

THE INNS OF COURT SCHOOL OF LAW, LONDON

WORLDWIDE ADVOCACY CONFERENCE 1998

29 JUNE - 2 JULY 1998

SPEAKING TO THE MODERN JURY - NEW CHALLENGES FOR
JUDGES & ADVOCATES

A reflection on changes in the occupational,
ethnic and age make-up of the jury today and
their implications for communication with
jurors from generation-X

The Hon Justice Michael Kirby AC CMG

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LAWYERS AS COMMUNICATORS

Lawyers live by words. Words are oral and written. Much of the oral expression of lawyers occurs in the somewhat artificial environment of the courtroom. Most of the written words are

** 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.

determined before, and long after, the courtroom battle is concluded. Before the advocacy there are mountains of pleadings. Afterwards, at least in appellate courts, judges must use words to explain their decisions. Lawyers are commonly criticised for circumlocution and obscurity. In recent times, this criticism has given rise to the "plain English" movement for simpler expression of legal documents - whether Acts of Parliament, pleadings or judicial opinions.

Scholars have taken appellate courts to task including ultimate appellate courts, for the language in which they explain their opinions. In the United States of America, one essay¹ criticises the Supreme Court for its alleged failures in explaining itself to the people. The author asserts that, in essence, the jurisprudence of the Court "alienates the very citizens whose confidence legitimates the system"². He suggests that the only way to overcome this alienation is to reconnect the constitutional jurisprudence of the Court to the people of the nation. This is easier said than done. Courts are obliged to conform to authority. Authority is expressed in Acts of Parliament or past decisions. Analysing these is often a technical and even a tedious task. Generalities and homilies, expressed in terms of universal understanding, might be easier for the people to

1 S B Smith, "The Constitution of Jurisprudence" (1997).

2 *Ibid.* at 9.

comprehend. But they could also involve a departure from the real technical function of a court of law.

Nonetheless, there is an element of truth in the claim that a an ultimate court "maintains its constitutional authority, in part, by reinforcing the political principles and political bonds of the country"³. Thus, a constitutional court will always be speaking to several audiences: to the parties, to the judiciary and legal profession, to the politicians and to the community more generally. This requires skills of communication. Text which might satisfy a critic could leave wholly unconvinced the politician, the judiciary and the legal profession. Somehow, an ultimate appellate court, by the language of its communication, must endeavour to convince all of these disparate audiences. Otherwise, the judges will be criticised as "no longer concerned with the citizens they serve"⁴. At a time when Australia is re-exploring its identity and the ultimate foundation for the legitimacy of its constitution, it is appropriate that the problems of communication by judges and lawyers should be re-examined.

There are many issues affecting communication in the modern courtroom. In December 1997, the British Home Secretary, Mr Jack

3 C Miller, *The Supreme Court and the Uses of History* (Harvard, 1969) at 170.

4 Smith, above n 1, 69.

Straw, announced a "radical reform of the way judges and magistrates sentence criminals". It was said to be intended to introduce an "American-style sentencing" under which judges would specify the precise period which the convicted person would serve and indicate the earliest possible release date. Victims will be given notification of the sentence. The stated purpose of the reform is to generate "a better public appreciation of sentencing decisions"⁵. Legislation along these lines has already been enacted in Australia⁶. It too evidences a concern on the part of legislators to promote greater clarity in the communication of judges and lawyers with the prisoner, the victim and the community.

It is in the field of criminal law that special attention is often paid to judicial communication, notably with the jury. Appellate courts scrutinise the instructions which judges give to juries. They do so in order to ensure that the judge has adequately and accurately informed the jury of the legal tests that are to be applied. Where there is a significant misdirection, this may lead to an appellate order quashing a conviction, usually with a requirement that a new trial be

⁵ Reported *Guardian Weekly*, 21 December 1997 at 5.

⁶ See eg *Crimes Legislation Amendment Act (No 2) 1989* (Cth) (Act No 4 of 1990) esp 16A and 16E noted *R v El Karhani* (1990) 21 NSWLR 370; (1990) 51 A Crim R 123. See also *Sentencing Act 1989* (NSW) explained *R v Maclay* (1990) 19 NSWLR 112.

had⁷. A great deal of the work of appellate courts in criminal appeals is spent examining the judge's communications with the jury. Whereas a judge may, with perfect legitimacy, amend *ex tempore* reasons given in disposal of proceedings, amendments to a charge to a jury (other than the correction of typographical or like mistakes) are ordinarily impermissible. The appellate court must read the charge precisely as the jury heard it.

The rules governing the examination of judicial instructions to a jury are well known. The court must scrutinise a party's criticisms in the context of the charge read as a whole⁸. It must try to put itself into the same position as the jury experienced. Sometimes, where a jury instruction is criticised, an appellate court may proffer suggestions concerning the way in which an accurate instruction might have been given to the jury⁹. More commonly, the appellate

7 See eg *BRS v The Queen* (1997) 148 ALR 101.

8 *Driscoll v The Queen* (1977) 137 CLR 517 at 527; *Jones v The Queen* (1989) 166 CLR 409 at 411; *Shackelroth v R* (1996) 86 A Crim R 438 at 455 (NSWCA).

9 See eg *Viro v The Queen* (1976) 141 CLR 88 at 146-147 criticised D Lanham, "Death of a Qualified Defence" (1988) 104 LQR 239 at 240; *R v McManus* (1985) 2 NSWLR 448 at 461. See also criticisms (1985) 59 ALJ 644; (1987) 61 ALJ 759; (1988) 12 Crim LJ 28. For more recent attempts see J Glisson et al, *The Right Direction: A Casebook of General Jury Directions in Criminal Trials*, Sydney, 1990; J Mullighan, "Jury Directions and Summing Up" in *Judicial Orientation Programme*, Aust Inst of Judl. Administration, Sydney, 1994, 245-254; M Duckworth, "Clarity and the Rule of Law: The Role of Plain Judicial Language" (1994) 2 *Judicial Review* 69, 85; *BRS v The Queen*

court contents itself with criticism of what the judge said, leaving it to future judges (or to those who now design standard directions in judicial bench books) to draw inferences concerning the way in which an accurate instruction should be given.

The preparation of bench books¹⁰ is a comparatively recent development in Australia. Generally speaking, judicial directions to juries in Australia are much longer than those given in the United States of America. In that country, jury instruction by a judge is generally quite short. The view is held that the elaboration and assessment of the facts is a matter for the jury and not a matter into which judges should intrude¹¹. In Australia, following the practice common in England, judges are ordinarily subject to an obligation to summarise the relevant facts for the jury and to bring the authority of their office to bear upon an elaboration of the way in which the legal principles, binding on the jury, may be applied. The result of this has

(1997) 71 ALJR 1512 at 1529-1530 (suggestion by McHugh J as to a "proper direction". See also *Peters v The Queen* (1998) 515 ALR 51 at 78.

¹⁰ The Judicial Commission of New South Wales has prepared Bench Books for use by judges in New South Wales presiding at jury trials. The books contain draft standard jury directions with reference to statutory and judicial authority.

¹¹ *Quercia v United States* 289 US 466 at 469-470 (1932); *Walker v New Mexico and Southern Pacific Railroad Co* 165 US 593 at 596 (1896); *Dimick v Schiedt* 293 US 474 at 485 (1934); *Baltimore and C Line v Redman* 295 US 654 at 657 (1934). See also *Coukoulis v Schwartz* 17 NE 2d 601 at 603 (1938).

been an added burden on judges. It has caused lengthy expositions of the facts. Out of recognition of the time taken, the chances of factual errors and the risks of undue influence that may sometimes arise, even unconsciously, from judicial elaboration of the facts, statutory provisions have now been enacted in some parts of Australia to permit judges, in certain circumstances, to omit a lengthy analysis of the evidence¹².

The foregoing is the context in which the issues which I wish to discuss arise. My purpose is to examine communication with juries. But my concern is with modern juries. Juries which, overwhelmingly, will now be made up of members of the community drawn from the so-called generation X¹³ ("gen X"). Research in the United States suggests that judges in their instructions and advocates in their argument may need to take into account the changing composition of the modern jury. They may need to be alert to features of communication with a jury whose composition, and attitudes, may be

12 *Crimes Act* 1900 (NSW), s 405AA which provides that the judge need not summarise the evidence at the end of a trial before a jury if the judge is of the opinion that, in the circumstances, a summary is not necessary. See *Domican v The Queen* (1992) 173 CLR 555 at 560-561 and *BRS v The Queen* (1997) 71 ALJR 1512 at 1532. See also *Criminal Code* (Qld), s 620; *Criminal Code* (WA), s 638; *Criminal Code* (Tas), s 371(j) and *Criminal Code* (NT) s 364).

13 The expression may have first appeared in the book by Charles Hamblett and Jane Deverson, *Generation X* (1964).

changing. This research was brought to my notice at a conference in the United States. My object is to draw the United States conclusions 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.

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 Bench¹⁴. It has been confirmed many times since then in English decisions¹⁵, decisions of the Privy Council¹⁶ and decisions of

¹⁴ *Rex v Wooler* (1817) 6 M and S 366.

¹⁵ *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.

¹⁶ *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1; *Nanan v The State* [1986] 1 AC 860.

Australian courts¹⁷. The rule of jury privacy is a strong one as these decisions show. 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 time¹⁸. 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 deliberations¹⁹.

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 will sometimes constitute a contempt of court for lawyers, or anyone else, to interrogate a juror as to the course the jury's deliberations took and the reasons for their decision. In this regard the jury is, and remains, as enigmatic as the sphinx²⁰. Secondly, the provisions of the local

¹⁷ *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.

¹⁸ *R v Roads* [1967] 2 QB 108.

¹⁹ *Boston v W S Bagshaw and Sons* [1966] 1 WLR 1135 at 1137 per Harman LJ.

²⁰ 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*

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 juror²¹. 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"²². 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 prohibition²³. 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 are permitted²⁴.

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)).

21 *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).

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

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

24 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

Therefore, for the most part, judges and advocates, considering the way juries think, are left to surmise, speculation, 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 perhaps 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.

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 of freedom of speech. Yet because the legal

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.

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 spread outside the United States. I refer to the deletion in many States of exemptions from jury service²⁵. This means that it is perfectly possible, in those

²⁵ 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.

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 Australia²⁶. However, in changing times when talk of popular sovereignty is common, the idea of the truly universal jury cannot be completely ignored.

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,

²⁶ 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.

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%)²⁷.

In Australia we are in the midst of somewhat similar changes in the ethnic makeup of our population²⁸. It means that increasing 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 profoundly 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

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

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

their commitment to, and belief in, the constitutional legal arrangements of which the jury is one part²⁹. 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 and ethical traditions with most of their fellow jurors.

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 very real 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

²⁹ 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).

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*³⁰ 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

³⁰ (1964) 38 ALJR 162 (HC).

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 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.

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 uncommunicative 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 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 and the United States of America. Nevertheless, there are two features of the life of the current generation of younger people, whether in Australia, the United States or other developed societies

which are somewhat different from those of preceding generations. The two features are inter-connected. 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 (taken to be people 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 time³¹. 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

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

advertisers should endeavour to catch their attention³². However, some of the lessons derived from such market research may have implications for communication with jurors from gen.x. In the United States, this potential is already attracting specific study and public commentary³³.

Adopting the foregoing division of the population, projections of future juries in the United States, as they will be empanelled in the 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 Australia³⁴. 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

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

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

34 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.

judges and lawyers should know this. Over time, acquaintance is bound to increase as advocates, accustomed to addressing jurors, 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.

Information acquisition: Allowing 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 media³⁵. 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

³⁵ N C Nelson, "A new generation of jurors?", *Trial*, July 1997, 54 at 56; Sonya Hamlin, *What Makes Juries Listen Today*, at 37.

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 selecting³⁶:

"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 states³⁷:

"'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."

36 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.

37 Ritchie, above n 32, at 117.

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 that a typical gen.x child has spent 22,000 hours watching television before age 18. This is more than twice the time spent in school³⁸. 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"³⁹. If you are in doubt about this I would invite you to watch a diet of United States television, including news programmes. Or compare *Time* and *Newsweek* magazine layout today with that of twenty years ago.

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

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

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 (which now appear on the Special Broadcasting Service) they present repeated advertisements for themselves and for their programmes. Presumably this self-promotion is aimed to capture the attention of a generation of viewers and listeners 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". Anything long-winded is liable to fall victim to instant dismissal by remote control⁴⁰. A review

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

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 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"⁴¹. 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.x⁴². This has encouraged an attitude which expects and demands value and service⁴³. 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"⁴⁴. One computer expert, Erick Wujcik observed of gen.x in the United States⁴⁵:

"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".

41 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.

42 Dunn, above n 41 at 31.

43 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.

44 Dunn above n 41 at 48; Sonya Hamlin, *What Makes Juries Listen Today* at 51.

45 Dunn, above n 41, at 28.

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 30⁴⁶. 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 stricter control of local broadcasting standards may make some of these figures difficult to apply. But the inference which a number of United States observers draw from the fantasy, violence and tabloid stock-in-trade to which United States 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"⁴⁷. 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.

⁴⁶ The Times Mirror Center for the People and the Press, *Report*, March 1993 Sonya Hamlin, *What Makes Juries Listen Today* at 53.

⁴⁷ Sonya Hamlin, *What Makes Juries Listen Today* at 54.

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 telling⁴⁸:

"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 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, 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

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

a remarkable capacity to put aside external knowledge and old prejudices, concentrating on the task in hand⁴⁹. I have myself accepted and repeated these assumptions. Until now, these assertions have been fundamental to the legitimacy and authority of the jury in the common law countries that still use them⁵⁰. Such assumptions might 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 larger demands on gen.xers that for them are greater than the demands made on previous generations of jurors. Their mindset, and their expectation of receiving information, of the use of time and their attitudes to life 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 and have quite different attitudes to authority, to time and to the receipt of information.

49 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.

50 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.

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 unnecessary description 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 causes⁵¹.

51 I have not in this article 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.