

FIRST REPORT

to

THE ATTORNEY-GENERAL

RELATING TO THE ORDER CLOSING SPEECHES IN CRIMINAL TRIALS

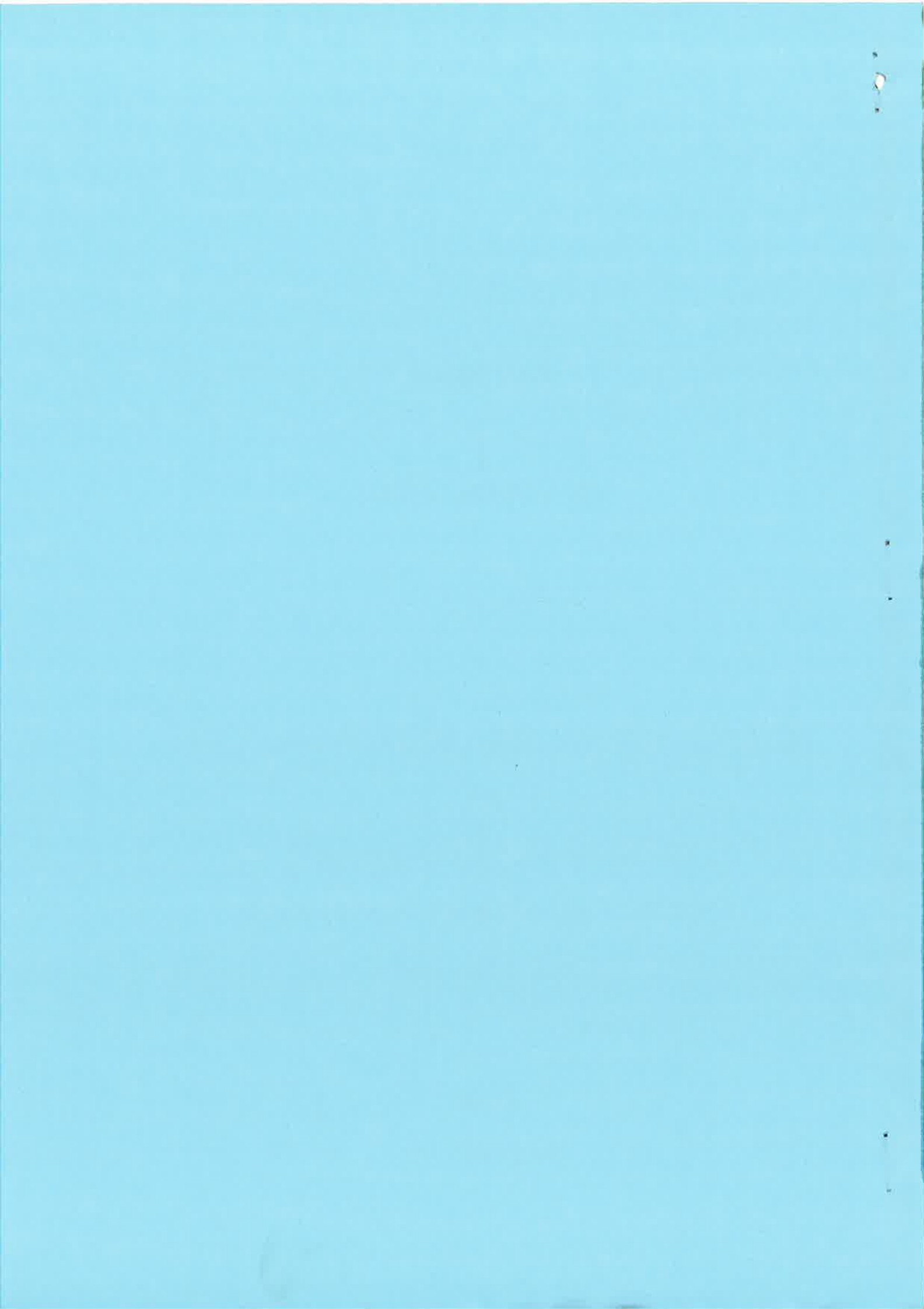
and

TO THE LAW AND PRACTICE CONCERNING

THE RIGHT OF THE CROWN TO STAND-BY JURORS

DARWIN

NOVEMBER 1979



Members of the Northern Territory Law Review Committee:

The Honourable Mr Justice Toohey (Chairman), the
Honourable Mr Justice Muirhead, I. Barker Q.C.,
Mr T.I. Pauling S.M., Mrs N.P. Withnall,
Messrs G.R. Clark, J. Dorling, P.G. Howard,
D. Mildren, A.R. Miller, M. Maurice, T. Riley.

REPORT OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE -
RELATING TO THE ORDER OF CLOSING SPEECHES IN CRIMINAL TRIALS AND
TO THE LAW AND PRACTICE CONCERNING THE RIGHT OF THE CROWN TO
STAND-BY JURORS

To: The Honourable P.A.E. Everingham,
Attorney-General for the Northern Territory of Australia.

Sir,

As you know a review of the Supreme Court Code was commenced early last year. Two matters relating to the conduct of criminal trials (namely the order of closing speeches in such trials and the right of the Crown to stand-by jurors) were reviewed by this Committee as being related to the greater exercise. Although the Committee was aware that both these topics might be embodied in the Code, nevertheless it was felt that they were matters which might properly be the subject of independent reports to you - a view which you shared.

PART I. THE ORDER OF CLOSING SPEECHES IN CRIMINAL TRIALS

1. Present Legislation

Section 11 of the Evidence Act (apart from the proviso quoted below) provides: "In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply; ..."

An existing anomaly was noted during our examination of the "closing address" problem and that was the proviso to section 11 which reads: "... provided that, in all cases being tried in the Supreme Court, the Crown Law Officer shall have the right of reply".

The Committee unanimously felt that this provision (which by virtue

of the Law Officer's Act is vested in the Crown Solicitor personally) is an anachronism which should be removed from the legislation.

2. The Possibilities

2.1 As to the right of final address in trials, we considered carefully the various arguments for and against four possible conclusions, which are -

- (i) that in order to accord to the accused the greatest degree of protection, the right of final address should always lie with the defence;
- (ii) that the existing rule (embodied in section 11 of the Evidence Act) whereby the defence has the right of final say (unless evidence, except as to the character of the accused, has been introduced without according the Crown any opportunity to comment thereon) coupled with the right of the accused to remain silent or to give unsworn evidence, without attracting comment, could accord to the defence an unfair advantage. For example, the defence might open in a general and vague manner, leaving it to the Crown to try to address the jury without being able to comment upon the salient points of the defence for the reason that these simply had not been clearly identified. Counsel for the accused might then proceed to "home in" on the particular points which it did wish to emphasize, leaving the Crown unable to balance the scales in respect of matters specifically emphasized. Indeed, the view was expressed that the foregoing type of situation arose quite often in practice in the Territory. An argument therefore lies for legislative abolition or amendment of the existing law;
- (iii) that the trial Judge should be given a discretion to invite or allow the Crown to have a right of final address where the Judge considered that the defence had so gained an unfair advantage. Although in the result this view did not prevail, it did not lack considerable support in the local

context. It was envisaged that, should a discretion be left to the Judge as suggested, obviously argument as to its exercise would have to be heard in the absence of the jury; and

- (iv) that the Crown should have the right, to be exercised fairly and sparingly, to make a final address dealing only with such salient points as might have emerged in the course of the presentation of the case for the defence but which had not become apparent until the defence made its address. This possible solution arose because of the strict duty on the Crown to present a case fairly, without availing itself of tactical avenues open to defence counsel in the use of all proper means to procure an acquittal. The role of the prosecutor being circumscribed by an overriding duty to avoid anything capable of construction as "unfair" tactics, the prosecution should not be put to unreasonable disadvantage through inability to set right any over-reaction on the part of the jury produced by a defence which took unfair advantage of the prosecutor's duty of office.

3. The Background to the Issues

- 3.1 The law in all Australian jurisdictions, except Victoria, is based on the common law rule modified by statute.
- 3.2 The common law rule is that the defence has the right of final address unless:
 - (i) the Attorney-General or Solicitor-General is appearing officially to conduct the case, or counsel for the prosecution states that he appears as a representative of the Attorney-General (the officers are those in England not the Territory);
 - (ii) evidence is adduced for the defence (other than that of the accused's character).

3.3 The first statutory change was in 1898 in England. Accused were given the right to be witnesses in their own defence. At the same time it was provided that if the only evidence was that of the accused he did not lose his right of final address. The Northern Territory equivalent to the 1898 legislation is section 11 of the Evidence Act.

4. Reform

4.1 The English Criminal Procedure (Right of Reply) Act (1964) completely altered the law. In all trials on indictment the accused is to have the right of last address. The prosecution may make supplementary submissions after the defence's address if that address raises new facts.

4.2 The Victorian Law Reform Commission (Report No. 2, 1974) recommended that the English provisions be adopted on the basis that for a fair trial it is essential that an accused man be allowed to answer all that is alleged against him.

4.3 The South Australian Criminal Law Reform Committee also recommended that the accused has the right of reply in all cases. It suggests that the final address does not have the persuasive effect that some Counsel attribute to it because the Judge in his summing up may attempt to redress any rhetorical advantage although there are obvious limitations on the extent of any such attempt. The South Australian Committee also stated that the Court should not be deprived of material evidence because of considerations irrelevant to the worth of that evidence, such as defence counsel's assessment of the power of the right of reply.

4.4 In 1976 the Victorian Commission's recommendation was implemented by the enactment of an amendment to the Crimes Act in that State. Although the amendment has been in force for a short time only it appears to be working well in practice. It appears to make the course of the trial smoother and reduces time spent on arguments as to whether the right of final address has been lost. It also spares defence counsel from having to resolve whether the introduction of further evidence merits the loss of right of reply.

5. Conclusion

5.1 Although the Committee was strongly attracted to recommending preservation of the status quo (except for the repeal of the anomalous provision granting a right to the Crown Solicitor in person a right of final address) the conclusion was reached that if any bias is to arise at all, then such bias should lie in favour of the accused.

6. Recommendation

It is therefore respectfully recommended that section 11 of the Evidence Act be repealed and the defence be given the right of reply in all criminal trials.

PART II. THE LAW AND PRACTICE CONCERNING THE RIGHT OF THE CROWN TO STAND-BY JURORS

1. The Background

1.1 Section 44 of the Juries Act provides:

"Upon the trial of a criminal issue, the Crown and the person arraigned or his counsel may each challenge peremptorily -

(a) in the case of a capital offence - 12 jurors; and

(b) in any other case - 6 jurors,

and are not, except for cause shown, entitled to further challenges.

(2) A peremptory challenge in excess of the number of peremptory challenges allowed under sub-section (1) is void and the trial shall proceed as if such challenge had not been made."

Section 43 provides:

"Nothing in this Ordinance affects the power of the Court on the trial of a criminal issue to order, at the request of the Crown Prosecutor, a juror to stand by until the panel of jurors is exhausted."

- 1.2 The right of the Crown peremptorily to challenge was originally removed by the Challenge of Jurors Act 1303 33 Eds. 1.C.2 (re-enacted ipsissimis verbis by section 29, Juries Act 1925 (Imp.)).
- 1.3 The reason for the removal of the Crown's right to peremptorily challenge and its substituted right to stand-by jurors was explained by Lord Campbell C.J. delivering the judgment of the Court of Queen's Bench in Mansell v. The Queen 8 El & Bl (1857) at pp. 70-71 thus:

"An abuse had arisen in the administration of justice, by the Crown assuming an unlimited right of challenging jurors without assigning cause, whereby inquests remained 'untaken'. In this way the Crown could, in an arbitrary manner, on every criminal trial, challenge so many of the jurors returned on the panel by the sheriff that twelve did not remain to make a jury; and the trial might be indefinitely postponed pro defectu juratorum, to the great oppression of the subject, and in contravention of the words of Magna Carta (1 stat. 9 H.3, c.29), 'Nulli negabim aut differem rectum vel justitiam.' The remedy was to give to the party accused a right to be tried by the jurors summoned upon his arraignment, if, after the limited number of challenges to which he was entitled without cause assigned, there remained twelve jurors of those returned upon the panel to whose qualification and unindifference no specific objection to be proved by legal evidence could be made.

To prevent the trial going off for want of jurors by the peremptory challenges of the Crown, it is enacted that 'they that sue for the King' 'shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the Court.' But there was no inten-

tion of taking away all power of peremptory challenge from the Crown, while that power, to the number of thirty-five, was left to prisoner. Indeed, unless this power were given under certain restrictions to both sides, it is quite obvious that justice could not be satisfactorily administered; for it must often happen that a juror is returned on the panel who does not stand indifferent, and who is not fit to serve upon the trial, although no legal evidence could be adduced to prove his unfitness. The object of the statute is fully attained if the Crown be prevented from exercising its power of peremptory challenge, so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to a valid objection. Accordingly, the course has invariably been, from the passing of the statute to the present time, to permit the Crown to challenge without cause till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the Crown, and to put the Crown to assign cause, so that, if twelve of those upon the panel remain as to whom no just cause of objection can be assigned, the trial may proceed. In our books of authority, the rule is laid down that the King need not show any cause of his challenging till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged."

On appeal to the Court of Exchequer Chamber (upon grounds not here material) Cockburn C.J. stated:

"It appears that, before 4 stat. 33 Ed. 2, the Crown, either by prerogative or by usurpation, exercised the power of peremptory challenge without restriction as to number; and, if that power was exercised so that twelve jurors did not remain, the inquest went off for that cause. To meet this evil the Act was passed. On the enactment a practice was grafted by which, on the counsel for the Crown intimating his intention to challenge one of the jurors, he was not put to assign cause at once, but the juror was set aside until the panel was gone through to ascertain if enough of persons not objected to might not be found to make

a jury. If the panel was large, this effect was equivalent to a peremptory challenge ... It must be admitted by everyone that it is not settled by overwhelming authority that, where it is proposed to object to a juror, the counsel for the Crown have the right to have the man set aside until it is seen if without him there will be jurors enough to try the prisoner, and that it is not until the panel is gone through that cause need be shown."

In our view the original reason for the removal of the Crown's right to unlimited peremptory challenge has for all practical purposes now disappeared. The Crown no longer abuses such a right as it clearly did prior to the year 1300. Further, section 37(2) of the Juries Act provides:

"If all the jury cards are exhausted, by challenge or otherwise, before 12 persons appear and remain approved as indifferent, the Court may, at the request of the Crown Prosecutor or the prisoner or his counsel, order the Sheriff to appoint forthwith from amongst such of the persons in or in the vicinity of the Court as are qualified and liable to serve, and not exempt from serving, as jurors in a jury district as many persons as are sufficient to make up 12 jurors."

- 1.4 A panel of some 80 jurors is presently summoned for each sittings of the Supreme Court.
- 1.5 It is most unusual for more than one jury to be sitting at the same time.
- 1.6 Each jury list is perused by the police who make side notes (for the benefit of Crown Prosecutors alone) with respect to approximately 10 to 12 jurors. The side notes draw Crown Prosecutors' attention to those persons whom it is felt (by the police) should not either generally or in particular cases sit on a jury. Whether or not prosecutors take notice of the side notes is of course a matter for each individual prosecutor.

The police would, for example, draw attention to:

- (a) a person who, though not a mental defective, is regarded as "simple",
- (b) a person whose close relatives have been imprisoned or constantly been in trouble with the police,
- (c) wives of police officers,
- (d) persons who have bad driving records,
- (e) persons who are reputed to have said that they would never convict anyone of anything,
- (f) persons with criminal records not otherwise disqualified.

With respect to (c) it is sometimes thought that police wives have a predisposition towards the prosecution. There may also be a danger that the wife of, say, a CIB officer may have overheard her husband or her husband's colleagues talking about a case.

With respect to (d) it certainly seems inappropriate that a person with a bad driving record should try a person charged with driving a motor vehicle in a culpable negligent manner (S. 16A Criminal Law Consolidation Act).

The stand-by facility appears to be used -

- (a) as a simple method of removing a juror in respect of whom challenge for cause could be sustained,
- (b) where there would be difficulty in adducing legal evidence to prove unfitness,
- (c) to save a person from the possible embarrassment of being examined as to fitness,

(d) where the Crown could otherwise use its power to peremptorily challenge under section 44.

The right does not extend to defence counsel but by custom is sometimes used by the Crown for the benefit of the defence.

The purposes for which the stand-by facility are used are considered to be reasonable and proper.

1.7 In the past, procedural problems have arisen with respect to the practice of standing by jurors. In Mansell v. The Queen (supra) questions arose as to the meaning of going through or perusing, the panel, whether or not the Court of its own mere motion has the right to stand by a juror, and the order in which names should be read after a panel has once gone through (some jurors having not originally been present). Such problems rarely arise in practice and do not of themselves constitute grounds for abolishing the stand-by principles or practice. The fact that the Crown has greater scope for determining the composition of a jury than has the defence and thus may be thought by some to have an unfair advantage has been advanced as providing a reason for abolishing the existing rights of the Crown. That view is considered to be both tenuous and untenable in reality.

2. The Position in other States and the A.C.T.

New South Wales:

The Crown's right to stand-by jurors has been abolished. The Crown has the same right of challenge as any person being prosecuted - 20 peremptory challenges in the case of an offence that is capital (murder) and 8 in any other case. Ss. 42 and 43, Jury Act.

South Australia:

The Crown's right to stand-by jurors has been abolished. The Crown has the right of challenge as any prisoner - 3 peremptory challenges only. Ss. 61 and 62, Juries Act.

Western Australia:

"Those prosecuting for the Crown have and may exercise in any case the right of challenge peremptorily of eight jurors and the right to pray for an order to stand four jurors aside." S. 38(2), Juries Act.

Queensland:

"The power of the Court in a criminal trial, upon application on behalf of the Crown, to order any juror to stand by is limited so that the numbers of jurors so ordered to stand by shall not exceed the number of peremptory challenges allowed to the person arraigned or, where more persons than one are jointly arraigned, the aggregate of the peremptory challenges allowed to them." S. 32(1A), Jury Act.

The Crown's right to stand-by jurors is preserved in Tasmania (S. 55, Jury Act), Victoria (S. 33, Juries Act) and the A.C.T. (S. 33, Juries Act).

3. Conclusions

Subject to minor amendments as hereafter mentioned, in our view the retention of the present system best meets the needs of the Territory at present. We feel that it is necessary to bear in mind the practical aspects of the problem - particularly apropos "local panels" where a shortage of jurors could conceivably arise. In this respect we understand the position may be improved as a result of the new Juries Act which purports to widen the available classes of persons subject to jury service - but this will not ipso facto produce larger numbers of competent jurors.

We believe that there is a (comparatively) high proportion of persons quite obviously unfit and since the present system allows for jurors to be stood aside by consent, it has a particular advantage in this area.

4. Recommendation

We therefore respectfully recommend the retention of the present system in principle in the Territory.

5. Ancillary

5.1 During discussion, the Solicitor-General made the point that it was unrealistic nowadays to think in terms of "capital offences". It is therefore recommended that section 44(a) of the Juries Act be amended so that the right of peremptory challenge of 12 jurors should extend not only to capital offences but also to those offences which are punishable by mandatory sentence of life imprisonment. Further, in cases not involving capital offences or those punishable by mandatory sentence of life imprisonment - that is, those referred to presently in section 44(b) - the number of jurors who may be challenged peremptorily in a criminal issue should be increased from 6 to 8.

5.2 Further, in the course of our discussions, there arose the question "At what point in time should the exercise of the right take place?" At present section 45 of the Juries Act provides that "A challenge upon the trial of a criminal issue shall be made as the juror comes to his seat in the jury box".

We feel the wording of this section is somewhat loose - indeed, that it could well be argued that a challenge could (in terms of the present section) be made at any time before the juror was actually seated in the jury box. This time might well be insufficient to accord to the accused the opportunity to consider prospective jurors and, if the accused so wished, challenge.

5.3 It is therefore recommended that section 45 of the Juries Act should be amended to read "A challenge upon the trial of a criminal issue shall be made before a juror is sworn and takes his seat."

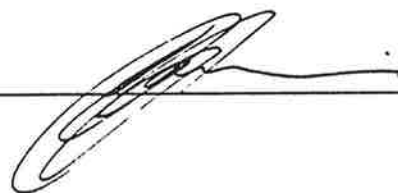
Summary of Recommendations

We respectfully recommend:

- (i) The retention of section 43 of the Juries Act without change;
- (ii) The retention of section 44 of the Juries Act subject to the inclusion of offences punishable by mandatory sentence of life imprisonment in sub-section (1)(a) along with capital offences providing for peremptory challenge of 12 jurors to either case and to changing sub-section (1)(b) thereof to read; "... in any other case - 8 jurors; ..."; and
- (iii) Amendment of section 45 of the Juries Act so that it provides: "A challenge upon the trial of a criminal issue shall be made before a juror is sworn and takes his seat in the jury box."


Chairman


Executive Member


Member