

A suggested alternative to the jury system

By Ian Turnbull QC

It is encouraging to see that an increasing number of writers, including lawyers and even a few judges, are drawing attention to the deficiencies of the jury system as we know it. However, most of them assume, without argument, that the only alternative is trial by a single judge, which also has a long tradition, but has some obvious disadvantages. As a result, the discussions are usually limited to focusing on ways to make the jury system work. I think it would be more fruitful to consider other alternatives to the jury system. In this article I suggest one which has not been widely discussed: trial by a judge and a panel of two or more professional judicial officers.

I had some years' experience as a Crown prosecutor practising under such a system in the former British colony of Southern Rhodesia (now Zimbabwe). For serious offences there were two forms of trial: one was by a judge and two assessors, the other by a judge and jury. African defendants were always tried by a judge and assessors. White defendants had the right to choose either form, but they often chose a judge and assessors, because it was generally believed by the legal profession that if the defence had a strong case, this was the better choice.

The assessors were legally qualified magistrates, with long experience of presiding over their own courts. When sitting in the superior court as assessors they were not mere advisers, they were an integral part of the court. They had the same right as the judge to question the witnesses. Legal issues were decided exclusively by the judge. The facts were decided by the judge and the assessors, deliberating together and voting with equal status (sometimes the judge was overruled by the assessors, and had to abide by their decision). The judgment of the court was written and delivered by the judge. It included all the facts decided by all the members of the court, and set out their reasons.

Decisions under this system were much fairer and more reliable than under the jury system. The assessors fully understood the legal issues, and were familiar with the rules of evidence and criminal procedure. They were trained, and had long experience, in making objective decisions based solely on the evidence. They had spent many years listening to witnesses and defendants and deciding whether or not they were telling the truth.

There were other advantages. The lengthy procedure of selecting a jury was avoided. Trials were quicker, because lawyers knew the assessors understood the issues. If the assessors accidentally heard some evidence that was inadmissible, there was no need to abort the trial, because they were accustomed to the need to disregard such evidence. For the same reason, pre-trial publicity did not prejudice a fair trial, and there was no need to choose a special venue for the trial.

On appeals, there was a further advantage. Because the assessors' reasons were

part of the judgment, there was full scope for appeal to the higher court on questions of fact. On the other hand, under the jury system, the power of an appeal court to overturn a jury verdict on questions of fact is severely limited. Most appeals from jury trials are concerned merely with legal issues, because the reasoning of the jury is unknown, so the verdict on the facts is almost unassailable.

Of course most of the advantages mentioned above also apply to trial by a judge sitting alone. But trial by jury and assessors had two further, substantial advantages. First, the members of the court shared the full responsibility of weighing all the evidence, focusing on all relevant details and determining the credibility of witnesses and defendants. Secondly, the fact that there were three members of the court reduced the risk of personal bias affecting the decision.

If a system along similar lines were adopted in Australia, various aspects could be changed to suit Australian views. The number of assessors could be increased, or could be varied according to the seriousness of the case. The judge could be excluded from deciding questions of fact, if it were thought that the assessors' function should be closer to that of a jury. In appropriate cases, the assessors could include experts from other fields, such as accountants in cases of corporate fraud, medical practitioners in cases involving complex medical evidence, and so on. There are many possibilities deserving serious consideration.

Our jury system is a legacy of England's distant past. It was a vast improvement on trial by ordeal and trial by battle, but it is time to take another step forward. Australia deserves something better than jury trials, but there will never be substantial progress unless we do two things. First, we must rid ourselves of the romantic notion that the jury system guarantees a fair trial. Secondly, we must realise that there are other alternatives besides trial by a single judge.

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