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THE AUSTRALIAN BAR ASSOCIATION

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THURSDAY 9 JULY 1998

DEMOCRACY AND THE LAW

DELIVERING JUSTICE IN A DEMOCRACY III - THE JURY OF  
THE FUTURE

The Hon Justice M D Kirby AC CMG

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### **ABSTRACT**

The jury has profoundly influenced the content and procedures of the common law system. It has been described as the bulwark of liberty and the means by which democratic values are regularly brought into the courtrooms of the nation. Yet the jury is changing in its composition, ethnic mix and attitudes. Drawing on research in the United States of America, the author explores three changes that are afoot.

The first change involves the withdrawal of traditional statutory exemptions for people in designated occupations (practising and retired lawyers, judges and other professional people and people with connection with the law). In many States of the United States they are no longer exempt from jury service. The second change affects the ethnic composition of modern juries. This has presented severe challenges to judges and advocates. These include the unfamiliarity of some jurors with the English language used in the trial but, more fundamentally, the introduction of different assumptions about legal institutions, the role of government and of the jury itself. The third change concerns the advent of jurors from the so-called generation-X, ie people born after 1961. Research suggests that a very large number of such persons have significantly different family experiences, values and aspirations from citizens of previous generations. They are commonly more accustomed to communication in digital form and to receiving information in ways which are designed to maximise interest and to minimise time-loss. For such jurors lengthy addresses by advocates and extended instruction by judges may be a source of intense boredom, irritation or both.

The changes to the jury in the United States have begun to affect the way in which judges instruct juries on the law and advocates address them. The purpose of this paper is to examine these changes in jury composition and to explore the impact which these changes may have upon judicial communication with juries and upon advocacy before juries of the future. Drawing upon United States data, the author asks how much the experience in that country can be applied to other countries of the common law facing similar developments. If the jury is the bulwark of democracy in the operation of the legal system, it seems that judges and lawyers need to adapt communication and re-examine assumptions that lie at the root of their communication with the jury of the future.

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THE BULWARK OF DEMOCRACY

We have it on the authority of Blackland that "trial by jury ever has been, and I trust ever will be, looked upon as the glory" of our legal system<sup>1</sup>. Historically, juries have been both an important institution in the common law systems of justice and a valuable

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\* Justice of the High Court of Australia. President of the International Commission of Jurists. The author has derived many of the ideas expressed in this paper from a presentation by Ms Sonya Hamlin, to a conference of the Litigation Section of the American Bar Association in Maui, Hawaii in January 1998. See her book *What Makes Juries Listen Today?* Available: Fax +1-973 890 0042. The book is recommended to those who wish to read more on these themes.

1 *Commentaries on the Laws of England*, 1765, Vol 1 at 379.

means by which members of the community participate in resolving serious disputes. Countries like Australia which began as penal colonies and settlements, owe much to the English jury. Many a worthy life was spared by a jury, flying in the face of the evidence, reaching a decision which carried the punishment of transportation rather than the sentence of death.

In Ireland, serious criminal trials must, by article 38.5 of the *Irish Constitution* be tried before a jury. The cases in Ireland give the usual explanations - the introduction of the "commoner touch"<sup>2</sup> and protection from executive zeal and judicial conservatism<sup>3</sup>. But perhaps the most vivid explanation of the importance of jury trial in Ireland was given by Justice Henchy in *The People v O'Shea*<sup>4</sup>:

"The bitter Irish-race memory of politically appointed and executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution therefor of summary trial or detention without trial, of cat and mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors, had long implanted in the consciousness of the people, and therefore in the minds of the political representatives, the conviction that the best way of preventing an individual from suffering a wrong conviction for an offence was to allow him to 'put himself upon his country', that is to say, to allow him to

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2 *Melling v O Mathghamhna* [1962] IR 1 at 39 per O'Dalaigh J.

3 *Ibid*, per Kingsmill Moore J at 34.

4 [1982] IR 384 at 432-433. See also *O'Callaghan v Attorney General* [1992] 1 IR 538 at 545.

be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution, who would see that all the requirements for a fair and proper jury trial would not be observed, so that, amongst other things, if the jury's verdict were one of not guilty, the accused could leave the court with the absolute assurance that he would never again 'be vexed' for the same charge".

Although the early military and civilian administrators in many British colonies were dubious about importing the jury system<sup>5</sup>, the "free" settlers quickly demanded it as a birthright of those entitled to British liberties. One of the few guarantees contained in the Australian Constitution is that trial on indictment of any offence against any federal law "shall be by jury"<sup>6</sup>. The Australian federationists believed that the participation of ordinary citizens, at least in serious criminal trials, would be a check against oppression, as it had sometimes proved in English legal history. The constitutional guarantee was originally given a narrow construction by the High Court of Australia<sup>7</sup>. But this attracted some famous dissenting views<sup>8</sup>. Eventually, the Court embraced a broader view<sup>9</sup>.

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5 B Cassidy, "12 Angry Persons Still Needed" (1998) 23 *Alternative Law Journal* 9 at 12.

6 Australian Constitution, s 80.

7 *R v Bernasconi* (1915) 19 CLR 629 at 637; *R v Archdall*; *Ex parte Carrigan* (1928) 41 CLR 128 at 139.

8 *R v Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1938) 59 CLR 556 at 580 per Dixon and Evatt JJ; *Li Chia Shing v Rankin* (1978) 141 CLR 182 at 198 per Murphy J; *Kingswell v The Queen* (1985) 159 CLR 264 at 310 per Deane J.

Yet the constitutional guarantee in Australia applies only to offences against federal law. It has no application to offences against the laws of the Australian States. As these still cover the majority of criminal offences in Australia, the limited operation of the guarantee is obvious. An attempt, in 1988, to incorporate a requirement of trial by jury in each of the Australian States failed to secure the majority necessary to incorporate it in the Australian Constitution<sup>10</sup>. In fact, in keeping with the usual conservatism of Australian electors when asked to approve amendments to their Constitution, the proposal was overwhelmingly defeated in every State. In the other States it was even lower. The highest yes vote it drew was 32.76% in the state of Victoria<sup>11</sup>. The result is that, save for federal offences tried on indictment, there is no constitutional guarantee of jury trial in Australia. If the jury remains the centrepiece of the criminal trial system, the symbol of its democratic accountability, the protector against autocracy and the assurance of its ultimate understandability, this is by tradition or apathy rather than constitutional requirement.

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<sup>9</sup> *Cheatle v The Queen* (1993) 177 CLR 541.

<sup>10</sup> Australian Constitution, s 128.

<sup>11</sup> A Blackshield and G Williams, *Australian Constitutional Law and Theory* (2nd ed) (1998) 1188.

Lately, in Australia, as in other countries where the jury system has survived<sup>12</sup>, there has been much scrutiny of the jury including consideration of how jury trials should be organised, jurors selected, remunerated and utilised and whether jurors should be specially educated for their task or chosen more carefully to ensure that they are truly representative of a changing society<sup>13</sup>. These questions have been the subject of official reports<sup>14</sup>, academic monographs and articles<sup>15</sup> and press commentary<sup>16</sup>. In the wake of the much publicised trial of O J Simpson in the United States of America,

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- 12 As to Canada see E J Gunn, "Criminal Jury Trials Seminar: An Overview" in Canada. National Judicial Institute, (1998) 11 *Bulletin* at 1.
  - 13 M Findlay et al *Jury Management in New South Wales*, Melbourne, 1994 ALJA 3-7; O Trembath, "Judgment by Peers: Aborigines and the Jury System" (1993) 31(5) *NSW Law Society Journal* 44; S Vikoren, "Justice or Gerrymander? Confronting the Under-representation of Racial Groups in the Jury Pool of New York's Eastern Districts" 27 *Columbia Human Rights Law Rev* 605 (1996); C Petersen, "Institutionalised Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 *Macgill LJ* 147.
  - 14 Great Britain, The Royal Commission on Criminal Justice (Chairman Viscount Runciman of Doxford), *Report*, London, 1993 HMSO Cm 2263 at 131-136; Victorian Parliament, Law Reform Committee, *Jury Service in Victoria*, Vol 1 Melbourne 1996.
  - 15 Findley and Duff, "The Jury Under Attack" (1988) in Cassidy above n 2 at 9.
  - 16 See eg J Tobin, "The Woman Who Let OJ Off the Hook", *Sunday Age*, (Melbourne), 19 January 1997 at 17; J Fife-Yoemans, "Juries on trial", *Weekend Australian*. Review, 14 September 1996 at 1.

which for a time captured world-wide attention, there has been much re-consideration of the jury system itself. In the age of global media entertainment, juries tend to get a bad press. Their ordinary work in humble courtrooms throughout the world is forgotten. A controversial acquittal of a sporting hero or the conviction of a foreign au pair worker capture the world's headlines. The value of bringing the legal system, in big trials and small, back to the understanding of ordinary citizens is overlooked. The competence of jury trial is questioned and its suggested defects emphasised.

In this paper, I will assume that, for all the heartburning, juries will survive in countries like Australia, even where not constitutionally required, for reasons of history, political evaluation and recognition of the disadvantages of the alternative of trial by judges alone. Upon that assumption, I wish to address some of the issues that may be presented by the jury of the future. Those issues arise from (1) the changing pool from which juries, in many jurisdictions, are now drawn; (2) the changing ethnic, cultural, religious and attitudinal mix from which jurors of the future will be chosen; and (3) the changing attitude to jury service likely to be evident amongst jurors from the so-called generation-X.

Research in the United States suggests that judges in their instructions to juries, and advocates in their argument before juries, may need to take into account the changing composition of the modern jury. They may need to be alert to the new features of communication with a jury whose composition, and attitudes, may be

changing. This research was brought to my notice at a legal conference in the United States in January 1998. My object is to draw the debates at that conference to wider attention. It seems likely that some of the conclusions reached in the United States will be relevant to other countries of the common law - both to judges and to advocates. If, as we often say, the jury is the bulwark of democracy in the legal system, it is important that judges and advocates should be aware of who the jurors are, for they are changing.

#### GETTING INTO THE JURY ROOM

For lawyers of the common law tradition in most countries other than the United States, it is ordinarily difficult or impossible to obtain accurate information on what takes place in the jury room. This is because the courts in England for hundreds of years - and the courts of most countries which adopted the English jury system - have placed substantial impediments in the way of investigating jury deliberations in actual cases.

The principle was stated in 1817 in the Court of King's Bench<sup>17</sup>. It has been confirmed many times since in English

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17 *Rex v Wooler* (1817) 6 M and S 366.

decisions<sup>18</sup>, decisions of the Privy Council<sup>19</sup> and decisions of Australian courts<sup>20</sup>. The rule of jury privacy is a strong one as these decisions demonstrate. The rule may even exclude taking evidence from a juror that he disagreed with a verdict announced in open court although he was too frightened to stand up and say so at the time<sup>21</sup>. The reasons underlying the strict rule include defence of the finality of jury verdicts; recognition of the limited and collective responsibility of the jury; and protection of the jury system itself from being undermined by external evidence as to what goes on in jury deliberations<sup>22</sup>.

The traditional common law inhibitions upon interrogation of jurors is reinforced, in Australia at least, by two legal sanctions. The first is the operation of the law of contempt. It may be a contempt of court for lawyers, or anyone else, to interrogate a juror as to the

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18 *Raphael v Bank of England* (1855) 17 CB 161; *Nesbitt v Parrett* (1902) 18 TLR 510; *Ellis v Deheer* [1922] 2 KB 113; *Boston v W S Bagshaw and Sons* [1966] 1 WLR 1135 and *Reg v Mickelburgh* [1995] 1 Cr App R 297.

19 *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1; *Nanan v The State* [1986] 1 AC 860.

20 *R v Rinaldi* (1993) 30 NSWLR 605 at 611. cf *Milgate v The Queen* (1964) 38 ALJR 162 (HC). A recent case is *R v Isaacs* (1997) 41 NSWLR 374.

21 *R v Roads* [1967] 2 QB 108.

22 *Boston v W S Bagshaw and Sons* [1966] 1 WLR 1135 at 1137 per Harman LJ.

course the jury's deliberations took and the reasons for their decision. In this regard the jury is, and remains, as enigmatic as the sphinx<sup>23</sup>. Secondly, the provisions of the local *Jury Act* commonly include criminal sanctions designed to discourage, under pain of punishment, the solicitation of information from, or harassment of, a juror or former juror<sup>24</sup>. Such amendments usually make it clear that the prohibited discourse includes "the deliberations of a jury including statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations"<sup>25</sup>. Soliciting information "in accordance with an authority granted by the Attorney-General for the conduct of a research project into matters relating to juries or jury service" may be excluded from the

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23 It is in *Ward v James* [1966] 1 QB 273 at 301 that Lord Denning MR described the inscrutability of the jury as sphinx-like. See *Bromley v Tonkin* (1987) 11 NSWLR 211 at 214. For cases involving prosecution for interviews with jurors see *Rex v Armstrong* [1922] 2 KB 555 at 568-569; *Ellis v Deheer* [1922] 2 KB 113 at 118; *Attorney-General v New Statesman and National Publishing Co Ltd* [1981] QB 1 (and interview with a juror in the criminal trial of Mr Jeremy Thorpe MP, Leader of the British Liberal Party. The application for an order of contempt was refused). Cf *Attorney-General v Associated Newspapers Ltd* [1994] 2 AC 235 (where the application was successful following the passage of the *Contempt of Court Act* 1981 (UK), s 8(1)).

24 *Jury Act* 1977 (NSW), s 68A discussed in *R v Rinaldi* (1993) 30 NSWLR 605 at 611. cf England, Criminal Revision Committee, *Secrecy of the Jury Room* (1968) Cmnd 3750. But see now *Contempt of Court Act* 1981 s 8(1).

25 s 68A(2) of the *Jury Act* 1977 (NSW).

prohibition<sup>26</sup>. Although the power exists in the Attorney-General in some jurisdictions, and has been exercised, it can be expected that it will be rare that intrusions into actual jury deliberations will be permitted<sup>27</sup>.

Therefore, for the most part, judges and advocates, considering the way juries think, are left to surmise, impression and professional gossip (rather than empirical evidence). To ascertain how a jury was impressed by particular flights of advocacy, or what the jurors made of judicial instruction about their legal obligations, resort must usually be had to professional or media speculation which cannot be confirmed, or denied, or by use of mock juries where the seriousness of a trial cannot really be replicated. Some members of the Australian legal profession (and not a few judges) are convinced that they have a good insight into the working of the mind of the jury. But there is ordinarily no way of checking, in actual cases, as to whether their feelings are accurate.

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26 *ibid.* s 68A(3). cf G Williams, *The Proof of Guilt*, 7th Hamlin Lecture (1955).

27 In February 1996 it was announced that a study is to be conducted by a group in the University of New South Wales led by Professor Michael Chesterman concerning the impact of media on jury verdicts. It has the approval of the NSW Attorney-General. See "Media impact on jury examined", *West Australian*, 19 February 1998, at 38.

Many lawyers outside the United States are shocked at the apparent ease with which jurors are interviewed by the media and by others in some parts of that country, immediately after controversial decisions. They may be even more alarmed by a growing practice whereby jurors themselves approach the media, make statements and even write books on their experiences. Such developments are generally dismissed as aberrations of a legal system blinded by First Amendment protections for freedom of speech. Yet because the legal system of other common law countries is, in important respects, similar to that of the United States, and because our jury systems and trial practices are, like those of the United States, mostly derived from England, it is relevant for judges and lawyers to consider research upon the United States jury - and upon the population from which it is now derived. Not all of the lessons will be applicable to juries in other jurisdictions. But many of them will be. We therefore do well to consider the extent to which United States experience requires us to adjust the way in which our judges and advocates communicate with modern juries.

#### CHANGING JURY COMPOSITION - EXEMPTIONS

In the United States three changes are occurring which are relevant to the composition of a jury in that country and therefore to

communication with its members. The first is a statutory phenomenon which has not yet really spread outside the United States. I refer to the deletion in many States of exemptions from jury service<sup>28</sup>. This means that it is perfectly possible, in those jurisdictions which have opted for a no exemptions jury, to strike on the jury a practising attorney, a former judge, a police officer or other official who may be quite knowledgeable about the law. The fact that a jury might include such persons, and that they cannot by law be excluded (except for cause unrelated to their occupation) imposes a new burden on lawyers to adjust their advocacy to special knowledge and to avoid belabouring points which may be well known to the expert juror, although not to others. At least for the moment, this is a complication which we do not face in Australia<sup>29</sup>. However, in changing times when talk of popular sovereignty is common, the idea of the truly universal jury cannot be completely ignored.

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<sup>28</sup> G Spencer, "New Rules Issued to Manage End to Jury Exemptions" 214 *New York LJ*, 1 (1995); G Spencer, "Repeal of Jury Exemptions Win Support", 213 *New York LJ* 1 (1995); C McMahon and L Sharp, "A Jury of Your Peers", 81 *American Bar Assn J* 40 (1995). Moves to abolish jury exemption has been followed in 25 States of the United States and in 10 more States the exemptions have been reduced.

<sup>29</sup> A recent report by the Law Reform Committee of the Victorian Parliament proposed that, to improve community participation in the jury process, the number of exempt persons should be limited. See Victorian Parliament, *LRC Jury Service in Victoria*, vol 1, Melbourne, 1996 noted B Cassidy (1998) 23 *Alternative LJ* 9 at 10.

### CHANGING JURY COMPOSITION - ETHNIC MIX

A second development often mentioned in United States discussions of the jury is the changing ethnic makeup of the jury pool. In the United States this means, in effect, an increasing number of African American and Latino citizens. But it also means increasing proportions of native Americans, Asian Americans and other citizens whose language at home is not English. For these, there is often a real difficulty in following court proceedings. It is interesting to observe the changing ethnic mix of the population of the United States. Whereas at the moment so-called whites constitute 75% of the population, in the middle of the next century it is projected that they will be about 53%. In the same time African Americans will increase marginally from 12% to 14%. The biggest increase expected is in the Hispanic population (10% to 20%) and amongst Asian Americans (3% to 13%)<sup>30</sup>.

In Australia we are in the midst of somewhat similar changes in the ethnic makeup of our population<sup>31</sup>. It means that increasing

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30 Sonya Hamlin, *What Makes Juries Listen Today* at 60.

31 Australian Bureau of Statistics, *Year Book Australia 1996*, Canberra (1996). This shows that at 30 June 1994, 4.06 million of the population of 17.84 million were born overseas, ie 22.77% of the population. The proportion born in non-English speaking

Footnote continues

numbers of Asian Australians and citizens from other ethnic backgrounds will, in the future, be called upon to serve on juries. The commentators in the United States suggest that the changing ethnic background and linguistic skills of jurors will greatly affect not only communication with them and within the jury room itself. It will also affect matters beyond language. Relevant considerations are their life's experiences, their assumptions about government, law, policing and punishment, their religious belief systems (if any) and their commitment to, and belief in, the constitutional legal arrangements of which the jury is one part<sup>32</sup>. Jurors from an Asian or Arabic cultural background may not share the same religious, ethical and social perceptions as other jurors. To this extent, at the moment, the cultural challenges facing future juries in Australia are likely to be more significant than in the United States, whose Hispanic and Latino jurors will generally share at least common religious traditions with most of their fellow jurors.

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countries was between 1.20 million and 2.56 million, making a maximum of 14.35% of the population.

32 Studies of the representativeness of Australian juries include Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Melb, 1996 noted B Cassidy, "12 Angry Persons Still Needed" (1998) 23 *Alternative LJ* 9 at 11; Criminal Justice Commission Queensland, *The Jury System in Criminal Trials*, Brisbane, 1991, 9-11; Law Reform Commission of New South Wales, *The Jury in a Criminal Trial*, Sydney, 1986, 25-58 and D Challenger (ed) *The Jury*. Canberra AIC (1986).

Language facility in the jury is one thing. It is susceptible to rudimentary inquiries. But discovering the attitudes of people whose familiarity with our constitutional and legal system is even more shaky than that of Anglo-Celtic Australians is much more difficult. Their approaches to instruction about the fundamental rights of the criminal suspect may present significant challenges to the judge and advocate of the future.

The Australian Constitution and Australia's court and trial systems were adopted, and the jury system introduced, for a society which was largely monochrome in its ethnic composition and religious tradition. As these features of Australian society change, and as many of Anglo-Celtic ethnicity themselves question established institutions, religious convictions and the jury system itself, it can no longer be assumed that the judge or advocate speaking to the jury is communicating with a microcosm of a common society bound together by multiple strands of shared history, race, loyalty, religion, beliefs and culture. Multiculturalism has many challenging and wonderful features. They enrich the soul of the nation concerned. But, in practice, multiculturalism presents new potential challenges in the setting of a jury trial in Australian courts.

More than thirty years ago, Chief Justice Barwick stressed the need to recognise the changing composition of the Australian jury. In *Milgate v The Queen*<sup>33</sup> he mentioned, as an illustration, the traditional way by which, in a criminal trial, the clerk of arraigns used the traditional English formula: "Are you agreed on your verdict?". After receiving the verdict the clerk's duty was to say: "So says your foreman, so say you all?" Chief Justice Barwick went on:

"In Australia ... substantial numbers of people move from one State to another. Also we have an increasing number of migrants who, although they become naturalised, may not be as familiar with the traditional requirements of our jury system as we expect our Australian-born citizens to be. Therefore the clerk of arraigns' formula on the taking of a verdict should not be expressed in a perfunctory way nor allowed to appear as a mere statement of an assumed or concluded state of affairs, but should be clearly interrogative of the members of the jury. Indeed, some thought might well be given to the modernisation of its terms to remove any possibility of misunderstanding or inadvertence. In addition, the presiding judge, depending on the circumstances of the trial, may feel that these precautions should be fortified by an express direction in the course of the summing up."

In microcosm, these observations illustrate the challenge both to judge and to advocate, in addressing the jury in a multicultural society. All of the assumptions of the past need close re-examination. That re-examination must go beyond the provision of interpreters for some witnesses or the provisions of different holy

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33 (1964) 38 ALJR 162 (HC).

books (where still applicable) for the taking of an oath. Not only may there be a linguistic barrier. There may be distinct attitudinal assumptions and cultural beliefs that need to be addressed if judge and advocate are to be effective in performing their respective functions in finding common ground with all members of the jury.

The third change to which I now turn is even more fundamental and pervasive. I refer to the changing age composition of the modern jury. This is where generation X comes marching in.

#### SPEAKING TO GENERATION X

*Who are they:* Gen X is a perfectly respectable expression, although I confess that I rarely heard it mentioned in the upper reaches of the Australian legal profession, at least until quite recently. It appears as a noun in both the *Oxford Concise Australian Dictionary* and in the third edition of the *Macquarie Dictionary*. The latter defines it as "The generation following the baby-boomers, characterised in contrast with that group as being not as easily identifiable as a group, and in particular not being vocal on social issues but rather concerned with individual gain".

This definition is rather unhelpful if you do not know that the "baby-boomers" referred to are persons born in the "baby boom" which followed World War II. According to the same dictionary these are characterised "initially as vocal on social issues and liberal in outlook but later as concerned with self-advancement and the

preservation of their social privileges". All in all, you might say, a generation following a not unfamiliar pattern: inclining to conservatism in mature years to coincide precisely with the time in their lives when they have accumulated some property and status worth conserving.

Experience teaches the dangers of stereotyping individuals, members of particular races or identifiable social groups. By inference, the same dangers exist in the case of an entire generation. This is especially true where the generation grows up in the somewhat different social and cultural environments of, say, Australia, the British Isles and the United States of America. Nevertheless, there are two features of the life of the current generation of younger people, whether in Australia, Europe or the United States (or other developed societies) which are different from those of preceding generations. The two features are interconnected. I refer to the globalisation of media, travel, economics, problems and ideas and the technological phenomena which dominate the lives of most young people of the past two decades living in such countries. Relevantly, the latter include multi-media, the Internet and the World Wide Web. It is the change in the media of communication - both in the outlets of broadcasting and in the Internet - which may have penetrated most deeply the cognitive processes of the generation of young citizens now coming to jury service. The change effects an alteration in the way in which those potential jurors commonly receive, and expect to receive, information

and the way they themselves communicate with others and expect others to communicate with them.

It is this change which has led to a great deal of research in the United States, relating especially to communication with so-called seniors (people born before 1943); baby-boomers born between 1943 and 1960) and gen X - the new group, born between 1961 and 1981, now being called up to jury service for the first time<sup>34</sup>. Most of the research in the United States concerning gen.x does not relate to their role in juries at all. It concerns the sale of products to them and the differing ways in which merchants and advertisers should endeavour to catch their attention<sup>35</sup>. However, some of the lessons derived from such market research appears to have implications for communication with jurors from gen.x. In the United States, this potential is already attracting specific study and expert commentary<sup>36</sup>.

Adopting the foregoing division of the population, projections of future juries in the United States, as they will be empanelled in the

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34 Sonya Hamlin, *What Makes Juries Listen Today* at 35.

35 See eg K Ritchie, *Marketing to Generation X*, New York, Lexington Books, 1995. See also Sonya Hamlin, above n 31 at 38.

36 A Stevens, "As Generation X Joins Juries", *Wall Street Journal*, 5 June 1995.

year 2000, suggest that 27% of them will be seniors; 32% baby-boomers and 41% from gen.x. It seems likely that, given roughly similar age compositions of our population, the same pattern will be repeated in a country such as Australia<sup>37</sup>. With the passage of time, the number of gen.x jurors will increase rapidly. If, therefore, there are indeed special features in the modes of communication with which they feel comfortable, influenced by the technology and information sources they are using every day, it will be important that judges and lawyers should know this. Over time, acquaintance is bound to increase as advocates, accustomed to addressing juries, themselves come from gen.x. But in big cases, the advocates at least of the immediate future are much more likely to be "baby-boomers". For some time, the judges are likely to be "seniors". If, then, there are changes in communication which go beyond the superficially observed differences which exist between every generation and those that came before and come after, it is important that the communicators be aware of the changes. With expert communicators, who pride themselves on their skills with language and whose functions involve explaining or persuading, knowing the audience is the first obligation.

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37 Australian Bureau of Statistics, *Year Book Australia 1996* reveals that of the Australian population of 17.84 million on 30 June 1994, persons born prior to 1943 were 4.91 million (ie 27.54%). "Baby-boomers", ie born between 1943 and 1960, aged 37 to 54, numbered 5.24 million (ie 29.39%). "Gen.xers", ie born between 1960 and 1980, aged between 17 and 37, numbered 4.89 million (ie 27.46%) of the population.

*Information acquisition:* Allowing fully for different inclinations in particular cases and the dangers of over-simplification and stereotyping, the decision research survey conducted in 1995 in the United States found notable differences in the ways in which seniors and baby-boomers (on the one hand) tend to acquire information and use the media<sup>38</sup>. The former will, on average, read newspapers and view local television news as the primary source of news and information. They will tend to be passive recipients of entertainment and information supplied by others. People from gen.x are much more likely, in the United States, to view cable news, to read, men's, women's and sports magazines, and to exert a high measure of control in the use of information technology to select entertainment and information sources of their particular choosing. Gen.x are described as selecting<sup>39</sup>:

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<sup>38</sup> N C Nelson, "A new generation of jurors?", *Trial*, July 1997, 54 at 56; Sonya Hamlin, *What Makes Juries Listen Today*, at 37.

<sup>39</sup> H J Risko, "Generation X Jurors: A Challenge" *ABA Journal*, October 1995, 14; Sonya Hamlin, *What Makes Juries Listen Today*, at 38. The Australian Bureau of Statistics estimates that of the 6.4 million households in Australia, 1.5 million have access to a personal computer, ie a 23% take-up rate. In capital cities this increased to 26% while only 16.3% of country areas had a home computer. To estimate access to the Internet, it is necessary to determine how many computers have access to a modem in Australia. The statistics suggest that of the 6.38 million home computers, some 0.028 million have access to a modem, ie 3.9% of home computers. However, the figure in all developed countries is rising rapidly. See ABS, *Australian Demographic Statistics*. June Quarter, 1997, Canberra, 18.

"Self-focussed, narrow, particular information rather than passively opening up the daily paper and letting a broad cross-section of information wash over them, seeking and perhaps not finding, what particularly interests them."

In a book on marketing to gen.x, the author states<sup>40</sup>:

"Control" is the key word. Far from being passive viewers of television, xers are active channel surfers, who view with remote control in hand, searching hundreds of options for whatever suits the impulse at the moment [selecting] amongst broadcast programs, cable, pre-recorded videos rented ... shows they've taped ... and video games ... programming dictates selection."

Whereas a "senior" or "baby-boomer", set a task of acquiring information, would probably go to a library or search amongst books, the gen.xer, without leaving home, will commonly plug into the Internet, search on-line, select the best references, scan the information given anonymously and download what is needed. This will be done in much shorter time. The gen-xers will not have to dress up to standards expected for a public library in order to conduct their search. They may have a different attitude to providers of information and authority figures. Above all, they will tend to have a different attitude to time. Quite apart from their exposure to interactive information technology, United States research suggests

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40 Ritchie, above n 35, at 117.

that a typical gen.x child will have spent 22,000 hours watching television before age 18. This is more than twice the time spent in school<sup>41</sup>. Exposure to this form of communication involves passivity, inattention, lack of continuity and the presentation of information in comparatively "painless, non-challenging, pureed form using built-in techniques designed to motivate the listener to stay tuned"<sup>42</sup>. If you are in doubt about this watch a diet of United States television, including news programmes. Or compare the *Time* and *Newsweek* magazine layout today with that of twenty years ago.

It is possible, of course, that Australian gen.xers, served by a national broadcaster and the Special Broadcasting Service, are more accustomed to BBC style presentation of facts without the entertainment hype that seems to be standard in the broadcasting media of the United States. There, except for public broadcasting, reliance on advertising revenue encourages a mode of presentation which typically lays emphasis on entertainment, variety, novelty and shocking the audience in ways that a national broadcaster at one time disdained. But in Australia, even the publicly funded radio and television broadcasters are now imitating their American counterparts. If they do not contain advertisements for sponsors

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41 Sonya Hamlin, *What Makes Juries Listen Today* at 43.

42 Sonya Hamlin, *What Makes Juries Listen Today* at 43.

(which now appear on the Special Broadcasting Service) they present repeated advertisements for themselves and their programmes. Presumably this self-promotion is aimed to capture the attention of a generation of and listeners viewers weaned on commercial radio and television which continues to attract larger audience ratings. That generation is accustomed to the tight presentation of succinct stories and the use of visual supports (voiceover, graphs, vivid sights and sounds etc). So-called "talking heads" have given way to the "sound bite" and "spin". Anything long-winded is liable to fall victim to instant dismissal by remote control<sup>43</sup>. A review of the programmes which capture mass audiences on television suggests the interests of gen.x and many of the baby-boomers. Comedy, soap operas, entertainment, action with violence and fast moving sport are in. Cerebral subjects tend to be squeezed into remote time slots.

Whilst in Australia and in other English-speaking countries we do better than the United States, because of the statutory charter and traditions of national broadcasters, the general trend of media is certainly in a common direction. In part, this is because of the influence of global media. But, in part, it is doubtless the result of

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43 Sonya Hamlin, *What Makes Juries Listen Today* at 44.

market research chasing audience ratings and aiming to meet perceived audience demand.

*Life, values, authority and impatience:* Research in the United States on the profile of gen.x also bears out ordinary experience that their engagement in family life will often have been different from that of baby-boomers and certainly of seniors. Thus, in 1960, 88% of children in the United States lived with two parents. By 1988 that figure had dropped to 60%. Now, there is about a 50% chance that a gen.x child will have spent at least one year in a single-parent household. Stereotyped notions of the average juror's experience of "family" may therefore need reconsideration. People who have a different family experience may well have different expectations of human relationships and of human responsibilities.

One feature upon which researchers on the gen.xer in the United States seem to agree is that this is the "ultimate shopper generation"<sup>44</sup>. Sometimes as a palliative to the pain resulting from the breakup of parental relationships, parents and grandparents have spent more on consumer goods for children of gen.x<sup>45</sup>. This has

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44 Sonya Hamlin, *What Makes Juries Listen Today* at 45 quoting William Dunn, *The Baby Bust: A Generation Comes of Age*, Ithaca, American Demographic Books, 1993, 20.

45 Dunn, above n 44 at 31.

encouraged an attitude which expects and demands value and service<sup>46</sup>. Many writers observe a common generational difference in attitudes to work, career and social issues. Because of their family life experience is typically altered and because their attitude to anonymous automated information systems is different, a feature of gen.x may be that "[They don't] create any interaction ... any verbal skills"<sup>47</sup>. One computer expert, Erick Wujcik, observed of gen.x in the United States<sup>48</sup>:

"More than any other generation in American history [they are] game players. They play electronic games, arcade games, computer games, what-have-you. This is the generation of kids raised on games".

Whereas 85% of "seniors" consider that there is too much violence on television that is the opinion of only 57% of Americans under the age of 30<sup>49</sup>. Whereas only 20% of "seniors" were numbered amongst the heavy consumers of violence on television, 74% of those under 30 were attracted to such programmes. The

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46 The 1990 Roper College Track Survey of full-time college students in the United States showed 86% had a car; 61% a credit card; 70% an ATM card and 63% had their own television.

47 Dunn above n 44 at 48; Sonya Hamlin, *What Makes Juries Listen Today* at 51.

48 Dunn, above n 44, at 28.

49 The Times Mirror Center for the People and the Press, *Report*, March 1993 Sonya Hamlin, *What Makes Juries Listen Today* at 53.

stricter control of local broadcasting standards may make some of these figures difficult to apply outside the United States. But the inference which a number of United States observers draw from the fantasy, violence and tabloid stock-in-trade to which gen.xers are exposed and expose themselves, is that basically "there are no rules of human behaviour that people cannot break and still manage some kind of a life"<sup>50</sup>. Respect for authority figures is down. Impatience for the rapid provision of information (over which they ordinarily have full and immediate control) is up. Live encounters and human interaction has been lessened. Established rules are often suspect. Institutions of citizenship may be viewed cynically and not idealistically. All of this may have consequences when a member of gen.x is called to jury service.

*Speaking to gen.x:* The inference drawn from the studies of gen.x in the United States, for application to communication with them when they are called to jury service, is telling<sup>51</sup>:

"Being forced to listen to something not of their own choosing, such as expert testimony, that is too often boring, tedious, left-brain, fact-filled, technical, abstract and packed with nitty-gritty reality, isn't exactly at the top of anyone's wish list ... But for gen.x's, who can suffuse their lives with large doses of unreality and fantasy at will - with heroes and dragons, MTV and a

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50 Sonya Hamlin, *What Makes Juries Listen Today* at 54.

51 Sonya Hamlin, *What Makes Juries Listen Today* at 55.

tailor-made environment created on computers - does any of this include the hard facts of life and the world? ... The change of venue in a video is instantaneous and fantastic and makes no logical or chronological sense. Things happen simply to stimulate appetites that have already seen and heard a great deal".

For the generation which communicates by e-mail messages sent remotely and pursued virtual reality, the old sensory judgments in evaluating personality, character, reliability and truth are commonly replaced by digital communication which enjoys both speed and convenience. What is intolerable to gen-x? Lengthy openings to a jury: elaborate reminders of the detail of evidence recently heard: the regurgitation of passages of testimony and, above all, the taking up of time in circumstances where the listener and watcher has lost completely the power of control. How many times, judges and lawyers have reassured each other that the jury is the microcosm of the community? How often they have said that, once sworn, the jury has a remarkable capacity to put aside external knowledge and old prejudices, concentrating on the task in hand<sup>52</sup>. I have myself accepted and repeated these assumptions. Until now, these assertions have been fundamental to the legitimacy and

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<sup>52</sup> See for recent Australian discussion *Civil Aviation Authority v Australia Broadcasting Corp* (1995) 39 NSWLR 540 at 550. Cf *X v Amalgamated TV Services (No 2)* (1987) 9 NSWLR 575 at 591.

authority of the jury in the common law countries that still use them<sup>53</sup>. Such assumptions may still be correct. Perhaps within the courtroom, with the drama, the responsibility and the seriousness of the occasion, the juror's sense of involvement and obligation takes over. We must hope so. However, the lesson of the studies of generation-X in the United States of America is that the courts - advocates and judges - are making demands on gen.xers that, for them, are greater than the demands made on previous generations of jurors. The mindset, and expectation of receiving information, of the use of time and attitudes to life of many gen-xers may be significantly different from those of older jurors who disdain video games, abhor electronic violence and video clips (timed to equal advertising breaks), who have never used e-mail do not know what virtual reality is and have quite different attitudes to authority, to time and to the receipt of information.

The consequences of all this for communication of advocates and judges with juries plainly needs much further study. Specifically, it needs study to gauge its relevance to the marginally different societies outside the United States. So far as judges are concerned, it argues strongly for briefer directions to juries; the avoidance of

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<sup>53</sup> cf *Palmer v The Queen* (1998) 71 ALJR 254 at 269, 278. cf Gans, "Directions on the Accused's Interest in the Outcome of the Trial" (1997) 21 *Criminal Law Journal* 273 at 276-277.

unnecessary descriptions of the evidence; the severe simplification and clarification of judicial directions on law; and the conduct of proceedings with a briskness suitable to the digital age. So far as the advocate is concerned, the lessons include the avoidance of the "talking heads" mode; the curtailment of long hours of address; careful attention to enlivening the jurors' interest, involvement and participation of the juror and brevity and succinctness in the use of precious time.

Judges and advocates who forget these basic lessons may satisfy themselves that they are communicating with the jury in the way their famous forebears did. But they may be overlooking the features of many members of the new generation who have had a different life's experience and who have different expectations. If the art of the advocate is to persuade and the duty of the judge is to explain the law, they will ignore research about generation-X at the peril of failed persuasion and ineffective explanation.

## CONCLUSIONS

Typical of a senior, I have now spent a lot of time, as only an authority figure can, conveying a relatively simple message. The racial and cultural background of the community is changing. This is bound to have an impact on the future composition of juries. That impact will not be limited to problems of language. It will extend to different attitudes to authority, to the individual and society that will need to be taken into account in communicating with modern jurors.

Even more fundamentally, the arrival of generation-X in jury service brings to the courtroom people with an experience in communication different from all those jurors who have gone before. At the close of a millennium, it is appropriate to reflect upon the enduring capacity of the jury of citizens to adapt and change and still to be resilient. The advocate and the judiciary will adapt and change in order to fulfil their tasks, so important to a free society. Whilst juries remain part of the court system, it will be the duty and privilege of advocates and judges to speak to them. It will surely not be beyond the skills of advocates and judges of today to adapt to the changes which I have mentioned. But the beginning of wisdom is the recognition of the need for change and of its causes<sup>54</sup>. If the jury is truly to remain a democratic bulwark, it is judges and lawyers - not jurors - who will have to change.

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54 I have not reviewed the possible alteration in facilities for jurors that will eventually accompany the advent of jurors with keyboard and computing skills. Just as "baby-boomer" jurors began to demand facilities for note-taking, access to exhibits and provision of (edited) transcripts, it seems unlikely that future jurors, raised in familiarity with digital technology will be content with such facilities. It may be predicted that they will demand transcript in electronic form, other digitalised information and technical facilities.