

## The new lay-judge system in Japan: A comparison with the jury system in NSW

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### 1. Introduction

I am an assistant judge of the Chiba District and Family Court. I am currently staying in Sydney for a one year period through the Judge-in-Residence scheme as organised by the Australian Network for Japanese Law (ANJeL) and the Supreme Court of Japan. I am very glad to be given this wonderful opportunity to introduce the new Japanese lay-judge system. My presentation consists of four parts. In the first part, I will present the meaning and the outline of the new system. In the second part, I will focus on the impact of this system on Japanese criminal justice and society. In the third part, I will discuss the deficiencies of the system in comparison with the jury system in New South Wales. Finally, I will present my conclusions.

The opinions in this speech are my own.

### 2. The meaning and outline of new lay-judge system

#### 2.1 The meaning

“The Law for Implementation of Lay-judge system in the Criminal Court Procedures” was promulgated on 28 May 2004. The law will come into force by May 2009. Today, the criminal justice system is mainly the domain of professional lawyers. However, this newly promulgated law allows for the general public to shoulder part of the responsibility for criminal justice in Japan. In fact, this is not the first time that the general public has played a role in the criminal justice system. In 1923, Japan experienced a jury system by way of a Jury Act. In those days, however, Japan had not been exposed to any system that would allow the general public to participate. The person tried by jury was not able to appeal the decision of the jury. For this reason, people objected to a trial by jury and the jury system was under-utilised. The Jury Act has not been used since it was suspended in 1943. Therefore, it will

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be for the first time in just over 60 years that the general public will be able to participate in the process of criminal justice through the new lay-judge system. The new lay-judge system will usher in a new era of criminal justice in Japan.

## 2.2 The outline

In (a) cases involving crimes punishable by death or imprisonment (with or without labour) for an indefinite period, or (b) cases which are noted in the *Courts Act* section 26(2) (ii)<sup>1</sup> and in which the victim has died due to an intentional criminal act (excluding those cases covered by (a) ) will fall under the ambit of the lay-judge system.<sup>2</sup> As a general rule, 3 judges and 6 lay-judges will participate in deliberations, reach a verdict and decide on a sentence.<sup>3</sup> However, authority is vested solely in the professional judges in decisions relating to questions of law and legal proceedings.<sup>4</sup> Decisions involving lay-judges' participation in deliberations will be by majority opinion of the members of the judicial panel, which shall include both an empanelled judge and a lay-judge of the same opinion.<sup>5</sup>

## 2.3 Data

In 2003, there were a total of 3,089 cases to which the lay-judge system is considered applicable. Of those 3,089 cases, most dealt with robbery resulting in bodily injury (810 cases). The second most common type of case concerned homicide (768 cases). The third most common was arson of an inhabited building (337 cases). The fourth most common was rape resulting in death or bodily injury (299 cases). The fifth most common was bodily injury resulting in death (261 cases).

Lay-judges are selected from those people listed in the electoral rolls, and as the total population of citizens who have voting rights is nearly 122.3 million (at the time of the 2003 election of the members of the House of Representatives), the estimated number of people to be summoned annually is approximately 1 in 330 – 660 people, on the assumption that 50 to 100 candidates will be selected for each case.

## 3. The impact of this system on Japanese criminal justice

### 3.1 Realising justice

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<sup>1</sup> Courts Act section 26(2) (ii) provides that crimes with a penalty or death or imprisonment over one year will be heard by judicial panel of three judges.

<sup>2</sup> The Law for Implementation of Lay-judge system in the Criminal Court, s 2 (1)

<sup>3</sup> ss 2 (2), 6 (1)

<sup>4</sup> s 6 (2)

<sup>5</sup> s 67

Professional judges and lay-judges will work together throughout the deliberation process, and in reaching a verdict. This will bring together the professional judge's knowledge and experience with the lay-judge's new and fresh perspective and sense of justice. This will result in a more diverse investigation of fact. It will assist in ascertaining the truth of those facts, which is a crucial aspect in the Japanese criminal judicial system. It will also ensure that the sentencing reflects public attitudes and opinions.

### 3.2 Simplifying the trial and shortening the period of trial

In the lay-judge system, it is necessary that lay-judges without legal expertise can fully understand the case. It is therefore expected that the trials will be easily understood by the public. To that end, professional lawyers are expected to acquire more refined skills of communicating with lay-people. For public prosecutors and defence lawyers, these are the skills of advocacy and cross-examination. For judges, it is the skill of explaining matters clearly. Today, even if public prosecutors or defence lawyers have poor advocacy skills, they can assume that professional judge will fully understand the importance of the witness and the relevance of their statement. However, in the new system, the same cannot be expected from the lay-judges.

Further, in order to ensure the smooth participation of the general public, it is necessary to shorten the period of the trial. In order to carry out a court trial effectively and expeditiously, the judge, the prosecutor, and the defence counsel will have to conduct pre-trial discussions to plan court hearings. As a result, it is expected that trials will be conducted in an efficient manner.

### 3.3 Increasing the awareness of the criminal justice system amongst the general public

Participation by lay-people in the criminal justice system will increase its awareness amongst the general public. They will be able to understand what it is that professional judges do, and how they approach issues. It has long been considered that neither the general public nor the mass media fully understand the role of the judge, how they approach an issue and a reach a verdict on a case. As a result, it is not unusual that criticisms made by the general public or the media, based on misperceptions, have been levelled at members of the judiciary and their respective decisions. In this new system, however, we will be able to conduct discussions based on a common and an accurate understanding of the case and its particulars. The lay-judge system will also improve public confidence towards the criminal justice system.

## 4. Deficiencies in the new system compared with the jury system in NSW

I would like to discuss several problems concerning the lay-judge system in comparison with the jury system in NSW. There are 5 points.

#### 4.1 Selection

In NSW, jurors are selected only by using numbers which are assigned to each potential juror. The crown prosecutor, the accused person and his or her counsel will have no more information about the potential juror than their assigned number and their general appearance on the day when they are empanelled. Therefore, neither party will know the name of potential juror, much less their address or occupation. The parties are prohibited from asking the potential juror any questions, and therefore, they will not be aware of the opinions of the individual juror. By contrast, in the Japanese lay-judge system, information about the potential lay-judge is given to both parties beforehand.<sup>6</sup> Furthermore, both parties may request that the presiding judge ask questions of potential lay-judges.<sup>7</sup> Both parties can gain much more information in our lay-judge system than in the jury system in NSW. It is therefore more probable in our system that the privacy of the potential lay-judge and their security is under threat. We must take every precaution to protect the privacy and security of the (potential) lay-judge.

#### 4.2 The right to question witnesses

In NSW, jurors cannot question witnesses by themselves. If they wish to do so, they may submit the question to the judge via a court officer. If the judge deems the question to be appropriate, he or she will question the witness accordingly. However, the judge is under no obligation to do so, and it is at his or her discretion. In our new system, lay-judges may question witnesses directly with the permission of the presiding judge.<sup>8</sup> As there is no vetting of the question that the lay-judge will ask the witness, it is possible that the lay-judge might ask inappropriate or unnecessary questions, and that this will, in turn, disrupt the proceedings of the trial. It is important that the presiding judge control the proceedings. Moreover, the questions might give an indication to the parties as to what the lay-judge is thinking.

#### 4.3 Explanation of the law and directions from judges

In NSW, jurors are prohibited from discussing the case with the presiding judge outside of the courtroom. At the end of the trial, the judge provides a summation, and then gives directions to the jury before both parties. This way, both parties can examine whether the judge explains the law and correctly summarises the evidence. If the summation is inappropriate, either party can appeal to the Court of Criminal Appeal. However, in the new Japanese system, there is no clear rule of when and where the judge shall explain the law and summarise the evidence. If the

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<sup>6</sup> s 31

<sup>7</sup> s 34 (2)

<sup>8</sup> s 56

judge can explain the law and summarise the evidence with both parties absent, neither party can examine the judge's explanation or directions. If possible, they can only make assumptions through the reasoning expressed in the judgment. It is probable that each party will doubt that the judge explained the law and summarised the evidence properly. This may result in an increase in the number of appeals. To prevent any such doubt, I believe that it is preferable that the explanation of the law and summary of the evidence be conducted in the presence of both parties, and that only a supplementary explanation and summary of evidence be made in the parties' absence.

#### 4.4 Deliberation and verdict

In NSW, only the jurors may deliberate, and the verdict must be unanimous. By contrast, in our new system, professional judges and lay-judges deliberate together, and the verdict depends upon whether professional judges and lay-judges mutually agree to constitute a majority opinion of the collegiate body.<sup>9</sup> We judges have to be careful not to excessively pressure lay-judges into adopting our opinions, and rather, we should encourage lay-judges to discuss their own thoughts freely. Lay-judges should actively engage in the issue, and should have the fortitude not to be easily pressured into making compromises when reaching a verdict.

#### 4.5 Judgment

In NSW, a jury returns a verdict only on a question of fact without having to provide a reason. In Japan, professional judges and lay-judges have to reach a verdict both on questions of fact and on sentencing, and demonstrate their reasoning.<sup>10</sup> In written verdicts, the particulars of the deliberation cannot be covered due to a time limit. Therefore, decisions will be simplified with adequate reasons given. The actual process in creating a written verdict has not been adequately considered, and requires further thought.

Lay-judges will have to engage in the process of sentencing. However, sentencing is a very technical matter, and is not formulaic. It is very difficult to explain to lay-judges. Judges will have to prepare materials, such as past judgements and statistics, for lay-judges' deliberation on sentencing. This requires further consideration.

### 5. Conclusion

Unlike Australia, Japan does not have an established tradition that allows for the general public to participate in the criminal justice system. We have to become familiar with this system gradually and steadily. We are starting from scratch. We will do our best so that we can be proud of

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<sup>9</sup> s 67

<sup>10</sup> s 6 (1)

our lay-judge system in the future.