



# Understanding Juries: History, Function and Contemporary Issues

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## Pre-learning activity

- Find a definition for the words adjudicator, deliberate and verdict.
- If we have judges, why are juries needed?
- What might be some advantages and disadvantages of using a jury?

## Introduction

*“The community receives important... benefits from a trial by jury in the involvement of the public in the administration of justice and in keeping the law in touch with the community standards.”*

Justice Yehia at [29] *R v White* [2024] NSWSC 1369

A fair and just democratic society relies on **civic participation** – where citizens are actively involved in the political and community life of their society with the aim of making it better for everyone to live in. Jury duty is an important aspect of civic participation that ensures that current community perspectives and values are reflected in the legal system, making jury duty an important way in which Australians contribute to the legal process.

This resource will explore the history of the use of juries, the role and characteristics of jury trials, and the effectiveness of juries in delivering just outcomes. It will also consider the risks associated with juror misconduct, looking at real cases to examine the challenges facing the modern jury system.

## What is a jury and what is their role?

A jury is a group of eligible adult citizens randomly selected to determine the facts of a case - an **‘adjudicator of fact’**. This means they make decisions on whether an event is likely to have occurred or not based on the evidence presented to them in court.

The role of a jury is to consider the evidence and arguments presented in court by both the defence and the prosecution. Jury members then discuss the evidence (*deliberate*) and come to a decision (*verdict*) as a group as to whether a defendant is:

- In criminal cases - guilty or not guilty beyond reasonable doubt; or
- In civil cases – whether, on the balance of probabilities, an event, action or inaction of the defendant was likely or not to have caused harm or loss to another party (the plaintiff).

These decisions can only be based solely on the evidence presented at trial.

## Origins of the jury system

The modern jury system, as we know it today, took shape in the mid-17th century. While its origins are often linked to the Magna Carta, the historical reality is more complex.

### Magna Carta 1215

Chapter 39 of the Magna Carta states:

*“No free man is to be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.”*

Although this is often identified as the source of trial by jury, the phrase “lawful judgment of his peers” originally referred to trial by ordeal, trial by battle, or ‘compurgation’ (taking an oath).

#### 1. Trial by Ordeal

In a trial by ordeal, the accused underwent a physically dangerous test in front of clergy members, such as walking across burning coal or being submerged in water. It was believed that God would protect the innocent, either preventing harm or ensuring a swift recovery.

#### 2. Trial by Battle

In a trial by battle, the accused and accuser would engage in a physical fight. The loser would either suffer death or significant injury, leading to a declaration that they winner was in the right. Again, the outcome was seen as a form of judgment by God.



### 3. Compurgation and the Rise of Early Juries

By the mid-13<sup>th</sup> century, a new form of trial emerged: 'compurgation', or trial by oath. In this system, the accused swore an oath of innocence, supported by the testimony of 11 or 12 individuals who would vouch for their credibility. If they failed to gather enough supporters, they would then be subjected to trial by ordeal.

Over time, compurgation evolved into a system of inquests. In these cases, 24 'good and lawful men' from the community were summoned to investigate and provide a verdict based on their personal knowledge of the case. These early juries were self-informing, meaning jurors were chosen because they already knew the parties involved and the details of the dispute. Self-informing juries began to decline in the early fifteenth century as small villages grew into larger towns and cities, where anonymity was more likely.

#### Juries in the early Australian Colony

In the early years of the New South Wales settlement, trials were conducted by military officers or magistrates, who were generally wealthy landowners without formal legal training. Civilian juries were first introduced by the New South Wales Supreme Court in 1824.

However, the *Australian Courts Act 1828* effectively abolished juries because it legislated that trials had to be conducted before a panel of military personnel instead. It was not until the *Jury Trials Amending Act 1833* was passed that criminal trials with a civilian jury were restored in the colony.

#### Juries in Modern Australia

##### Is there a right to trial by jury in Australia?

A common misconception is that Australians have a constitutional right to a jury trial in all cases. However, this is not true. Section 80 of the Australian Constitution states:

*"The trial on indictment of any offence against any law of the Commonwealth shall be by jury."*

This means that jury trials are only mandatory for federal indictable offences, the most serious criminal offences such as terrorism and major drug importation offences covered by Commonwealth legislation.

At the state level, jury trials are governed by legislation. For example, section 131 of the *Criminal Procedure Act 1986* (NSW) states that criminal trials in the Supreme Court or District Court are generally to be conducted

before a jury. However, a jury trial is not an absolute right in state trials either. Courts have a discretion to order a judge-alone trial if a party applies and the court determines that it is in the interests of justice to do so.

##### Who is eligible for jury duty?

All Australian citizens listed on the Electoral Roll are eligible for jury service in their state or territory unless they are disqualified by legislation. For example, Schedule 1 of the *Jury Act 1977* (NSW), identifies people as having committed serious criminal offences or who is an Australian lawyer as being ineligible, and the Schedule 2 of the *Juries Act 2000* (Vic) prohibits Electoral Commissioners from participating.

Individuals can also request to be excused from jury duty under certain circumstances in the relevant legislation. For example, Schedule 2 of the *Jury Act 1977* (NSW) enables dentists, pharmacists or members of the clergy (such as priests) to ask to be exempt from jury duty. In contrast, s21 of the *Jury Act 1995* (Qld) lists the criteria that must be applied by judges and sheriff's in determining whether a person may be excused from jury duty, such as whether inclusion on a jury would cause significant financial hardship to the individual or inconvenience to the public.

##### Discussion:

Why are some people excluded? (HINT: think about fairness!)

Why is it important to allow people to ask to be exempt?

##### Did you know?

There are no age restrictions for jury service. However, since individuals under 18 are not eligible to vote and are not included on the Electoral Roll, they cannot be selected for jury duty.

##### How are juries chosen?

As every state and territory have their own legal systems, different legislation governs the jury system in each state and territory.

##### Activity:

Research the process of jury selection in your state or territory and create a flow chart showing the steps.



## How many jurors are selected for a trial?

In Australia, juries are used in both civil and criminal cases. The number of jurors required can vary depending on:

- the jurisdiction the case is being heard in (geographical or court);
- the estimated length of the trial; and
- whether the case is civil or criminal.

Generally, criminal juries are made up of 12 people, with civil cases varying widely across Australian jurisdictions.

Jurisdiction	Criminal	Civil
NSW	12, no less than 10	4
VIC	12, no less than 10	6
QLD	12, no less than 10	4
SA	12, no less than 10	Unlawful
WA	12, no less than 10	6
TAS	12, no less than 10	7
Federal	12, no less than 10	12

In lengthy trials, more than 12 jurors may be empanelled or sworn in to reduce the risk of the trial being aborted due to juror unavailability, such as a juror becoming unwell and no longer being able to serve. In this case, typically up to 15 jurors are permitted, however, in Western Australia the maximum is 18, and in Tasmania, 14.

Before deliberations start, the jury is reduced to 12, with surplus jurors randomly selected to leave the panel.

## What is deliberation?

After the trial concludes, the empanelled jurors retire to *deliberate* – discuss with each other the evidence, arguments and information presented to them in order to reach a decision. This is a confidential process that requires all jurors to understand and adhere to the trial Judge's instructions in order to reach a fair verdict.

## How many jurors make a decision?

Historically, juries were required to reach a *unanimous verdict*. However, this is no longer always the case – except in the Federal Court.

For example, previously, in NSW criminal cases, all 12 jurors had to agree on the exact same decision before a verdict could be reached. Following amendments in 2006 to the *Jury Act 1977* (NSW), if deliberations continue for an extended period without reaching a

unanimous decision, the court may accept a majority verdict, such as 11 out of 12 jurors.

The table below identifies legislation that allows for majority verdicts in criminal cases in each Australian jurisdiction.

Jurisdiction	Legislation	Section
NSW	Jury Act 1977 (NSW)	s55F
VIC	Juries Act 2000 (VIC)	s46
QLD	Jury Act 1995 (QLD)	s59A
SA	Juries Act 1927 (SA)	s57
WA	Criminal Procedure Act 2004 (WA)	s114
TAS	Juries Act 2003 (TAS)	s43
NT	Criminal Code Act 1983 (NT)	s368
ACT	Juries Act 1967 (ACT)	s38

## Question:

List all of the costs you can think of that might happen in a court case for both defence and prosecution. What do you think the ideal number of jurors making a decision should be and why?

## Decisions

After deliberations, the jury will reach a verdict (decision). They will re-enter the court, where the judge will ask the foreperson (the juror chosen by the other jurors to be the spokesperson) if a decision has been made, and what it is. This verdict determines the conviction (guilty), acquittal (not guilty), or the civil liability (responsibility) of the defendant(s).

## What happens when a jury can't agree?

If the jury is not able to come to a unanimous decision or a majority decision, it is called a 'Hung Jury'. In this case, the judge releases (discharges) the jury from their duties and the prosecution must decide whether to retry the case before a new jury.

Although hung juries are relatively rare in Australia (occurring in 3–8% of trials), they can lead to costly retrials or case dismissals, potentially obstructing justice for the innocent party.

## How do juries help to achieve fairness?

There are a number of safeguards built into the jury system to ensure fairness for the accused and to protect juries from being targeted by media or parties to a case.

In Australia, juries:

- **Do not have to give reasons** for their decision.
- **Deliberations are confidential:** jurors are not allowed to discuss anything relating to the case



outside of the jury room, even after completion of the trial.

- **Jurors remain anonymous:** Jurors cannot be identified by name to anyone both during and after a trial process. They are only identified by their juror number during the trial. In Australia, laws relating to juries make it a criminal offense for jurors to identify themselves or to disclose any details about deliberations during and after the trial has concluded. This strict confidentiality contrasts with practices in other countries, such as the United States, where jurors are permitted to speak publicly about their experiences and may even give media interviews. Juror anonymity in Australia ensures fairness by protecting jurors from external influences and pressures, supporting the integrity and confidentiality of the deliberation process.
- **Prospective jurors are screened to remove conflicts of interest:** Both prosecution and defence can challenge jurors to ensure impartiality, and empanelled jurors swear an oath to remain fair and unbiased.
- **The judge gives the jury directions:** The presiding judge provides jurors with legal instructions to ensure they focus on evidence in the trial and apply legal principles correctly. Before deliberations begin, the judge also gives the jury a "summing up" to explain the law and instruct jurors on their responsibilities. This process aims to minimise errors or unfair verdicts. To ensure consistency, the script for judges for these instructions are given in the "Bench Book," a guide containing all required procedures that judges must follow to ensure equality and fairness in court.
- **Don't decide on penalties in criminal cases or remedies in civil cases:** This responsibility lies with the judge who will take into account a number of factors, including comparable historical cases, legislation and the purposes of punishment to make a decision.

## Advantages and challenges of the jury system

### Advantages of Juries

Juries enhance democratic participation by involving the public directly in legal decision-making. Their presence necessitates the use of plain language, making trials more accessible; and promotes transparency, because evidence and submissions must be understood by average members of the community. By involving the perspectives of everyday people, juries ensure that decision-making in serious

disputes before the law incorporate community values, meeting society's needs. Furthermore, respectful debate and collaborative decision-making among a diverse range of jurors enhances deliberations, ensuring that the differing worldviews that make up the Australian community are given a voice and taken into account.

### Challenges of the Jury System

Despite various safeguards built into the jury system, factors such as the personal biases of jurors, the nature of complex evidence presented in trials that requires expertise to deeply understand it, and external influences, such as media coverage and social media commentary can undermine the fairness of jury trials.

Ensuring inclusive juries also remains a critical consideration across Australian jurisdictions. Of particular concern is the inability of individuals who are deaf or blind to participate in juries, despite being taxpayers and eligible to vote in elections.

In addition, juror misconduct, including independent research (such as jurors using google or social media to search for a case or relevant law, going to a crime scene or disclosing case details or deliberations to outside parties), can result in mistrials due to a juror having relied on evidence or opinion not tested in court. Juror misconduct can lead to the discharge of a jury, meaning that a mistrial has occurred. This leads to a new trial with a new jury starting again, which is very costly for the state and could lead to delays in justice for victims and accused persons.

### The effect of jury trials on justice outcomes

According to the Bureau of Crime Statistics and Research (BOCSAR), in NSW, 81% of trials heard in the District Court between July 2023 and June 2024 were decided by juries, with jury trials leading to more convictions than judge-alone trials. Of that number, 56% of defendants were found guilty of at least one charge by the jury, with 39% acquitted of all charges.

In addition, judge-alone trials have a 12% increase in the probability of an acquittal compared to jury trials.

### Conclusion

Juries play an important role in ensuring that justice system outcomes remain in touch with society's values, standards, expectations and needs. Juries also provide community members with the opportunity to contribute to one of the most critical systems that maintain social cohesion in Australia – our justice system.