of confirming or validating their own sometimes tentative initial view. Indeed, even amongst jurors who changed their minds during the course of deliberations, the fact that 11 other people had reached the same decision provided substantial reassurance and validation, and was thus a very important function of deliberations. It increased their confidence in the verdict, and offered a chance for them to share with others the responsibility of making a decision about someone else's life.

6.57 In most cases, therefore, deliberations were a highly significant part of the process. This highlights the importance of providing juries with appropriate guidance on strategies for good decision-making; the deliberation process has a major impact, and it is important that juries get assistance to enable them to do it effectively and efficiently.

7
Understanding and applying the law and the judge's directions

7.1 JURORS GENERALLY RECEIVE AN OUTLINE OF THE LAW during the Crown opening at the commencement of the trial. However, detailed instruction on the law and how it relates to the facts in the case is left to the judge's summing-up at the conclusion of the trial before the jury retires to consider its verdict.

7.2 Usually, the judge begins by canvassing a number of general issues relevant to the jury's deliberations: the role of the jury as fact-finder; the need to reach a verdict solely on the evidence before the Court; the need to reach a decision free from prejudice or sympathy; the value in assessing credibility from the demeanour, appearance and manner of a witness; the drawing of inferences; the burden and standard of proof; and the weight to be placed upon lies or contradictions in the evidence of a witness. The judge then outlines the legal elements of each offence with which the accused is charged and any defences raised by him or her, and, finally, summarises the evidence presented by prosecution and defence.

JURORS' VIEWS OF THE JUDGE'S SUMMING-UP

Helpfulness and clarity

7.3 Respondents were asked how helpful and clear they found the judge's summing-up. Responses were overwhelmingly positive. Over 85 per cent found it clear, and over 80 per cent said it was helpful.

7.4 A few of those who said that they found the judge's instructions helpful or clear nevertheless expressed some criticism of aspects of them. Even when those views are included, however, only a very small minority of jurors were overtly critical. These criticisms fell into six categories :

- A small number simply found the instructions too detailed or too technical and therefore too confusing for them to understand or absorb.
- A few thought that their problems in this regard were exacerbated by a lack of structure in the judge's instructions, although there appeared to be real substance to this criticism in only two cases. In other cases (which were few), the view that the judge's summing-up was poorly organised was confined to one or two jurors, and likely to have resulted from the individual juror's inability to concentrate on or follow the judge's oral presentation. In these cases, there was nothing in the comments of other jurors or in our own observations of the instructions to suggest that the instructions were defective.
- Quite a number of jurors criticised the presentation of the summing-up, saying that it was boring, delivered in a monotonous voice, and conducive to sleep.

This may have been because some judges appeared to be reading their summing-up, in contrast with others who attempted to deliver the summing-up in a more extempore fashion.

- A couple of jurors said that they wanted more direction on decision-making or the judge to provide them with a framework within which they could make a decision.
- Many jurors wanted, and several expected, more direction from the judge on the appropriate verdict, and expressed disappointment that this direction was not given.
- Finally, two jurors suggested that the judge's summary of the facts and the prosecution and defence cases was unnecessary and repetitive.

7.5 Overall, jurors were complimentary of the judge's instructions. To the extent that there were criticisms, they generally derived either from the limitations of the individual juror or from the fact that the instructions were delivered in oral form without written or visual aids.

The length of the summing-up

7.6 The length of the judge's summing-up varied enormously. At one extreme, it lasted for 20 minutes or less in four per cent of trials; at the other extreme, it lasted for more than one hour in over 20 per cent of trials, with half of these being more than 90 minutes.

7.7 Reactions to the length of summing-up were more mixed than reactions to its content. As many as a third of jurors thought the summing-up was too long. But their perceptions in this respect were not closely related to the actual length of the summing-up. For example, all of those jurors interviewed in the trial involving a summing-up of two hours 35 minutes found it to be about right, while half of the jurors interviewed in trials involving summings-up of 40 minutes or less regarded them as too long.

7.8 Clearly trials involving multiple or alternative counts and multiple defendants, or involving a number of alternative defences, require a more lengthy explanation from the judge. Jurors recognised this, with one or two jurors specifically stating that, while the summing-up was long, they recognised that it was necessary. Undoubtedly, therefore, jurors' reactions to the length of the summing-up were influenced by the nature of the case. In addition, they probably varied according to the aptitude of the individual juror, their ability to concentrate upon oral information, and the judge's style of delivery.

CONSCIENTIOUSNESS IN APPLYING THE LAW

7.9 Inevitably, some jurors sometimes allowed emotions of sympathy or prejudice to influence their reaction to the evidence and their decision-making. In 19 of the 48 trials, these emotions were brought to the deliberation process, with one or more jurors reporting that either they or other jurors expressed feelings or views involving sympathy or prejudice. Sometimes jurors found themselves reacting adversely to the abhorrent nature of the alleged conduct or the perceived character of the accused which led to prejudgment. More often, jurors were swayed by sympathy for the accused or his or her family or concern about the impact of a guilty verdict upon the accused.

7.10 However, these feelings only infrequently influenced or dictated the decision-making process of the jury or their eventual verdict. Most jurors were ultimately persuaded or cajoled by other jurors to accept the majority approach, so that their individual views were overridden by the collective process of jury decision-making. There were only six cases in which feelings of sympathy or prejudice seem to have affected the outcome of the trial in some way: three resulted in a hung jury; one in a perverse verdict; and two in a verdict which was justifiable on the evidence but arrived at by dubious reasoning.

7.11 Overall, therefore, jury decision-making was characterised by a very high level of conscientiousness in following the instructions the jurors were given: they endeavoured to understand the law and to apply it to the facts as fairly and as impartially as they could, often methodically working through the elements of the law on the basis of the judge's instructions in order to do so. There was thus little evidence that juries were concerned to temper the rigidities of the law by applying their own "common sense" or by bringing to bear their own brand of justice; rather, they generally endeavoured to follow the judge's instructions even when this led them to a verdict which was against their "gut feeling". With very few exceptions, jurors took their role very seriously, were extremely concerned to ensure that they did the right thing, and as a result often found it stressful and worried about it afterwards.

VARIABLE UNDERSTANDING OF THE LAW

7.12 Despite the fact that jurors generally found the judge's instructions on the law clear and helpful, and conscientiously attempted to apply them, there were widespread misunderstandings about aspects of the law which persisted through to, and significantly influenced, jury deliberations. Indeed, there were only 13 of the 48 trials in which fairly fundamental misunderstandings of the law at the deliberation stage did not emerge.

The ingredients of the offence itself

7.13 In 19 trials, one or more jurors misunderstood significant aspects of the ingredients of the offence itself, although in two of these cases errors in the judge's summing-up contributed to the jury's problems. Some of these problems involved an inadequate understanding of the distinction between murder and manslaughter, the meaning of "wounding" and "supply", what was sufficient to amount to a "lawful excuse" or "lawful, sufficient and proper purpose", the difference between "fraud" and "forgery", the meaning of "failing to account" and so on. Occasionally, the problems were also exacerbated by a lack of clarity in the indictment.

The meaning of intent

7.14 In addition, there were five trials in which juries debated and struggled with the meaning of "intent". They were unsure about the difference between purpose and intent, and sometimes thought that intent implied premeditation. Occasionally they were also unclear about the time at which intent needed to be formed in order to satisfy the ingredients of the offence. Typically, too, the judge's summing-up failed to address this specific issue, as a result of which the jurors debated it and misunderstood what the law required them to decide.

Beyond reasonable doubt

7.15 Jurors were typically told on a number of occasions throughout the trial that the burden of proof was on the prosecution to prove all the ingredients of the offence "beyond reasonable doubt". The judge invariably included this in the summing-up. However, in conformity with appellate court direction, judges did little to elaborate on this or explain what it meant, assuming that "beyond reasonable doubt" was a well understood term which juries would apply in a common sense fashion.

7.16 However, many jurors said that they, and the jury as a whole, were uncertain what "beyond reasonable doubt" meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage certainty required for "beyond reasonable doubt", variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof.

7.17 It cannot be said, however, that this problem produced questionable or perverse verdicts. Individual jurors sometimes agreed to a verdict on the basis of a distorted perception of the standard which they were to apply (and thus made their decision on an incorrect basis), but there is little evidence to suggest that any perverse or questionable verdicts resulted from the application of an incorrect standard by the jury collectively.

On the balance of probabilities

7.18 In four cases where the accused was charged with possession of cannabis or cannabis oil for sale or supply, some members of the jury did not fully understand the implications of the fact that, when the amount of cannabis involved reached the threshold at which sale or supply was presumed, the burden of proof shifted to the accused to prove on the balance of probabilities that the cannabis was not possessed for that purpose. One juror did not know what the balance of probabilities meant; one thought that the standard of proof in relation to the accused was "beyond reasonable doubt"; and one simply indicated that the jury as a whole was a bit confused about the standard of proof. Another juror indicated that several members of the jury did not understand why the onus was reversed and thought it might be because the accused chose to testify.

The wording of the indictment

7.19 Juries were usually provided with copies of the indictment and took that into the jury room with them during deliberations. However, in three cases the wording of the indictment exposed potential difficulties.

7.20 The first difficulty arises when the indictment incorrectly records some detail, such as the time and date of the offence. Juries are not usually told that if they believe that the offence has been proved but that there is a mistake in the material particulars relating to it, they should report this to the judge before bringing in a verdict. As a result, they may not know to draw the perceived mistake to the attention of the judge and there is every possibility that juries sometimes acquit, or even convict, on the basis of a misapprehension about the significance of a perceived mistake.

7.21 Secondly, when the indictment specifies the means by which the offence has been committed, juries may be reluctant to convict on a particular count because

they reach the view that the offence was committed in a slightly different way. This suggests that the increasingly common practice, especially in sexual offence cases, of specifying in the indictment the means by which the offence was committed needs reconsideration. More importantly, it again points to the need for the jury to be advised that they should seek directions from the judge if they believe that there is a mistake.

7.22 Thirdly, where the indictment includes a specified sum of money in respect of a property offence, jurors are rarely told that they are at liberty to bring in a verdict for a lesser sum of money if they believe that the full quantum specified has not been proved. That is scarcely surprising, since it would enhance the potential for confusion and misunderstanding if given on a routine basis. However, it is certainly possible that juries sometimes fail to reach a verdict because of their ignorance of their ability to bring in a lesser verdict on an included charge. Again, this points to the desirability in appropriate cases of a general direction that the jury should report to the judge if it believes that the ingredients of the offence have been proved, but in different terms from those set out in the indictment.

Multiple and alternative charges

7.23 Where there were multiple charges, jurors in three trials were initially confused about what they were required to do. All of these uncertainties were resolved by seeking clarification from the judge, although in one of these cases one juror still remained confused after the trial about the basis upon which the jury had reached its decision.

7.24 In two cases, the jury were also uncertain about the effect of alternative counts. In one of the trials, some jurors were unsure whether they had to unanimously agree on a "not guilty" verdict on the first charge before they were entitled to consider the alternative count. In the second trial, the jury speculated about the meaning of the alternative count in the jury room and, instead of seeking clarification from the judge, decided for themselves what they thought it meant, which was that if the accused was found "guilty" on the first charge, he would automatically be found "guilty" on the alternative count as well.

The impact of misunderstandings about the law

7.25 Since misunderstandings about the law were fairly widespread, they did affect the way in which individual jurors, and sometimes the jury as a whole, approached the decision-making task; they undoubtedly prolonged deliberations and they sometimes led individual jurors to agree to a verdict on an erroneous basis. However, by and large, errors were addressed by the collective deliberations of the jury and did not influence the verdict of the majority of cases. Our assessment is that legal errors resulted in either hung juries or questionable verdicts in only four of the 48 trials, and in two of these, the questionable verdicts were acquittals in respect of only a proportion of a large number of counts.

IMPACT OF THE JUDGE'S SUMMARY OF THE FACTS

7.26 Jurors rarely mentioned the judge's summary of the evidence. Two specifically said that it repeated what they had heard already and was unnecessary, and a few others suggested that it was boring and they did not listen to it. For the most part, when jurors were questioned about the judge's summing-up, they

focused on the directions on the law. Equally, when they indicated how the jury had taken the judge's directions into account during deliberations, they referred to the law and the standard directions but did not mention the evidence. While it is not possible to conclude with confidence that juries were unaffected by the content of the judge's summing-up on the facts, this does nevertheless suggest that the judge's comments in this respect are of only minor importance and that juries are unlikely to be affected by nuances or minor omissions in those comments.

7.27 Overall, of the 312 jurors interviewed, only 92 (30 per cent) thought that the judge communicated his or her view of the appropriate verdict. In only four of the 48 trials did a majority of those interviewed agree that the judge favoured a particular verdict, and in only two of these trials was the judge's perceived preference overtly referred to or taken into account during deliberations.

7.28 To the extent that judges expressed opinions on the facts, those opinions appeared to have little or no impact on individual jurors' views of guilt or innocence. Of those who did believe that the judge communicated a view, it is clear that, with the exception of the four cases mentioned above, there was a strong correlation between their perception of the judge's view and their own initial view, but no correlation at all between their perception and the judge's actual view. In other words, jurors looked for support for their own position in the judge's comments, and sometimes found that support by reading into the judge's remarks interpretations which were not necessarily intended.

7.29 In summary, while it cannot be concluded from the data that the judge's summary of the evidence serves no purpose, it does assume rather less significance than is often imagined. Moreover, there are two dangers with such summaries which need to be borne in mind. The first is that jurors will sometimes – indeed, probably usually – search for signs of the judge's view and as a result misinterpret innocuous or routine comments as lending support to their own assessment of the case. The second is that, where a majority of the jury share the same perception of the judge's preference, they are likely to use this as a lever to persuade dissenting jurors, thus significantly increasing the pressure for them to agree on a verdict notwithstanding their personal view. It is therefore arguable that lengthy or detailed expositions of the evidence relied upon by prosecution and defence are best avoided.

UNDERSTANDING OF AND ADHERENCE TO OTHER STANDARD INSTRUCTIONS

7.30 In addition to their instructions on the law and summary of the evidence, judges provide a number of instructions about the way in which jurors are to approach the evidence. One general point about jurors' reactions to these instructions should be noted: at least some of them did not realise that particular directions were "standard"; they believed that at least some of them were being mentioned because they had special significance in the particular trial; and they therefore drew unwarranted conclusions which had the potential to influence the deliberation process and the outcome.

7.31 Because jurors were not asked specific questions about each of the standard directions, we are unable to say how common this sort of reaction was, or to what extent it impacted on individual and collective decision-making. However, our impression is that jurors commonly expected and looked for indications

from the judge as to his or her assessment of the evidence and view of the appropriate verdict. Given that, it is to be expected that some of the standard directions, given in all cases without regard to the characteristics of the individual case, will have undue weight attached to them.

Inferences

7.32 One of the standard directions which judges give is that juries, in determining the appropriate verdict, may draw inferences – that is, if they find certain facts proved, they may feel justified in drawing a logical inference about the existence of another fact, even though there is no direct proof of it. In the few cases where jurors did refer to the judge's instructions on inferences, they were inclined to read too much into them. They did not understand that they were standard directions and interpreted the comments as a hint from the judge as to the appropriate verdict. Much more frequently, however, jurors made no explicit reference to the instruction on inferences. This is scarcely surprising as the direction on inferences was usually provided in the abstract, without reference to the evidence in the particular case, and it is clear that a substantial number of jurors struggled to grasp the concept and to understand its implications in the particular case. Indeed, some simply did not know what the judge was talking about, or did not know how it related to the trial at all.

The direction on lies

7.33 Where the accused gives evidence, the judge often gives guidance to the jury about any adverse inferences they might draw from that evidence, and routinely does so when the accused contradicts earlier statements or is demonstrated to be telling lies. In particular, they are told that if they reject the evidence altogether, they should put it to one side and proceed as if the evidence has not been given; they should not automatically assume guilt, because the onus is still on the Crown to prove all the elements of the charge.

7.34 Unfortunately, jurors in all trials were not specifically asked whether they understood and applied this direction. However, the question was asked in two trials, and some jurors mentioned their reaction, without prompting, in a third. On the basis of these few responses, it can be very tentatively concluded that the instructions made little or no difference to the way in which jurors evaluated the evidence in the case. They were generally prepared to assess the credibility of witnesses, including the accused, in a pragmatic way, and where they believed that the accused was telling lies and that there was no satisfactory explanation for these lies, they not surprisingly attached considerable weight to this in reaching their verdict. It seems that the standard direction on lying was simply perceived to be counter-intuitive and was therefore disregarded. Juries did not automatically jump to the conclusion that the accused was guilty because he or she told lies to the police or in the witness box, but they found it impossible, and perhaps nonsensical, to proceed as if the evidence had not been given at all.

The implications of refusal by the accused to answer police questions or give evidence

7.35 Where an accused has refused to answer police questions during the investigation or at the time of arrest, judges routinely tell juries that accused persons have no obligation to answer police questions, that the fact that they have not done so

does not necessarily imply guilt, and that the onus is still on the prosecution to prove all the ingredients of the offence beyond reasonable doubt. Where the accused does not give evidence during the trial, a similar instruction is given. For the most part, jurors reported that they understood and absorbed these instructions and took them into account during the assessment of the evidence and the decision-making process.

7.36 In only eight of the 48 trials did the accused essentially refuse to answer police questions. In five of these cases, all of the jurors interviewed said that the refusal did not affect their own thinking about the case. In the other three trials, only four of the interviewed jurors in total said that the refusal made them think that the accused might be guilty; the rest said that they ignored it.

7.37 When jurors were asked about the impact of the failure of the accused to give evidence in court, a similar pattern emerged. There were only 20 trials of the 48 in which no accused gave evidence, and there were a further two in which one accused did not give evidence but others did. Of these 22 trials, virtually all of the jurors interviewed in 14 of them maintained that both individually and collectively they attached no weight to this. The majority of these jurors also recollected the judge's instruction that the accused was not obliged to give evidence and that the onus was still on the Crown to prove all the ingredients of the offence. Moreover, one or two of them said that they entirely agreed with this and that it was a fair approach. A number also said that the accused benefited from the fact that they did not give evidence, since they did not incriminate themselves, and some even suggested that this was a significant factor resulting in acquittal. In these 14 trials, therefore, it seems fairly clear that the jury as a whole did make a conscious effort to apply the judge's direction, although some of them would have taken such an approach anyway.

7.38 In the other eight trials, jurors' reactions to the failure to give evidence were more mixed. In two cases, half the jurors said that it affected their individual thinking to a limited degree. However, they all denied that it had any impact on their deliberations, saying that the failure to give evidence either was not mentioned at all or was mentioned in passing but not given any weight.

7.39 In contrast, in six cases the failure to give evidence not only affected the thinking of a significant number of individual jurors but also played a part in the collective decision-making, with a number of jurors concluding that if he was not guilty he would have got on the stand and said so. In this minority of trials where the failure to give evidence did assume some importance, it appears that the judge's instructions were rarely referred to. Certainly some jurors mentioned that, in the light of the judge's direction, they tried to disregard the fact that the accused had not given evidence, but some of them acknowledged that they found it difficult to do so. Other jurors, however, made no mention of the judge's instructions at all.

7.40 Overall, therefore, it seems clear that the majority of both individual jurors and juries collectively took seriously the judge's directions that they should not use the refusal to answer police questions or failure to give evidence at trial as proof of guilt, and most acted on that basis, at least on a conscious level.

Direction to make their decision solely on the evidence before the court

7.41 Jurors are told in both the jury video and the jury booklet that they must not try to gather their own evidence and must reach their verdict solely on the evidence presented in court. This is generally repeated by judges in their opening instructions and summing-up.

7.42 Individual jurors commonly provided the jury as a whole with background information about issues relating to the case – such as the signs of schizophrenia, financial procedures in the construction industry, the street value of cannabis, and legal procedures for buying and selling property – which they knew from their own occupation or life experience. In a couple of cases, they also reported to the jury adverse information about the character of the accused which they had picked up from local knowledge or media publicity. Apart from this, there were only five cases in which the jury made any external inquiries about factual material. These inquiries included visiting the scene of the crime and bringing into the jury room explanatory brochures about legal and factual issues.

7.43 In none of these cases did the jury make any reference to the judge's instructions not to take into account external information. They may have thought that the instruction did not apply to this sort of investigation; they may not have absorbed the instruction at the time; or they may simply have decided to disregard it. Whatever the reason, the instruction did not have the desired effect in these cases. In the other 43 cases, there was no evidence of external inquiries, but by the same token there was nothing to indicate that the jury was dissuaded from doing so by the judge's instruction.

7.44 Apart from these five cases where the jury obtained additional information about factual issues, jurors not infrequently attempted to obtain additional information on the law, particularly during the trial itself – for example, by looking up definitions of key terminology in the dictionary or taking a legal textbook on fraud into the jury room. The jury gave no indication in any of these cases that they thought their investigations were improper.

7.45 Thus, while the directions not to conduct external inquiries were adhered to in a majority of cases, there was no evidence that the directions themselves made a difference to the actions of juries in this respect. By and large, juries simply did not seem to appreciate the importance, or did not understand the logic, of restricting themselves to the information presented by the parties and the judge.

Direction to ignore pre-trial and trial publicity

7.46 Jurors are often specifically told in the judge's opening instructions, particularly in high-profile cases, that they should ignore any pre-trial publicity or other knowledge about the case of which they may be aware. In the event that there has been publicity during the trial, the judge may also reiterate during the summing-up that they should ignore any media accounts of the case they may have seen or heard.

7.47 As we described in chapter 1, we asked jurors whether they were aware of any pre-trial publicity about the case or publicity during the trial itself, and if so, whether that publicity had had any impact upon their thinking about the case. We were thus able to make some assessment of whether they had followed the judge's explicit or implicit instructions in this respect.

7.48 In order to obtain as much data as possible on the impact of publicity, we selected as many high-profile cases for the sample as possible. It is therefore surprising that, while in 23 (48 per cent) of the 48 trials at least one juror recalled seeing or hearing some pre-trial publicity about the case, the jurors in these trials were very much in the minority; in total, only 58 (19 per cent) of the 312 jurors interviewed said that they recollected any pre-trial publicity; and there were only four cases in which half or more of the jurors did so. In contrast, there was much more widespread awareness of publicity during the trial. While there were only 20 cases (42 per cent) in which one or more jurors saw or heard publicity during the trial, there were in total 106 jurors (34 per cent), including all or most in 15 out of the 20 cases, who did so.

7.49 When we asked those jurors who were aware of pre-trial publicity whether it had any impact on their thinking about the case, only two acknowledged any effect. Similarly, when we asked those jurors who were aware of publicity during the trial about its impact, none of them said that it affected them in any way. However, this is perhaps to be expected. Jurors are aware of the dangers of bias and of the judge's instruction to ignore publicity and to base their decision solely on evidence before the court. They will therefore be reluctant to admit in interview that pre-trial or trial publicity has influenced them. Moreover, they will often be unaware of any biases or preconceptions arising from such publicity or, if they are aware of them, believe that they have successfully put them to one side.

7.50 Nevertheless, there were some indicative data on the impact of media coverage from which at least tentative conclusions can be drawn. We will discuss these data in relation to pre-trial publicity and trial publicity separately.

Pre-trial publicity

7.51 There are three aspects of the research findings which suggest that the impact of pre-trial publicity is in almost all cases minimal. First, despite the emphasis in our sample upon high-profile cases, very few of the jurors who were aware of pre-trial publicity knew anything of the case at all beyond a hazy recollection of the bare essentials of the incident. In fact, only 16 jurors in the whole sample, spread across six trials, admitted to knowledge of any details of the alleged offence or the accused's involvement in it which might have led to any element of bias or pre-judgment.

7.52 Secondly, amongst those 16 jurors, there were only two who admitted that their knowledge did have an initial impact on them, and there was only a handful of others who described what they knew of the case from pre-trial publicity in terms which indicated an element of prejudgment. Moreover, some of these jurors were aware of their preconceptions and purported to make a deliberate effort to put them aside and to make a decision on the evidence alone; and others, when confronted with evidence in the trial which contradicted opinions they had formed as a result of pre-trial publicity, seem to have had no difficulty

in changing those opinions, so that their initial vote on the verdict (even before they had been influenced by collective deliberations) was contrary to their initial prejudgment.

7.53 Thirdly, even if an individual juror was inclined to refer to pre-trial publicity or to introduce material derived from it, this did not mean that it had any impact on the eventual verdict. In at least one case where a juror shortly after the Crown opening did mention in the jury room that the case had been on television, he was promptly told by other jurors that they did not want to know about that. In fact, in only one case were we able to detect some evidence that pre-trial publicity may have influenced the deliberations of the jury collectively. In this case, in which there had been a previous trial resulting in a great deal of media publicity, all of the jury knew a number of details of the case and of the accused and his history and referred to this in their deliberations. Even in this case, however, it seems likely that the jury's verdict was based predominantly upon the fact that, like the judge, they found the main prosecution witness highly credible.

Publicity during the trial

7.54 The impact of publicity during the trial upon the thinking and approach of individual jurors was more difficult to determine. Some jurors went out of their way to avoid listening to or reading the media during the trial, sometimes conscious of the judge's instruction that they should make up their minds on the basis of the evidence presented during the trial itself. In contrast, others avidly followed media coverage, keeping newspaper clippings and watching out for any television coverage of the case, no doubt out of natural curiosity to see what was being said about the case in which they were involved. In three cases, other jurors reported that these jurors let the media coverage influence the way in which they approached the case and relied upon media reports of the evidence itself.

7.55 Despite this, there are again two reasons why media coverage during the trial itself probably had limited impact and was unlikely to have affected the final outcome. First, most of the jurors who did see or hear media coverage during the trial said that they put it to one side because it was partial and often inaccurate. They saw the coverage as an illustration of poor media standards, and regarded themselves, perhaps a little smugly, as being much better informed than the media about what the true story was.

7.56 Secondly, in three cases where jurors who followed media coverage closely tried to bring newspaper clippings or other information about media reports into the jury room with them, they were again told bluntly by other jurors that the information was not relevant and not wanted.

7.57 In summary, therefore, jurors were only rarely aware of sufficient details of pre-trial publicity to enable them to form any bias or prejudgment. When they were, for the most part they reported that they consciously made an effort to put that aside and focus upon the evidence alone; and when they did not, other jurors in the process of collective deliberations generally overrode any individual bias or predetermination. While some other jurors were more affected by media coverage during the trial, there is similarly no evidence that any of the collective deliberations of the juries in the sample were ultimately driven or even influenced

by this. It is impossible to know whether this was because the jury took the judge's instructions to heart or because they thought that it was unfair or inappropriate to take media publicity into account in any event.

CONCLUSION AND OPTIONS FOR REFORM

7.58 A small number of judges are now using a variety of written aids as a means of explaining the law to the jury and structuring the decision-making process. These innovations, and other comments made by jurors during interviews, suggest that there are three broad options for reform: summaries of the law in writing; instructions on the law in the form of a flowchart or sequential list of questions; and providing an opportunity for the jury to seek clarification before deliberations.

Summaries of the law in writing

7.59 In six cases, the judge provided the jury with a summary of the law in writing to assist them in following the summing-up. In a couple of cases, this summary simply consisted of the relevant statutory provisions verbatim, but more often it broke down the statutory provisions, and any defences raised, into their constituent parts and presented them in list form. Where the jury received written assistance of this type, they were almost invariably appreciative.

7.60 Jurors were asked more generally whether they would have found a written summary of the law from the judge useful. A majority (62.2 per cent) responded positively. Only 24 per cent said that they would not have found it useful, with a further 13.8 per cent providing no response. Those who would like to have received the summary in writing gave four main reasons for this:

- Some noted that, while they tried to concentrate upon what the judge was saying when he or she was talking about the law, it was difficult to absorb it all, and it would have been good to be able to digest the key elements of it in a more relaxed atmosphere back in the jury room.
- Several jurors noted that, while they thought that they understood the summing-up on the law perfectly, they found that different jurors had slightly different interpretations of what the judge had meant.
- Some jurors noted that, in the absence of a written summary from the judge, jurors had taken their own notes, but the extent to which notes were taken varied from one juror to another. Moreover, some jurors were reluctant to rely upon the notes of others, believing that the notes might be partial or incorrect.
- Finally, a couple of jurors pointed out that, if they had had a written summary of the law, deliberation time would have been reduced: in one case they spent time collectively putting together their notes to work out what the key elements of the offence were; and in the other they had to ask the judge a question to clarify the law, which they believed would have been unnecessary if they had received a written aid.

There is thus a strong case for arguing that written summaries of the law ought to be provided as a matter of course.

Instructions on the law in the form of a flowchart or sequential list of questions

7.61 In two cases in the sample, and in one further trial which we were informed about during the research, judges provided the jury with not only an outline

of the elements of the offence, but also a flowchart with a sequential list of questions derived from the elements of the offence which was designed for use as an aid to decision-making. Juries were not asked to provide answers to each question, but they were told that the questions might prove useful as a basis for systematising their discussions. All of the jurors in these cases said that the written flowcharts were extremely useful in the deliberations and provided them with a series of points to work through. A couple of other jurors who did not receive a written structure of this sort said that they needed one, because they had no framework for their decision-making and did not work through the legal points in the case systematically.

Providing an opportunity for the jury to seek clarification before deliberations

7.62 Even if the judges in our sample had provided written summaries of the law more systematically and had provided flowcharts to structure decision-making, it is clear that some jurors would have been left with some uncertainty about aspects of the law. This is demonstrated by the fact that, in one trial where a written summary and a flowchart were provided, the jury still had to ask a question about the law during deliberations. Where such uncertainties exist, the quality of decision-making during deliberations is likely to be enhanced by providing jurors with an opportunity to seek clarification from the judge, before deliberations begin, about any issues emerging from the trial or the summing-up about which they are uncertain.

8
Jury disagreement and uncertainty

THE PRESSURE TO REACH A VERDICT

8.1 FIVE JURIES IN OUR SAMPLE were unable to reach a decision – one in the High Court and four in the District Court. Three of these trials involved charges of a sexual nature. All five juries had received a Papadopoulos direction.[7] In one other District Court trial, the jury convicted on six charges but was unable to reach a decision on one. No Papadopoulos direction was given in that case.

8.2 Twenty-six per cent of jurors ultimately reached a decision which was the opposite of the one they favoured at the beginning of deliberations. A further 20 per cent entered the jury room undecided and formed their final view in the course of these deliberations (see para 6.56). Many of the jurors in the study felt considerable pressure to reach a unanimous decision.

8.3 There were four main areas of pressure affecting jurors once deliberations began:
- pressure from other jurors to agree to the majority view;
- jurors' own feelings of obligation to reach an agreed verdict;
- Papadopoulos directions; and
- time constraints, poor facilities and late sittings – which exacerbated the pressures from other sources.

Pressure from other jurors

8.4 In 22 of the cases in our study, one or more jurors mentioned that pressure to reach a verdict came from other members of the jury. Those who were on their own or part of a small minority felt the worst pressure, with pressure increasing as other minority jurors changed their minds. Other jurors simply talked of being rushed. Juries sometimes adopted tactics designed to increase the pressure on dissenters who could feel intimidated by this.

The feeling of obligation to reach a verdict

8.5 In addition to the cases in which a Papadopoulos direction was given (see below), jurors in two other cases specifically mentioned their determination to achieve an agreed verdict. Jurors described themselves as having a responsibility to the court and the parties, and commented on the waste of time, money and effort if they failed to agree.

Papadopoulos directions

8.6 Section 374(2) of the Crimes Act 1961 requires that a jury deliberate for at least four hours before it can be discharged after failing to reach a verdict. Juries in our sample, however, routinely deliberated for much longer than that without being called back by the judge or seeking further directions.

8.7 Papadopoulos directions, or a variant of them, were given in nine (19 percent) of the 48 trials. All but one of the trials was in the District Court. Moreover, cases involving charges of indecent assault or rape/sexual violation were overrepresented: of the 11 cases of this sort in our sample, four were subject to a Papadopoulos direction and three of these resulted in a hung jury.

8.8 While some juries concluded that they were unable to agree on a verdict after a fairly brief period of deliberation, most found this very difficult and were reluctant to admit to what some jurors saw as defeat. In some cases this reluctance was intensified by jurors' ignorance of the consequences of their failure to agree. The Papadopoulos direction was, therefore, interpreted by many as a "telling off" – an expression of judicial displeasure which highlighted their failure and produced considerable pressure to go back to the jury room and get a result.

8.9 The giving of Papadopoulos directions and the pressures produced by renewed efforts to reach a verdict affected juries in a number of ways:

- in two cases it produced no detectable impact;
- in two cases it seems to have made matters worse;
- in four cases some jurors indicated that it produced a compromise verdict; and
- in three cases some jurors described it as providing a focus which assisted in reaching a verdict.

8.10 *No effect on deliberations or verdict.* In two of the five trials which resulted in a hung jury, jurors made no comment on the Papadopoulos direction or on their deliberations after it had been delivered. In one of these cases, the minority consisted of a single "rogue" juror and it is likely that nothing could have made an impact anyway. In the other, the jury was split 10:2 in favour of acquittal, with strong positions on the evidence being taken by both sides.

8.11 *Making matters worse.* In two trials matters got rather worse after the jury returned to its deliberations. In one case, involving a "rogue" juror, the dissenter seems to have simply become more truculent. In the second case, the jury, which had agreed on two of the four counts prior to the Papadopoulos direction, deliberated for a further hour and ended up disagreeing on all four.

8.12 *Pressures to compromise.* In all four cases in which the jury reached a decision, jurors mentioned the pressure to compromise, and in at least two of these cases the verdict seems to have actually been a compromise. (See more generally below chapter 9.)

8.13 *Focusing discussion.* Sometimes juries experiencing difficulty in reaching a decision can refocus the discussion and either achieve unanimity or at least identify the areas in dispute (see chapter 6 above). In two of the cases in which the jury subsequently agreed on a verdict, jurors commented on the focusing effect of the direction. In one of these the Papadopoulos direction was accompanied by a redirection on the law.

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[7] When a jury is having difficulty reaching a verdict, the judge may call the jury back to the court and give them a Papadopoulos direction (named for the case of *R v Papadopoulos* [1997] 1 NZLR 621 (CA), although the contents of the direction are now in accordance with a later case, *R v Accused* [1988] 2 NZLR 46 (CA)). In essence, the direction is an exhortation to come to a verdict. The jury is told that if it is necessary to discharge them a new trial will ordinarily follow; that they have a duty to listen to and weigh dispassionately one another's view, and that an honestly held view can be honestly changed as a result; and that no juror should vote against his or her conscientious view based on the evidence.

8.14 Nevertheless, as currently used, the Papadopoulos direction is a rather crude instrument for assisting the jury in reaching a rational and just decision. It increases the pressure on minority jurors which will sometimes be based on illegitimate considerations. The likely outcome, in cases where it is successful, is to produce a compromise verdict rather than one which is based on the evidence. It does not directly assist jurors to identify their problems and resolve them, so that juries which are genuinely divided in their views of the evidence and unwilling to compromise remain locked in disagreement. Where the judge accompanies the Papadopoulos direction with a restatement of the basic issues in the case, jurors are likely to find this helpful. It would be more helpful, however, for the judge to try and identify with the jury the area of disagreement, so that any extra remarks can be directed to that rather than to the case as a whole.

Time pressure and inadequate facilities

8.15 For juries whose deliberations were lengthy, there was a feeling that time was running short, or that people wanted to come to a decision and go home. Jurors in six of the cases in our study said that this sort of pressure was an important factor in their reaching a verdict. Cramped and unpleasant facilities could contribute to jurors agreeing to a verdict, especially when deliberations ran on for a long time. Such pressures seem to be a significant element in some compromise decisions, and may well mean that some juries deliver their verdicts before all their members have fully considered the case. Although juries should be encouraged to conduct their deliberations in a timely fashion and, where necessary, jurors should be encouraged to make pragmatic decisions in order to reach agreement, it is entirely inappropriate that the catalyst for this should be poor facilities and physical and mental exhaustion.

JURORS' CONFIDENCE IN THEIR DECISIONS

8.16 Jurors were not asked specifically about the verdict and whether they were happy with their decision. However, in 16 of the 43 trials in which there was a verdict, one or more jurors commented on their degree of confidence in it. In ten of these trials, the only jurors who commented expressed their confidence in the verdict; in five, the only comments suggested lack of confidence; and in one trial, some jurors were confident and some were not. Overall, in 37 of the 43 trials, jurors either commented positively on the verdict or, at least, made no comments indicating a lack of confidence.

8.17 In the six cases in which jurors expressed a real lack of confidence in the verdict this was the result of the fact that they felt pressured into a verdict they regarded as wrong; the verdict was the result of a clear compromise which they now regretted; or they were unsure whether they had in fact assessed the evidence correctly.

8.18 *Pressure.* In three trials, one or more jurors attributed their decision, to agree with a verdict that they regarded as wrong, to the pressure produced by being a minority juror.

8.19 *Compromise.* In two cases, jurors who had agreed to an acquittal on one or more of the charges as part of a compromise to achieve a verdict, subsequently expressed a lack of confidence in that decision. In one of these cases, the verdict followed a Papadopoulos direction.

8.20 *Doubting their assessment.* While there were a number of cases in which jurors commented on their own inadequacies, there was one case in which a juror linked this with a concern about the verdict which seemed to go beyond simple nervousness about the responsibilities of the job and amounted to a lack of confidence in the way the evidence had been assessed.

8.21 Cases in which jurors expressed confidence or lack of confidence in their verdict need to be distinguished from a number of other situations in which jurors were happy or unhappy with the verdict:

- In five cases, jurors said that while they believed that their decision was right in law, they did not believe that it was the "correct" outcome for the case.
- In two other cases, jurors indicated that they believed the verdict that they had agreed to was wrong – the accused had been acquitted on charges they still believed he was guilty of – but that the outcome was the "correct" one, and they stood behind it. In a third case, a juror who said that she still believed that the Crown had not proved the case beyond reasonable doubt, nevertheless believed the verdict was correct because "I knew he had done something".
- In eight cases, jurors made comments which, while not demonstrating a lack of confidence in the verdict or even unhappiness with it, indicated that they were seeking reassurance that it was correct.
- In one case, a juror described himself as "not happy" with the decision, although he believed it was correct in law and the proper outcome for the case, because he felt considerable sympathy for the accused who he thought had been failed by the system.

8.22 Overall, few jurors expressed serious doubts about their decisions. While individual jurors may have had doubts about the decision-making process and disliked the pressures and compromises that it involved, they generally felt that they had made the right decision – or at least that they had conscientiously applied the law. Many jurors worried about their decision and its impact and sought some indication from the court or the parties that they had got it right. It may be that the sort of debriefing session noted below (see para 10.23ff) has a role to play in this process, but it is important to stress that anxiety of this sort is not necessarily an indication of uncertainty about the verdict. It is also, perhaps, important to note the obvious: for every juror with doubts about the verdict there were numerous others who expressed no doubts at all. Indeed, in our sample, over half the jurors entered the jury room with a clear view of the case and maintained this view through to verdict.

9
Jury verdicts and hung juries

9.1 THE VERDICTS for the 48 trials were:

TABLE 9.1 VERDICTS

	Number	Percentage
Guilty on all counts	21	43.7
Not guilty on all counts	7	14.6
Not guilty by reason of insanity	1	2.1
Not guilty on principal counts, but guilty on alternative counts	2	4.2
Guilty on some counts and not guilty on other counts	10	20.8
Some accused guilty and others not guilty	1	2.1
Guilty on six counts and no agreement on one count	1	2.1
No agreement on all counts	5	10.4
Total	48	100.0

Thus 72.9 per cent of trials resulted in a "guilty" verdict on one or more of the counts in the indictment. However, this included 20.8 per cent of trials which resulted in mixed verdicts of "guilty" and "not guilty" and a further 4.2 per cent which resulted in "not guilty" verdicts on principal counts but "guilty" verdicts on alternative counts.

AGREEMENTS AND DISAGREEMENTS BETWEEN JUDGE AND JURY

9.2 Before the jury delivered its verdict, the judge was interviewed about various aspects of the trial and the performance of counsel, and in the course of that interview asked what the verdict would have been if he or she had been sitting alone to hear the case. It is therefore possible to compare the jury's verdict with the judge's assessment of the evidence.

9.3 The judge and jury were essentially agreed on the appropriate verdict in 24 out of the 48 trials. These comprised: 17 verdicts of guilty on all or most counts; six verdicts of not guilty; and one verdict of not guilty by reason of insanity. In a further 11 trials, where there was disagreement between judge and jury as to the appropriate verdict on one or more of the counts in the indictment, the jury's view appeared to be reasonable and supportable on the evidence. In most of these cases, the disagreement simply resulted from differences in the assessment of the credibility of key witnesses, but in one case the jury based its verdict on

features of the evidence, clearly establishing guilt on one of the counts, which the judge overlooked. Moreover, in many of these cases, judges were in fact hesitant about their view (sometimes making a point of stating that they did not think about it during the trial), and asserted that the jury could reasonably take a different view of the facts from that which they expressed to us. Overall, therefore, a verdict which was either fully supported by the judge or supportable on the evidence was given in 35 out of the 48 trials.

9.4 In the remaining 13 trials, five were classified as "compromise" verdicts in multiple count cases; three were classified as either perverse or questionable verdicts; and five involved fully hung juries. We shall discuss each in turn.

Compromise verdicts

9.5 Compromise verdicts accounted for five trials where the jury convicted on some counts but acquitted on other counts, while the judge and researchers would have convicted on all counts. Unlike cases resulting in questionable or perverse verdicts, where the jury more or less unanimously reached a verdict on an erroneous basis, these verdicts stemmed from jury uncertainty or disagreement which resulted in a compromise on some of the charges.

9.6 In a couple of cases this simply amounted to a decision by some jurors, in the face of opposition by others to a "guilty" verdict on the principal counts, to agree to a "not guilty" verdict on those counts and a "guilty" verdict on lesser counts for the sake of reaching agreement. In three cases, however, there was much more explicit "horse-trading": majority jurors who were pressing for "guilty" verdicts on all counts capitulated in the interests of achieving a result, agreeing to "not guilty" verdicts on some counts in exchange for an agreement by the minority jurors to bring in a "guilty" verdict on other counts. All of the jurors in these cases spoke of "doing deals", "plea bargaining", "compromising" and "trade-offs" in reaching a final decision.

9.7 Some jurors felt uneasy about the unprincipled nature of their decision, but most simply saw it as a pragmatic and sensible solution to the problem they confronted: they all thought that the accused was guilty of something; they differed as to the nature and extent of that guilt; and they therefore decided that "guilty" verdicts on some of the charges would dispense justice, albeit perhaps rough justice, and avoid the expense of a retrial. As discussed in chapter 8, some were encouraged in this view when they received a Papadopoulos direction from the judge, which they saw as an indication that there should be some compromise and "give and take" in their deliberations.

9.8 While these cases all involved some questionable verdicts which could not be justified on the evidence, their outcome cannot be regarded as wholly perverse, and in some cases the effect of the compromise "not guilty" verdicts on the eventual sentence may have been negligible.

Perverse or questionable verdicts

9.9 There were three trials which were categorised as resulting in perverse or questionable verdicts:

- In the first case, which involved multiple counts of fraud, the jury concluded that the evidence provided by the complainant lacked credibility. The judge took the same view. However, the jury was equally suspicious of the accused's

testimony and ended up convicting on most counts because of what the accused had admitted to doing, without ever adequately focusing on the crucial issue of dishonest intent. This verdict has to be regarded as questionable, and based on a dubious rationale.

- In the second case, the jury acquitted on all but one count. Again this seems to have been on the basis that they did not believe the complainant's evidence and thought that he knew more than he was saying, as a result of which they simply failed to evaluate the rest of the evidence properly, or to consider the plausibility of the accused's own version of events. In a sense, when confronted by a complainant who appeared to be hiding something, they ended up throwing out the baby with the bathwater. Interestingly, the researchers were told that defence counsel had tried to persuade his client to plead "guilty" because of the absence of a defence, and the prosecutor said that the verdict was a classic illustration of the unpredictability of juries.
- In the third case, the jury in their deliberations discussed irrelevant considerations about the impact of their verdict upon the community, which may well have influenced their eventual "not guilty" verdict. More importantly, they reached that verdict on the basis of a fundamental misunderstanding about the law. Interestingly, the majority of the jury who were in favour of a "not guilty" verdict were convinced that their view of the law was right, and a couple of them said in interview that the three minority jurors were focused on tangential issues, and initially did not focus on what the law required the jury to rule on. It is therefore quite likely that they interpreted the law incorrectly so as to fit with the verdict they wished to reach, and then persuaded the minority to that view.

Hung juries

9.10 With five fully hung juries in 48 trials, the rate of hung juries was a little in excess of 10 per cent, although our sample was deliberately biased in favour of high profile and complex cases in which hung juries are arguably more likely to arise.

9.11 We examined the nature of and reasons for failures by juries in our sample to reach a verdict, the strategies employed by them to try and reach agreement, and the initial and ultimate division of opinion. It became evident that the hung juries fell into two distinct groups.

9.12 In two of the five trials, the failure to reach a verdict was directly attributable to the actions of a single "rogue" juror who refused to consider a "guilty" verdict but made little attempt to participate in deliberations, and was unable or unwilling to articulate any rational argument in favour of a "not guilty" verdict. Even in these two cases, however, it is by no means certain that the jury would have brought in "guilty" verdicts on all charges. Individual jurors had reservations about particular charges – which in one case appeared to be well founded and in the other somewhat spurious – but those reservations were never properly addressed or resolved because each jury realised that the presence of the rogue juror made further deliberations and further polls pointless.

9.13 In the other three trials resulting in a hung jury, however, the minority jurors provided a clearly articulated and reasoned basis for their dissent. In two of these cases the dissent actually appeared to be well founded: in one, the

researchers thought that the view of the majority would have resulted in a questionable, if not a perverse, verdict; and in the other the case was finely balanced and the judge shared the view of the minority. In the third case the dissent resulted from genuine and considered doubts, which resulted in part from a misunderstanding about parts of the evidence which could perhaps have been addressed if the evidence had been put to the minority juror more clearly.

MAJORITY VERDICTS

9.14 In recent years there have been some calls for majority verdicts, similar to those permitted in England and Wales and a number of Australian jurisdictions. The jurors in our sample were not specifically asked whether they favoured the introduction of majority verdicts. However, a number of jurors volunteered their opinion, generally as a result of their own experience on the jury. At least one juror in each of the hung juries in the sample, and at least one juror in another 14 trials, volunteered their belief that majority verdicts should be introduced. In all, 33 jurors took this view. They gave three reasons for this opinion.

9.15 First, a number believed that majority verdicts were required in order to cater for recalcitrant or disgruntled jurors who were not amenable to reason; in other words, to address the problem of "rogue" jurors. Second, some suggested that the provision of majority verdicts would allow juries to reach decisions more quickly and efficiently, by providing a means by which they could resolve difficulties and disagreements without the need for protracted discussions. Third, a number felt that majority verdicts would allow dissenting jurors, who currently feel extreme pressure to compromise their principles to achieve a verdict and who consequently have difficulty in coming to terms with the decision later, to have a mechanism by which they could stick to their principles without affecting the jury's ability to achieve a result.

9.16 This support for majority verdicts was not unanimous. Three jurors (one of whom was in the minority on a hung jury) expressed reservations about the introduction of majority verdicts, believing that it would bring undue pressure to bear on jurors in the minority and would stifle debate of the case. The data suggest that these reservations are well founded, and that the disadvantages of introducing majority verdicts may well outweigh any benefits achieved. There are a number of reasons for this:

- While two of the five fully hung juries in the sample were directly attributable to the actions of a single rogue juror, it is possible that the jury might not have reached agreement on all counts anyway. In two of the other three trials, the differences of opinion were rationally based and the view of the majority, if it had carried the day, would arguably have resulted in a mistaken verdict. Yet in both of those cases, an 11:1 or 10:2 majority verdict would have resulted if it had been available. Thus, while hung juries sometimes result from the prejudice, perversity or irrationality of one or two dissenting jurors, the data suggest that they are just as likely to arise from the carefully considered conclusions of a minority of jurors who avert an unjust or questionable result.
- One likely consequence of the introduction of majority verdicts is that many of those jurors who report that they feel considerable pressure from a number of sources to reach agreement would instead stick to their minority view. This would lead to many more majority verdicts than there are currently

hung juries, which would have the potential to undermine the perceived finality of the jury's verdict and jeopardise public confidence in the system.

- In any case, the introduction of majority verdicts would not wholly eliminate the pressures confronted by jurors. Where there is division of opinion within a jury, it is frequently the case that juries begin their deliberations with four or more dissenters from the majority opinion. Thus, the introduction of majority verdicts would simply change the threshold at which the pressure on minority jurors came into play. While one or two could avoid compromising their principles, the remainder would be under exactly the same pressure as currently exists to change their mind.

10
Jurors' experiences and views of the value of the process

10.1 JURORS WERE ASKED HOW THEY FELT about their experiences as a juror, and about any inconveniences or problems they or their families experienced as a result of jury service.

THE VALUE OF BEING A JUROR

A worthwhile and informative experience

10.2 Positive comments were made by 82 per cent of jurors. At least one juror in every case described the experience as positive, and in 18 cases (38 per cent) all the jurors interviewed felt that their experience had been worthwhile. As well as seeing positive personal gains, jurors noted a greater understanding of the criminal trial and reported feeling that a "civic duty" had been done.

10.3 Even where the case was serious or complex in nature, some jurors saw the best in their situation. For example, in one murder case, two jurors acknowledged the interest they had maintained throughout the trial and deliberations, even though there had been an initial reluctance to get involved. Others found the experience "harrowing", imposing a heavy responsibility and causing them to feel "sick to their stomachs", but still found it worthwhile. In particular, they felt that they had made a big contribution, had learned more about the process, had a heightened interest in court cases, and had become more self-confident about putting their point of view across.

10.4 Ten jurors, involved in eight cases, said that, whilst they thought the experience had been worthwhile, they did not want to be on a jury again soon. The cases were all serious, and six of the eight involved upsetting evidence or long and difficult deliberation periods.

A bad experience or a waste of time

10.5 Where cases were seen to be trivial or involving essentially private matters, or where the costs of prosecution outweighed the harm caused, some jurors expressed annoyance that their time (and taxpayers' money) had been wasted. Even where the charges were actually quite serious, jurors occasionally decided that the behaviour was too trivial to warrant a trial or defined it as a private matter.

10.6 Hung juries produced adverse reactions in jurors and caused some to doubt the utility of trial by jury. Other trials involving pressured deliberations and the responsibility inherent in some serious cases left some jurors feeling drained and unhappy about their experience and very unwilling to repeat it.

A tiring experience

10.7 Twenty-three per cent of jurors reported feeling tired or exhausted during and after jury service. These jurors were involved in 31 cases (65 per cent). Some jurors directly attributed this to the effort of concentrating on oral evidence for extended periods – often exacerbated by monotonous presentation, a lack of visual or other aids, the absence of regular breaks, and the highly stressful environment of the criminal trial.

10.8 In addition, some jurors were tired because they worried about the case and slept badly throughout the trial. Others were obliged to work before and/or after court and felt the consequences of that, and one or two had served on a jury earlier in the week which they found not only physically draining but also psychologically overwhelming.

10.9 Regular breaks, more extensive use of visual aids, and the reduction of routine oral evidence to written form would help jurors' concentration and assist in alleviating some of the feelings of tiredness.

The behaviour of other jurors

10.10 How jurors felt about each other could have a great impact on their general feelings about the value of the process. Where a jury had worked well as a team, jurors tended to be positive about their experience. Where jurors saw others as stupid, obstructive, insensitive, or not taking the job seriously, they tended to have a more negative view.

10.11 However, different members of the same jury could come away from the experience with totally different views, because their expectations and priorities were so dissimilar.

10.12 It is clear from our interviews that good relationships between jurors can both affect and be affected by how smoothly deliberations run, and that these two things, along with the nature of the case, can markedly affect jurors' views about the value of the process. Steps to foster collegiality among jurors would not only improve jurors' perceptions of the experience but also influence the quality of jury decision-making.

STRESS, THE SOURCES OF STRESS AND PROCEDURES FOR COUNSELLING

Stress

10.13 Stress affected the way in which jurors felt about their experiences and their verdict. In some cases it affected their relationships and daily life – both during and after the trial. It may also have affected their decision-making.

10.14 Jurors' recognition of and response to stress varied. Some were evidently stressed and described themselves as such. Others exhibited the symptoms of stress in their comments. Some experienced stress during the trial. For others, the impact of the trial hit them only after they had left court and their lives had supposedly returned to normal. With some jurors, stress was manifest only in the vehemence of their determination not to serve on a jury again. For others, tension affected

their home lives or their emotional well-being; jurors spoke of not sleeping, "having a good cry", and domestic tension.

Sources of stress

10.15 The most enduring stresses arose from five main sources and often lasted well beyond the delivery of the verdict. These were:

- making an important decision about someone else's life and the implications of reaching the "wrong" verdict;
- feelings of discomfort or intimidation;
- evidence which brought issues in the jurors' own lives to the fore and created personal stress;
- deliberations which were emotionally charged or draining; and
- the pressure to reach a verdict.

The responsibility of being a juror

10.16 As noted in para 7.11, jurors were extremely conscientious and recognised that they were deciding on an important issue in the life of the accused, the victim and their respective families. This could create considerable strain throughout the trial. Some jurors were simply unprepared for the intensity of the pressure of judging the accused, others felt unqualified to do so, and a few felt that they should not be doing it. While some of those who expressed these feelings were able to take comfort from the collegiate decision of the jury, most still felt the responsibility in a very personal way. Two jurors mentioned that the stress produced by the nature of the job was exacerbated by the fact that they were unable to talk to anyone else about it.

Feelings of discomfort or intimidation

10.17 Jurors mentioned their discomfort at contact with the families of the parties in 11 cases. This generally occurred when they were going in and out of court, but some jurors also expressed concern about the likelihood of contact on the street. In two other cases, jurors felt intimidated by counsel staring at them, and a number of jurors also mentioned being stared at by the accused and by the families in court.

10.18 Jurors in four cases spoke of feeling intimidated and scared after the case, and one commented that although the court attendant had warned them after the trial of the accused's violent nature, no assistance was offered in getting home.

10.19 The nature of the evidence also produced discomfort for some jurors, either because experiences in their own lives were brought back to them (see para 10.20) or because they were confronted with unpleasant things, such as photographs of murder victims, sometimes without warning.

Evidence creating personal stress

10.20 In three cases, jurors commented that the evidence in the case brought back elements of their own past experience which they would rather forget. In particular, in one sexual abuse case, four jurors disclosed their own experiences as victims of sexual abuse (one for the first time) in the course of a lengthy and fraught deliberation, which eventually resulted in a hung jury.

Difficult deliberations

10.21 Drawn-out deliberations, coping with irrational or recalcitrant jurors, personality clashes in the juryroom, and deliberations in cases with a high emotional content – for example, sexual abuse cases – produced considerable stress for some jurors.

Pressure to reach a verdict

10.22 Minority jurors or jurors who remained undecided sometimes commented on the stress produced by the pressure – exerted by the court, other jurors and themselves – to reach an agreed verdict. (See chapter 8.)

The need for counselling or debriefing

10.23 At the time of our study, formal counselling arrangements were not in place in all of the court centres. Furthermore, the information jurors receive on counselling is generally delivered in a form which is neither memorable, relevant, nor particularly encouraging. When they first arrive at court, prospective jurors are simply told in the booklet *Information for Jurors* that in "particularly distressing cases" counselling is available on request through the court staff. None of the jurors interviewed said that they had received counselling, and only two mentioned that counselling had been offered. In one case, a juror remembered that it had been mentioned as available at the start of the trial; in another, it was mentioned after the verdict when jurors were getting their things together to leave. Nevertheless, in 16 of the 48 trials, one or more jurors noted the need for counselling, debriefing or some form of support for jurors after the trial. Thirteen of these trials were of a serious and/or complex nature, although some would not be the sort of case in which court staff would usually think counselling might be necessary.

10.24 Both during and after the trial, jurors used their own methods of alleviating stress. These included "retail therapy", talking it through with their partner, laughter and having a cry. But in 16 cases, one or more jurors felt that their own methods of release and debriefing were not adequate, and that they would have appreciated at least the availability of a support service. In a small number of interviews it was clear to us that some jurors were having considerable difficulty in coping with the impact of their experiences.

10.25 As well as noting the need for counselling, some jurors simply wanted some sort of debriefing session in which they could talk about the case and what had happened. There was a feeling that the court should be proactive in offering services rather than waiting for jurors to request help.

10.26 From our responses it is clear that counselling would be useful for a number of jurors in a range of cases. While it is likely that many of those jurors who said that they would have appreciated the offer of help would not have actually taken it up, court staff should routinely offer such support, and make it known both before and after the trial that it is both free and available. In addition, there would seem to be room for the development of some form of debriefing to give jurors a chance to talk about what has happened and achieve some feeling of closure. Current developments in British Columbia, where some judges have adopted a practice of talking to jurors after the verdict, both to obtain feedback on court procedures and jurors' understanding of their directions and to answer any questions jurors might have about the trial process, provide one model for this.

Other services

10.27 As noted above, in a number of cases jurors felt intimidated or upset by their proximity to, or the actions of, the parties and their families or supporters. In most cases this was due to the physical constraints of the court building which, for example, meant the jury had to pass through public areas on entering and leaving the court. In two cases, jurors particularly commented on the impact of this once they had delivered their verdict, and in one of these cases, a juror suggested that the court should have provided jurors with taxis to enable them to avoid the offender's family and friends. Currently this is generally only done when the verdict is delivered late at night or public transport is unavailable. Court staff should be more proactive in ascertaining jurors' concerns about this sort of contact – especially in gang-related and similar cases – and should provide advice and, where necessary, assistance.

FACILITIES FOR JURORS

10.28 When asked to rate the facilities overall, 43 per cent of those who replied rated them as "adequate", 37 per cent as "good" and only 19 per cent as "poor". In 10 of the 47 cases where jurors gave a rating, at least one juror described the facilities as "very poor", and in 16 cases at least two jurors rated them as "poor" or "very poor". Conversely in only one case did all the jurors interviewed describe the facilities as either "good" or "very good".

10.29 Two points should be made about these ratings. First, the "adequate" to "good" ratings may be misleading. Throughout our interviews jurors' actual comments tended to indicate rather greater dissatisfaction than their overall rating of the facilities suggested. Secondly, the ratings do, as some jurors commented, depend on the duration of the trial and deliberations. Facilities which are adequate for a two day trial are not likely to be seen the same way after five weeks.

10.30 Jurors who rated the facilities as adequate or poor were asked for their reasons for that assessment. Their comments covered four broad areas:

- the jury room, including size, temperature, general comfort and access;
- the provision of adequate toilet facilities;
- food and drink; and
- smoking.

The jury room

10.31 In 29 of the 47 cases onwhich we have information, one or more jurors complained that the jury room was cramped, claustrophobic, and/or lacking in natural light. In three cases, jurors complained of extremes of temperature and a lack of air-conditioning. In five cases, adverse comments were made on the layout of the room and inadequate furnishings; for example, a table with 12 chairs did not enable jurors to move around, take "time out", or defuse tension.

10.32 In a number of cases, jurors commented that, as well as being unpleasant, conditions in the jury room affected deliberations. Tempers frayed, people developed headaches, and concentration lapsed. In a few cases, it was suggested that conditions in the jury room contributed to compromise verdicts or increased the pressure on dissenting jurors to change their minds. (See chapter 8.)

10.33 Before court and during lunch and other meal breaks, jurors were usually locked out of the jury room. This exacerbated some jurors' feelings of marginalisation.

Two juries wanted to use the jury room during these periods to review their notes and discuss the evidence. Other jurors simply wanted to have their lunch where they could talk about the case in privacy if they wanted to, and where they wouldn't have to brave the elements, incur any further expense, or risk meeting the parties or their families.

10.34 It is difficult to see the justification for this practice. Locking jurors out is unlikely either to prevent them discussing the case or to affect the chances of factions forming. However, it will increase the risk of jurors talking about the case in public, and it may expose jurors to contact with the parties. In addition it will certainly confirm some jurors' view that their needs and wishes are not rated highly by the system.

Toilet facilities

10.35 Toilet facilities caused embarrassment or inconvenience for jurors in 14 cases, with some jurors expressing very strong views indeed. Jurors commented mainly on the lack of privacy, but criticism also extended to the number of toilets provided (especially for women jurors), broken catches on the doors and a lack of basic hygiene.

Sustenance

10.36 In four cases, jurors made positive comments about the food and drink provided. Adverse comments were made in 25 cases. Although this was often manifested as a low-level annoyance, in cases where jurors were already under pressure or feeling cramped and uncomfortable, it took on more significance. Cupboards were locked, no inquiries were made about special dietary needs, the only drinks available were coffee or tea, the coffee machine was messy or produced tepid coffee, and the biscuits seemed to be rationed. In addition, the jury room often lacked basic equipment such as knives and forks, plates, serviettes, glasses and cold water; and some jurors had to spend most of the time in short breaks queuing for their drinks. Some jurors would have liked a microwave to heat up snacks or their lunch.

10.37 Complaints of this sort were not confined to the jury room. In four cases, jurors noted that, unlike everyone else in the court, there was no water available to them during the trial.

Provision for smokers

10.38 The lack of facilities for smokers was seen to be a major problem by jurors in 18 cases. Furthermore, it was a problem both for smokers and non-smokers: smokers either could not smoke or had to hang out of the window, while non-smokers had to put up with smoke, draughts and irritable fellow-jurors.

Impact

10.39 Taking the ratings and comments as a whole, jurors were at best unenthusiastic about the facilities provided for them and at worst deeply dissatisfied. Facilities in most courts are inadequate. Basic amenities are either not provided or are only provided at a fairly minimal level. This may have a number of consequences. Jurors who are thirsty, hot, tired and embarrassed about going to the toilet are

unlikely to do their best, either in court or during deliberations. In long or difficult trials, in particular, poor facilities can not only distract jurors but also exacerbate conflicts between them and increase the pressures faced by dissenters. Just as significantly, the inadequacy of the facilities is liable to be seen by some as an indication of the justice system's lack of respect and appreciation for them and their role.

THE INCONVENIENCE OF JURY SERVICE

10.40 Jurors were asked whether sitting on a jury had caused them any inconveniences. At least one juror in each of the 47 trials said that it had. In all, 57 per cent of those who responded said that they had suffered inconvenience as a result of serving on a jury. In many cases the inconveniences were minor, but others took on more serious proportions.

10.41 Jurors identified three broad categories of inconvenience:

- employment issues, including loss of money and the pressures of self-employment;
- home and social life, including childcare problems; and
- transport and parking.

Employment issues

10.42 Employment issues were the most common inconveniences experienced by jurors, with at least one juror having some kind of problem with work or their employer in all but eight of the cases in the study. These "problems" varied in seriousness. For those involved in short trials, employers could get "tetchy" about the uncertainty of whether their employee would be on a jury that day. In longer trials employers could be described as "becoming aggro". Some jurors worried about their work during the trial, or were concerned about it building up because they would not or could not be replaced.

10.43 It was also fairly common for jurors to continue working around their attendance at court. For example, one juror worked from 7am to 9am, went to court, and then returned to work from 5pm to 8pm. Another attended court and then worked from 9pm to 2am.

10.44 Some jurors lost pay because their employer would cover only the basic hours worked and not the usual overtime hours. Self-employed jurors or those who worked as temps could also end up considerably out of pocket. Furthermore, in addition to employers refusing to get cover for their employees or pay full wages, there were two instances in our study where jurors complained that their employer not only deducted the money they received for jury service from their wages, but also required them to work off the time lost as a result of serving on the jury.

10.45 There was a feeling that the payment given to jurors was too low, especially in lengthy trials, and that the arrangements were unfair to self-employed jurors. However, no juror in our sample said that they had applied for an increased fee on grounds of hardship; indeed, there was no indication that they even knew that they could. This is scarcely surprising. The only information most jurors receive on this is the statement in *Information for Jurors* that "in exceptional circumstances your fee could be increased".

Disruption to family and social routines

10.46 Jurors in 24 trials said that being a juror had affected their home lives and their families. Childcare was a common problem, sometimes combined with work pressures, and jury service could disrupt family life and cause arguments. The problems increased where jurors were involved in long trials or deliberations. One juror noted the conflict between the hours worked by the court – not starting until 10am and sometimes deliberating until late at night – and the demands of childcare.

10.47 Other jurors spoke of disruption to their social lives. While in short trials these inconveniences tended to be minor and could be planned for, in longer trials they were more serious. Stress levels increased and some jurors felt that their lives had been put on hold.

Transport and parking

10.48 In almost all centres, the information sent to prospective jurors with the summons says that they will receive payment to cover "attendance plus fares by public transport". Jurors in 12 trials complained about the inconvenience and cost incurred in getting to court, especially in centres with poor public transport or where there was little or no provision for parking. Those who came in by car found that the cost of parking was high and thought that they should be reimbursed. Four jurors reported receiving parking tickets.

CONCLUSION

10.49 In general, jurors felt that serving on a jury was a worthwhile experience for them, and one from which they benefited, even if it was simply by learning about what happens during a criminal trial. There was also some pride that they were performing a necessary and important civic duty. However, jurors often felt that they were not valued by the system and that their needs were seen as either secondary or unimportant. In our view, these perceptions were generally well founded. Jurors often appeared as outsiders in a system where even the architecture appeared to be focused on the needs and routines of the official players. They were sometimes obliged to assemble in public areas or in areas that were inadequate to accommodate them. They often met and deliberated in rooms that were cramped and uncomfortable, with poor facilities and only basic refreshment. Where disturbing evidence had been presented during the course of a trial, or where deliberations were protracted and difficult, a significant minority of jurors experienced high levels of stress, which the system did not adequately recognise. For many the very nature of the job made it tiring and stressful, let alone the conditions under which they were expected to perform it. Yet the majority of jurors approached their task conscientiously and most were highly appreciative of the consideration and help they received from judges, court staff and even counsel. It is the institutional arrangements that marginalise jurors, not the actors within those arrangements.

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