PUBLISHED VERSION

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Australian Bar Review, 2018; 45:36-61

Originally published at:
https://advance.lexis.com/search/?pdmfid=1201008&crid=33d83665-23f9-4aaf-bb35-b1fa964db057&pdtocsearchterm=%E2%80%98Squizzy%E2%80%99+and+the+Cuckold+%3A+How+Majority+Jury+Verdicts+Got+their+Australian+Foothold%E2%80%9D&pdtocsearchoption=docsonly&pdsearchterms=&pdtypeofsearch=TOCSearchDoc&pdfilterstring=MTA3MjQ4MA&pdsearchdisplaytext=Australian+Bar+Review&pdcontextvalue=analytical-materials-au&pdtocfullpath=%2Fshared%2Ftableofcontents%2Furn%3AcontentItem%3A5901-4MC1-FBKD-B000-00000-00&ecomp=26hdk&prid=bff7e340-4159-4b92-98e7-00e602555b64

‘Squizzy’ and the cuckold: How majority jury verdicts got their Australian foothold

*Greg Taylor**

Majority jury verdicts in criminal cases were introduced far earlier in South Australia than in most comparable places. A number of factors combined to produce this result: one was the South Australian Law Reform Commission of 1923–27, a body which can now be seen as ahead of its time despite the ridicule heaped upon it by Mr Justice Evatt because it was not staffed by lawyers. It uncovered and mobilised a substantial degree of support for majority verdicts among the leaders of the profession. In Victoria in the same decade there was a great deal of anxiety about jury squaring (rigging) based partly on rumours surrounding the notorious gangster ‘Squizzy’ Taylor. This spread to South Australia, and, unlike the Victorian, the South Australian legislature was in a position to take decisive action. Nevertheless, rumours of and even proof of jury squaring continued after majority verdicts were introduced.

I Introduction

Attention has again been directed to majority jury verdicts in criminal cases by a recent decision of the High Court of Australia on appeal from South Australia, in which it was pointed out that that State was the first in Australia to introduce majority jury verdicts in criminal cases by s 57 of the *Juries Act 1927* (SA).[1] Since then every Australian State has made provision for such jury verdicts, although the details differ: in New South Wales, long a bastion of unanimity, s 55F of the *Jury Act 1977* (NSW), added in 2006,[2] provides for majority verdicts of 11 of 12 jurors after at least 8 hours’ deliberation, whereas in South Australia a verdict of 10 may be accepted after only 4 hours’ deliberation (but that does not extend to a verdict of guilty of murder or treason, which must be unanimous).[3] As is well-known, it has been held that s 80 of the federal Constitution precludes majority verdicts in federal trials.[4]

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1 *NH v Director of Public Prosecutions* (2016) 90 ALJR 978, 989.

2 This was preceded by a report of the New South Wales Law Reform Commission (‘NSWLRC’), *Majority Verdicts*, Report No 111 (2005) — which recommended retaining the requirement for unanimity. Queensland abandoned that requirement even later, with the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld) s 8, and that despite the scandal documented in the NSWLRC report just cited, at 6.

3 As originally enacted *Juries Act 1927* (SA) s 57 prohibited any verdicts by majority, whether of guilty or not, in capital cases, with the sole exception of a verdict of guilty of manslaughter in a murder trial. This qualification was suggested by the Judges of the

However, little is known about the reasons which induced South Australia to introduce this innovation some 40 years before England[5] and before any other Australian state (Tasmania being the second cab off the rank, in 1936).[6] It is an interesting story, involving a substantial degree of input from Victoria also as well as South Australia's own Royal Commission on Law Reform of 1923–27 — even though Victoria stood aloof from the introduction of majority verdicts until 1993.[7] The story, alongside its inherent interest and significance, also reminds us of the importance of the political process, with all its changes and chances, to the reform of the law, for majority jury verdicts came to South Australia first, bypassing Victoria for two-thirds of a century, because it was in South Australia rather than Victoria that a stable parliamentary majority for reform existed at the time when majority jury verdicts placed themselves upon the public's and politicians' agendas. If anything, there was a better case for majority jury verdicts in Victoria in the 1920s, but political realities simply did not allow for their introduction there.

South Australia's Royal Commission on Law Reform was subjected to withering ridicule by Mr Justice Evatt — a strong supporter of unanimity in jury verdicts[8] — in a paper read to the Australian Legal Convention of 1936.[9] His Honour singled out in particular the vagueness of the Commission's remit, which referred to the desirability of introducing 'law reform' as if it were 'some sort of nostrum whose introduction into the State would immediately cure all the ills of the body politic' and to the fact that the Commission included no lawyers, 'so that its capacity to undertake the simple task of "introducing law reform" was undoubted'.[10] While there was no doubt something in this criticism, and the Commission's lack of experience with legal matters does painfully come to the fore in some unrelated fields that it considered (such as legal costs), this criticism was not entirely fair: his Honour might have recollected that what is perhaps Australia's greatest law reform, the Torrens system, was championed by a non-lawyer and met mostly with indifference or hostility on the part of the legal profession.

In the course of the discussion of his Honour's paper by the assembled legal dignitaries we learn from GC Ligertwood KC (later Mr Justice Ligertwood and the eponym of the law school's building at the University of Adelaide)

Supreme Court of South Australia: Murray CJ to Homburg A-G (GRG No 1/2/199/1927/384, State Records of South Australia, 7 September 1927). See further below, n 124.

4 *Cheatle v R* (1993) 177 CLR 541; see also *Rizeq v Western Australia* (2017) 91 ALJR 707.

5 *Criminal Justice Act 1967* (UK) s 13. Of course, the law of Scotland has long provided for majority verdicts, a fact frequently pointed out in Australian debates.

6 *Jury Act 1936* (Tas) s 2. Some of the background to the change in Tasmania is given in Mr Justice H V Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal (Supplement)* 49.

7 *Juries (Amendment) Act 1993* (Vic) s 7.

8 D M Downie, '"And Is That the Verdict of You All?": A critical examination of the requirement for unanimity of the Criminal Jury, as it exists in New South Wales, Victoria and Queensland, with a comparative study of the position in other jurisdictions' (1970) 44 *Australian Law Journal* 482, 484. This article also contains a useful review of the position at the start of the 1970s in Australia, England and beyond. At the time it was written, New South Wales and Queensland as well as Victoria continued to require unanimity.

9 Evatt, above n 6.

10 Ibid 59ff.

that one main reason for the introduction of the majority verdict was 'a desire to counteract the power of juries exercised by two great advocates who practised at the South Australian bar'.[11] Doubtless one of those was Francis Villeneuve Smith KC, who himself had just spoken in the same discussion; the other may have been Sir Josiah Symon KC, despite his retirement from court work in 1923.[12] There is, as is only to be expected from such a distinguished source, a good deal of truth in this explanation, but it omits the substantial push for majority jury verdicts that was given from Victoria and in particular its experience with jury 'squaring'[13] (rigging or bribing,[14] as we should now call it) both in fairly unremarkable cases and — allegedly — in those involving the legendary gangster Leslie 'Squizzy' Taylor. There was also one serious suspected case of attempted jury rigging in South Australia, although it was in a civil case. Nevertheless, Victoria did not succeed in having majority verdicts introduced in this era, largely owing to the more complicated political situation there. Victorians had to content themselves with stricter provisions for the secrecy of the jury panel as a method of safeguarding the jury from bribery and intimidation.

Concern about ensuring that juries were not bribed and worries that the safeguards against that practice may be insufficient were hardly new — they come through clearly in the works of Sir John Fortescue, writing in the 15th century.[15] However, it was the rise of the armed American-style city gangster, most obviously 'Squizzy' Taylor, that led to severe levels of concern in Victoria during and after the World War I and, coupled with the other factors just mentioned, in turn to something new under the sun — majority jury verdicts.

II Jury squaring and unanimity in verdicts in Victoria in the 1920s

A Public concern about jury squaring in Victoria

Rumours of jury squaring in Melbourne may be traced back at least to the 1890s.[16] Indeed, in 1906 a low-level case of attempting to influence a jury

11 Ibid 75.

12 So says his entry in John Ritchie (ed), *Australian Dictionary of Biography* (Melbourne University Press, 1990, vol 12).

13 The word may be found in this sense in the present online edition of the Oxford English Dictionary, *sv* 'square', 6a: 'slang or colloq — to conciliate, satisfy, or gain over (a person), esp by some form of bribery or compensation; to get rid of (one) in this way'. Examples of the word's usage in this sense are given only from 1859–85. Presumably this meaning is derived from meaning 4a: 'fig — to regulate, frame, arrange, or direct, by, according to, or on some standard or principle of action'.

14 Nevertheless there are occasional examples of methods of rigging that do not involve bribery, such as sending a customer to a shopkeeper on the jury and steering the conversation towards one of the customer's friends who is about to stand trial: South Australia, *Parliamentary Debates*, House of Assembly, 29 September 1931, 1736.

15 James H Landman, '"The Doom of Resoun": Accommodating Lay Interpretation in Late Medieval England' in Barbara A Hanawalt and David Wallace (eds), *Medieval Cultures* (University of Minnesota Press, 1999) vol 16, 99ff.

16 *The Champion* (Melbourne), 14 September 1895, 1; *The Champion* (Melbourne), 25 April

member in a minor case actually made it to the law reports;[17] there is at least nothing on the face of what is reported to suggest a broader organisation or regular attempts to influence jurors improperly, and one of the would-be squarers said that she was acting in the interests of her brother (rather than any large-scale jury-squaring operation). On the other hand, the very prosecution-friendly draft Victorian Criminal Code of 1904, an adaptation for Victoria of Chief Justice Griffith's code, proposed — although such a thing was certainly not to be found in Chief Justice Griffith's code — that majority verdicts might be accepted as a means of neutralising corrupt or obstinate jurors.[18] As the Victorian Criminal Code was never enacted, agitation for majority jury verdicts lapsed for a time.

Jury squaring first emerges on the parliamentary record in 1915, when the solution eventually adopted in 1922 was foreshadowed. Sir Arthur Robinson, an Honorary Minister in Sir Alexander Peacock's government who had trained as a solicitor — a leading law firm commemorated him in its name until recently — declared that the public selection of the jury panel then practised,[19] which was intended to bolster public confidence in the jury system and give notice to the accused of those who might try him, was instead 'a means whereby evil-minded persons could pervert the ends of justice'[20] and should be abolished. It simply gave facilities to those who wished to tamper with jurymen[21] to find out who they were. However, the Legislative Council, taking its lead from another solicitor-politician, Robert Beckett, did not agree, and deleted a sub-clause in what would become the *Juries Act 1915 (No 2)* (Vic) that would have abolished the public selection of the jury panel and availability of the names to the public; somewhat inconsistently, it retained the proposed deletion of the provision under which any person might acquire an official copy of the panel for two shillings.[22] At this stage, however, insufficient evidence of any nefarious practices had been presented to justify holding the selection of the panel in private.

In August 1918, *The Argus* newspaper suddenly took up the cudgels, motivated by a series of cases in which juries had failed to agree on a second or even third trial.[23] It announced that:

1896, 1 (although this journal was conducted by Henry Hyde Champion and may not be a fully reliable source); *Table Talk* (Melbourne), 14 January 1898, 3.

17 *Re Dunn* [1906] VLR 493.

18 Greg Taylor, 'The Victorian Criminal Code' (2004) 23 *University of Queensland Law Journal* 170, 185f. Many years later, one of the authors of the Victorian code, Judge Woinarski (as he now had become), again expressed a view in favour of majority verdicts, although only in a case of obstinacy rather than corruption: *The Argus* (Melbourne), 9 February 1922, 7.

19 *Juries Act 1915* (Vic) s 51. The jury panel is not a jury itself, but those persons eligible for jury service who are summoned to make themselves available for any particular period of jury service and who may, depending on the drawing of lots at the start of each trial in Court, become jurors in a trial within that period.

20 Victoria, *Parliamentary Debates*, Legislative Council, 23 November 1915, 3339.

21 Female jurors did not exist until the enactment of the *Juries (Women Jurors) Act 1964* (Vic).

22 *Juries Act 1915 (No 2)* (Vic) s 4. Such provisions were inherited from England, as witness the *Common Law Procedure Act 1852* (UK) s 106.

23 Eg, *The Argus* (Melbourne), 17 August 1918, 16 — the prosecutor being Woinarski KC.

> 'jury-squaring' has been reduced to a science in Melbourne. Certain men are practically professional 'jury-squarers'; they have their organisation, with agents in the various suburbs. The first thing to do when an accused man wants some 'squaring' done is to get a list of the panel of jurymen for the sittings.

(After the 1915 amendments, such a list would merely have to be copied out by hand in the sheriff's office by the would-be squarers.) To its credit, however, the newspaper referred also to the difficulty of knowing exactly what was going on: 'Cases have been known, by the way, in which the "squarer", gambling on the chance of an acquittal, has kept for himself the whole of the money given to him to "work the oracle" with, making no attempt to reach any juryman.'[24] Interviewing assorted politicians the following day, the newspaper found (Sir) Arthur Robinson S-G conceding that 'while there might be a very strong suspicion, or even a moral certainty, that there had been "squaring" in some particular case, it was very hard to obtain any definite evidence'.[25] Four years later, he let on that he had at around this time received a report from the chairmen of General Sessions to the effect that some juries' disagreements were suspicious and 'due solely to improper interferences with some of the jurors'.[26]

According to Mr Punch,[27] '[t]he man on the street has known for a very long time that jury-squaring, and jury-rigging, were going on here', and it was about time that the politicians and newspapers of the colony with the highest opinion of themselves (clearly a reference to *The Argus*) caught up with this news. Shortly afterwards, figures were published which showed a virtually identical number of criminal jury trials in the 12 months ending on 30 November 1917 and 1918 (221 as against 219) but a sudden upsurge in disagreements (12 in 1917, 28 in 1918).[28] As a percentage this is also startlingly high compared to the figures quoted by Mr Justice Evatt for the period 1933–35,[29] namely 3.2 per cent in the Supreme Court of Victoria and 3.9 per cent in General Sessions (today's County Court of Victoria).

These matters rested in this supposedly urgent scandal on justice for over a year. Proceedings were resumed in October 1919 by the *The Age*, which published its own series of articles about 'the very strongest suspicion [that has] fallen on a man — the ringleader of [a] gang' — probably a reference to 'Squizzy' Taylor — but admitted that it was 'almost impossible'[30] to obtain evidence that they were in fact using the jury panel lists to target jurors for

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24 *The Argus* (Melbourne), 21 August 1918, 8.

25 *The Argus* (Melbourne), 22 August 1918, 4. At the same page, the newspaper comments on its own revelations in a leader. The phrase 'moral certainty' has passed out of common use: it meant 'virtual certainty'. The same man uses nearly the same phrase in Victoria, *Parliamentary Debates*, Legislative Council, 14 December 1920, 667. A similar point was also made in England at the time of the introduction of the majority verdict there: Downie, above n 8, 493.

26 Victoria, *Parliamentary Debates*, Legislative Council, 22 November 1922, 2938.

27 *Punch* (Melbourne), 29 August 1918, 3.

28 Victoria, *Parliamentary Debates*, Legislative Council, 10 December 1918, 2806.

29 Mr Justice Evatt, above n 6, 58.

30 *The Age* (Melbourne), 25 October 1919, 15. See also *The Age* (Melbourne), 27 October 1919, 6; *The Australasian* (Melbourne), 1 November 1919, 32; *The Age* (Melbourne), 9 April 1920, 7.

bribery. 'Squizzy' was notoriously involved in a large two-up school,[31] and references in public to the publication of jury lists in two-up schools[32] are likely to have been intended as references to jury squaring by him or his minions. There were also suspicions that he had squared a juror in 1924, on one of the few occasions that he himself was prosecuted before a jury.[33]

The Age laid the blame for this 'awful stigma on our system of justice' that had 'been long notorious' on the 'unutterably feeble'[34] government. Going beyond this a few days later, it advocated nine-twelfths or even simple majority verdicts.[35] The outgoing president of the Law Institute of Victoria was more cautious and thought that, if jury squaring were indeed going on (an important qualification), consideration should be given to five-sixths majority verdicts.[36] The more conservative *The Argus*[37] suggested consulting the judges on the point. The idea was, of course, that it would at least be far more difficult to square juries if the resistance of one or two jurors to a guilty verdict could be overcome by a majority. In late 1919 the government, under the new Premier (Sir) Harry Lawson, tried again with its proposal to close the jury selection to the public and got the Bill through the Legislative Council, but on 23 December was defeated by Labor opposition in the Assembly based partly on the lack of time to consider the Bill, partly on the lack of hard evidence that jury squaring had occurred and partly on the salutary principle that governmental actions should occur in public unless good reason to the contrary were shown.[38]

The difficulty of obtaining evidence was clearly a major barrier to action; it made it difficult to say then, and impossible now, how great the extent of the problem really was. Clearly there were many suspicions, but it was usually not

31 Hugh Anderson, *The Rise and Fall of Squizzy Taylor: A larrikin crook* (Allen & Unwin, 2013) 149.

32 Victoria, *Parliamentary Debates*, Legislative Council, 12 December 1919, 3316; Victoria, *Parliamentary Debates*, Legislative Council, 18 October 1921, 479; Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 1922, 553; Victoria, *Parliamentary Debates*, Legislative Council, 22 November 1922, 2937.

33 VPRS 251/P0/123, referring to the contents of file 1924/3080. Unfortunately this entire series of files, including 1920/4811 which is the principal file on the question of jury squaring according to the index in VPRS 252/P0/62, cannot be located despite extensive searches in the Public Record Office of Victoria both by the author and by Charlie Farrugia, Senior Collection Adviser in that office. The series of file numbers comes to an end — under the 'top numbering' filing system, a new file number was issued for each new piece of incoming correspondence on the general topic of juries — with 1946/2100, which is annotated in the register as 'Pend 46' and 'Letter to Mr Gillies for Cabinet 1/4/46'. It is uncertain what 'Pend 46' meant or where the file could be now, if it ever was transferred to the archives. A further series on the same topic ends with 1959/9242 (VPRS 7741/P1/5), but that is also not in its numerical place. All that remains are the descriptions of the files' contents in the registers and indexes, which sometimes, as in the case referred to in the text, are reasonably extensive.

34 *The Age* (Melbourne), 28 October 1919, 6.

35 *The Age* (Melbourne), 5 November 1919, 6; 6 November 1919, 6; three-quarters majority: *The Weekly Times* (Melbourne), 8 November 1919, 35.

36 *The Argus* (Melbourne), 28 November 1919, 6; *The Age* (Melbourne), 28 November 1919, 8.

37 *The Argus* (Melbourne), 19 August 1920, 6.

38 Victoria, *Parliamentary Debates*, Legislative Assembly, 23 December 1919, 4108–10. The text of the Bill is at Victoria, *Parliamentary Debates*, Legislative Council, 12 December 1919, 3318.

possible to know whether something untoward had really happened or juries were simply being unpredictable and the prosecution over-confident. Thus jury squaring was suspected in a case against two men named Mulcahy at the end of 1919,[39] and the Judge ordered the return of the stolen whisky they had allegedly received to its rightful owner,[40] but had they interfered with the jury? No one could say. Robinson A-G was compelled to admit in Parliament in late 1919 that 'I cannot get legal evidence to lay a charge.'[41] Sometimes the frustration of the authorities almost leaps off the printed page, as in a report in *The Age* of 9 April 1920,[42] in which we are assured that 'the detectives have almost positive information', whatever that may be, 'that two of the jurymen were "squared"'. On another we are told, with no sense of the inherent contradiction, that in one case 'a verdict for the police was considered certain. But although the case for the prosecution was established almost [!] beyond doubt the men were declared by the jury to be innocent',[43] or at least not guilty. Police even began to advocate the complete abolition of jury trial and its replacement by a panel of Judges on the European model.[44]

However, there was also awareness that the jury system would on occasion produce 'erratic'[45] verdicts. *The Age*[46] (of all newspapers!) made the suggestion that a 'spirit of Bolshevism' was abroad which induced jurors not to convict of property offences, while for the *The Argus*[47] some of the blame lay, alongside the jury squarers, with 'the ultra-sentimentalism which has been a feature of recent thought and teaching' and which had made jurors reluctant to condemn their fellow creatures.

B Further attempts in Parliament

At this point it is necessary to have a look at the state of political play in Victoria, for it has almost passed out of living memory that the party system in Victoria took a very long time to settle down, and Victorian politics were marked as late as the 1950s by bewildering instability, constant party splits and odd coalitions — such as that between the Labor and Country parties — on a scale far beyond that of most other states and the Commonwealth. From 1918, when he became premier as a result of a split in the Nationalist Party, until 1920 the Premier, Harry Lawson, enjoyed a relatively secure majority, although memories of the unpleasantness that had led to the resignation of the previous premier persisted. From the general elections of 1920, when his party lost its majority, Lawson was premier in an uneasy arrangement with the Country Party which collapsed the following year over the issue of wheat marketing. After the ensuing election which changed the party balance but

39 VPRS 251/P0/115, referring to the contents of file 1919/6675; see also Victoria, *Parliamentary Debates*, Legislative Council, 22 November 1922, 2937ff.
40 *The Argus* (Melbourne), 28 November 1919, 7.
41 Victoria, *Parliamentary Debates*, Legislative Council, 12 December 1919, 3316.
42 *The Age* (Melbourne), 9 April 1920, 7; also quoted in Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 1922, 1462.
43 *The Age* (Melbourne), 25 May 1920, 10. Similar: *The Weekly Times* (Melbourne), 9 July 1921, 39.
44 *The Argus* (Melbourne), 27 April 1920, 8; *The Australasian* (Melbourne), 1 May 1920, 26.
45 *The Australasian* (Melbourne), 1 May 1920, 26.
46 *The Age* (Melbourne), 20 November 1920, 13.
47 *The Argus* (Melbourne), 25 July 1921, 6.

little, Lawson succeeded in obtaining Country Party support again with a compromise over the wheat issue, and by 1922, when the jury squaring issue was disposed of as well as could be managed, '[t]here was a return to relative stability',[48] which however did not last into 1923. Our present-day model of a disciplined governing party in firm and undoubted control of at least one of the Houses of Parliament certainly does not describe the situation in Victoria in the period in question; much more careful management had to be given to the Lower House, and from 1920 the Lawson conservative government could not even be sure of a majority on any issue for its proposals.

For that reason, the government found even minor reforms difficult to get through, and restricted itself to minimal measures. Robinson A-G was personally in favour of majority verdicts, and there was public support for them from the well-known (as merciless) Judge Woinarski[49] — who at one point in the early 1930s produced a verdict of guilty from a jury in Sale by deprecating before them the rule of unanimity and suggesting that the minority should agree with the majority, '[a]ssuming that there is no malign influence in this case, that you are all honourable men with open minds, open to conviction'[50] — employing an egregiously ambiguous word as well as a degree of boldness that would hardly be countenanced today. But Robinson A-G realised that majority verdicts went far beyond what was likely to receive the sanction of Parliament.[51] Even minor changes such as restricting the availability of the jury panel were difficult enough to get through.[52]

In 1920 the government tried yet again with that proposal, and again the Labor Opposition, led by George Prendergast, demanded evidence that jury squaring was actually occurring.[53] Even some members of the government party's backbench, most notably (Sir) Frederic Eggleston, raised the same question and attributed much, if not all of the supposed jury squaring to the frustrated enthusiasm of the detectives for catching their quarry.[54] (Sir) Harry Lawson was reduced to conceding that he had 'the strongest possible suspicions in regard to certain cases'[55] but no proof. In the Legislative Council, James Brown, MLC, who was admitted as a legal practitioner and had been Attorney-General in earlier conservative governments for a month short of 5 years from 1909–13, recalled from that time that he had been told about the supposed rifeness of jury squaring, and accordingly:

> it was directed that certain members of the Criminal Investigation Department should make a searching inquiry into these matters. It was stated to me and to the Crown Law Department that a certain hotel in the city was well known to be a place

48 Margaret Fitzherbert, 'Harry Lawson, Sure and Steady' in Paul Strangio and Brian Costar (eds), *The Victorian Premiers 1856 – 2006* (Federation Press, 2006) 165. For a good summary, see also Raymond Wright, *A People's Counsel: A History of the Parliament of Victoria 1856–1990* (Oxford University Press, 1992) 150ff.

49 See above n 18.

50 *Gippsland Times* (Sale), 19 March 1931, 5.

51 Victoria, *Parliamentary Debates*, Legislative Council, 18 October 1921, 482. See also *The Argus* (Melbourne), 21 February 1922, 6; *The Weekly Times* (Melbourne), 8 July 1922, 5.

52 *The Age* (Melbourne), 8 July 1921, 6.

53 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 December 1920, 429.

54 Ibid 435ff.

55 Ibid 432.

> where men engaged in jury-squaring congregated, and where jury-squaring was arranged. The officers who were told off to inquire into the matter were put upon their mettle. It was about six weeks before a report came in, and the report showed that there was not a tittle of evidence to justify the statements that had been made. I told the Chief Commissioner of Police that if he could give any evidence that could be reasonably and properly submitted to a jury, I would consider it. All the resources of the Criminal Investigation Department were utilised in order to ascertain whether there was jury-squaring or not; and the result of the inquiry was that it was impossible to submit any case on which to found a prosecution. There was quietness on the subject for a few years, but recently similar remarks have again been made.[56]

However, Parliament passed the government's Bill[57] with one major amendment: the Crown as well as the accused was not to have access to the Sheriff's information about the panel until the day before trials commenced with each jury panel.[58] Henceforth the selection of the panel was also to take place behind closed doors. Clearly the hope was that the accused would now not have sufficient time to engage in jury squaring, but trials before a particular jury panel do not all commence on the same day; the time fixed for lifting the secrecy of the panel was, in essence, the day before the first trial before each entire jury panel, not the day before each individual trial.[59] It was a sensible precaution to ensure that information was denied to both sides equally, for the practice of 'jury vetting' in modern times, disapproved of in *Katsuno v R*,[60] shows that the prosecuting authorities are not always above using back door sources of information in order to ensure that the jury is to their liking when information about jurors is meant to be secret.[61]

C Proof at last

Whether by coincidence or design, as this Bill was going through its final stages in Parliament in December 1920 some harder evidence about jury squaring began to emerge. On the day after it passed through the Legislative Assembly and was awaiting consideration in the Council, a man was arrested in Lonsdale Street after making offensive noises (apparently 'raspberry tarts') in the presence of three detectives and becoming abusive on being asked to stop. His name was Leonard Thompson, a bricklayer, and he was found to be carrying two lists of jurymen,[62] one of which was, the police claimed, annotated to indicate those who could not be bribed. He gave suspiciously evasive answers to questions about jury squaring, why he had the documents

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56 Victoria, *Parliamentary Debates*, Legislative Council, 16 December 1920, 818.

57 *Juries Act 1920* (Vic).

58 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 December 1920, 439.

59 Presumably this was interpreted in a common sense way to exclude weekends and holidays although there was no statutory enactment of this principle before *Acts Interpretation (Time) Act 1969* (Vic). Of course, once the jury panel was known to some accused and their advisers it would be hard to conceal it from all accused, even if their trials started some time after the first day on which the panel was employed.

60 (1999) 199 CLR 40.

61 The practice of the State prosecuting authorities at present is set out in ch 7 of the collected policies of the Office of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria* <http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>.

62 Another accused person carrying a list of jurymen is recorded in *The Age* (Melbourne), 11 June 1921, 12.

and what he was proposing to do with them. However, merely possessing an annotated list of jurors was not a crime, and in the absence of anything better he was charged with having insufficient lawful means of support rather than with jury squaring; the police magistrate, quite rightly, dismissed even that charge.[63] In February 1921 another case emerged in which jurors claimed that they had been approached during a break by a man who may have been the accused's brother and offered them money to find the accused not guilty.[64] Judge Moule noted that a circular had been issued by the Attorney-General stating that the government would gladly pay the costs of providing jurors with meals in any case in which the trial judge thought it desirable to keep them away from the public.[65] Shortly afterwards, one Henry Khyat was accused of approaching jurors both in his own case and on behalf of one Mark Davis; none of those charges stuck, and indeed a jury found him not guilty of jury squaring, but he was found guilty, again by a jury, of obtaining money by false pretences.[66]

Parliament assembled on 6 July 1921, and the newly elected Henry Isaac Cohen KC, MLC declared in the address-in-reply debate that it was 'common knowledge with those who have any familiarity with the subject' that jury squaring and intimidation were 'rife in the community at the present time'.[67] Whether he himself was among those who had 'familiarity with the subject' might be doubted, for according to his biography in the *Australian Dictionary of Biography* his practice had not extended to the criminal law. No proposals to combat jury squaring had, in fact, been included in the Governor's speech opening the session, a fact on which *The Age*[68] remarked disapprovingly. 1921 would, in fact, pass without any parliamentary action on jury squaring. It was the year of the snap election (held on 30 August) following the collapse of the government on the issue of wheat marketing. A Bill was introduced in the new Parliament in October to improve further the secrecy of the jury panel[69] — including rights to breach the secrecy for the Crown that were to be denied to the accused, something which the Labor Opposition had objected to in the previous year — but time simply ran out.[70]

63 *The Age* (Melbourne), 4 December 1920, 17; 11 December 1920, 16.

64 *The Argus* (Melbourne), 4 February 1921, 11; *The Age* (Melbourne), 5 February 1921, 10.

65 *The Argus* (Melbourne), 5 February 1921, 10; 7 February 1921, 6; *Ballarat Star* (Ballarat), 8 February 1921, 4; see also Victoria, *Parliamentary Debates*, Legislative Council, 18 October 1921, 480.

66 *The Argus* (Melbourne), 21 April 1921, 5; *The Argus* (Melbourne), 18 May 1921, 10; *The Argus* (Melbourne), 19 May 1921, 6; *The Argus* (Melbourne), 27 May 1921, 8; *The Argus* (Melbourne), 30 June 1921, 7; *The Weekly Times* (Melbourne), 13 August 1921, 8 (appeal based in part on alleged prejudice to accused from warnings to the jury about the possibility of squaring attempts was dismissed). See further Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 1922, 553. According to Robinson A-G in Victoria, *Parliamentary Debates*, Legislative Council, 18 October 1921, 479, one juror approached was 'one of the most respectable and best-known citizens in Carlton' and the accused, presumably Mark Davis, was 'a very dangerous criminal, whom we had never been able to convict'. Khyat may again be found in Court where allegations of jury squaring were mentioned in *The Age* (Melbourne), 26 July 1921, 9.

67 Victoria, *Parliamentary Debates*, Legislative Council, 6 July 1921, 10.

68 *The Age* (Melbourne), 7 July 1921, 8.

69 Victoria, *Parliamentary Debates*, Legislative Council, 18 October 1921, 478–84.

70 *The Argus* (Melbourne), 10 December 1921, 28.

Why did the Attorney-General even try to have a lopsided law about the secrecy of the jury panel accepted by Parliament? The 1921 election had not changed the balance of power significantly, but what had changed was the level of evidence available for the existence of jury squarers: there had at last been a conviction.

It was hardly the biggest possible fish, but it was at least a conviction and some hard evidence of jury squaring at last. In August 1921 James Joseph Lyon,[71] 'a strongly built young man described as a manufacturing furrier',[72] was found guilty of approaching a man named Dowling whose son was on trial for murder after shooting his neighbour.[73] Lyon visited him one night, boasted that he had 'fixed up two big cases'[74] in a week and put the proposition to him: sufficient members of the jury — bricklayers and labourers with large families — could be purchased for the price of £300, later reduced to £250 (about 60 times the basic weekly wage of the day[75] and on that rough-and-ready basis about $40 000 today). The jury found Lyon guilty after a retirement of 25 minutes, and in sentencing him to three years' imprisonment Judge Wasley had the good sense to say that jury squaring certainly occurred, 'though probably not to the extent that was sometimes thought and mentioned. There were other reasons sometimes to account for the verdicts juries brought.'[76] However, *The Weekly Times*[77] thought that it might be the tip of the iceberg: '[t]he audacity and nonchalance with which Lyon entered into his negotiations indicate that jury-squaring is regarded by those who attempt it as a simple and profitable business.'

In February 1922, further high-level public support was lent to theories of jury squaring when Judge Woinarski said in open Court, just after sending a jury out again after it reported that it had no chance of reaching a verdict in a third trial for perjury, that it was 'amazing' that they could not reach a verdict and that '[i]t is a dreadful thing that there are unlawful means by which disagreements of juries can be brought about by dishonest persons'.[78] In May three juries failed to agree in a week; on the third occasion Judge Woinarski,

71 Sometimes newspaper reports of his name vary; it is given here as in the presentment in VPRS 17020/P1/48. The precise charge was that Lyon, between 22 June and 8 July 1921, unlawfully incited Arthur Fritz Dowling and Grace Roberts Dowling to conspire with him to prevent, obstruct, pervert or defeat the course of public justice.

72 *The Age* (Melbourne), 10 August 1921, 8.

73 There is further information about this case at Travis M Sellers, *Murder at Mordialloc: The Case of Patrick Joseph Duff* (6 March 2010) Kingston Historical Website <http://localhistory.kingston.vic.gov.au /htm/article/479.htm> and a story more favourable to the wife at Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 1922, 1448.

74 Statement of police officer who heard the conversation between the accused and Dowling in trial file *R v Mulcahy*, VPRS 30/P0/1933.

75 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 1920, 6814; *Federated Gas Employees' Industrial Union v Metropolitan Gas Co* (1922) 16 CAR 4, 13.

76 *The Argus* (Melbourne), 11 August 1921, 6; similar: *The Age* (Melbourne), 11 August 1921, 6.

77 *The Weekly Times* (Melbourne), 20 August 1921, 34.

78 *The Age* (Melbourne), 9 February 1922, 7 — although these words are not in *The Argus* (Melbourne), 9 February 1922, 7. It is also noticeable that, in the trial of one Scott at about the same time (*The Argus* (Melbourne), 9 February 1922, 7), a juror held out all night but was talked around in the morning, suggesting obstinacy rather than corruption.

'speaking very deliberately and eyeing the jury sternly',[79] again professed himself 'amazed', and said, 'it will be better if I say nothing in case I should say too much'.[80] A government minister went on record refusing to provide reports on allegations of jury squaring in another trial against two men named Debney as it could assist jury squarers to do so;[81] the Premier said later, under parliamentary privilege, that Debney had made payments to Lyon for no lawful purpose.[82]

D The successful Bill passes

As 1922 began two newspapers showed a more sceptical, and also more sophisticated line. *The Age*[83] thought that there was a 'widespread belief' that jury squaring occurred, but there was no proof of it; yet what was certain, it thought, was that confidence in the jury system was being damaged by that belief. It suggested majority verdicts, at least in some cases, but there was still no chance of that getting through Parliament.[84] The *Geelong Advertiser*[85] was even more sceptical and thought that the jury-squarers were really fraudsters who took people's money and did little or nothing. It had no evidence for that assertion either, and it was also compatible with the idea that public confidence needed to be restored.

In August 1922, introducing the Bill for what would become — after amendments — the *Juries Act 1922* (Vic), (Sir) Harry Lawson, the Premier, made a long, carefully prepared and forensic speech in which he marshalled all the evidence available for the existence of jury squaring, largely by means of reading a long memorandum provided by the Law Department. It was during this speech that he referred to the transactions between Lyon and Debney noted earlier. The Bill proposed merely to keep the names of jurors secret from all except those authorised by the law officers; that might not be a sufficient remedy, but he had concluded that the House would not accept majority verdicts. Again the case for tightening the law was dependent upon the acceptance that unjust verdicts had been procured and thus that those benefited by them were not merely guilty, but clearly and almost unarguably so — but now there was at least the one case, that of Lyon, in which a conviction for jury squaring had been obtained.[86] The Labor Party made it clear through interjections that it remained unconvinced, and as a result both morning newspapers told it off on the following morning.[87] *The Age* asked why there could be any objections to providing names of jurors to the Crown but not the accused, given that the Crown would not be guilty of attempting to 'square' a jury and could be trusted. It would be a 'monstrous assumption that the Crown would employ dishonest and corrupt methods to obtain the

79 *The Age* (Melbourne), 13 May 1922, 12.
80 *The Argus* (Melbourne), 13 May 1922, 22.
81 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 November 1921, 830.
82 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 1922, 553; see also Victoria, *Parliamentary Debates*, Legislative Council, 22 November 1922, 2936f.
83 *The Age* (Melbourne), 10 February 1922, 6.
84 See above n 51.
85 *Geelong Advertiser* (Geelong), 7 August 1922, 6.
86 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 1922, 549–56.
87 *The Argus* (Melbourne), 9 August 1922, 10; *The Age* (Melbourne), 9 August 1922, 8.

conviction of innocent persons. If that assumption is correct, then the whole fabric of government is rotten, and there is nothing solid upon which we can base any system of justice.'[88] This perspective overlooks the slight but significant cutting of corners that might sometimes be thought defensible in the noble cause of convicting the guilty; it is not a black-and-white matter.

In the course of the debate the Labor members accused the government of panicking following a newspaper scare.[89] To the argument that the Crown could be trusted not to pack juries, one Labor member, in a revealing interjection, responded: 'They have done it repeatedly, in Ireland, in particular.'[90] Another, more recent and local experience to which Labor members referred in debate was that of being harassed by government spies at anti-conscription meetings during the recent War, something which had also shaken their trust in the fairness of the authorities.[91] The claim was again made that the jury squarers were really just fraudsters who took people's money and did nothing except hope and pray that the jury's verdict would not uncover their fraud.[92] That was certainly an interesting theory, but — even allowing that one to go through to the keeper and ignoring the fact that Lyon had been convicted — it went too far, and merely given an outing to his talent for speechifying, for the Opposition Leader, George Prendergast, to declare that the Crown Law memorandum relied on by the premier contained a number of untruths and was simply 'a cowardly attack on the jury system'.[93] *The Weekly Times*[94] thought that '[w]hen public men deny that scandalous jury-squaring has polluted the fount of justice, either their discernment or their judgment, or both, must suffer in general esteem.'

However, opposition again came from the government backbench, led by (Sir) Frederic Eggleston who stated that he would vote against the Bill if the special rights for the Crown to know the composition of the jury panel were not removed — although he would himself be willing to vote for majority verdicts of 11 out of 12 if they were proposed.[95] Another government backbencher who was a solicitor, Oswald Snowball, called the Bill 'hysterical legislation' and added that he opposed abolishing unanimity.[96] The Bill passed its second reading by 26 votes to 22, with Eggleston in favour for the time being but Snowball and one or two other government backbenchers voting

88 *The Age* (Melbourne), 9 August 1922, 8; see also *The Age* (Melbourne), 21 September 1922, 8; *The Age* (Melbourne), 15 November 1922, 2798.
89 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 August 1922, 758.
90 Ibid 762; the speaker is EC Warde, MP. Apparently 'Warde' was a stage name adopted by his father, whose original surname was Coughlan: *The Age* (Melbourne), 8 February 1926, 10. See also 19 September 1922, 1399; 20 September 1922, 1431.
91 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 September 1922, 1401; see also Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 1922, 1435; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 1922, 2751, 2789.
92 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 1922, 1436, 1439, 1448, 1458ff; Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 1922, 2755; Victoria, *Parliamentary Debates*, Legislative Council, 22 November 1922, 2950.
93 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 1922, 1458.
94 *The Weekly Times* (Melbourne), 30 September 1922, 42.
95 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 September 1922, 1378, 1381.
96 Ibid 1395–7; he expands on his reasons on 15 November 1922, 2757–9.

with the Opposition.[97] In Committee the provision for the Crown to have privileged access to the jury panel lists was deleted on the motion of the Premier, who recognised that the House would not accept it,[98] and after an all-night sitting, with the Labor members clearly filibustering, the Bill finally passed at around 6 am with Eggleston voting in favour but one or two government backbenchers still opposed.[99] It had a smoother passage through the Legislative Council and the principle of jury secrecy was at last established, with equal treatment of both prosecution and defence: henceforth neither side was to know who the jurors were and there was no publicly available list. As amended by s 3(1) of the *Juries Act 1922*, s 55(2) of the *Juries Act 1915* now provided that the Sheriff should not disclose the names of jurors to anyone (unless compelled to do so in some other way, such as in giving evidence); provisions for the panel to be made known even a day in advance were deleted.

As a result, as *The Age*[100] commented in April of the following year, challenges were starting to be made in a manner that would be familiar to today's practitioners: largely on the appearance of the would-be jurors. The defence frequently objected to 'elderly gentlemen with iron grey looks and a resigned expression that speaks of regret for past sins and a sympathy with law and order' and, in cases involving theft-based offences, to those who appeared prosperous, while the Crown objected to hairdressers, tobacconists and tram workers who might have heard things beforehand given their frequent contact with the public as well as to labourers who might sympathise with others at the bottom of society's pile. In 1923, also, Victorian newspapers started reporting the proceedings of the South Australian Law Reform Commission, and a few articles in favour of majority verdicts as a means of combating '[t]he occasional [!] "jury-squarer" and the obstinate "crank"'[101] began to appear — but it was clear, given the difficulty which the *Juries Act 1922* had encountered before Parliament, that no such change could possibly be expected in Victoria.

Not even reports of further attempts at jury squaring,[102] some involving 'Squizzy' Taylor,[103] nor even two further convictions of men named McGauhay and Reid for attempts to do so[104] sufficed to bring on any further action. In 1924, *The Herald*[105] reported, exactly a month before he lost office, Robinson A-G's advocacy of five-sixths majority verdicts and added that this view was shared by '[s]ome of the members of the Cabinet' — but the continuing instability in Victorian politics in the 1920s meant that no action

97 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 1922, 1464.
98 Ibid 15 November 1922, 2731.
99 Ibid 2799.
100 *The Age* (Melbourne), 5 April 1923, 6.
101 *The Argus* (Melbourne), 16 April 1923, 8; see also *The Age* (Melbourne), 11 April 1923, 10.
102 *The Age* (Melbourne), 18 April 1924, 11; *The Age* (Melbourne), 10 November 1927, 15.
103 *The Age* (Melbourne), 24 March 1924, 13; *The Age* (Melbourne), 1 April 1924, 14. VPRS251/P0/123 also contains a reference to file 1924/3080, in which Judge Woinarski is said to have forwarded a letter from a juror in a trial involving one Taylor re alleged jury squaring.
104 *The Argus* (Melbourne), 20 May 1927, 15; *The Argus* (Melbourne), 23 August 1927, 16; *The Argus* (Melbourne), 26 August 1927, 7; *The Argus* (Melbourne), 14 December 1927, 33.
105 10 June 1924, 7.

was taken: πυνθάνομαι ἐπιβουλεύειν σε πρήγμασι μεγάλοισι, καὶ χρήματά τοι οὐκ εἶναι κατὰ τὰ φρονήματα.[106] By 1927, according to the *The Age*,[107] '[t]he only remedy seems to be the abolition of trial by jury!' Whether by design or coincidence, after 'Squizzy' Taylor died by the proverbial sword in October 1927 the newspapers based their analyses of the deficiencies of jury trial not on jury squaring, but mostly on the dangers of obstinate jurors.[108] After an interlude of Labor government under Prendergast, yet another cobbled together conservative government and a further Labor spell in power, a proposal in Sir William McPherson's conservative government's policy speech of June 1929[109] to introduce majority verdicts went nowhere when that government also fell in December. Then the Great Depression began to bite, and, after Labor had been in and out of office again, by 1932 we find the new conservative Attorney-General for Victoria, one R G Menzies, advocating not majority verdicts of 12, but a reduction in the size of juries as an economy measure.[110]

III South Australia

A Background — Politics and the Law Reform Commission

Crucially, the political situation in the mid-1920s in South Australia was far different and more stable than Victoria's. After Sir Henry Barwell lost the 1924 general elections partly owing to dissension among the city and country branches of the conservative movement, during the tenure of the Gunn/Hill Labor government of 1924–27 the conservatives in both city and country healed previous rifts, formed an alliance and agreed to limit contests with each other in the following general elections, those of March 1927. While this arrangement lasted only until the following year (although it was re-formed in an enduring fashion in 1932 as the once-famous Liberal and Country League), the proto-alliance's brief existence during 1927 sufficed both to win the elections of that year and to have majority jury verdicts in criminal cases introduced.[111]

The Royal Commission on Law Reform which was formed in 1922 under Barwell's government, although over his opposition, recommended majority

106 Herodotus, *The Histories* 3.122.3: 'I see you have big plans but not the means necessary for your purposes.'

107 *The Herald* (Melbourne), 14 June 1927, 8.

108 *The Argus* (Melbourne), 16 March 1928, 14; *The Australasian* (Melbourne), 29 September 1928, 5; *The Age* (Melbourne), 26 October 1928, 12.

109 *The Argus* (Melbourne), 13 June 1929, 10. The Bill received a first reading in Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 1929, 699, and was then never heard of again; there are drafts providing for a five-sixths majority verdict in VRPS 10265/P0/458. Commentary, again referring to jury squaring, is in *The Weekly Times* (Melbourne), 22 June 1929, 36; *The Age* (Melbourne), 20 July 1929, 9.

110 *The Argus* (Melbourne), 18 July 1932, 6; draft Bills from 1932 providing for criminal juries of nine, except in trials for treason and capital felonies, in VRPS 10265/P0/458. A few years later, however, Menzies stated his disagreement with majority verdicts in commenting upon Mr Justice Evatt's paper: above n 6, 74.

111 Dean Jaensch, 'Stability and Change: 1910–1938' in Dean Jaensch (ed), *Flinders History of South Australia: Political History* (Wakefield Press, 1986) 232–4.

verdicts in the following year, but they were not implemented until 1927. The reason for this is, as in Victoria, that the Labor Party in South Australia and its Attorney-General, Bill Denny MC, lacked any interest in such a departure from tradition. While Denny A-G was certainly not averse to departing from tradition in some respects — as witness, for example, the *Female Law Practitioners Act 1911* (SA) — only a few days after that Act had received the royal assent the following exchange occurred in the House of Assembly:

> Denny A-G: The unanimous verdict had been the law for centuries.
>
> Mr Rudall: You are not so conservative; you can get away from the law of centuries.
>
> The Attorney-General replied in the negative. He was democratic. There were quite a number of good things in the law the member was sent there to uphold, and one that they desired to keep was the unanimous verdict.[112]

As in Victoria, the radicals closed their minds to change, while the conservatives hastened to change centuries of tradition.

B The Law Reform Commission of 1923–27

Who were the members of the Royal Commission on Law Reform which Mr Justice Evatt so witheringly satirised, what did it do and why was it formed?

The view of Mr Justice Evatt was that the debates on the introduction of majority jury verdicts in the South Australian Parliament 'on the whole ... make poor reading'.[113] This can, unfortunately, also be said of the debates on the creation of the Law Reform Commission itself; but it must be recalled that it was a proposal well in advance of its time, as the proliferation of similar bodies in our own day shows. A modern-day H V Evatt would surely not be so contemptuous of a body with a general brief to promote improvements in the law, however little he might agree with some of its recommendations. Nevertheless the parliamentarians of 1922 certainly raised a grab-bag of grievances in advocating, over the opposition of the Premier, Sir Henry Barwell A-G, a parliamentary select committee on law reform: law costs, harassment of witnesses and of course jury squaring.[114] The future chairman of the inquiry, Harry Young, was however aware of this regrettable aura of vagueness, and at one point went so far as to say that law reform was 'a very intricate question, and my chief object in bringing it forward is to see what the House can do in connection with it. Personally I have no definite or fixed idea

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112 *Register*, 16 December 1911, 14; South Australia, *Parliamentary Debates*, House of Assembly, 15 December 1911, 1288 has a cut-down version only of this exchange. See also below n 161. But by 1931 Denny A-G had come to believe that juries could be wholly dispensed with! See South Australia, *Parliamentary Debates*, House of Assembly, 3 September 1931, 1542.

113 Above n 6, 59.

114 South Australia, *Parliamentary Debates*, House of Assembly, 9 August 1922, 172ff; South Australia, *Parliamentary Debates*, House of Assembly, 15 August 1922, 217ff; South Australia, *Parliamentary Debates*, House of Assembly, 4 October 1922, 812–17; South Australia, *Parliamentary Debates*, House of Assembly, 18 October 1922, 1005–9; South Australia, *Parliamentary Debates*, House of Assembly, 25 October 1922, 1153–60.

of what is required.'[115] These words wear a different complexion today, when it is agreed that it is, indeed, a good thing to have a body with the quite general task of identifying areas in which the law needs improvement. Moreover, it is particularly apposite that such a groundbreaking body should be formed in South Australia with its proud history of legal innovation — from the Torrens system to votes for women to enabling the accused person to give evidence at trial.

Although the government had opposed the formation of the select committee, again party discipline was not tight enough to prevent its passage, and it passed without a division.[116] In order to allow the committee to meet outside parliamentary sessions and include members of the Upper House,[117] the Premier at the end of January 1923 sportingly suggested constituting the select committee a royal commission, the sole term of reference of which was 'to enquire into and report upon the question of the introduction of law reform into South Australia'.[118] Two legislative councillors and five assembly members formed the commission, which was thus a royal commission composed entirely of parliamentarians. One Commissioner, Thomas Butterfield from the Labor Party, resigned on 8 August 1923,[119] as the last witnesses on the jury system were being heard, because of 'alleged bias on the part of the Commission in regard to the calling of witnesses'[120] — he desired, a newspaper report stated, to call junior members of the Bar, and thought this so important that he resigned when his colleagues refused to agree.[121] In 1927 Butterfield spoke and voted against majority verdicts as the Bill to introduce them went through Parliament,[122] so his dissatisfaction with the foreseeable recommendation of the majority of the commissioners was probably the real reason; he thus ensured that the commissioners' verdict for majority decisions was itself unanimous.

Thus, at the time of the report in favour of majority jury verdicts there were six commissioners: two MLCs, one Labor and one Liberal, and four MHAs, one Labor and three Liberal. That report was presented on 4 October 1923 as the Commission's first progress report; there were to be four more: on conciliation courts,[123] the Bill for the *Local Courts Act 1926* (SA), law costs

115 South Australia, *Parliamentary Debates*, House of Assembly, 4 October 1922, 812.
116 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 1922, 1160.
117 *Register*, 1 February 1923, 7.
118 South Australia, *South Australian Government Gazette*, No 5, 1 February 1923, 225; State Records of South Australia, GRG 24/6/657/1922/1280; see also South Australia, *Parliamentary Debates*, House of Assembly, 13 December 1922, 2183; 14 December 1922, 2247.
119 South Australia, *South Australian Government Gazette*, No 32, 9 August 1923, 286; State Records of South Australia, GRG 24/6/663/1923/745 (with a record of government's decision not to replace him).
120 South Australia, *Parliamentary Debates*, House of Assembly, 7 August 1923, 118.
121 *News* (Adelaide), 9 August 1923, 7. Later changes in personnel may be followed in State Records of South Australia, GRG 24/6/657/1922/1280; South Australia, *South Australian Government Gazette*, No 21, 15 May 1924, 1098; *South Australian Government Gazette*, No 10, 5 March 1925, 389; *South Australian Government Gazette*, No 20, 12 May 1927, 1045.
122 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 1927, 1114ff.
123 I have not checked this, but the interesting and thorough report of the Commission presumably gave the impetus for the enactment of the *Conciliation Act 1929* (SA) referred to by Dr Howard Zelling, 'Judges as Arbitrators' (1993) 15 *Adelaide Law Review* 25, 25.

and introducing degrees of murder.[124] The Commission thus continued its work through the Labor government's term from 1924–27 and into the early months of the ensuing conservative government under (Sir) Richard Butler which enacted some of the recommendations of its first report in the *Juries Act 1927*.

One matter that the Commission conspicuously did not report upon is the creation in South Australia of the modern system of criminal appeals, accomplished in the year after it began its work by the *Criminal Appeals Act 1924* (SA). Indeed, the newly created system for taking convictions on appeal did not at any time feature among the arguments for introducing majority verdicts. At no time did the Commission or anyone else stoop to suggesting that the new system of appeals would enable injustices committed by a majority of jurors against the accused to be corrected. This is as it ought to be and suggests that the Commission was sufficiently sophisticated about the law to realise that the two issues should be kept quite separate.

Who then were the members of the Commission who advocated majority jury verdicts? Mr Justice Evatt was certainly right to say that none was a lawyer; indeed, only one led a life of sufficient significance to impress the editors of the *Australian Dictionary of Biography*. Harry Young, MP, the chairman, was 'a staunch Liberal, and a strong champion of private enterprise'[125] who was the proprietor of Kanmantoo Estate and whose main extracurricular interest was horse racing. John Carr, the Labor MLC on the Commission, was an equally staunch Labor man from Port Adelaide who had been active in a number of unions and had been a keen footballer as a young man.[126] Henry Tassie, the Liberal MLC, was senior partner in an accounting firm which numbered BHP among its clients and also governing director of an office supplies company; he had been mayor of Glenelg and also chief of the Caledonian Society of South Australia[127] — Scotland, it will be recalled, has long accepted majority verdicts. Fred Birrell, a Labor MHA, was a typographer and journalist who believed that 'anarchy and red revolution have no place in Australian sentiment' and was in favour of 'perfecting our arbitration and conciliation machinery'.[128] Peter Reidy, MP was one of the Labor men who defected to the other side during the conscription controversies of the World War I. Unlike many of them, he was a Roman Catholic of Irish extraction; he had also farmed the land. Nevertheless, as is

124 South Australia, *Second Progress Report of the Royal Commission on Law Reform (Court of Conciliation)*, Parl Paper No 54 (1924); *Third Progress Report of the Royal Commission on Law Reform (Local Courts Bill)*, Parl Paper No 54 (1925); *Fourth Progress Report of the Royal Commission on Law Reform (Law Costs, etc)*, Parl Paper No 54 (1926); *Fifth and Final Report of the Royal Commission on Law Reform (Degrees of Murder, etc)*, Parl Paper No 54 (1927). It ended with a whimper, its fifth and final report being remarkable for the triviality of its recommendations: *Register*, 5 October 1927, 8. However, in Parl Paper No 54 (1927) 4, it did recommend reviewing the exemption from majority verdicts for capital offences on the ground that some jurors were averse to bringing in any verdict that implied death. Such a phenomenon certainly did exist, but no such change in the law ever occurred and the arguments against it are obvious.

125 *The Advertiser* (Adelaide), 21 June 1944, 6.

126 *News* (Adelaide), 7 June 1929, 10; *Register News-Pictorial*, 7 June 1929, 38.

127 *News* (Adelaide), 26 October 1945, 3.

128 Quoted in his entry in the *Australian Dictionary of Biography*.

well-known the Irish Roman Catholic element in South Australia is much smaller than it was in Victoria, and therefore there is nothing like the references to Irish experience as a reason for distrusting prosecutors such as we saw in Victoria. A policeman before his entry into politics, Reidy believed that an involuntary transfer to Adelaide was to be ascribed to a Liberal Premier and had thereupon gone to the extreme of standing against him at an election and defeating him.[129] Finally, Alby Robinson, MP was a Liberal member of the country persuasion whose main interests were in primary production.[130]

It was therefore a commission of quite broad talents and varied life experience, even if none of it extended to wearing a horsehair wig or even writing wills in a solicitor's office. However, just as the jury system deliberately seeks out lay input into the legal system, discussions about whether the jury system should be reformed should by no means be confined to lawyers. Moreover, plenty of lawyers were available to give evidence to the Royal Commission, as we shall see.[131]

C Jury squaring in South Australia

At the commencement of the Commission's labours, the *Juries Act 1917* of South Australia provided for a public system of selecting jury panels similar to that already encountered in Victoria. Section 71 provided for a public draw of the panel, and ss 91–4 for the availability of the panel lists in the sheriff's office and the common gaol. And of course there was no provision for majority verdicts in criminal cases; in civil cases a verdict could be taken from 9 of 12, or 5 of 6, after 3 hours' deliberation (s 111).[132] The result of the reforms in South Australia was to be precisely the reverse of that in Victoria: the *Juries Act 1927* retained the public selection of the panel and its publication to the parties and in the gaol (ss 32, and 38–41) but introduced majority verdicts (s 57). Indeed, the provision for publication of the jury lists (unlike the public draw, which ceased at the dawn of the computer age in the mid-1970s)[133] survived until the enactment of s 20 of the *Statutes Amendment (Courts) Act 2004* (SA), by which time it had fallen into disuse and was repealed in order to meet concerns by jurors about the need to preserve their privacy.[134]

Public concern about jury squaring in South Australia was usually low — there was no equivalent of 'Squizzy' Taylor in South Australia. While there were, of course, criminal juries that failed to reach a majority verdict, there is

129 *The Advertiser* (Adelaide), 18 January 1932, 9.

130 Drinkwater in *Biographical Dictionary of the Australian Senate*, vol 1, 1901–29 (Melbourne University Press, 2000) 215–17.

131 State Records of South Australia, GRG 1/4/46/103 is an index of files which contains an entry suggesting that the Law Society had the idea of providing a Crown Law officer to the Commission to advise it upon evidence. However, the file is missing. Judging on other files (such as GRG 24/6/663/1923/745), the secretary was John Sincock, who had extensive experience in the public service but no legal qualifications; there is a short biography of him in *Who's Who — South Australia Centenary, 1936* (Amalgamated Publishing, 1936) 304. There is no trace of any legal assistance provided to the Commission although parliamentary clerks may also have been consulted at times.

132 *Supreme Court Act 1878* (SA) s 23 determined whether the jury was to be of 12 (contract cases) or six (other cases).

133 *Juries Act Amendment Act 1974* (SA) s 18.

134 South Australia, *Parliamentary Debates*, House of Assembly, 4 December 2003, 1141.

nothing to suggest that it was a more serious problem than anywhere else.[135] But in July 1922, during the long-running and high profile Bickford divorce case which involved a great many assets, highly placed co-respondents and, as petitioner (and cuckold of this article's title), the managing director of the well-known Bickfords beverage company still in existence today,[136] a juryman was spoken to by a person claiming to be a friend of one of the parties and the Judge made a public statement about the matter.[137] As far as can be gathered, nothing more occurred, but this incident alone, in such a prominent case, ensured that the topic was firmly lodged in the public memory. In Victoria there had been occasional rumours of jury squaring in civil cases,[138] but nothing nearly as noticeable as that. However, shortly afterwards in South Australia the *Juries Act 1927* also all but abolished civil juries, which had already become rare,[139] and accordingly the question of jury squaring in civil trials disappeared — along with the strange spectacle of jury trials in divorce cases, at least in South Australia.

But there was already a substantial reservoir of support for majority jury verdicts in criminal cases in South Australia waiting to be tapped; that largely explains the ease with which this change passed in 1927. Evidence given to the Royal Commission during its hearings indicates that, along with the level of jury squaring that the various witnesses thought might be occurring.[140] The sheriff, Heinrich Schomburgk, believed on the basis of 'idle rumours' that 'two or three jurymen in the *Bickford* case were got at'[141] and supported five-sixths majorities in all criminal cases except capital ones. The Assistant Crown Solicitor, Albert Hannan, and Crown Prosecutor, (Sir) Eric Millhouse, each supported majority verdicts, although the former was only 'suspicious'[142] that there had been jury squaring and the latter said, 'I do not think jury squaring goes on to any appreciable extent in South Australia.'[143] A veteran detective, Duncan Fraser, also did not think that jury squaring occurred in South Australia at all.[144] On the other hand, his colleague

135 Eg, *Register*, 6 April 1922, 10, reporting on the trial of Koster, Farquhar and King — WJ Denny representing Farquhar. The accused were re-tried shortly afterwards and verdicts given.

136 Other steps in the litigation are reported under various titles in *Bickford v Bickford* [1922] SASR 314, 347; *Bickford v Bickford* [1923] SASR 148, 158.

137 *Register*, 15 July 1922, 9.

138 Victoria, *Parliamentary Debates*, Legislative Assembly, 8 August 1922, 551; 20 September 1922, 1447ff.

139 An average of one jury trial a year according to Ligertwood KC in the discussion of Mr Justice Evatt's paper, above n 6, 75.

140 However, in South Australia, *Parliamentary Debates*, House of Assembly, 18 October 1927, 1019 Peter Reidy MP said that not all statements were taken down in evidence and that the Commission heard 'that in some important cases where wealthy men were concerned an army of men were put on to have a chat with the jurors' — this may well be a reference to *Bickford*.

141 South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) 2, 4; see also 212.

142 South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) 25.

143 Ibid 40; he repeated similar sentiments behind the scenes in State Records of South Australia, GRG 1/2/199/1927/384.

144 South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) 72ff.

Detective Sergeant Herbert Allchurch had kept jurors under observation and seen men approach them, but not often; he supported majority verdicts of two-thirds of the jury except in murder cases.[145]

Support for majority verdicts also came from the President of the Law Society, AW Piper;[146] the Crown Solicitor, FW Richards KC;[147] Professor Coleman Phillipson of the University of Adelaide;[148] Jethro Brown, formerly professor of law at the University of Adelaide and then president of the Industrial Court of South Australia;[149] and EE Cleland KC.[150] Three of those named in the previous sentence became Supreme Court Judges. Another name well-respected in South Australia that could be cited in favour of majority verdicts was that of John Salmond J, whose support in his newer post in New Zealand also reached South Australia.[151] Sir Arthur Robinson, Attorney-General for Victoria, lent his support also to majority verdicts except in capital cases via an article in the Adelaide newspapers.[152] In a public lecture at about this time Professor Phillipson said, 'After all, in the present practice unanimity is often more apparent than real',[153] meaning that jurors in the minority sometimes abandoned their views or at least compromised with the majority in order to ensure a verdict — Phillipson appears to have practised in England, but presumably this view was based on the same sort of speculation about what happens in the jury room as we might indulge in today. Among the lawyers only Francis Villeneuve Smith KC, whom we encountered in the introduction as a brilliant jury advocate, expressed outright opposition, and stated that he was not sure that there had even been the one case of jury squaring that he suspected in a case he was personally involved in (presumably *Bickford*, the divorce case of 1922).[154] Opposition to majority verdicts also came from *The Advertiser*[155] and the secretary of the Trades and Labour Council, who said that he represented the workers' viewpoint and was sure that he would have heard of any jury squaring that was going on; as he

145 Ibid 102ff.

146 Ibid 171cf. State Records of South Australia, GRG 1/2/199/1927/384 contains correspondence stating that there was 'some difference of opinion' on the question in the Council of the Society, but its president was 'strongly' in favour. A contact in the Society advised me that its Council's minutes contain little of value on this topic, and the procedures for obtaining access to them are not worth undergoing.

147 South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) 4ff.

148 Ibid 53.

149 Ibid 82.

150 Ibid 198.

151 New Zealand, *Parliamentary Debates*, Legislative Council, 26 October 1921, 795; *Register*, 28 October 1921, 10. However, New Zealand did not introduce majority verdicts until the *Juries Act 1981* (SA) s 29C was enacted in 2008.

152 *Register*, 14 April 1923, 8; see also *News* (Adelaide), 18 March 1926, 6; *Register*, 22 March 1926, 8.

153 Lecture to the Justices' Association: *Register*, 23 March 1923, 9 and (1923) 20 *Honorary Magistrate* (NS) 17.

154 South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) 91, 96ff.

155 *The Advertiser* (Adelaide), 3 July 1923, 8. However, the *Register* supported the Commission's recommendations: 10 October 1923, 8, and *The Advertiser* seems to have changed its mind in its leader on 6 October 1927, 8.

had heard of none, it evidently was not.[156]

The Royal Commission had uncovered nearly unanimous support among the legal elite for majority verdicts. As has occurred both before and since, taking the time out to study and consult about an issue outside the cut and thrust of debate in Parliament, and to build or reveal consensus for a particular course of action, bore fruit.[157] Even the Labor members of the Royal Commission joined in the recommendation for majority verdicts. With such a level of support it was only necessary to find a government that was willing to introduce majority verdicts. Yet the doubts about the prevalence of jury squaring in South Australia, as distinct from Victoria — witnesses were clearly aware of the conviction of Lyon in Victoria, which had no counterpart in South Australia[158] — made the Commission's task of recommending them somewhat more difficult. Its recommendation for majority verdicts, implemented in 1927, was accordingly based upon the need to be able to overrule obstinate jurors as well as to make jury squaring more difficult; its recommendation to keep the panel secret, which was noticeably not adopted by the legislation of 1927, was based on the danger of jury squaring and the precedent embodied in the recent Victorian legislation only.[159]

With the defeat of Labor and the installation of the conservative government in March 1927 the way was clear for majority verdicts. Denny A-G had blocked them while the Labor Party was in office, but the new Attorney-General, Hermann Homburg, was in favour. The unacted-upon recommendation of the Law Reform Commission was initially drawn to his attention by the Parliamentary Draftsman, who also expressed his support for its implementation, as did Sir George Murray CJ on behalf of the judges of the Supreme Court of South Australia in a confidential letter responding to a request for their comments from Homburg A-G (a standard procedure when changes to court procedures were in question).[160] As the legislation was going through, Denny made the argument for the Labor Party: 'Don't you think we should wait until we find some responsible part of the Empire adopting the system?'[161] The equally incongruous reply from Homburg A-G, supposedly representing conservatism, was that South Australia had led the Empire with the adoption of the secret ballot and the Torrens system. Peter Reidy, MP, a member of the Law Reform Commission that had just concluded its labours,

156 South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) 199ff.

157 As well as today's law reform commissions, another example is the codification of the criminal law: compare my 'Dr Pennefather's Criminal Code for South Australia' (2002) 31 *Common Law World Review* 62, 100.

158 Eg, Detective Sergeant Allchurch: South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) 103; and see South Australia, *Parliamentary Debates*, House of Assembly, 11 August 1925, 359. Needless to say, the debate in Victoria was also closely followed in South Australia; in the Victorian Public Record Office, VPRS 251/P0/120/1923/1616 refers to a letter from the Royal Commission in Adelaide asking for copies of the Victorian Bills and police reports on jury squaring.

159 South Australia, *First Progress Report of the Royal Commission on Law Reform (The Jury System)*, Parl Paper No 36 (1923) xiiiff.

160 State Records of South Australia, GRG 1/2/199/1927/384.

161 South Australia, *Parliamentary Debates*, House of Assembly, 6 October 1927, 941. See also 12 August 1925, 391; above n 112.

unsuccessfully advocated adding to the Bill the provisions for the secrecy of the jury panel which the Commission had also suggested in order further to combat jury squaring.[162]

The Bill passed easily. In the crucial division in Committee all the votes against came from the Labor Party, but Fred Birrell, MP, who had been one of the Labor Party's royal commissioners, appears to have absented himself. The government and its backbenchers carried the measure with a solid vote in favour, again contrasting with the position in Victoria, alongside the votes of the highly distinguished anthropologist Dr Herbert Basedow, an independent member, and the sole member from the short-lived Protestant Labour Party.[163] Majority verdicts became available at the start of 1928[164] and a few months later it was being reported that lawyers were 'generally'[165] (the report did not say 'unanimously'!) pleased with it. The Crown Prosecutor, (Sir) Roderic Chamberlain, new but already acquiring his reputation for toughness, reported his own unsurprising satisfaction with majority verdicts to Homburg A-G in the following year, giving as an instance a case in which one juror would have held out against the others because the accused was a member of his football club and stating that 'quite a large number of instances of unanimous verdicts have been returned, because the one or two jurymen disposed to hold out have realised that they could do no good'.[166] Such satisfaction was only to be expected; while it is not inevitable that all majority verdicts will be convictions,[167] it is perhaps the more usual case.

A further example of a majority verdict was shortly to hand: a colossal sensation occurred in February 1931 with the conviction by a 10-2 majority verdict of Bert Edwards, MP of the Labor Party for sodomising a 16-year-old, 'on his own admission [...] sexually perverted boy';[168] the sentence was 5 years' imprisonment.[169] Edwards was also a city councillor and president of a major-league football club and would have voted against majority verdicts in 1927 but for a parliamentary 'pair'.[170] Murray CJ, the trial judge, agreed with the majority's verdict,[171] although he did not say so at the time and

162 South Australia, *Parliamentary Debates*, House of Assembly, 18 October 1927, 1020; he did this also behind the scenes in State Records of South Australia, GRG 1/2/199/1927/384.

163 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 1927, 1115. See also above n 121.

164 South Australia, *South Australian Government Gazette*, No 1, 5 January 1928, 1. This proclamation bringing the Act into effect was signed by Murray CJ as Lieutenant-Governor and countersigned by Henry Tassie, by then Chief Secretary and previously a member of the Law Reform Commission.

165 *News* (Adelaide), 22 March 1928, 11.

166 South Australia, *Parliamentary Debates*, House of Assembly, 3 September 1929, 906.

167 As (Sir) Eric Millhouse, the Crown Prosecutor, pointed out in a minute dated 14 July 1927 in State Records of South Australia, GRG 1/2/199/1927/384: 'On the other hand occasionally an obstinate juryman hangs out for a conviction when the rest desire to acquit'.

168 *Register News-Pictorial*, 14 February 1931, 2 (Murray CJ).

169 Ibid 18 February 1931, 3. Appeals against both sentence and conviction were dismissed: *Edwards v R* [1931] SASR 121, 376; (1931) 47 CLR 639; *Advertiser and Register* (Adelaide), 28 May 1931, 9 (reporting dismissal of appeal to High Court of Australia; judges evenly divided with Dixon and Evatt JJ. in the statutory minority; the nature of the jury's verdict was not the basis of the appeal — admission of evidence was the point in question).

170 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 1927, 1115.

171 The boy, John Gault Mundy, last appears on the public record after his conviction for sexual

refrained from lending any public support to the political decision in favour of majority verdicts[172] (something he would likely have considered improper for a judge). If there was any political backstory to this, Edwards' entry in the *Australian Dictionary of Biography* suggests it would involve rivalries within the Labor Party, and in particular an enmity with Denny A-G, rather than any conservative plot against him. We do not know why two jurors held out; it is possible that they had been beneficiaries of, or impressed by Edwards' philanthropy, or that they were dyed-in-the-wool Labor men. No doubt this possibility occurred to contemporaries as well, and if there was anything in this, then majority verdicts had proved themselves useful in this case at least.[173]

In the 1930s, however, more reports of jury squaring emerged despite the extra hurdle imposed by majority verdicts. A newspaper report of February 1930 of attempted bribery of jurors was denounced as mere sensationalism by Homburg A-G,[174] but in 1931 two men were imprisoned for the crime, providing the sort of evidence that had not been available in the 1920s[175] — and both convicted men refused to identify whose instructions they had been carrying out in contacting a juror.[176] The Labor Party was back in office and it fell to Denny A-G to introduce a bill to make the jury panel's names secret on the Victorian model, which he did with apparent enthusiasm and conviction but no success[177] — there was opposition from the conservative side for reasons similar to those encountered a decade earlier in Victoria, and the second Labor split, over economic policy during the Great Depression, had deprived the government of a majority even in the lower House; it was

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offences against a small child in the 1950s: *The Advertiser* (Adelaide), 28 May 1953, 5. He makes no further appearance, at least by that name, in the newspapers. However, there were earlier appearances; at one of them, Murray CJ said that 'I formed the opinion then [in *Edwards*] that you were more sinned against than sinning in matters of this description', and, with his Honour's characteristic acuteness of mind combined with elegantly simple phrasing, said in passing sentence:

> You ought to know by your own experience that a serious wrong was done to this little boy. You have done something to him of the same nature as was done to you, leading to your downfall, and from which you have never recovered. The danger is that boys never forget what has been done to them, and they find themselves as guilty as you at some future date. (*The Advertiser* (Adelaide), 20 January 1940, 24)

172 Cf John Emerson, *First Among Equals: Chief Justices of South Australia Since Federation* (University of Adelaide Barr Smith Press, 2006) 98; on the Edwards case, see further 99–101. Given that consulting the judges confidentially was standard procedure when changes to court procedures were mooted, it may well be that their endorsement was informally conveyed to the parliamentarians who debated the Bill; if so, they quite properly said nothing.

173 It should be added that what Edwards did would still be a crime in South Australia, where the age of consent is 17 years. Homosexual acts were then wholly illegal, but their subsequent legalisation and the equalisation of the age of consent for heterosexual and homosexual acts would make no difference in this case.

174 *The Advertiser* (Adelaide), 12 February 1930, 15; *News* (Adelaide), 21 February 1930, 1.

175 Indeed, the *Advertiser and Register* (Adelaide), 5 August 1931, 9 noted that this was the first such charge in South Australia.

176 *The Advertiser* (Adelaide), 20 October 1931, 13. One defence counsel was (Sir) Eric Millhouse.

177 South Australia, *Parliamentary Debates*, House of Assembly, 29 September 1931, 1735–373; 27 October 1931, 2063–8. See also above n 112.

maintained in office only by the support of those same conservatives. South Australia, for this short period, experienced the same difficulty in having legislation on our topic passed as had Victoria in the 1920s. In 1933 Chamberlain, the Crown Prosecutor, sent a memorandum to (Sir) Shirley Jeffries A-G, the new conservative Attorney-General, pleading for the names of the jury panel to be kept secret in order to frustrate attempts, some of which he thought might even have been successful, at interfering with jurymen.[178] But, as noted earlier, no such step was taken until 2004 when jurors' fears of retribution finally convinced the legislature to take action,[179] so perhaps there was less to this renewed panic than met the eye.

IV Conclusion

As can be seen, the introduction of the majority jury verdict into Australian law was a multi-, or at least bi-jurisdictional affair. In Victoria, views could no doubt differ about the seriousness of the problem but, however serious it really was, there was at least some proof available that jury squaring had gone on, not just suspicion; yet Victoria lacked the political machinery to effect the more radical solution of majority jury verdicts, which would require the would-be jury squarer to nobble more than one juror per trial. On the other hand, South Australia had far less of a problem, but it had more effective machinery for implementing law reform — both a Royal Commission on the topic which was convened just after concern had reached its height in Victoria and which was able to muster and publicly demonstrate support for a consensus position, and a Parliament which was less fractious and more easily able to legislate. It also had a judiciary in favour, although their Honours did not lend any aid publicly to the cause, and a legal profession whose leading members were not unanimous in their support of majority verdicts, but nearly so.

While at the time in question Victoria adopted other, less far-reaching measures to attempt to reduce the danger of jury squaring, South Australia decided that the danger of jury squaring in its much smaller and somewhat poorer bailiwick was part of the justification for majority jury verdicts alongside the more traditional problems of obstinate jurors. However, the alleged danger of jury squaring was to some extent a panic whipped up in order to justify making a change to the law that might otherwise have met more determined opposition. Even in Victoria, there are good reasons for thinking that — while there was certainly a small number of cases — the extent of jury squaring was sometimes exaggerated, although the proportion of truth to exaggeration could not even then be determined; in South Australia jury squaring was virtually non-existent, in the 1920s at least. Juries are notoriously unpredictable, and what appears clear as day to one juror may not to another: almost all disagreements are perfectly legitimate differences of opinion.[180] Furthermore, it is not unknown for prosecuting authorities to

178 *The Advertiser* (Adelaide), 8 November 1933, 19.

179 See above n 134.

180 Thus, there is nothing in the two Victorian cases noted at 'State Supreme Courts: Notes of Decisions' (1927) 1 *Australian Law Journal* 247, eg, that suggests that jury squaring was involved.

over-estimate the strength of their case and think it virtually unanswerable — perhaps then drawing the further conclusion that stupidity or corruption can be the only reasons for their lack of success. In South Australia, jury squaring was at most an excuse to carry out a reform that was thought desirable for more workaday reasons.

Nonetheless, majority verdicts were thought desirable in South Australia by most of the legal profession as well as the lay members of the Royal Commission and legislators as a whole, and accordingly there is no force to Mr Justice Evatt's criticism of the Royal Commission as a bunch of amateurs introducing a poorly reasoned change masquerading as a reform. Modern jury research, not of course available to the reformers of the 1920s or Mr Justice Evatt, also goes some way towards confirming the idea that majority verdicts may well be justifiable when the majority is overwhelming, for hung juries usually, it is claimed, arise when at least some jurors have become convinced to switch from the minority to the majority,[181] suggesting more than usual intractability on the part of the hold-outs. The *12 Angry Men* scenario is far less likely than the gradual agreement of all but an unusually stubborn one or two.[182] On the other hand, the arguments are not all one way, and there are isolated instances in which a small minority in a hung jury is vindicated by an acquittal at the subsequent re-trial, meaning that a majority verdict might have produced the conviction of an innocent person;[183] as is only to be expected, the requirement of unanimity also sometimes produces a more thorough discussion of the issues and evidence. A further consolation, however, is provided by the finding that pro-acquittal minorities are more likely to triumph in the end than pro-conviction ones,[184] which further reinforces the presumption of innocence. And since Mr Justice Evatt wrote, all the states of Australia have followed South Australia's lead, suggesting that scorn should not be heaped upon even lay-staffed law reform bodies by those who may end up on the wrong side of history.

181 The *locus classicus* is of course Harry Kalven, Jr and Hans Zeisel, *The American Jury* (Little, Brown and Co, 1966) 462ff. There is an excellent overview of modern research in NSWLRC, above n 2, ch 2.

182 Randolph N Jonakait, *The American Jury System* (Yale University Press, 2003) 103. However, as Valerie Hans et al, 'The Hung Jury: The American Jury's Insights and Contemporary Understanding' in Valerie P Hans (ed), *The Jury System: Contemporary Scholarship* (Ashgate, 2006) 433, 435ff point out, such cases do occur. As they say, that may pose problems for accepting majority verdicts if they result in cutting discussion short; perhaps, however, they were dealing with systems which, unlike those in Australia, do not require a minimum length of deliberation before a majority verdict may be accepted.

183 NSWLRC, above n 2, 7ff refers to one such case.

184 Dennis J Devine, *Jury Decision-Making: The State of the Science* (New York University Press, 2012) 31ff; NSWLRC, above n 2, 27.