

Jury service in Aotearoa New Zealand for people with low levels of English language ability

Report for the Ministry of Justice
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1 Background

In late 2012 the Executive of TESOLANZ (Teachers of English to Speakers of Other Languages Aotearoa New Zealand) became aware that New Zealanders with low levels of English seemed to be increasingly summoned for jury service, but that there is a lack of a clear process for excusal on the grounds of English language ability. The pamphlet which is sent with a jury summons has the following information about English ability (Ministry of Justice, 2010):

Do you need to be able to speak English fluently?

All proceedings are in English. Understanding English is important. If you can understand and take part in a group conversation in English, you probably understand English well enough to be on a jury.

If you think you may have trouble understanding the trial, you should speak to a member of staff at the court.

TESOLANZ entered discussions with the Ministry of Justice about improving the system for people with low levels of English¹. We offered to consult with members and colleagues to find out:

- a) whether English language students or clients with low levels of English have had any particular issues with jury service, and
- b) any feedback they might have about the language and terminology on the website and related materials.

This information would then be submitted to the national jury management working group of the Ministry of Justice. The email attached as Appendix A to this report was sent to members of TESOLANZ, English Language Partners, the Office of Ethnic Affairs, New Zealand Settlement Support Coordinators, and Refugee Services Coordinators.

Replies were received from eight people on behalf of groups of colleagues or students/clients, and 14 people with their own individual responses. Since there was no formal statement of ethics for the consultation, this report gives an overview of the responses with all identifying information removed. Some reference is made to academic and other information, although the timeframe precluded a detailed literature review. This was not a representative sample of those working with New Zealanders from migrant or refugee backgrounds, and the analysis and discussion is based around the key themes from email replies, together with some suggestions for next steps.

¹ This report focuses on English language only, and does not discuss issues relating to the use of other official languages Māori or New Zealand Sign Language.

2 Summary and recommendations

There is a number of issues involved in English language ability for jury service, including understandings of the New Zealand legal system, the assessment of English language ability, responses to jury summons, letters of excusal, jury selection, and courtroom and jury language. The jury service website and information materials are clear and useful, but could be developed further for people from migrant and refugee backgrounds with low levels of English.

The recommendations are ordered according to the discussions which follow, indicating those actions which should be implemented urgently (**), and those which should be a priority for action (*).

It is recommended that consideration be given to:

- 1 Preparing detailed information about the legal processes in Aotearoa New Zealand, specifically designed for second language learners who come from different judicial systems.
- 2 Preparing specific information about the role of the courts and juries within the New Zealand legal system.
- 3 Developing teaching materials based on the particular aspects of courtroom language in New Zealand.
- ** 4 Clarifying what interpreting (spoken) or translation (written) support is available for jurors.
- * 5 Setting guidelines for levels of English necessary for jury service in New Zealand, possibly with reference to international benchmarks such as the International English Language Testing System (IELTS) (2013) or the Common European Framework of Languages (CEFL) (Council of Europe, n.d.).
- * 6 Seeking appropriate expert input into the design of an appropriate process for the assessment of the English language ability of potential jurors.
- 7 Translating jury summons information into as wide a range of languages as possible.
- ** 8 Ensuring that court notices for jurors are spoken clearly, and available in writing on court websites wherever possible.
- 9 Including more information in the summons about the value of jury service.
- ** 10 Clarifying English language ability as grounds for being excused from jury service.
- ** 11 Improving and clarifying the process for approaching court officials and including relevant information with the jury summons.
- 12 Translating the jury service website into other languages.
- ** 13 Including a question about English language in the jury service Frequently Asked Questions page, e.g. "I don't understand English well. What shall I do?"
- 14 Commissioning research to provide sound statistical information on the current situation for jurors with low levels of English.
- 15 Commissioning research to examine the language use in New Zealand courtrooms and identify possible ways in which court officials, judges, and lawyers could adapt their language use for people with low levels of English.

3 Findings and discussion

The findings from respondents have been grouped according to the key themes which came up in the responses. Some of their reported experiences have been included to illustrate the points made.

3.1 Understandings of the New Zealand legal system

Although not directly relevant to English language, several of the responses included more general issues relating to the attitudes of New Zealanders people from migrant or refugee backgrounds towards the legal system:

- It is important for refugees and migrants to understand that New Zealand laws are different from the laws in their own country.
- The ethics of the issue before the courts could make it difficult for people from some cultures to make objective decisions about the evidence before them. It is particularly important for jury members to be fully informed about their role in the types of cases where this could be a factor.
- Many people from migrant and refugee backgrounds have a fear of legal and court systems. Their experiences of unsafe legal systems in their countries of origin make them nervous about participating in jury service in New Zealand.

“There is one person I know who has received at least two such letters asking her to be on the jury selection panel. She and her partner have been here for at least 30 years, and each time she has been asked to participate in this process, her husband writes a letter saying that her English is inadequate. She has had all those years to brush up on her written English, and I have offered help, but she has refused to engage saying that it was too late for her to improve. Her oral English is fairly good, but it's more her fear of the Justice system that has actually put her off.”

“One person [...] said to me that her young daughter was on jury duty this year and was the youngest to be selected. She said it was the [older] men on jury service that put her at ease, especially as it was a case about rape.”

The explanatory material on jury trials which was located during the preparation for this report is too complex for use with people with low levels of English (e.g. Young, Cameron, and Tinsley, 2003), but could be the basis for developing teaching materials.

Recommendations

That consideration be given to:

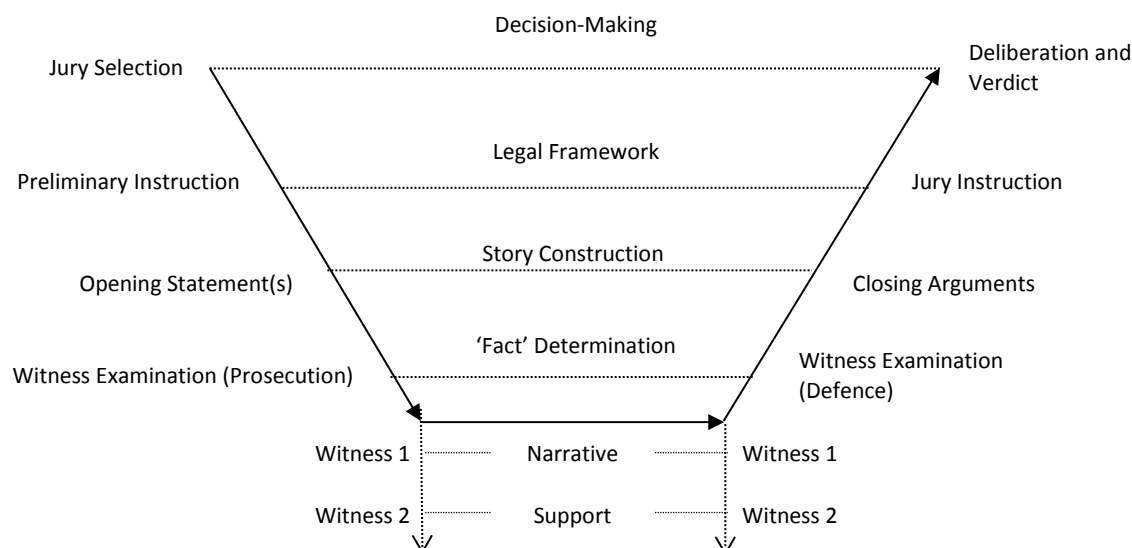
- 1 Preparing detailed information about the legal processes in Aotearoa New Zealand, specifically designed for second language learners who come from different judicial systems.
- 2 Preparing specific information about the role of the courts and juries within the New Zealand legal system.

3.2 Courtroom and jury room language

Some responses for this report identified the need for English language teaching materials focusing on courtroom language. Academic analyses of courtroom language have identified the particular aspects

in which the discourse differs from everyday language (e.g. Eades, 2010; Coulthard and Johnson, 2007), and Heffer (2010) has developed a model of the jury trial, with a linear sequence of linguistic genres forming a hierarchical ‘forensic narrative’, as shown in Figure 1.

Figure 1 *A model of jury trial as complex genre*
(Heffer, 2010, p. 201)



These different uses of language will be particularly challenging for jurors with low levels of English ability. The following aspects of courtroom language were noted in the responses:

- the speed of spoken language;
- the tendency of speakers to look down;
- the complexity of sentence structure;
- the density of idiomatic language;
- the use of legal jargon;
- the volume of information;
- the length of time that close attention is required;
- the wide range of vocabulary needed.

“Last time I was on jury duty [...] the trial I was on had an incredible amount of reading and long hours of listening to statistical data and recorded conversations - very high level academic language too.”

“I [...] teach on a course in liaison interpreting where the entry level is IELTS 6 General or equivalent. The graduates of this course often go on to work with the Police and sometimes in the courts, but find they need to do a lot of preparation around vocabulary in particular.”

There is a substantial international literature on the language of instructions for juries (Heffer, 2008), and other jurisdictions in the United States and Australia have legislated the standard language of instructions given to juries (see Tiersma, 2013; Victoria Department of Justice, 2013). However, in New Zealand the approach has moved towards “question trails”, tailored to specific cases, in which judges identify the main questions which juries have to decide (Glazebrook, 2012; Clough, 2013).

Some responses noted that the discussions in the jury room were a further potential cause of difficulty, particularly as there is no requirement for a court stenographer to capture the proceedings.

A further issue was a lack of clear understanding of what (if any) translation or interpreting services are available for the support of jurors.

Recommendations

That consideration be given to:

- 3 Developing teaching materials based on the particular aspects of courtroom language in New Zealand.
- 4 Clarifying what interpreting (spoken) or translation (written) support is available for jurors.

3.3 Assessment of English language ability

Several responses noted that “conversational English” as noted in the jury service pamphlet (Ministry of Justice, 2013) is not adequate for the role of a juror. Given the complexity of English language used in a jury trial, it is clear that there is a need for a deeper understanding of the components of English language ability required by a juror, e.g. skills in speaking, reading, writing, listening, and vocabulary.

The issue of literacy ability (i.e. reading and writing) for all jurors has been analysed by law commissions in both New Zealand and Australia. In New Zealand the commission has rejected an earlier recommendation that there be a literacy test, although they note that this is available at the judge’s discretion for whole juries “where literacy is required to properly understand the evidence” (Law Commission Te Aka Matua o te Ture, 2001, p. 81). It is not clear what test would be used, and they state that over a million New Zealand adults are below minimal levels of English literacy competence. The Western Australian commission concluded that although written aids such as transcripts, written directions, flowcharts, glossaries and chronologies are increasingly being used to assist juries, a requirement for literacy ability was not appropriate, and that “a juror who can understand English but who cannot read or write is just as capable of assessing the evidence as a literate juror” (Law Reform Commission of Western Australia, 2010, p. 94). It is pointed out that in order to avoid embarrassment with literacy difficulties, jurors in trials involving a significant amount of written evidence can write a note to the judge seeking to be excused. It is difficult to see how this is appropriate for people with low levels of literacy skills.

Within the timeframe of this report’s preparation it was not possible to find out the details of what other jurisdictions use for determining adequate levels of English language by jurors. However, some information could be found from internet searches:

- In Ireland the decision is made on a case-by-case basis by court officials, judges and practitioners “using their knowledge and experience to discern indications of capacity or otherwise”, and continuation of this practice was recommended in a 2013 review. Jurors would be reminded of the English language requirements for themselves and other jurors (Law Reform Commission/Coimisiún um Athchóiriú an Dlí, 2013, p. 68).
- The Western Australia review recommended that guidelines be developed for judicial officers for those who self-identify as not understanding English or being able to communicate in

English, with standardised questions similar to those used to identify if a person requires an interpreter (Law Reform Commission of Australia, 2010, p. 99).

- Ontario has a two step process with a questionnaire sent to determine whether someone is eligible for jury service before the summons is sent. The questionnaire includes a question asking if the person speaks, reads and understands English or French, and the note explains that the person "... must be fluent in either language and understand it well enough to follow a trial where all evidence and legal instructions will be given in English or French, without the assistance of an interpreter" (Ontario Ministry of the Attorney General, 2013)

It should be noted that assessment of English language ability is a specialised area, and it is not clear how other jurors, court officials, or judges untrained in this area would be able to make appropriate assessments (as recommended by the Law Commission, 2001, see Appendix B). A short discussion with a court official or judge (even if they were trained in language assessment) would not be sufficient to make a decision on the ability of a juror to understand the spoken language (including recordings) or written texts which might be presented as part of a trial.

One suggestion is that the New Zealand jury service website include an English language self-assessment test.

Once clearer understandings of the appropriate levels have been identified, it will therefore be advisable to strengthen the assessment procedures in two ways: for potential jurors to assess their own levels of English language ability; and for others to assess the appropriate English levels of potential jurors. In either case, it will be more efficient (and less stressful) for an assessment of a potential juror's English language ability to be made *before* rather than *after* the jury selection.

Recommendations

That consideration be given to:

- 5 Setting guidelines for levels of English necessary for jury service in New Zealand, possibly with reference to international benchmarks such as the International English Language Testing System (IELTS) (2013) or the Common European Framework of Languages (CEFL) (Council of Europe, n.d.)
- 6 Seeking appropriate expert input into the design of an appropriate process for the assessment of the English language ability of potential jurors.

3.4 Responses to jury summons

Only one response indicated that there had been no students or clients who had disclosed anything about jury service. Most said they had had "a few" who had reported being summoned.

Some reported positive responses to the summons, noting that jury service can be a good cultural experience for migrants:

"We have had 2 learners receive letters asking them to do jury service. Both were in the first few months of their arrival in New Zealand and had very limited written and spoken English. I think they were impressed by the democratic nature of our justice system - they were from [...] - but with my bi-lingual assistant's help we were able to ascertain that they felt totally inadequate to do this."

“[My experience was with a] migrant whose English was not perfect, but who highly valued engagement with the community and could use it well in such forums. He told me he had been on a jury, and I mentioned that he could have excused himself and he said that he knew that but he had highly valued the opportunity to be included and did not think that his level of English had impeded his contribution. For him, it was a definite marker of belonging and I have every confidence that his was a valuable voice in the group.”

Others reported negative responses, particularly about the fear of making a wrong judgement through a lack of understanding the trial:

“[I have written letters ...] for elementary and low to mid/pre-intermediate students. Once translations were made, they were horrified at the idea that they could possibly be sending someone to jail when they could barely understand basic everyday stuff.”

“[...] was excused from jury service after writing a letter himself about his level of English. He has a degree in law, and felt it was unfair to have a jury member who may easily misunderstand a detail, thus clouding their judgement. This happened several years ago. He had lived in New Zealand for about 7 years at that stage, and his English is at an advanced level.”

The summons information in New Zealand is mostly written in English, other than the sentence “If you think you may have trouble understanding the trial you should speak to a member of staff at the court” (which is translated into Māori and 12 other languages). Some responses for this report mentioned situations where the recipients could not understand the summons:

“I have had to write a letter to excuse a [...] learner who felt she didn’t have the level of English required for jury service. She couldn’t even read the summons and had asked her children to translate it.”

“A lady said when she was summonsed she found it very difficult understanding the recorded message on the [...] court’s telephone and had to play it for at least 9 times to understand it. She said they talked too quickly and too softly.”

Other responses felt that English was an excuse to use when they did not want to do jury service.

A further comment was that many refugees and migrants are in low paid occupations. Jury service could cause financial hardship because the fee is so low (especially if the employer does not make up the difference between the jury service fee and the lost wages).

Recommendations

That consideration be given to:

- 7 Translating jury summons information into as wide a range of languages as possible.
- 8 Ensuring that court notices for jurors are spoken clearly, and available in writing on court websites wherever possible.
- 9 Including more information in the summons about the value of jury service.

3.5 Letters of excusal

There were a number of replies from teachers who had written letters for students to be excused. Some reported that they had written letters resulting in excusal:

“[Two learners received letters]. We helped them write letters asking for deferral until their English. One received a letter saying he would be deferred for 4 years but got a letter the following week to serve! We had to photocopy the letter they had sent previously and again ask for him to be excused. His English was too poor to either understand or write a reply--but failure to could have caused him to be in trouble with the law.”

Others reported that the letters had not been successful:

“This year an elderly [...] couple whose English is very low received a letter. Though their daughter wrote a letter explaining their incapability of English language, they were not excused. As a result, the couple went to the court for selection, waited for a long time, and finally didn't get chosen for the duty.”

There is a need for clarification of English language as a grounds to be excused for jury service, in conjunction with the clarification of appropriate English language ability discussed above.

Recommendations

That consideration be given to:

- 10 Clarifying English language ability as grounds for being excused from jury service.

3.6 Jury selection

The information tells potential jurors who are concerned about their level of English to “speak to a member of staff at the court”. This sentence is translated on the current form into Māori and 12 other languages (Arabic, Chinese Simplified, Chinese Traditional, Hindi, Korean, Cook Islands Māori, Fijian, Niuean, Sāmoan, Tokelauan, Tongan and Tuvaluan). However, it is not made clear when this is to occur, whether the discussion can take place in advance, or whether support people can attend with the potential juror.

Some responses noted that the jury selection process may be particularly alienating and frightening for those who have low levels of English:

“The last time I was on jury duty one [...] lady turned up and didn't really even have enough English to explain that she didn't have enough English! She was excused but not a nice position to be in.”

“Two [...] people turned up to attend jury service but felt very intimidated by the officious officials and overwhelmed by the proceedings. Both were challenged before getting on the jury and felt it was possible “anti Asian”. I explained to them that it isn't personal and although I am not Asian, it has happened to me too! I explained the process of selecting a jury and several were surprised at it.”

In the United Kingdom, the jury service website has very brief information but refers potential jurors to the Jury Central Summoning Bureau for advice about jury summons or jury service (www.gov.uk/jury-service).

Recommendations

That consideration be given to:

- 11 Improving and clarifying the process for approaching court officials and including relevant information with the jury summons.

3.7 Website and information materials

The use of WriteMark (www.writemark.co.nz) by the Ministry of Justice to ensure that jury information materials are written in plain English is also useful for people from migrant and refugee backgrounds with low levels of English language ability. Responses reflected that the language used for the Jury Service website's written and video resources is clear and straightforward. However, those who are at beginner levels of English will still struggle, and it would be useful to have the material translated into other languages, as well as further information specifically relating to issues about English language.

Recommendations

That consideration be given to:

- 12 Translating the jury service website into other languages.
- 13 Including a question about English language in the jury service Frequently Asked Questions page, e.g. "I don't understand English well. What shall I do?"

3.8 Conclusion

This report has been carried out to establish the issues about jury service for people with low levels of English. It was an initial exploration and within the terms of this study it was not possible to carry out an in-depth investigation. Further linguistic studies would be useful in several areas, including to establish the current numbers of people with low levels of English who receive jury summons and details about how they respond, and examining the language use in New Zealand courtrooms (by court officials, judges, lawyers, witnesses, and jurors) together with possible ways in which this language could be adapted.

Recommendations

That consideration be given to:

- 14 Commissioning research to provide sound statistical information on the current situation for jurors with low levels of English.
- 15 Commissioning research to examine the language use in New Zealand courtrooms and identify possible ways in which court officials, judges, and lawyers could adapt their language use for people with low levels of English.

Acknowledgements

I would like to thank the people who took part in this study and responded to a draft of the report. However, the opinions and conclusions expressed in this report do not necessarily represent any official views of the participating organisations nor of TESOLANZ.

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Appendix A: Consultation letter

From: Hilary Smith [mailto:hilary_smith@xtra.co.nz]
Sent: Friday, 1 November 2013 8:02 a.m.
To: Hilary Smith
Subject: TESOLANZ consultation re jury service for English language learners

Dear TESOLANZ members

Kia ora tātou, greetings from the TESOLANZ National Executive. We are writing to you because we have become aware that there are some potential problems with participation in jury service by New Zealand citizens who are learners of English language. We are working with the Ministry of Justice to see if any improvements can be made to the system.

Background

The website for jury service is www.justice.govt.nz/services/jury-service. This has short explanatory videos, response forms, etc. The information pamphlet for people selected for jury service says:

Do you need to be able to speak English fluently?

All proceedings are in English. Understanding English is important. If you can understand and take part in a group conversation in English, you probably understand English well enough to be on a jury.

If you think you may have trouble understanding the trial, you should speak to a member of staff at the court.

This is similar to the information in the Jury Summons letter. However, having a low level of English ability is not officially one of the reasons for excusal. These reasons are set in law and we have been informed they would be very difficult to change, even if it were possible to make a legal definition of inadequate ability in English. Also, we do not want to discourage any citizens from taking part in a jury because of their language background. We are therefore discussing with Ministry of Justice people what might be an appropriate mechanism for people who do feel they would not be able to participate as jurors to let this be known before getting to the jury selection process.

Your response please

The Ministry of Justice has asked us to find out about the extent and nature of the problem, so we are writing to our members and to other organisations involved in provision of English language to people from refugee and migrant backgrounds. Could you please let us know:

- a) *Experiences*
Have any of your students, or their family members, had any particular issues with jury service (this can be anonymous)?
- b) *Website and materials*
Do you or your students have any feedback about the language and terminology on the Jury Service website and related materials?
- c) *Anything else?*

I would appreciate a response by the end of November. If you have any queries, please do not hesitate to contact me.

Ngā mihi
Hilary

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Teachers of English to Speakers of Other Languages Aotearoa New Zealand (Inc)
Te Rōpū Kaiwhakaako Reo Ingarihi ki Iwi Reo Kē

Appendix B: Extract from Law Commission Report 69

Law Commission Te Aka Matua o te Ture (2001), pp. 78-79.

Ability to understand English

196 Under common law, jurors or potential jurors were incompetent and therefore disqualified if they were unable to understand the language in which the trial was conducted.²²⁹ The Juries Act 1981 does not contain any specific disqualification on the grounds of inability to understand English to a reasonable level, although registrars appear to have the power to exclude such persons within the general terms of section 15(1). Moreover, judges probably have the power to do so as part of their inherent jurisdiction to ensure a fair trial.

197 In practice, the inability to understand English is a real problem. In the Research conducted for this report, eight jurors in seven trials²³⁰ either said they had failed, or were reported by other jurors to have failed, to comprehend the evidence fully because of a problem with understanding English, which was their second language.²³¹ This is despite the clear requests in the jury booklet and introductory video, in a number of languages, for potential jurors to advise court staff if they cannot understand English.

198 One submission²³² suggested that the summons and video (and the booklet) should say not that you can ask to be excused, but that there is a positive duty to declare a lack of conversational English:

It might be possible to tie this to a suitable everyday test eg “Can you fully understand the network news on TV in the evening? If not, you must declare it” . . .

199 The Department for Courts’ submission pointed out that it is very difficult in practice to detect these people:

The system relies on people volunteering information, or court staff noticing that a juror appears to be having difficulty understanding. This can be difficult in a crowded jury assembly room when staff are focusing on administrative procedures . . . The booklet *Information for Jurors* says that it is “*important that you find English easy to understand*”. This may mislead some jurors who understand simple day-to-day language but who have difficulty with the level of English required in a courtroom.

One option is to change the information currently given to advise jurors that they need to understand English to a reasonably high level, that they need to be able to easily understand a large amount of oral evidence, and that language used may consist of complex ideas and legal and technical terms. Any such information would need to provide a balance between adequately informing jurors of the language skills needed and providing a disincentive to potential jurors.

200 It appears to us that a further screening process is required, but clearly further testing by court staff would be quite impracticable. We recommend that, when the jury retires to choose a foreman, the judge should direct them to talk among themselves and ensure

that each of them is able to speak and understand English, and to advise the judge if any juror appears unable to do so. At that stage they have already been empanelled, but the case has not been opened. We have recommended (see paragraphs 265–268) that there should be a broad single provision governing discharge of jurors. Inability to understand English sufficiently well will fit within this general power.

- 201 One criticism which might be made of this proposal is that it puts the burden on the jury, and requires jurors to determine the competency of others in their group. It may make other jurors feel uncomfortable, or open to criticisms of racism. Although the jurors would simply point such people out, the judge would be the one to finally determine whether they serve or not. But there is nevertheless potential for embarrassment and ill-feeling.

When the jury retires to choose a foreman, the judge should invite them to talk among themselves and ensure that each of them is able to speak and understand English, and advise the judge if any juror appears unable to do so. The proposed second informational video should also emphasise this issue. If the judge is satisfied that a juror cannot speak English sufficiently well, the juror should be discharged (see paragraphs 265–268).

- 228 Juries Act 1981 ss 15(1)(a), 16(a).
229 *Ras Behari Lal and Ors v King-Emperor* (1933) 50 TLR 1.
230 Out of 48 trials, or in 15 per cent of trials studied.
231 See *Juries II vol II*, para 3.18.
232 A High Court judge.