International Journal of the Sociology of Law 1998, **26**, 35–54

Ethnic Bias in Jury Selection in Australia and New Zealand

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Introduction

Juries are a significant feature of many of the common law jurisdictions where an adversarial system, proof beyond reasonable doubt and cross-examination form the basis for adjudication. Although cases tried by jury represent merely the tip of the iceberg of justice, generally being used only in serious criminal cases where the defendant pleads not guilty, juries act as a symbol of the integrity and fairness of the process of criminal justice in these countries.

Superficially, the job of the jury seems quite straightforward. Twelve people are selected at random from the community and are brought together to decide two main issues: first, what the facts of the case are; second, on the basis of these facts, whether the accused is guilty or innocent. Members of the jury are supposed to use their common sense to weigh up the evidence that is presented to them at a trial. They must decide whether particular events were likely to have happened or not, which witnesses were credible, and whether the story offered by the defendant could be believed. Once the jury has come to a conclusion about what the facts are, it has to apply them to the law as outlined by the judge in order to decide whether an offence has been committed.

However, the role the jury plays in the criminal justice system goes far beyond this. The jury has been heralded by judges, government bodies and academic lawyers variously as acting as the conscience of the community (New South Wales Law Reform Commission 1986) [1], as a citizen's

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0194–6595/98/010035 + 20 $25.00/0/sl980057

ultimate protection against oppressive law and oppressive law enforcement (Devlin 1966; Law Reform Commission of Canada 1982; Law Reform Committee of Victoria 1996), as a means for the public to learn about and critically examine the functioning of the criminal justice system (Law Reform Commission of Canada 1982), as a way of increasing the public's trust in the criminal justice system (Law Reform Commission of Canada 1982; New South Wales Law Reform Commission 1986), and as a form of relief for judges by removing from them the heavy responsibility of deciding the question of guilt or innocence (Holdworth 1956). These are weighty claims because they go to the heart of the relationship between the legal system and the people whose conduct it regulates.

Although judges in Australia and New Zealand regularly attest to the importance of juries, we really know very little about juries in these countries. As in most other common law countries (McCabe 1988; Vodanovich 1989; but see Duff *et al*. 1992 on Hong Kong), there have been considerable restrictions on the kinds of research that can be undertaken on the jury system. As a result, juries have attracted very little detailed analysis. In several states in Australia, reports have been written as part of the process of law reform. Most have been composed by government agencies charged with the task of overseeing the reform process. For example, reviews have dealt with the overall jury system (New South Wales Law Reform Commission 1986; Criminal Justice Commission of Queensland 1991), the question of jury management (Findlay 1994), and the composition and selection of juries (Law Reform Commission of Western Australia 1978; Queensland Law Reform Commission 1985; New South Wales Jury Task Force 1993; Supreme Court of Queensland Litigation Reform Commission 1993; Law Reform Committee of Victoria 1994, 1995, 1996). In some cases, these led to legislative changes to improve the selection, summoning and representativeness of juries [2]. New Zealand has a shorter history of interest in jury reform. In the last few years, the Ministry of Justice and the Law Commission have started to investigate the composition and selection of juries (Dunstan, Paulin & Atkinson 1995; New Zealand Law Commission 1995), though the Law Commission has not yet published a discussion paper or a report on the subject.

Bankowski & Mungham (1976) however claimed that the purpose of the jury system is essentially ideological rather than practical. They maintained that reform may not be vital as long as practical difficulties did not detract from the ideological function of the jury, that of legitimizing the law and legal institutions, because 'without the element of legitimacy a trial process is, of course, little more than formalised gansterism' (Dickey 1973–4: 223). Duff & Findlay (1982) argued that legitimization was grounded in an invocation of two ideals: that of impartiality, and that of the community conscience.

In an adversarial system, the defence and the prosecution put their cases as best they can and an arbiter decides which side has won. For both sides to have any confidence in the system, the arbiter must appear to be impartial, disinterested in the outcome. With the expansion of the activities of the state bureaucracies, parts of the state apparatus have been brought into contests more and more often as parties to disputes. The jury

> …makes it possible for the judge and the whole judicial system to appear to be above the struggle, making judgments fairly in the event of conflicts between the State and its subjects (Chambliss & Seidman 1971: 443).

Duff & Findlay (1982) suggested that the jury itself does not provide the legitimation of the whole system. That is performed by the principle of impartiality. However, the jury system does act as the 'showpiece' (page 262); the main stage upon which this impartiality can be demonstrated and fêted.

The second ideal that buttresses the legitimacy of the judicial system is the idea that juries represent the conscience of the community. Criminal justice institutions draw legitimacy from the support and involvement of lay people as long as the extent of that involvement is manageable and does not extend to the point of undermining the position of the institutions. The jury system is one of the major instances where non-professionals participate in the activities of the criminal justice system as something other than as a witness or an accused. Indeed, the jury is the only part of the criminal justice system where lay people might actually influence some part of the decision-making process, albeit within a structured and prescribed role.

Recently, however, practical problems have become more and more apparent. The jury's ideological importance means that these cannot simply be dealt with at an operational level. They raise difficulties that reach to the legitimacy of the institutions of justice, casting doubt on the jury's impartiality and representativeness — the jurors that we select may not be able to make impartial decisions and the juries that we empanel may not be able to represent the entire community. In Australia and New Zealand, these difficulties may have a particularly acute impact on indigenous people who, despite their overrepresentation in trials as defendants, seem to have only a very minor involvement in trials as jurors, let alone as lawyers, judges or court staff.

In this article, I examine the nature of and the reasons for the underrepresentation of indigenous people and members of ethnic minorities in New Zealand and Australia and consider the attempts that

have been made in these two countries to tackle this underrepresentation [3].

The Selection of the Jury

While juries are supposed to be selected at random, in practice there are several points in the selection process where institutional bias and deliberate interference can make a significant impact on the eventual composition of a trial jury. The New Zealand Law Commission (1995: 6) described the system that operated in that country as "compromised random selection", a term that would also accurately depict the different systems used around Australia.

The process of jury selection used in the jurisdictions that exist in these two countries can be divided into two parts: first, the selection of the jury panel from the list of qualified jurors (the out-of-court selection procedures); and, second, the selection of the actual jury from the panel (the in-court selection procedures). The *source list* refers to the list from which the register of people who are eligible to the jurors is created. The register is often called the *jury roll*. From this jury roll, people are called to attend court for jury service. For various reasons, some legitimate, some do not attend. Those that do make themselves available at the court are called the *jury panel*. From this group, the eventual trial jury is selected through a procedure of nomination by the court and various forms of challenges by defence and prosecuting counsel.

In many parts of the common law world, concern has been expressed at the underrepresentation of particular ethnic groups on juries. In both Canada and the U.S.A. there has been a great deal of interest in the nature of the source list used to choose jurors and problems created by other out-of-court selection processes (Butler 1981; Hastie *et al*. 1983; Fukurai 1985; Hans & Vidmar 1986; Wishman 1986; Kassin & Wrightsman 1989; Clark 1989; Cawsey 1991; Fukurai *et al*. 1991*a*, *b*, 1993; Hamilton & Sinclair 1991*a*, *b*; Law Reform Commission of Nova Scotia 1994). Attention has also been focused on in-court selection procedures. In the U.K., a significant amount of concern has been expressed, with respect to the ability of judges to empanel particular kinds of juries and on in-court selection procedures that seem to weed out any members of ethnic minorities and indigenous communities that make it onto jury panels (Cornish 1968; Baldwin & McConville 1977; Runciman 1993; Herbert 1995). Arguments in Australia and New Zealand have been tame in comparison. However, there is little room for complacency in either country — considerable evidence exists that indigenous people are underrepresented on juries in both New Zealand and Australia.

New Zealand

According to the 1996 Census, New Zealand has a population of over 3.68 million (New Zealand Official Yearbook 1997). About 4.7% of New Zealanders identified themselves as being of Asian origin, mostly of Chinese and Indian descent. The Census recorded that people who identified themselves as Maori or Pacific Islanders comprised 14.5% and 5.6% of the population respectively. Colonialism almost destroyed Maori systems of justice (Jackson 1988; Pratt 1991). Indeed, removing Maori law was part of the process of entrenching British colonial power. While early New Zealand law did bring Maori into positions of decision-making, this was only in cases involving other Maori. As a result, the Juries Act 1880 allowed all-Maori juries to be established for cases where both the accused and the victim were Maori (Dunstan *et al.* 1995).

Maori were only included in the general pool for juries dealing with cases involving non-Maori in 1962. In 1988, a report written by Moana Jackson for the Department of Justice drew attention to fears that the continuing prevalence of monocultural juries might be denying Maori people a fair trial. Jackson argued that Maori defendants should be allowed once again to have an all-Maori jury. Jackson's report led to research by Dunstan *et al.* (1995) which found that some groups were still under-represented on both panels of potential jurors as well as on trial juries.

In accordance with the Juries Act 1981, the panel of jurors is drawn from those people aged 20–65 years old on the electoral roll who live within a jury district, that is anywhere that lies 30 km from the courthouse by the nearest practicable route. Dunstan *et al.* found that Maori on average formed about 10% of the jury panel, though this proportion varied widely across the country (between 1.7 and 29.5%). However, this constituted only about 86% of the number of Maori who were expected to be on the jury panel.

Dunstan *et al.* argued that Maori were underrepresented on the panel for two important reasons. First, courthouses are located in urban areas and, since according to the 1991 census a greater proportion of Maori (39%) than non-Maori (30%) live outside the major urban areas, they were excluded to a greater degree from the panel than non-Maori. Second, a lower proportion of people with Maori ancestry were enrolled on the electoral lists (73%) than those who were not of Maori ancestry (83%). Dunstan *et al.* also suggested that Maori were underrepresented on the panel for two other reasons: first, their higher rate of geographical mobility meant that they did not receive summonses sent by post; and second a higher rate of Maori were sentenced to imprisonment or juvenile detention, an event which under particular circumstances would disqualify someone from jury service (Lovell & Norris 1990; Atkinson 1993). Dunstan

et al. found that Maori women appeared to be particularly under-represented on the panel, a result that Dunstan *et al*. suggested might be due to the likelihood that women rather than Maori men would be responsible for looking after children.

Once they have assembled at the court, jurors are selected at random from the panel of potential jurors. Counsel have an unlimited number of challenges for cause and up to six peremptory challenges. As a result of these challenges, Dunstan *et al*. found that the proportion of Maori who were selected dropped even further. Fifty-three per cent of Pakeha (New Zealanders of European origin) on the panel of potential jurors served on a jury, but only 44% of New Zealand Maori.

Dunstan *et al*. found that counsel for the prosecution were twice as likely to challenge Maori potential jurors than non-Maori in the High Court and nearly three times more likely in the District Court. On the other hand, counsel for the defence were two times more likely to challenge non-Maori potential jurors than Maori. Dunstan *et al*. interviewed barristers to find out how they went about making decisions about which jurors to challenge. They discovered that some counsel had several different reasons for challenging Maori potential jurors: the higher number of previous criminal convictions among Maori (as opposed to non-Maori) men; the possibility that Maori jurors might be sympathetic towards or kin of Maori defendants [4]; the belief that some Maori were biased against the police and therefore the prosecution; and the high proportion of Maori in the lower socio-economic groups that the prosecution tended to challenge more often irrespective of race. Some of these factors are not directly related to ethnicity and, as a result, Dunstan *et al*. concluded that it was possible that the high number of challenges on Maori men might have been explained by factors other than their ethnicity *per se*.

Nevertheless, many — though not all — of the lawyers and judges interviewed by Dunstan *et al*. believed that the prosecution tended to weed out Maori jurors *because* they were Maori when there was a Maori defendant. Two defence counsel described how this process was equally obvious to some jury panels. They claimed that the prosecution just "look at the [Maori] person and they barely get four steps forward and they're challenged, and it's just standing out and everybody knows". On the other hand, some prosecution counsel told the researchers that they were particularly careful to ensure that they did *not* challenge all Maori:

> I actually try and make sure that you get a good Maori representation on the jury, just so that people can't say that Maori are being excluded from the juries. Often that means you'll let on a Maori person who has got previous convictions if you've challenged three Maori people with serious convictions already, because the last thing you want is a Maori accused or a Maori person watching from the back of the court

> thinking that, this is white man's justice (quoted in Dunstan *et al*. 1995: 138).

Maori seem to be underrepresented on juries as a result of bias at both the out-of-court and the in-court selection stage. Part of the problem lies in the boundaries of the jury districts, part in the exclusive use of the electoral roll as the source list, part in the criteria adopted for excluding people from the jury list. However, a significant source of underrepresentation also derives from the use of challenges by prosecuting counsel.

Australia

Australia's population is about 18.4 million. In 1991, indigenous people (Aborigines and Torres Strait Islanders) constituted about 1.6% of the population (265,000) though this figure has probably risen in the last 5 years. About 5% of the Australian population were born in Asia and under 1% in Africa. Contemporary race relations between Aboriginal and other Australians are deeply affected by a long history of racist practices and violence committed by or condoned by successive Australian state and federal governments. Criminal justice institutions have often been used as a tool of government policy towards Aboriginal people and this has led to considerable distrust among indigenous Australians towards the criminal justice systems. The authority to make law is divided between the Federal parliament and the state and territory legislatures. State governments have responsibility for issues of law and order, including the responsibility for organizing jury selection. As a result, regulations that concern juries vary from jurisdiction to jurisdiction.

It is difficult to suggest that juries in Australia are anything more than "moderately representative" (Freiberg 1988: 113) of the whole of the community. Many jurisdictions have only scrapped property qualifications (the requirement that jurors own a specified amount of property) relatively recently and the marked variations in selection procedures between states mean that juries in some states are far less representative than others. However, there is evidence to suggest that throughout the country Aborigines are underrepresented among jurors. For example, the Australian Law Reform Commission's research paper on customary law in 1983 revealed deep concern that while Aboriginal people were heavily over-represented among the people who were processed by the criminal justice system, they rarely found their way onto juries. The Final Report concluded that

> …the representation of Aborigines on juries has changed little in recent years. In those parts of Australia where Aborigines represent a

> sizeable proportion of the population, it is still rare for an Aborigine to sit on a jury (1986: para 590).

Difficulties have been identified in both the out-of-court and the in-court selection procedures.

Unlike the U.S.A., voting is compulsory in Australia and so electoral rolls are likely to be more representative of the total population than the American lists. Nevertheless, it is still probable that members of the white, well-educated, English-speaking, middle class are more likely to be on the electoral roll than members of economically deprived, rural, minority racial groups (Scutt 1982).

Vodanovich (1989) examined the proportion of Western Australian jury panellists who were Aborigines. Over 10,000 Aboriginal people live in the Perth Metropolitan area, yet Vodanovich found that the Deputy Sheriff in Perth could only recollect three or four Aborigines featuring on the selection roll over an 8-year period. Findlay's (1994) more systematic study in New South Wales found that only 0.5% of jurors were Aboriginal and he attributed this to various administrative and legislative procedures that that state used to select jurors. Findlay pointed to the problems of using the electoral roll in that stage and noted that the New South Wales Law Reform Commission's 1986 report had found that some electoral districts in the west of the state that had significant Aboriginal populations had been excluded from the jury roll. For example, although Aboriginal people formed only 0.9% of the state's population, they constituted 30.7% of the subdivisions of Wilcannia and 20.4% of Menindee, both regions that were excluded from the jury districts. The apparent discrimination was remedied by the new Sheriff in 1985 (Wilkie 1987).

In 1989, the Supreme Court of New South Wales was forced to consider the representation of Aborigines and Torres Strait Islanders on juries in Queensland. The case of *Binge and Others* vs. *Bennett and Another* [42 A Crim R 93] involved an attempt to extradite 16 Aborigines from New South Wales to Queensland to face trial on charges of rioting. The defendants resisted the order alleging among other things that they would not receive a fair trial because of the unjust and oppressive jury system in Queensland which excluded Aborigines from jury service.

While the court held that the system in Queensland was neither unjust or oppressive, it did find that, with a few notable exceptions, Aboriginal people were almost entirely absent from juries in that state:

> The lack of Aboriginals on both jury panels and juries is to be greatly regretted. The present system of making up jury panels does not of itself discriminate against Aboriginals. However, it is a system which, because of their education, lifestyle and attitudes, does not readily encompass them (per Smart J at p.107).

The court heard from the Director of Prosecutions in Queensland that the method of selecting juries meant that Aborigines were likely to be underrepresented. To become a juror, people had to enrol as an elector, be placed on the electoral rolls, live within a jury district, not be disqualified, be able to read and write English, continue to be at the address under which he or she was included on the electoral roll when the jury notice came round, and finally complete and return the jury notice. The Director blamed the lower than average proficiency in English, greater mobility, and greater lack of cooperation in filling in the form among Aborigines as well as their higher number of convictions for his failure to see "anybody who was either a full-blood Aboriginal or close to that or a half blood Aboriginal either on the jury list or on the jury" [5].

There is little evidence in South Australia that Aboriginal people are being deliberately excluded at the out-of-court stage. However, as in Queensland, there are several points in the out-of-court selection process which may contribute to the underrepresentation of Aboriginal people (Israel & Hutchings 1997). First, Aboriginal people are likely to be underrepresented on the source list. This will occur even if Aboriginal people register at the same rate as non-indigenous Australians as the age of the Aboriginal population is a great deal younger than the total state or national population. Second, Aboriginal people are not evenly distributed through the population centres of the state (Hugo 1995). As a result, Aboriginal people may be disproportionately affected by the practice of drawing jurors from only three specific regions of South Australia. In particular, more jurors are drawn from Adelaide than any other part of the state. Although Adelaide contains the largest concentration of Aboriginal people, there are proportionately fewer Aboriginal people in Adelaide than non-Aboriginal people. Many of the other urban centres and regions with significant Aboriginal populations fall outside the jury districts or are more than 150 km from the place where the jury will be empanelled — a reason for automatic excusal from jury service. There are several other reasons why we might expect Aboriginal people to be underrepresented in the annual jury list. It is possible that Aboriginal people are more likely to be disqualified from jury service because of prior convictions. Again, it is conceivable that Aboriginal people might be disproportionately affected by the requirement that jurors must be able to understand English.

While exclusion at the out-of-court stage may be no more than the unfortunate result of faulty or excessively bureaucratic administrative procedures, there is some evidence that indigenous Australians are being removed quite deliberately at the in-court stage of selection. In Western Australia, there have been examples where Aboriginal jurors have also been systematically excluded through challenges [6]. Vodanovich (1989) was told that despite making up over 25% of the jury roll in the Kimberleys

the number of Aborigines who actually served on any particular jury of 12 was generally only two or three. In one case in Derby in 1984, an all-white jury was empanelled in a town where 60% of the population were Aborigines. In another case in Broome in 1989 concerning the murder of an Aboriginal man who had been apprehended breaking into a car, about one-third of the 40–50-member jury panel was Aboriginal. All the Aboriginal members faced peremptory challenges from prosecution and defence lawyers. In Perth, over an 8-year period the Deputy Sheriff could not remember any Aboriginal people actually serving on a jury. The Royal Commission into Aboriginal Deaths in Custody, investigating the death of John Pat, was concerned by the fact that Pat's trial before a Supreme Court judge in the Pilbara had been conducted before a jury without any Aboriginal members, despite the high proportion of Aborigines in the local population.

In New South Wales, there is also evidence that some prosecutors, when faced with an Aboriginal defendant, have attempted to challenge the composition of juries in such a way that no Aboriginal jurors are selected. In 1981 in *Smith* [(1981) *Aboriginal Legal Bulletin* **3**, 81], the defence lawyer employed by the Aboriginal Legal Service was reported as saying that where the defendant was Aboriginal it had become common practice for the prosecution to challenge all potential jurors who were Aboriginal (Lyons 1984; Findlay 1994).

In *Binge and Others* vs. *Bennett and Another* [42 A Crim R 93], witnesses testified to the low number of Aborigines who actually served on juries in Queensland. A barrister who had practiced in Queensland for 40 years had seen no more than 50 Aboriginal people on panels, and only one of them had actually been sworn on as a juror. In 1986, there were 9931 indigenous people in the ATSIC District of Townsville, constituting about 3% of the population. A Crown Prosecutor who had worked on 30–50 trials in Townsville over 2 years from 1985 to 1987 had only ever seen one indigenous person on a jury. During that period, in trials at Cairns, Mackay, Innisfail, Bowen, Charters Towers and Hughenden, he remembered seeing indigenous people on jury panels but thought that only one had reached the trial jury itself.

The New South Wales Supreme Court was convinced that, with the exception of Cairns and perhaps a few other smaller centres, prosecutors in Queensland regularly challenged Aboriginal prospective jurors. This happened despite the presence of guidelines issued by the Director of Prosecutions. However, the judge in New South Wales also noted that even if these practices were abolished and Aboriginal people were brought onto juries in a number proportionate to their presence in the overall population (2.37%), there would still be comparatively few cases in Brisbane and south-east Queensland where they would appear. In the case

of the Brisbane Jury District, for example, only 0.78% of the population were Aboriginal people.

In both New Zealand and Australia, indigenous people and other ethnic minorities have been deliberately excluded from jury service for a long period of time. While this is less often the case now, some selection procedures are seriously flawed in that they make it more likely than not that ethnic minorities will either be less likely to be called or more likely to be weeded out from jury service than other members of the community. Problems have been identified in the construction of source lists, the process of selection from those lists, the categories of disqualification, ineligibility and excusal, and the use of proximity requirements which can disproportionately exclude minorities from service where courts are built in urban areas and minorities are underrepresented in those areas and overrepresented in rural regions. A continuing source of difficulty is the use of challenges by counsel to remove indigenous people and members of other ethnic minorities from the trial jury.

Combating Ethnic Bias in Selection

Indigenous people have an obvious interest in being able to participate in jury service in the same way as every other citizen. They also have an interest in being tried by impartial jurors who are selected to represent the entire community. As a result, jury selection has become a site of political and legal struggle. People from African–Caribbean and South Asian ethnic minorities in Britain (Enright 1991; Herbert 1995), as well as African, Asian and Native American communities in the U.S.A. (Fukurai *et al*. 1993; King 1993; Smith 1993; Alschuler 1995*a*, *b*) have challenged their under-representation on jury panels and trial juries. This has resulted in a line of important judicial decisions on the matter. In Canada, attacks have been made on the rules of the court that stopped defence lawyers finding out about prejudice among prospective jury members (Roach 1995). In New Zealand and Australia, far less has been done to combat ethnic bias in jury selection.

New Zealand

Attempts to combat bias in jury selection in New Zealand seem to have been fairly *ad hoc*. Recently, efforts have been made to improve the management of out-of-court selection procedures, initiatives necessitated when one judge investigated how a particular panel had been summoned and discovered that serious procedural defects existed in the process. However, very little attention has been paid to in-court selection processes.

In 1993, a District Court judge in Whangarei noticed that the summoned panel from which juries were being drawn appeared to include very few Maori. This seemed to be very unlikely in an area where about 16.5% of the population were Maori. The judge discovered that the Electoral Enrolment Centre had made a mistake in preparing the jury lists for that period (February–August 1993). Instead of calling jurors from an area of 30 km around the courthouse (which would have included electors from the electorates of Whangarei, Hobson, Northern Maori and Kaipara), the summonses were only issued to people in Whangarei. This had important consequences for the ethnic composition of the jury panel as it meant that the Northern Maori electorate was excluded. Judge Rushton discovered the mistake after the verdict and before the sentencing — for the cultivation and possession of cannabis — of Cornelius, a man whose mother was Maori and who voted on the Maori special electoral roll. The judge believed that she should order a new trial because

> …the jury list was improperly compiled so that those resident in three electorates and two sectors of the community were excluded: those registered on the same ethnically based roll as the accused and those having a community of interest with locus of the crime.

The judge referred the matter to the Court of Appeal [*R* vs. *Cornelius* [1994] 2 NZLR 74 (CA)] which decided that while the mistake may have led to fewer Maori jurors, there had been no departure from the principle of random selection of qualified jurors. If the defence had objected to the selection process before the trial, the trial should not have proceeded [7]. However, the Court of Appeal relied on s 33(a) of the Juries Act 1981 and held that procedural defects such as this should not vitiate trials unless there had been a substantial miscarriage of justice. The Court of Appeal accepted that the mistake might have contributed to an argument that there was a miscarriage of justice, particularly if the case had involved racial issues, but that it could not in itself render the verdict void. The Court refused to demand a retrial and returned the case to the District Court for sentencing.

Before the last General Election, the New Zealand Electoral Enrolment Centre ran a campaign to increase the proportion of Maori who registered to vote. The Department for Courts is about to establish an electronic jury management system which would use electoral rolls which are updated quarterly to create a jury source list. As the Maori population seems to be more mobile than the non-Maori population, this change might increase levels of Maori representation on the jury lists.

Maori defendants have had almost no success challenging in-court selection procedures. In 1990, in *Kohu*, the Court of Appeal denied five applicants the opportunity to appeal against conviction for *inter alia*

damaging a city library. The defendants claimed that they had not obtained a fair trial because the Crown Solicitor acting as the prosecutor had challenged every prospective Maori or Polynesian juror thereby ensuring that the jury that was empanelled was all-European. The defendants maintained that such a jury could not constitute a jury of peers. The court held that the Juries Act had been complied with and that these were political questions, not legal issues for an appellate court [8]. The judgment was delivered 26 days before the New Zealand Bill of Rights Act came into force. It is difficult to predict whether this might have changed the court's view of what kinds of questions they might consider. In 1995, a judge in the High Court in Hamilton rejected a submission that a defendant be tried by a jury consisting of six Maori and six Pakeha. Penlington J held that the court had no authority to order the creation of a jury with a particular composition [*R* vs. *Pairama* 1996 BCL 182].

The Department of Justice's recent interest in the composition of New Zealand juries has led to the report by Dunstan *et al.* (1995). After seeing a draft copy of the report, the Solicitor-General issued a direction to all Crown prosecutors instructing them to take whatever steps might be necessary to ensure that male Maori jurors were not disproportionately excluded by prosecutorial challenges. No statistical evidence is available that might reveal the effect of that direction and the more general issue of jury reform is now before the Law Commission. However, so far, Maori groups have had little success in challenging in-court selection practices and it has been left to the diligence of particular judges to rectify procedural defects in the out-of-court selection procedures.

Australia

In Australia, ethnic minorities have no right to be tried by juries consisting entirely or even partly of members of their ethnic group. As a result, most of the attempts to use the courts to challenge various selection practices have been unsuccessful. In 1988, the Queensland Court of Criminal Appeal heard an application from an Aboriginal resident of Stradbroke Island who challenged the composition of the jury that had found him guilty of several criminal offences. He claimed that he had been denied a jury of his peers as he had not been tried by a jury of Nunukel people. The Court held that the jury had been called in accordance with the relevant state statute, *The Jury Act 1929 (Qld)*, which did not recognize the possibility of a jury drawn exclusively from a particular ethnic group, and that therefore it was irrelevant that there were no Nunukel people on the jury.

There have been several unsuccessful attempts to challenge the array in order to ensure that Aboriginal defendants do not face all-white juries. For

example, in Victoria in *Grant and Lovett* in 1972, a challenge to the array was made on the basis that there were no Aboriginal people on the jury. Several Aborigines gave evidence that they had never heard of Aboriginal people being called for service, but when the sheriff gave evidence that Aboriginal people had in fact been called, the challenge to the array failed (Vodanovich 1989).

The same argument failed for the same reason in Broken Hill in 1968 [9], Tamworth in 1974 (Lunn 1988), in Dubbo (Nettheim 1974), all in New South Wales, and in South Australia. In the last case, in 1973, Harry Gibson, a Pitjantjatjara man charged with murder, challenged the array in his trial in Port Augusta. The sheriff gave evidence that he could not recall any Aboriginal people actually serving on a jury in Adelaide, although he knew of one person who had served and one who had obtained exemption at Port Augusta. Bright J held that although Gibson's counsel had produced evidence that the Aboriginal people were not aware of anyone from their communities serving on a jury, the sheriff had made no attempt to exclude Aborigines and was therefore not guilty of any impropriety [*R* vs. *Gibson* (Unreported) Supreme Court, South Australia. 12/121/73].

In 1974, an Aboriginal defendant in Tamworth in New South Wales challenged the array on the basis that no Aboriginal people were included on the jury panel. The challenge failed when evidence was provided to show that there were in fact some Aboriginal people were on the jury roll for the district and that the Sheriff had not acted with impropriety (New South Wales Law Reform Commission 1985: 86).

Aboriginal defendants have had more success in having their trials shifted from racially divided towns. For example, in 1985, one trial in Western Australia was moved from Port Hedland to Karratha [*R* vs. *O'Brien* (Unreported) Supreme Court, Karratha. 1/5/85]. This form of administrative concession has received support from senior lawyers in that state (Davies 1976). In 1986, a former president of the Criminal Law Association claimed that jury trials should be moved from racially divided towns where white residents thought of Aborigines as 'trash' [10].

In 1981 in *Smith* [(1981) *Aboriginal Legal Bulletin* **3**, 81], Judge Martin in the Bourke District Court in New South Wales was unimpressed with the fairness of the use of peremptory challenges to remove Aboriginal jurors and discharged the entire jury:

> The accused man is obviously of Aboriginal blood, equally obviously there were three members of the jury panel called who were of Aboriginal blood and none of these three remains… each of them was challenged by the Crown prosecutor…
>
> It is something which worries me immensely and continues to worry me. It is the second time it has happened in a court over which I have had the duty of presiding in the west… if I allow the situation to

> continue some members of our community, of our country, may think that appearances suggest that justice is not being done…

Although the New South Wales Law Reform Commission (1986) recommend that judges should be given the power to discharge a jury where the use of peremptory challenges gave the appearance of unfairness (a codification of Smith), this was not pursued. Eight years later, Findlay (1994) did not believe that there was any evidence to support direct intervention from the judiciary that would enable juries to be socially engineered to include a particular racial mix.

In Australia, Aboriginal defendants and their lawyers have had very few victories in challenging jury selection in court. Some judges have been willing to move trials from towns where racial tension is particularly high and, in *Smith*, a New South Wales judge was so disgusted with the use of challenges by the prosecution that he discharged the entire jury. However, overall the strategy of challenging in-court selection in court has not yielded much success.

Conclusion

In both New Zealand and Australia efforts have been made to confront the underrepresentation on juries of indigenous peoples and other ethnic minorities. Three major issues have dominated discussion: how to create representative source lists; how to screen out racist jurors; and how to stop jurors of particular ethnic backgrounds being removed from jury panels. On each issue, some successes have been achieved. However, no jurisdiction in Australia nor New Zealand can be held up as a shining example where indigenous people are represented at a level that is equivalent to their numbers in the overall population.

In several jurisdictions in Canada and the U.S.A., political and legal challenges have been made to the way in which the jury district or 'community' is constructed. These include efforts to draw attention to the manipulation of geographical boundaries to exclude minorities as well as condemnation of the use of non-representative source lists. In the U.S.A., in particular, various strategies have been developed to increase the representation of ethnic minorities on source lists. These embrace the oversampling of ethnic minority jurors, the construction of a jury panel that includes proportionate numbers of ethnic minority jurors, and the moving of trials between ethnically diverse areas. In Canada, several suggestions have been made to reduce the disqualification of ethnic minority groups on grounds of lack of citizenship or lack of proficiency in English or French. This line of argument has not been followed in Australasia. In Australia, for example, proficiency in English is seen as a

prerequisite even in a case where the defendant and witnesses may be speaking in an Aboriginal language and a non-English speaking juror may be fluent in that language.

In some countries, concern has been expressed at the probability that some jurors may allow their racial prejudices to influence their verdict. In the U.S.A., the *voir dire* has been used by defence counsel to weed out some racist jurors. Without the *voir dire*, counsel may have very little information on which to base a challenge. Recently, in Canada and in England, there have been signs that judges may be willing to investigate ways of screening out racist jurors in cases where this may be particularly important. In Australia and New Zealand, this suggestion does not appear to have found favour with judges.

Finally, activists in several countries have been disturbed by the tendency of some counsel to challenge members of ethnic minorities and have them removed from the jury. In the U.S.A., counsel may be asked to justify their challenges. Again, in Australia and New Zealand there has been very little to stop prosecution counsel adopting such a tactic.

Many of the strategies adopted in North America have attempted to use the legal system itself to promote change. This has led to some success in New Zealand but has not proved particularly helpful in Australia. Of course, the problem is not only a legal one — will the law recognize current problems in jury selection? It is also a political issue: do we want a legal system that enjoys very little legitimacy among specific parts of our society? Of course, juries need not be part of a solution to this problem if indigenous peoples are able to operate their own justice systems (Tauri & Morris 1997). However, if juries are to act as a symbol of integrity and fairness by invoking the ideals of impartiality and community conscience, then changes have to be made in the ways that juries are selected. The mismatch between the levels of participation of indigenous people as defendants and as jurors is a dangerous state of affairs. It has the potential to cause serious damage to our system of justice: those who are defendants believe that verdicts might have been reached unfairly; those who are not selected for jury service may feel that they and their community are not being allowed to participate in a criminal justice system that is being controlled by and for someone else; and those who care about justice are deeply concerned by the certainty that justice is not being seen to be done, and in some cases is clearly not being done.

Acknowledgements

I am indebted to the Department of State Aboriginal Affairs in South Australia for providing funding for this work. It forms part of a larger report on Aboriginal people and juries undertaken in collaboration with

Dr Suzi Hutchings. I wish to thank David Rathman, Ceilia Divakaran-Brown, Alan O'Connor and the contact group for their help in developing the proposal and the Sheriff's Department in South Australia for their patience and assistance. Thanks also to Susan Potter at the New Zealand Law Commission for her help with and comments on an earlier draft.

Notes

1 United States Supreme Court in *Witherspoon* vs. *Illinois*, 391 U.S. 510, 510N.15 (1968).
2 Jury Act 1995 (Qld); Jury Amendment Bill 1996 (Qld); Jury Amendment Act 1996 (NSW).
3 It would be inappropriate to make proposals for changes in the system of jury selection without consulting indigenous communities and is beyond the scope of this article.
4 In Dunstan *et al.*'s study, 47% of male Maori potential jurors were challenged by the prosecution when the defendant was also Maori. In the cases in the District Court, the figure rose to 55% though the researchers warned against placing too much weight on the absolute figures given the small size of their sample of Maori defendants.
5 Testimonial of Mr D.G. Sturgess as reported by Smart J at pp. 102–3.
6 See *Daily News* 11/12/84 'Race Row over Jury Trial' and *West Australian* 24/2/89 'Race Strife Threats after Court Verdict' and 7/3/89 'Put More Blacks on Juries Says Aboriginal Legal Service'.
7 This happened in *R* vs. *George* (High Court, Whangarei, T 29/93, 16 August 1993, Hillyer J), a case that was due to take place after the Whangarei mistake had come to light.
8 *R* vs. *Kohu and others* (unreported, Court of Appeal, CA 107/90, CA 108/90, CA 109/90, CA 119/90, CA 177/90, 2 August 1990).
9 See letter to editor in 1975 in *Australian Law Journal* **49**, 697 from Austen, Brown, Thompson and Swift.
10 *Daily News* 6/6/86 'Legal Man in Call on Race Trials'.

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