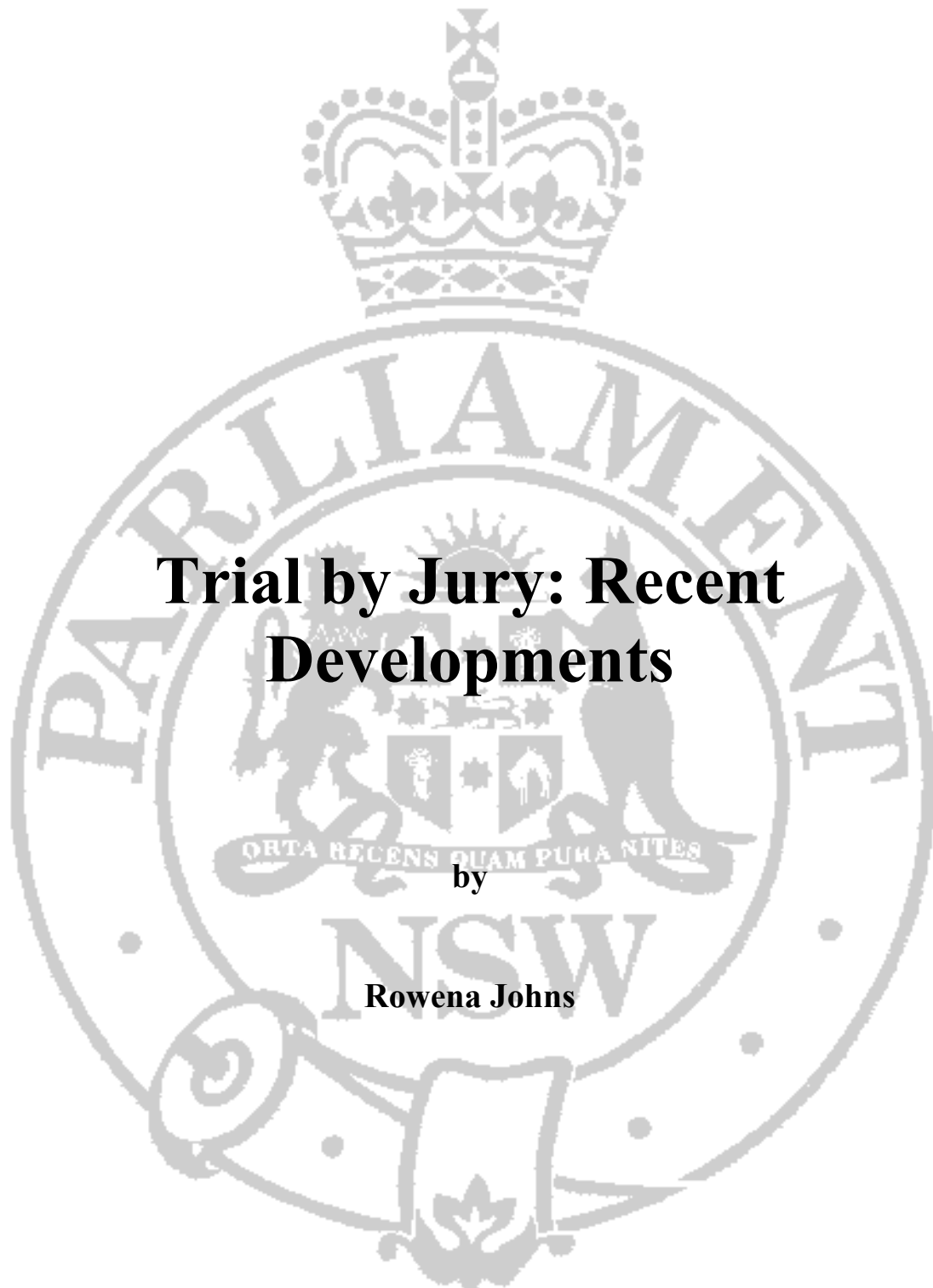


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**Trial by Jury: Recent
Developments**

by

Rowena Johns

Briefing Paper No 4/05

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ISSN 1325-4456
ISBN 0 7313 1778 5

April 2005

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Trial by Jury: Recent Developments

by

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EXECUTIVE SUMMARY

Historical development of the jury system in New South Wales (pages 3-8):

This chapter summarises key events in the development of the jury system in New South Wales, from the establishment of the colony in 1788 to the present day. Trial by jury of 12 civilians became the standard in criminal cases in 1839 in the Supreme Court and Quarter Sessions (the predecessor of the District Court). Throughout the 19th and 20th centuries, eligibility for jury service broadened with the abolition of property and gender requirements. However, there has been a reduction over time in the use of juries in non-criminal cases.

Types of courts and cases involving juries (pages 9-16):

A range of proceedings in New South Wales may be heard before a jury, including criminal trials, hearings to determine mental fitness to plead, civil trials, defamation cases, and coronial hearings. Trial by jury in criminal cases is available in the Supreme Court and District Court. Alternatively, the accused may choose trial by judge alone if certain conditions are met. In the Local Court, hearings are conducted before a Magistrate without a jury. The jurisdiction between the District Court and the Supreme Court in civil matters is basically determined by monetary value. Civil cases (except for defamation) are to be tried without a jury unless the court orders otherwise. Another issue considered in this chapter is the concept of disposing with juries in certain difficult cases, such as complex fraud trials.

Current jury procedures (pages 17-27):

The main provisions of the *Jury Act 1977* are reviewed in this chapter, with particular attention to the eligibility requirements for jury service, the process of jury selection, peremptory challenges and challenges for cause, protection of juror anonymity, jury deliberations, discharging the jury, and payment of jurors. Also examined are offences committed by jurors or against jurors, pursuant to the *Jury Act 1977* or the *Crimes Act 1900*.

Juror misconduct (pages 28-40):

Prominent cases in recent years, such as *R v K* (2003) 59 NSWLR 431 and *R v Skaf* (2004) 60 NSWLR 86, have illustrated the legal problems that can occur when jurors, despite judicial instructions to confine their deliberations to the evidence before them, undertake their own research, discuss the case with non-jurors, or visit a place connected with the offence. The increasing amount of legal information available on the internet is a cause for particular concern. The *Jury Amendment Act 2004*, commencing on 15 December 2004, prohibits jurors from making inquiries about the accused or issues in the trial, except in the proper exercise of juror functions. The Sheriff's Office is specifically empowered by the new legislation to investigate jury irregularities.

Impact of prejudicial publicity on juries (pages 41-45):

Research undertaken by the University of New South Wales and the Law and Justice Foundation suggests that a relatively small proportion of verdicts in criminal trials are affected by media publicity. The case of *R v Sheikh* (2004) 144 A Crim R 124 revived debate on this issue when the Court of Criminal Appeal set aside the conviction and ruled that the trial judge's directions to the jury could not remove the prejudice created by the media coverage. A Private Member's Bill, introduced in December 2004 by the Shadow Attorney General, Andrew Tink MP, proposes that actual evidence of the influence of media reports upon jurors in criminal trials should be required before the Court of Criminal Appeal can find that there has been a miscarriage of justice.

Majority verdicts (pages 46-53):

A general overview of majority verdicts is presented in the first half of this chapter, including: arguments for and against majority verdicts; studies assessing whether their adoption in New South Wales would reduce the rate of hung juries; and the use of majority verdicts in other Australian States and Territories. The second half of the chapter examines recent developments. In September 2004, the Government issued a reference to the Law Reform Commission to report on whether the unanimity requirement in criminal trials should be preserved in New South Wales. The Shadow Attorney General, Andrew Tink MP, reaffirmed the Opposition's support for majority verdicts by introducing a Private Member's Bill in October 2004.

Proposal to involve jury in sentencing process (pages 54-58):

In January 2005, the Chief Justice of New South Wales, Hon James Spigelman AC, suggested that consideration be given to allowing consultation between judges and jurors on sentencing issues, after a verdict has been reached in a criminal trial. However, the actual sentence would remain a matter of judicial discretion. The Law Reform Commission is conducting an inquiry into the concept.

1. INTRODUCTION

The importance of the jury system in a democracy has been emphasised by many legal practitioners, academics and commentators. Lord Devlin observed in 1956, from an English perspective:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving... So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives... We are anxious that government should be strong and yet fearful lest the gathering momentum of executive power crush all else that is in our State. We look for some landmark that we may say that so long as it stands, we are safe; and if it is threatened, we must resist. It is there, this beacon that seven centuries have tended...¹

Recently, the Chief Justice of New South Wales, Hon James Spigelman AC, described the enduring relevance of the jury in our society:

There is... a specific institution which, in my opinion, is of fundamental importance in maintaining public confidence. I refer to the jury system. The direct involvement as decision-makers of members of the public, in their capacity as such, does more to ensure the maintenance of a high level of trust and confidence in the administration of justice than, perhaps, any other single factor.

Decision-making by jurors is not, of course, the cheapest form of dispute resolution. Nor, however, is democracy the cheapest form of government. The pressure on public expenditure over recent decades is one of the reasons why the use of juries has progressively retreated and, in this State, has almost disappeared in civil matters. There is, however, no real doubt that the jury will be retained as the critical decision making body which imposes the stigma of guilt of a serious crime, leading to the penal consequences of such guilt, on any citizen.

...

The role of jurors as representatives of the community is a well understood and longstanding tradition. A jury does not represent the community in the sense of constituting, in some way, a microcosm of the community. That would be impossible. It represents the community by reason of the random process of its selection.²

Today in Australia and the United Kingdom, the use of the jury seems to be contracting and

¹ Lord Devlin, *Trial by Jury*, Revised edition, 1966, Stevens & Sons Ltd, London, p 164. The book reproduces a series of lectures delivered by Hon Sir Patrick Devlin, Judge of the High Court of Justice, at London University in 1956.

² Address by the Honourable J.J. Spigelman AC, Chief Justice of New South Wales, for the annual Opening of Law Term dinner, 31 January 2005, Sydney. The text is available on the Supreme Court website at <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_310105>

the ideal of the unanimous jury has been largely replaced by majority verdicts, although not in criminal trials in New South Wales. Some of the specific issues examined in this briefing paper are: juror misconduct and strategies to discourage jurors from making their own inquiries about the accused or the evidence in a case; the impact of prejudicial media publicity on jurors; the ongoing interest in majority verdicts in criminal cases, resulting in a Law Reform Commission inquiry; and the concept of judges consulting jurors on sentencing issues.

The research focuses largely on the role and operation of juries in criminal trials in New South Wales, although some reference is made to juries in other types of proceedings, and to jury practices interstate and in the United Kingdom. The information presented in this briefing paper reflects the law as at 25 March 2005.

2. HISTORICAL DEVELOPMENT OF THE JURY SYSTEM IN NSW

Significant stages in the development of juries since the establishment of the colony of New South Wales in 1788, include:³

- From 1788 Governor Phillip was authorised to establish a Court of Civil Jurisdiction and a Court of Criminal Jurisdiction. The first criminal proceedings in the colony were heard by a Judge Advocate and a panel of six military officers. A bench of Magistrates heard lesser offences. From the early years of the colony, juries were used in coronial inquiries to assist the coroner in determining causes of death. The coronial jury followed English practice, initially without any statutory mandate. ‘Juries of matrons’ were sometimes convened when a woman who was convicted of a capital offence pleaded that she was pregnant. This could stay the execution, at least temporarily. The role of the jury of matrons (married women) was to determine whether the condemned woman was pregnant.
- 1814 New civil courts were constituted under letters patent, including a Governor’s Court (with civil jurisdiction in matters where the sum in dispute did not exceed £50) and a Supreme Court.
- 1823-24 The *New South Wales Act 1823* created the Legislative Council, which convened for the first time in August 1824.⁴ The Act also provided for the establishment of the ‘Supreme Court of New South Wales’, and the Courts of General or Quarter Sessions. Criminal trials in the Supreme Court were to be heard before a judge and seven commissioned military or naval officers, who had to reach a unanimous verdict. In Supreme Court civil trials, the Chief Justice and two assessors (Magistrates nominated by the Governor) could decide by majority. Limited provision was made under the *New South Wales Act*, by agreement of the plaintiff and defendant, for issues of fact in civil cases to be tried by a jury of 12 men who were land or property owners. The Third Charter of Justice of 1824 appointed Francis Forbes as the first Chief Justice of the Supreme Court of New South Wales.
- 1824-28 Juries of 12 male civilians were used in criminal trials in the Quarter Sessions courts between 1824 and 1828, although the *New South Wales Act 1823* did not explicitly authorise this. Rather, Chief Justice Forbes reasoned

³ Information was sourced from: Ian Barker QC, *Sorely Tried: Democracy and Trial by Jury in New South Wales*, Francis Forbes Lecture 2002, Dreamweaver Publishing, 2003; Greg Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*, Federation Press, 2002; J. M. Bennett, *A History of the Supreme Court of New South Wales*, Law Book Company, 1974; and Alex Castles, *An Australian Legal History*, Law Book Company, 1982.

⁴ Members were initially appointed, but in 1843 the Council became partially appointed and partially elected.

that trial by jury was an established procedure at common law in the English courts of Quarter Sessions and should only be excluded by a statute using clear and specific language. The Quarter Sessions courts in New South Wales also employed ‘grand juries’ in a type of committal process from 1824 to 1828. The grand jury consisted of around 17-23 men who made a preliminary assessment of whether the charge should proceed to a full trial. Grand juries were not used in the Supreme Court, where a prosecution was initiated by presenting an ‘information’ (indictment) signed by the Attorney General. This power could also be exercised by the Attorney General in the Quarter Sessions courts.

- 1828 The use of juries of civilian men in Quarter Sessions criminal cases was halted in the colony by the *Australian Courts Act 1828* (UK) 9 Geo IV c.83, an Imperial statute which confirmed trial by a panel of military officers in both the Supreme Court and the Quarter Sessions.
- 1830s The *Jury Trials Acts* of 1832 and 1833 (NSW) granted accused persons in the Supreme Court and Quarter Sessions the right to elect a trial by a panel of seven military officers, or a jury of 12 citizens. Eligibility requirements for jurors included: being a male aged between 21 and 60 years; being a natural-born subject of the King; having an income arising out of lands or real estate of at least £30 per annum or a personal estate to the value of at least £300; and not being disqualified by the commission of certain serious crimes, mental inability, blindness, deafness or permanent infirmity. Emancipated convicts, meaning those who had completed their sentences, were entitled to serve as jurors if they fulfilled the other requirements.
- 1839 The *Jury Trials Act 1839* dispensed with the panel of seven military officers in criminal trials, making a jury of 12 civilians the standard for these matters in the Supreme Court and Quarter Sessions.
- 1844 The *Jury Trials Act 1844* abolished trial by assessors and established the *right* to trial by jury in civil cases in the Supreme Court. The civil jury consisted of four jurors, but the court could order a jury of 12 at the request of either party. If the jury had deliberated for at least six hours, a majority decision of three-fourths of the jury was allowed.
- 1847 The *Jurors and Juries Consolidation Act 1847* continued to exclude men from jury service who did not fulfil the property requirement, were not natural-born subjects of the Queen, and had certain criminal convictions. Numerous occupations were exempt from jury service including Members of the Executive and Legislative Councils, ministers of religion, barristers, solicitors, physicians, druggists, military officers, constables, schoolmasters, and bank tellers. At a Special Petty Sessions each year, the justices of each jury district were to examine and correct the lists prepared by the police, striking out the names of those not liable, disqualified, or disabled from serving, and ‘all men of bad fame or of immoral character and repute’.

- 1855 The *Constitution Act* replaced the Legislative Council with a bicameral legislature, consisting of a Legislative Assembly of elected members and a Legislative Council whose members were nominated by the Governor on the advice of the Executive Council. The new Parliament sat for the first time on 22 May 1856.
- 1876 Changes under the *Jury Laws Amendment Act (No.2) 1876* included allowing men who were not natural-born subjects of the Queen to be eligible for jury service if they had been naturalised or if, being an alien by birth, they had resided in the colony for seven years or more.
- 1901 The *Jury Act 1901* empowered the trial judge to discharge a criminal jury after 12 hours of deliberation if they could not agree on a verdict.
- 1905 The *Jury (Exemption) Act 1905* (Cth) exempted those serving in the armed forces from jury duty.
- 1912 The *Jury Act 1912* (NSW) consolidated but did not add to the law of the *Jury Act 1901*, the *Jury (Amendment) Act 1902*, and the *Jury (Amendment) Act 1905*. The *Coroners Act 1912* dispensed with the coroner's jury of six persons, except if a request for a jury was made by a relative of the deceased or the Minister of Justice so ordered.
- 1947 Jury service for women in New South Wales purportedly became available on an optional basis with the *Jury (Amendment) Act 1947*. Women who were entitled to be enrolled as electors could apply to the chief constable of their police district to be included on the jury roll. However, the commencement of this reform was delayed due to 'accommodation difficulties'.⁵ The *Jury (Amendment) Act 1947* also abandoned the requirements of real or personal estate, and removed the reference to natural-born subjects. Consequently, the key prerequisite was being enrolled as an elector. The Act created the offence of publishing a juror's name, address, description or photograph in a newspaper. Another amendment reduced from 12 hours to six hours the period for which a criminal jury had to deliberate before a judge could discharge the jury, if the judge was satisfied that the jurors were not likely to agree on a verdict.
- 1968 The *Administration of Justice Act 1968* provided that women who were liable to serve on juries could elect as of right *not* to serve, by lodging a notification with the chief constable of the police district in which they resided.

⁵ Attorney General, Hon Clarence Martin MP, Jury (Amendment) Bill, Second Reading Speech, *NSWPD*, 13 November 1947, p 1120: '...without going into unnecessary detail, there are certain accommodation difficulties.' Apparently this was a veiled reference to the lack of separate toilets for female jurors: Attorney General, Hon Frank Walker QC, Jury Bill, Second Reading Speech, *NSWPD*, 24 February 1977, p 4476.

- 1970 The *Supreme Court Act 1970* stipulated restrictions on civil cases that could be heard by a jury. However, there was still a right to a jury in claims involving fraud, defamation, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage. Claims arising out of motor vehicle accidents could be tried by a jury at the discretion of the court.
- 1973 The *District Court Act 1973* created the District Court and assigned to it the criminal jurisdiction of the courts of Quarter Sessions, which were abolished.
- 1977 The *Jury Act 1977* made every person enrolled as an elector in New South Wales liable to serve as a juror, and reduced the grounds of exemption. The Sheriff's Office was to prepare jury rolls based on the electoral rolls, and police would no longer compile lists of qualified persons and supply them to the Sheriff.⁶ Persons who were disqualified by the *Jury Act 1977* on the basis of criminal convictions included those who, within the last 10 years in New South Wales or elsewhere, had served part of a prison sentence, or had been on parole, or been detained in an institution for juvenile offenders.
- 1986 The New South Wales Law Reform Commission Report on *The Jury in a Criminal Trial* reviewed the practices and procedures relating to juries in criminal proceedings.⁷
- 1987-88 The *Jury (Amendment) Act 1987*, which had commenced in its entirety by 29 February 1988, made numerous amendments including:
- clarifying the classes of persons who were disqualified, ineligible or exempt from jury duty;
 - reducing the number of peremptory challenges available to the defence and prosecution in criminal proceedings to three each, unless the parties agreed to more;
 - making it an offence to solicit information from a juror/former juror about the deliberations of a jury, for inclusion in any material to be published or broadcast;
 - prohibiting jurors from disclosing, *during* the trial, information on the deliberations of the jury, except with the judge's consent;
 - prohibiting jurors from disclosing, *after* the trial, such information for a fee, gain or reward;
 - removing the requirement that jurors who were unable to agree on a verdict had to deliberate for six hours before the trial judge could discharge the jury.⁸

⁶ The Attorney General, Hon Frank Walker QC, stated: 'We believe that the police, because of their direct association with the prosecution process, should not be involved in the selection of persons for inclusion on a jury roll at all.' Jury Bill, Second Reading Speech, NSWPD, 24 February 1977, p 4476.

⁷ Report LRC48, March 1986.

⁸ Section 56 of the *Jury Act 1977* now simply provides that, 'Where the jury in criminal

The *District Court (Amendment) Act 1987* gave District Court judges the discretion (similar to that of Supreme Court judges) to order that a civil trial be conducted *without* a jury.

- 1990 The *Crimes (Public Justice) Amendment Act 1990* inserted Part 7 ('Public justice offences') into the *Crimes Act 1900*, creating offences relating to jurors, witnesses, judicial officers and public justice officials. These included an offence of threatening or intimidating a juror, and an offence of conferring or offering to confer a benefit on a juror to influence their conduct or attendance. Equally it is an offence for a juror to accept such a benefit. The maximum penalty is 10 years imprisonment, or 14 years if the intention was to procure the accused's acquittal or conviction for a serious offence (ie. an offence punishable by imprisonment for five years or more).
- 1994-95 The function of juries in defamation trials was reduced by the *Defamation (Amendment) Act 1994*, which commenced on 1 January 1995. Section 7A was inserted into the *Defamation Act 1974*, with the consequence that juries are to determine whether the matter complained of carries a defamatory imputation, but the judge alone determines whether any defences have been established and assesses damages.
- 1997-98 The *Jury Amendment Act 1997*, effective on 1 July 1998, gave jurors greater anonymity, by requiring that each juror is to be allocated an identification number and addressed or referred to only by that number during the proceedings. Another amendment required the prosecution to inform the jurors of the nature of the charge, the identity of the accused, and the principal prosecution witnesses, and to call on jurors to seek to be excused if they are not able to give impartial consideration to the case. An equivalent amendment required the parties in a civil trial to inform the jurors of the nature of the action, the identity of the parties, and the principal witnesses. The *Jury Amendment Act 1997* also increased the maximum penalty under the *Jury Act 1977* for soliciting information from or harassing a juror, and omitted the previous requirement that the information be solicited for the purposes of publication or broadcasting.
- 1999 The *Courts Legislation Amendment Act 1999* contained various jury-related provisions, including giving each side in civil proceedings the right to make peremptory challenges to the equivalent of half the number of jurors constituting the jury. Another amendment reduced, from five to three years, the period of disqualification from jury service for persons who had served a sentence of juvenile detention.

proceedings have retired, the court in which the proceedings are being tried may discharge them if it finds, after examination on oath of one or more of them, that they are not likely to agree on their verdict.'

- 2001 The *Courts Legislation Amendment Act 2001* permitted law enforcement agencies and courts to solicit information from jurors, and permitted sheriffs to disclose information about jurors to law enforcement agencies, for the purpose of an investigation or prosecution of a jury-related offence or contempt of court.
- 2002 The *Courts Legislation Amendment (Civil Juries) Act 2001* commenced on 18 January 2002, amending the *District Court Act 1973* and *Supreme Court Act 1970*, to provide that civil cases (except for defamation) are to be tried *without* juries unless the court orders otherwise. If a party requests a jury, the judge must be satisfied that the interests of justice require it.
- The *Defamation Amendment Act 2002* inserted s 76B into the *District Court Act 1973*, to state that a defamation action is to be tried *with* a jury unless the court orders otherwise. The court may make such an order if the parties consent, or if any prolonged examination of documents or investigation is required and cannot be conveniently undertaken with a jury. This amendment brought the District Court into line with the Supreme Court.
- 2004 The *Jury Amendment Act 2004* prohibits jurors from making inquiries for the purpose of obtaining information about the accused or issues in the trial, except in the proper exercise of juror functions. This includes searching the internet or conducting experiments to test evidence. The Sheriff's Office is also empowered to investigate suspected improper conduct by a juror. For further details see '**5.3 Jury Amendment Act 2004 and other new legislation**'.

3. TYPES OF COURTS AND CASES INVOLVING JURIES

Juries are involved in a variety of proceedings in New South Wales. For some types of proceedings, the option of a jury is not often used in practice. Overall, juries are most frequently empanelled in criminal cases.

3.1 Criminal trials

Trial by jury is available in criminal cases in the Supreme Court and District Court. An accused person who stands trial has pleaded 'not guilty', whereas those who plead guilty proceed directly to a sentence hearing. There are no jury trials in the Local Court.

Supreme Court: The Supreme Court tries the most serious criminal offences on indictment, such as murder, manslaughter, and offences that carry a maximum penalty of life imprisonment (if the Director of Public Prosecutions has formed the opinion that the imposition of a life sentence may be appropriate).⁹ State offences that are punishable by life imprisonment include aggravated sexual assault in company and drug offences involving a large commercial quantity of drugs.

District Court: Criminal trials take place in the District Court for the remainder of offences that are prosecuted on indictment but do not come under Supreme Court jurisdiction. This encompasses a wide range of offences including sexual assault, armed robbery, fraud, malicious wounding with intent, dangerous driving occasioning death, and drug supply or manufacture.

Local Court: Summary offences (and indictable offences that may be prosecuted summarily) are dealt with by the Local Court.¹⁰ If a person pleads not guilty, a hearing is conducted before the Magistrate but there is no jury. Evidence is presented, witnesses may be called, and the Magistrate makes a determination, generally by convicting the accused or dismissing the matter.

3.2 Trial by judge alone in criminal proceedings

There is provision for a criminal trial in the Supreme Court or District Court to be heard *without* a jury, pursuant to s 132 of the *Criminal Procedure Act 1986*. An accused person may be tried by a judge alone if: the accused makes that election before the date fixed for the trial; the judge is satisfied that the person has received legal advice from a barrister or solicitor before making the election; and the Director of Public Prosecutions (DPP) consents.

⁹ Supreme Court of New South Wales, Practice Note 98, issued by the Chief Justice on 22 April 1998, as amended by Practice Note 122, issued by the Chief Justice on 28 August 2001.

¹⁰ Schedule 1 of the *Criminal Procedure Act 1986* lists the indictable offences that may be prosecuted summarily.

The DPP's *Prosecution Guidelines* set out the factors that should be taken into account by prosecutors in deciding whether to consent to a judge alone trial:¹¹

Each case is to be considered on its merits. There is no presumption in favour of consent. It should be borne in mind that the community has a role to play in the administration of justice by serving as jurors and those expectations and contributions are not lightly to be disregarded. Consent is not to be given where the principal motivation appears to be "judge shopping".

...Predictions of the likelihood of conviction by either jury or judge alone or of a jury disagreement are not to be considered. The principal consideration is the achieving of justice by the fairest and most expeditious means available.

Trials in which judgment is required on issues raising community values - for example: reasonableness, provocation, dishonesty, indecency, substantial impairment under section 23A of the *Crimes Act 1900* [ie. the defence of diminished responsibility] - or in which the cases are wholly circumstantial or in which there are substantial issues of credit should ordinarily be heard by a jury.

...Cases which may be better suited to trial by judge alone include cases where:

- the evidence is of a technical nature, or where the main issues arise (in cases other than substantial impairment under section 23A of the *Crimes Act 1900*) out of expert opinions (including medical experts);
- there are likely to be lengthy arguments over the admissibility of evidence in the course of the trial;
- there is a real and substantial risk that directions by the trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity or other cause;
- the only issue is a matter of law;
- the offence is of a trivial or technical nature;
- witnesses or the accused person/s may so conduct themselves as to cause a jury trial to abort; and/or
- significant hurt or embarrassment to any alleged victim may thereby be reduced...

3.3 Civil trials

In both the Supreme Court and District Court, the judge may make an order that a civil action is to be tried *with* a jury if:

- a party files a requisition for trial with a jury;
- the party pays the fee prescribed by the regulations (the fee is to be treated as costs awarded in the action, unless the court decides otherwise); and
- the court is satisfied that the interests of justice require that the action be tried by a jury: s 76A of the *District Court Act 1973* and s 85 of the *Supreme Court Act 1970*.

In practice, the use of juries in civil matters is a rarity. According to Ian Barker QC, 'In my

¹¹ Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, 20 October 2003, paragraph 24. The guidelines are available on the DPP website at <www.odpp.nsw.gov.au>

view it is idle to assert that the law can require a litigant in civil proceedings to show a special need for a jury and at the same time say trial by jury in civil cases has not been abolished. For all intents and purposes, with a few exceptions, it has.¹²

District Court: The jurisdiction of the District Court in civil matters is outlined by s 44 of the *District Court Act 1973* and includes: an action in which the amount claimed does not exceed \$750,000; any motor accident claim, irrespective of the amount claimed; and any work injury damages claim, irrespective of the amount. Nor does the monetary limit apply if the Supreme Court decides to transfer proceedings to the District Court pursuant to s 143.

Supreme Court: The Supreme Court is the superior court of record in New South Wales and has wide jurisdiction in civil matters. Section 23 of the *Supreme Court Act 1970* states that it ‘shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.’ In practical terms, the Supreme Court deals with the matters that are beyond the monetary limit of the District Court and where its jurisdiction is not excluded by the operation of any other statute. For example, various Acts creating specialist courts or tribunals preclude certain proceedings being entertained in the Supreme Court.

3.4 Defamation cases

In defamation cases, juries determine whether the matter complained of carries a defamatory imputation, while the judge alone determines whether defences have been established and assesses the damages to be awarded: s 7A of the *Defamation Act 1974*.

In both the Supreme Court and District Court, defamation actions are to be tried *with* a jury unless the court makes an order to the contrary. The court may make such an order if: all the parties consent; or if a ‘prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury’: s 76B of the *District Court Act 1973* and s 86 of the *Supreme Court Act 1970*.

Supreme Court: The Supreme Court has a specialist Defamation List, managed by Justice David Levine. The rate of disposals in the Defamation List in 2003 was 65 cases, compared to 64 cases in 2002, 102 cases in 2001 and 107 cases in 2000.¹³

District Court: The monetary jurisdictional limit of the District Court applies to defamation cases. That is, the claim for damages should not be expected to exceed \$750,000, unless the Supreme Court transfers the matter to the District Court. Factors relevant to whether or not defamation proceedings ought to be transferred to the District Court or retained in the Supreme Court include:

- the quantum of damages that is likely to be obtained, the gravity of the imputations, and whether there are any major matters of principle that would warrant the

¹² Ian Barker QC, *Sorely Tried: Democracy and Trial by Jury in New South Wales*, Francis Forbes Lecture 2002, Dreamweaver Publishing, 2003, p 243.

¹³ Supreme Court of NSW, *Annual Review 2003*, Sydney, 2004, p 50.

- consideration of the Supreme Court: *Hoser v Hartcher* [1999] NSWSC 1060;
- the status of the plaintiff and the circulation of the newspaper: *Cohen v Nationwide News Pty Ltd*, (unreported, Supreme Court, 29 May 1998); and
 - the prospects of the matter being dealt with more quickly in either the Supreme Court or District Court: *Ieremia v Skalkos* [1999] NSWSC 315.

3.5 Coronial inquests

Section 18 of the *Coroner's Act 1980* provides that an inquest or inquiry¹⁴ shall be held before a coroner *without* a jury, except in limited circumstances, for example, if the Minister (Attorney General) or the State Coroner directs an inquest/inquiry to be held with a jury, or a relative of the deceased person so requests.

If an inquest is conducted with a jury, the jury's verdict is recorded, as to whether the person died and, if so: (a) the person's identity, (b) the date and place of the person's death, and (c) the manner and cause of the person's death – except where the matter is to be referred, pursuant to s 19 of the *Coroner's Act 1980*, to the Director of Public Prosecutions to consider prosecuting a known person. As to the cause of death, the jury could find, for example, natural causes, suicide, accident, misadventure, justifiable/excusable homicide, or could make an open finding.¹⁵

In an inquiry, the jury's verdict is to be recorded as to: the date and place of the fire or explosion; and the circumstances of the fire or explosion – except where the matter is to be referred to the DPP under s 19. In either an inquiry or an inquest, the record shall not indicate or in any way suggest that an offence has been committed by a particular person.

Section 22A of the *Coroner's Act 1980* states that a coroner or a jury may make such recommendations as they consider necessary or desirable in connection with the death, suspected death, fire or explosion which is the subject of an inquest or inquiry. Public health and safety, for example, could be the subject of a recommendation.

3.6 Mental unfitness proceedings

The *Mental Health (Criminal Procedure) Act 1990* sets out the regime for dealing with persons who are accused of a criminal offence but may be mentally unfit to be tried. A jury is involved at certain stages of the process, which can take place in the District Court or the Supreme Court depending on the nature of the charge.

When a question of an accused person's mental unfitness to be tried is raised, the court conducts an inquiry and the person's fitness or unfitness is determined by a jury.¹⁶ The *Jury*

¹⁴ An 'inquest' concerns the death or suspected death of a person, while an 'inquiry' means an inquiry into a fire or explosion: s 4 of the Act.

¹⁵ Kevin Waller, *Coronial Law and Practice in New South Wales*, Third edition, 1994, Butterworths, p 50.

¹⁶ It should be noted that the court may determine, due to the trivial nature of the offence, the nature of the person's disability, or any other matter, *not* to conduct an inquiry and may

Act 1977 applies in the same way as for criminal proceedings, although there is provision under s 11A of the *Mental Health (Criminal Procedure) Act 1990* for the inquiry to be conducted by a judge alone.¹⁷

The question of whether the person is unfit to be tried for the offence is to be determined on the balance of probabilities and there is no onus of proof on the prosecution or the defence: ss 6, 12. (In an ordinary criminal trial the burden of proof rests on the prosecution and the standard of proof is beyond reasonable doubt.) If the person is found fit to be tried, the criminal process resumes. If the person is found to be unfit, the court must refer the matter to the Mental Health Review Tribunal to determine (again, on the balance of probabilities), whether the person will, during the period of 12 months from the finding of unfitness, become fit to be tried for the offence.

If the Mental Health Review Tribunal determines that the person will *not* become fit to be tried within 12 months, the Tribunal notifies the Attorney General. After receiving advice from the Director of Public Prosecutions on the matter, the Attorney General may:

- direct that a ‘special hearing’ be conducted with regard to the offence; or
- advise the court and the police that the person will not be further proceeded against: s 19.

The ‘special hearing’ is in place of a criminal trial and is to be conducted ‘as nearly as possible as if it were a trial of criminal proceedings’, including in the presence of a jury, unless the person opts for a judge alone and certain requirements are met under s 21A. The person is taken to have pleaded not guilty, must be legally represented (unless the court allows otherwise), and is entitled to give evidence: s 21.

The verdicts available to the jury at a special hearing include:

- the accused is not guilty of the offence charged;
- the accused is not guilty on the ground of mental illness;¹⁸
- on the limited evidence available, the accused committed the offence (or an offence available as an alternative).

The consequences of a qualified finding of guilt are that the court must indicate whether, if the special hearing had been a normal criminal trial, it would have imposed a sentence of imprisonment. If so, the court must nominate a term, referred to as a ‘limiting term’ and may make an order with respect to the custody of the person that the court considers appropriate: s 23(1) & s 24. The court must also refer the person to the Mental Health

dismiss the charge: s 10(4) of the *Mental Health (Criminal Procedure) Act 1990*.

¹⁷ The accused may choose this option only if the prosecution consents, and the judge is satisfied that the accused has received advice from a legal practitioner before making the election.

¹⁸ The jury must return a special verdict of not guilty by reason of mental illness, if it appears to the jury that the accused person did the act charged but was mentally ill at the time: s 38.

Review Tribunal for assessment. If the court indicates that it would *not* have imposed a sentence of imprisonment, the court may impose any other penalty or make any other order it might have made in a criminal trial: s 23(2).

If the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the court may order that the person be detained in such place and in such manner as the court thinks fit (until released by due process of law) or may make such other order as it considers appropriate, including an order releasing the person from custody, either unconditionally or subject to conditions: s 39.

3.7 Concept of abolishing juries in certain criminal cases

An issue that has been ventilated from time to time in New South Wales is whether juries should be retained in complex criminal trials involving fraud offences. There are two obvious reasons why juries may find such cases onerous. Firstly, the volume and density of the financial evidence can be difficult to follow. Secondly, the length of some of these trials, lasting several months or more, can place an unfair burden on the employment and family commitments of jurors.

The New South Wales Law Reform Commission considered this issue in its 1986 report on *The Jury in a Criminal Trial*. It concluded that juries should be retained in trials for commercial crimes and that the complicated nature of the evidence could be alleviated by improving its manner of presentation. Two relevant recommendations made by the Commission were:¹⁹

- *Recommendation 76*: Where the facts of the case or the charge being tried make it likely that evidence of a complex, scientific or technical nature might be called, the right to trial by jury should not be affected.
- *Recommendation 77*: The qualifications of jurors for jury service should not vary according to the subject matter of the trial. In particular, there should be no requirement that a person should have obtained a certain educational standard to qualify as a juror in the trial of a complex case.

In the United Kingdom, by contrast, there are moves to restrict the use of juries in some cases. In 1986, the *Report of the Fraud Trials Committee*, chaired by Lord Roskill, recommended that fraud cases should be heard by a Fraud Trials Tribunal, consisting of a judge sitting with two lay members experienced in business.²⁰ The *Review of the Criminal Courts of England and Wales* by Sir Robin Auld in 2001 recommended that the judge have the power to direct a trial be heard with such expert assessors, or if the defendant agreed, by judge alone. In 2002 the British Government published a White Paper, entitled *Justice*

¹⁹ NSW Law Reform Commission, *The Jury in a Criminal Trial*, Criminal Procedure Report, LRC 48, March 1986, pp 129-135.

²⁰ *Ibid*, p 129. The Fraud Trials Committee proposed that the determination of guilt by the tribunal should be by majority, but that the judge should have sole responsibility for sentencing.

for All, which considered the involvement of experts would be too difficult, and therefore favoured the option of trial by judge alone in serious and complex fraud cases. The White Paper also expressed interest in judge alone trials when there are similar complex commercial arrangements, for example in some organised crime cases, or where there is a serious risk that the jury will be subject to bribery or intimidation.

Changes were introduced under Part 7 of the *Criminal Justice Act 2003* (UK) which, if enacted, would amend the *Juries Act 1974* (UK) to allow juries to be dispensed with in certain fraud cases or in order to avoid jury tampering. In both situations, the option would only be available if the case was to be tried on indictment, and if the prosecution applied to a judge of the Crown Court for the trial to be conducted without a jury. Additional conditions would need to be satisfied in each category of case:

- *serious or complex fraud cases* – the judge must be satisfied that ‘the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of a jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.’
- *to avoid jury tampering* – the judge must be satisfied that ‘there is evidence of a real and present danger that jury tampering would take place’ *and* that ‘notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.’ Examples are given in the legislation of cases where there may be a real and present danger of jury tampering, such as cases where the first jury was discharged because jury tampering took place, or there has been intimidation of a person who is likely to be a witness in the trial.

However, at the time of writing (February 2005) the provisions had not commenced. Peter Thornton QC, a Deputy High Court Judge, was critical of the provisions and questioned whether they would become a reality. In relation to the abolition of juries in complex fraud cases, he observed:²¹

This is a startling provision. For a start it may never become law. It fell in the debate on the Bill in the House of Lords and was only reinstated in the so-called “ping-pong” phase of the Bill,²² subject to government undertakings to review it before implementation and not proceed except with the consent of both Houses. Secondly, it is a provision entirely devoid of principle... Thirdly, the discretion given to the judge in making such an important decision is quite breathtaking in its breadth, and therefore likely to be applied inconsistently by different judges.

²¹ Peter Thornton QC, ‘Trial by Jury: 50 Years of Change’, *Criminal Law Review*, 50th Anniversary Edition, 2004, p 131.

²² Thornton explains that, ‘The “ping-pong” phase is the final stage of a Bill when time is running out for debate and the Commons and the Lords are deadlocked on key provisions. Negotiations take place backwards and forwards between the two Houses.’ *Ibid*, footnote 29 on p 131.

Thornton was equally critical of the jury tampering provision: ‘...this section does not attempt to avoid jury-tampering; it just avoids jury trial. It also gives a message to would-be jury nobblers that the State is incapable of otherwise enforcing the law.’²³ Other opponents of the plan to remove jury trials in fraud and complex cases included Liberty (a civil liberties organisation), the Legal Action Group (an organisation that promotes equal access to justice), the Criminal Bar Association, and the Bar Council.²⁴

²³ Ibid, p 132.

²⁴ Joint Statement from Liberty, Legal Action Group, Bar Council, and Criminal Bar Association, ‘Government’s Criminal Justice Plans for the Queen’s Speech’, 10 November 2002. Obtained from press releases section of Liberty’s website at <www.liberty-human-rights.org.uk>

4. CURRENT JURY PROCEDURES

The convening of juries and their operations are predominantly governed by the *Jury Act 1977* and the *Jury Regulation 2004*. There are also selected provisions affecting jurors in other legislation, such as trial provisions in the *Criminal Procedure Act 1986* and public justice offences under Part 7 of the *Crimes Act 1900*. Section numbers quoted are from the *Jury Act 1977* unless otherwise stated.

4.1 Eligibility to serve as a juror

(i) Current situation in New South Wales

Every person who is enrolled as an elector for the Legislative Assembly of New South Wales, pursuant to the *Parliamentary Electorates and Elections Act 1912* is qualified and liable to serve as a juror: s 5 of the *Jury Act 1977*.

However, the *Jury Act 1977* sets out three categories of persons who are not allowed to, or do not have to, serve as jurors: (i) persons who are *disqualified* from being jurors by Schedule 1; (ii) persons *ineligible* to be jurors according to Schedule 2; and (iii) persons under Schedule 3 who are entitled as of right to be *exempted* from jury service if they claim an exemption.

<p>Disqualified persons <i>Schedule 1</i></p>	<ol style="list-style-type: none"> 1. A person who within the last 10 years in NSW or elsewhere has served part of a sentence of imprisonment (not merely for failure to pay a fine). 2. A person who within the last 3 years in NSW or elsewhere has been found guilty of an offence and detained in a juvenile detention centre (not merely for failure to pay a fine). 3. A person who is currently bound by an order made in NSW or elsewhere, pursuant to a criminal charge or conviction, such as a parole order, community service order, apprehended violence order, disqualification from driving a motor vehicle, good behaviour bond, remand in custody pending trial or sentence, or release on bail.
<p>Ineligible persons <i>Schedule 2</i></p>	<ol style="list-style-type: none"> 1. The Governor of NSW. 2. A judicial officer. 3. A coroner. 4. A member or officer of the Executive Council. 5. A member of the Legislative Council or Legislative Assembly. 6. Officers and other staff of the Houses of Parliament. 7. A legal practitioner, whether or not practising. 8. A person employed or engaged (except on casual or voluntary basis) in the public sector in law enforcement, criminal investigation, the provision of legal services in criminal cases, the administration of justice, or penal administration. 9. The Ombudsman and Deputy Ombudsman. 10. A person who at any time has been a judicial officer, a coroner, police officer, Crown Prosecutor, Public Defender, Director or Deputy Director of Public Prosecutions, or Solicitor for Public

	<p>Prosecutions.</p> <p>11. A person who is unable to read or understand English.</p> <p>12. A person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror.</p>
Exempted persons <i>Schedule 3</i>	<p>1. Clergy.</p> <p>2. Vowed members of any religious order.</p> <p>3. Persons practising as dentists.</p> <p>4. Practising pharmacists.</p> <p>5. Persons practising as medical practitioners.</p> <p>6. Mining managers and under-managers.</p> <p>7. Persons employed or engaged (except on a casual or voluntary basis) in the provision of fire, ambulance, rescue or other emergency services, whether or not in the public sector.</p> <p>8. Persons who are at least 70 years old.</p> <p>9. Pregnant women.</p> <p>10. A person who has the care, custody and control of children under 18 years (other than children who have ceased attending school), and who, if exempted, would be the only person exempt on this ground in respect of those children.</p> <p>11. A person who resides with, and has full-time care of, a person who is sick, infirm or disabled.</p> <p>12. A person who resides more than 56 kilometres from the place at which the person is required to serve.</p> <p>13. A person who, within the 3 years that end on the date of the person's claim for exemption, attended court in accordance with a summons and served as a juror; or within the 12 months ending on the date of their claim for exemption, attended court and was prepared to, but did not, serve as a juror.</p> <p>14. A person who is entitled to be exempted on account of previous lengthy jury service (see s 39 of the Act).</p>

(ii) Blind and deaf jurors – possible reform

The New South Wales Law Reform Commission is examining the issue of blind and deaf people participating in juries. The Commission received a reference in March 2002: 'To inquire into and to report on whether persons who are profoundly deaf or have a significant hearing or sight impairment should be able to serve as jurors in New South Wales and, if so, in what circumstances.'²⁵ A discussion paper was published in February 2004. The Commission identified the following issues for discussion:²⁶

- Whether blind or deaf jurors who are able to discharge the duties of a juror in the circumstances of the particular case should be liable for jury service. If so, how the *Jury Act 1977* should be amended. For example, Schedule 2 currently makes ineligible 'A person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror.'

²⁵ New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Discussion Paper 46, February 2004, page v. The closing date for submissions was 30 April 2004.

²⁶ *Ibid*, pp 66-68.

- If blind or deaf people are required to serve on juries, should they have the option to be excused from jury duty on account of their blindness or deafness?
- Whether the trial judge should decide if a blind or deaf person is capable of discharging the duties of a juror in the circumstances of the particular case.
- Whether peremptory challenges would still be permissible against deaf or blind persons.
- What type of technological assistance blind or deaf people would need to discharge their duties as jurors, and the cost implications of those technologies.
- Whether Auslan interpreters should be provided for deaf jurors and, if so, under what conditions?

The preliminary submission of the Law Society's Criminal Law Committee highlighted the need to consider the capacity of blind or deaf jurors to assess exhibits, the testimony and demeanour of witnesses, and to assess audio and video tapes such as ERISPs (police electronically recorded interviews with suspect persons). Another issue raised by the Law Society was the presence of interpreters for blind or deaf jurors in jury rooms, particularly during jury deliberations.²⁷ The Law Reform Commission had not published the report at the time of finalising this briefing paper.

(iii) Recent changes to eligibility of jurors in the United Kingdom

From April 2004, the *Criminal Justice Act 2003* extended the age range of persons eligible to serve on juries in the United Kingdom to include those from 18 to 70 years. Previously the upper age limit was 65 years.²⁸

Many of the occupational groups who traditionally did not have to serve on juries, such as lawyers, police, doctors, prison officers and probation officers, ceased to be exempt with the *Criminal Justice Act 2003*.²⁹ However, the mentally disordered and those who have certain criminal convictions or are on bail are still ineligible. Full-time serving members of the defence forces can be excused if their commanding officer certifies that it would be prejudicial to the efficiency of the service if they were required to be absent from duty.

²⁷ No author, 'Exclusion of deaf or blind jurors', *Law Society Journal*, Volume 42, Number 4, May 2004, p 8.

²⁸ Pursuant to the *Criminal Justice Act 1972*, s 25.

²⁹ The amendments relating to the age and occupation of jurors commenced on 5 April 2004: *Criminal Justice Act 2003 (Commencement No. 3 and Transitional Provisions) Order 2004*, 16 March 2004.

4.2 Number of jurors in proceedings

The *Jury Act 1977* specifies the number of jurors who are to comprise the jury in different types of proceedings, when the matter is to be heard with a jury:

- *criminal proceedings* – the jury shall consist of 12 persons in the Supreme Court or District Court: s 19.
- *civil proceedings* – the jury shall consist of four persons in the Supreme Court or District Court. However, the Supreme Court may, upon application from either party, order that the jury shall consist of 12 persons: s 20.
- *coronial inquest* – the jury shall consist of six persons in the Coroner’s Court: s 21.

Section 22 sets out the minimum number of persons that may properly constitute the jury if any jurors die, are discharged, or are incapable of continuing:

- *criminal proceedings* – not below 10, except with written approval from the accused and the prosecution. If the trial has been in progress for at least two months, the number may be reduced below 10, but not below eight.
- *civil proceedings* – in the case of a jury of 12, not below eight; in the case of a jury of four, not below three.
- *coronial inquest* – not below four.

Number of jurors in District, Supreme, or Coroner’s Court proceedings

	Criminal	Civil	Coronial
Standard number of jurors	12	4, unless either party makes an application for 12	6
Minimum number of jurors (if any become incapable of continuing)	10, or lower with written approval of both sides. If trial has been running at least 2 months, no less than 8	3, or 8 where the jury started with 12 members	4

4.3 Jury selection process

(i) *Jury districts and rolls*

Section 9 of the *Jury Act 1977* provides that, ‘There shall be a jury district for each place appointed for sittings of the Supreme Court or the District Court for the trial of any criminal or civil proceedings...A jury district is to comprise such electoral districts or parts of electoral districts as may be determined and notified by the sheriff...’ The Sheriff’s Office of NSW must maintain a jury roll for each jury district: s 10. The Electoral Commissioner shall, upon the request of the Sheriff (at least once every 15 months for each jury district) deliver the latest electoral rolls for the purpose of preparing jury rolls: s 11.

At intervals of not more than 12 months, the Sheriff is to select a number of persons at random from the latest electoral rolls that relate to each jury district, and add them to the jury roll: s 12. Consequently, by this process the jury roll is supplemented every 12 months.

(ii) Summoning of jurors

The Sheriff's Office selects people at random from the jury roll in each jury district and advises them in writing that they may be called to sit on a jury at a court in their area in the next 12 months. (The recipient need only respond using the enclosed form if their details are incorrect, they are not eligible, are disqualified, or wish to apply for an exemption.) Persons who are subsequently selected for jury duty are sent a jury summons, which states their juror number, the date and time they are to attend a particular court, and what to do when they arrive.³⁰ When everyone called for that day is assembled at court, the Sheriff's Officer will ask if anyone wants to be excused from serving on a jury. Those people must give reasons, which will be put to the judge who determines the matter.³¹

(iii) Jury ballot

The jury for the trial of any criminal or civil proceedings shall be selected by ballot in open court: ss 48-49. The persons who are drawn in the ballot are called (by their identification numbers) to be sworn. If challenges are made, the ballot process continues until the required number of jurors is reached. Once the jury has been empanelled, the judge will ask the jury to choose a spokesperson commonly known as a 'foreman'. The foreman speaks on behalf of the jury in the court room, for example, to request that a witness be asked a particular question, and to read the verdict or advise the judge that a verdict cannot be reached. Other messages from the jury, especially regarding any problems experienced by the jurors, are usually conveyed to the judge in a note from the foreman.

(iv) Juror anonymity

Juror identification numbers were introduced by the *Jury Amendment Act 1997* (effective on 1 July 1998). The reform was influenced by complaints from jurors and incidents that appeared to be connected to revealing their names in open court. The Jury Task Force,³² which at that time was chaired by Justice Abadee of the Supreme Court, questioned whether measures needed to be taken to protect the safety of jurors and requested the Attorney General to review the existing practices. The Second Reading Speech to the Jury Amendment Bill stated:³³

³⁰ Information from 'How are people selected to sit on juries?' on the website of the Office of the Sheriff at <<http://www.agd.nsw.gov.au/ots.nsf/pages/jury3>>

³¹ 'Attendance at jury duty' at <<http://www.agd.nsw.gov.au/ots.nsf/pages/jury5>>

³² The Jury Task Force was formed in 1992 by the Chief Justice of NSW. Its members include representatives from the judiciary, the Attorney General's Department, and the Office of the Sheriff of NSW: Supreme Court of NSW, *Annual Review 2003*, Sydney, 2004, p 56.

³³ Minister for Local Government, Hon Ernie Page MP, Jury Amendment Bill, Second Reading Speech, *NSWPD*, 22 May 1997, pp 9101-9102.

The Government is mindful of its responsibility to protect members of the public who fulfil the important civic duty of jury service. At the same time, the Government does not wish in any way to undermine the trial process or prevent an accused person from receiving a fair trial. In this instance, it is clear that the withholding of a juror's name will not undermine the trial process or impinge upon the rights of an accused person by limiting his or her right to make a peremptory challenge...as a challenge solely based on a person's name is essentially a resort to stereotype. The only possible instance in which the name of a juror might assist the parties in the exercise of their rights to challenge is when the name may be relevant in disclosing a possible relationship with the accused person or witnesses. However, this bill proposes to address that concern by requiring prospective jurors to be informed prior to the commencement of each case of the nature of the proceedings and of the identities of persons involved..., so that jurors who feel they are unable to give an impartial judgment in the proceedings can seek to be excused.

The recent case of *Regina (Cth) v Ronen & Ors* [2004] NSWCCA 176 examined the issue of giving parties in a trial access to the names of the jurors. At the commencement of the trial of the defendants for conspiracy to defraud the Commonwealth of income tax, the defendants sought rulings on two questions. Firstly, whether, as a matter of construction, the *Jury Act 1977* (NSW) precludes an accused person from being supplied with the names and occupations of the members of the jury panel prior to the selection of the jury.³⁴ The trial judge answered this question in the affirmative. The second question was whether the *Jury Act 1977* thereby infringed s 80 of the Commonwealth Constitution and should not be applied to a trial for a Federal offence. (Section 80 of the Constitution guarantees simply that: 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed...') The trial judge answered the second question in the negative.

The defendants argued that the right to challenge potential jurors was an irreducible element of the right to trial by jury, but that without the names and occupations of potential jurors, the challenges (both peremptorily and for cause) could not properly be exercised and therefore a proper jury trial could not take place.

On appeal, the Court of Criminal Appeal (Ipp JA, with whom Grove J and Howie J agreed) upheld the trial judge's reasoning. The objectives of preventing jury tampering and the avoidance of threats and actual danger to jury members could not be achieved if the accused was to be informed of the identity of the panel members and subsequent jurors. The Court therefore found that the provision of names and occupations of potential jurors to the accused is not an essential element of the jury system. Ipp JA stated (at para 98-99):

³⁴ Section 29(4) prevents a person who is a jury panel member, or who is subsequently sworn as a juror, from being addressed or referred to otherwise than by his or her identification number. Section 37 prevents panel members and jury members from having to disclose their identity. However, the defendants submitted that there was nothing in ss 29 and 37 to prevent a judge from ordering the Sheriff to make an extract of the names, occupations and numbers of those on the panel and to provide the extract to the defence. The trial judge refused to make such an order.

...the content of the right to challenge has never been fixed in any absolute sense, and has frequently changed. In particular, there has never been an absolute right to know the names and occupations of potential jurors. The provision of the names and occupations of potential jurors has merely been, from time to time, part of the procedures of the jury system...

In my view, the provisions of the *Jury Act* that do detract from the accused person's right of challenge do not impinge on any incident that is fundamental, inherent in and of the essence of the system of trial by jury. Those provisions, in my view, as a matter of substance, do not impair the fundamentals of trial by jury.

The Court also confirmed that the possibility that revealing the names and occupations of jurors would uncover grounds for objections is reduced by s 38(7) of the *Jury Act 1977*, which requires the prosecution to inform the jury panel of the nature of the charge, identity of the accused, and the principal prosecution witnesses, and to call on the panel members to apply to be excused if they are not able to give impartial consideration to the case.

4.4 Peremptory challenges and challenges for cause

A peremptory challenge is a challenge that is made without needing to give a reason, and should be made before the juror has uttered their oath. Such challenges commonly involve a spontaneous assessment at face value. For instance, an accused might instruct counsel to object to any juror who appears to be from the same demographic group as the alleged victim, such as young Caucasian women.

In criminal proceedings, the defence and the prosecution each have three peremptory challenges without restriction, or more if the parties both agree to the challenges: s 42 of the *Jury Act 1977*. Introducing the three challenge limit in 1987, the Attorney General, Hon Terry Sheahan MP, stated:

The number of challenges available to the parties determines the extent to which they can mould the jury to their liking. Surely, the democratic principle of drawing a jury from a cross-section of the community is violated when peremptory challenges are used to systematically exclude certain groups from the jury or to stack it.³⁵

In civil proceedings, the number of peremptory challenges that each party can make is equal to half the number of jurors: s 42A.

A challenge for cause is a challenge with a stated reason and is determined by the presiding judge: s 46. These challenges are additional to the rights of peremptory challenge. Either party may challenge for cause. There is no numerical limit but challenges for cause are relatively uncommon, as some foundation for the application must be provided. For example, a juror could be known as a campaigner with particular views on an issue that is relevant to the trial.

³⁵

Jury (Amendment) Bill, Second Reading Speech, *NSWPD*, 19 November 1987, p 16524.

4.5 Deliberation and discharge of the jury

The jury determines questions of fact, which involves assessing the evidence and the testimony of witnesses. Legal argument over whether to allow certain material to be admitted into evidence takes place in the absence of the jury. When a preliminary examination of a witness (called a ‘voir dire’) is conducted during the proceedings, in order for the judge to assess the admissibility of their evidence, the jury is sent out of the courtroom.³⁶

At the end of the case, the judge gives a summing up and issues directions of law to the jury, which then deliberates before returning a verdict.

In *criminal trials* in New South Wales the jury’s verdict must be unanimous. Otherwise, the jury is known as a ‘hung jury’ and is discharged. The judge may discharge the jury if it finds, after examination on oath of one or more of the jurors, that they are not likely to agree on a verdict: s 56.

If the jurors are having difficulty arriving at a collective decision, the trial judge may exhort them to further deliberate and to consider the opinions of other jurors, but must not create pressure on individual jurors to adopt the majority position or to compromise their views. The judge should not state that failure to reach a verdict will result in public inconvenience and expense, or that jurors should engage in a degree of ‘give and take’: *R v Black* (1993) 179 CLR 44. In that case, the High Court formulated a model direction, known as a *Black* direction, to be given to juries experiencing disagreement.

In *civil trials*, majority verdicts are allowed where the jurors have retired for more than four hours and they are unable to agree on their verdict. The numbers required to form the majority are: in the case of a four person jury, the decision of three jurors; or in the case of a jury consisting of 12 persons (or reduced to nine, 10 or 11 persons), the decision of eight jurors.

If the jurors have retired for more than four hours and the judge finds, after examination on oath of one or more of the jurors, that they are not likely to agree on either a unanimous or majority verdict, the judge may discharge the jury: s 58. The court in civil proceedings has the additional power, granted by s 57A, to decide an issue of fact if the judge finds, after examination on oath of one or more of the jurors, that the jury is unable to agree on a decision about an issue of fact, and if the parties to the proceedings agree that the court should decide the issue.

In *coronial inquests* held before a jury, there is no provision for majority verdicts. Where the jury has retired for more than six hours, the coroner may discharge the jurors if, after examination on oath of one or more of them, the coroner finds that they are not likely to agree: s 59.

³⁶ Section 189 of the *Evidence Act 1995* sets out requirements for voir dire examinations and restricts the presence of juries.

4.6 Offences by or upon jurors

The *Jury Act 1977* outlines a range of offences, committed by or against jurors:

- **Providing false or misleading information to the Sheriff** when claiming to be disqualified, ineligible or exempted from serving as a juror, or otherwise not available, attracts a maximum fine of 10 penalty units (currently \$1100): s 62.
- **Failure to attend jury service** carries a maximum penalty of 20 penalty units (\$2200): s 63.³⁷
- **Impersonating a juror** is punishable by a maximum fine of 50 penalty units (\$5500): s 67.
- **Identifying a juror** – Publishing or broadcasting any material, or otherwise disclosing any information which is likely to lead to the identification of a juror or former juror (including their address) carries a maximum penalty of a fine of \$250,000 for a corporation, or in any other case a fine of 50 penalty units (\$5500) and/or two years imprisonment: s 68. The offence does not apply to the identification of a former juror *with* their consent. Nor does it apply to the disclosure of information by the Sheriff or any of the listed bodies or persons for the purposes of an investigation or prosecution of contempt of court or an offence relating to a jury.³⁸
- **Soliciting information from, or harassing, a juror or former juror** for the purpose of obtaining information about the deliberations of a jury, or how a juror/jury formed any opinion or conclusion in relation to an issue arising in a trial or coronial inquest is punishable by a maximum of seven years imprisonment: s 68A. The ‘deliberations’ of a jury include statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations. The provision does not prohibit a person from soliciting information from a juror or former juror in accordance with an authority granted by the Attorney General for the conduct of a research project into matters relating to juries or jury service. There is also scope for soliciting information from a juror or former juror for the purposes of an investigation or prosecution of an offence, the same as in s 68 for identifying a juror.
- **A juror must not wilfully disclose** to any person during a trial/coronial inquest information about the deliberations of the jury, or how the jury or a juror formed any

³⁷ Alternatively, s 66 provides that a person who failed to attend jury service may agree to receive a penalty notice (instead of having the matter dealt with at court) and pay a fine of 15 penalty units.

³⁸ The bodies are: the courts, the NSW Crime Commission, the Australian Crime Commission, the Independent Commission Against Corruption, the Police Integrity Commission, the Director of Public Prosecutions, the Police Service, or the Australian Federal Police. Nor does the offence apply to the disclosure of information by the Sheriff to a person in accordance with an authority granted by the Attorney General for the purpose of research.

opinion or conclusion about an issue in the trial/inquest: s 68B. Exceptions are provided for disclosing information to another member of the jury, or at the request or with the consent of the judge/coroner. The maximum penalty is a fine of 20 penalty units. There is a further offence if a juror or former juror, for a **fee, gain or reward**, discloses or offers to disclose such information to any person at any time. The maximum penalty increases to 50 penalty units.

- **A juror in a criminal trial must not make an inquiry** for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror: s 68C. The maximum penalty is 50 penalty units and/or imprisonment for two years.
- **An employer shall not dismiss or injure a person** in his or her employment, or alter the employee's position to their detriment, because the employee is summoned to serve as a juror: s 69. The maximum penalty is 20 penalty units.

In addition, the public justice offences under Part 7 of the *Crimes Act 1900* include:

- **Corruption of witnesses and jurors** – Section 321(1)(b) makes it an offence for a person to confer or procure any benefit (or offer same), intending to influence any person in their conduct or attendance as a juror, whether he or she has been sworn as a juror or not, and intending to pervert the course of justice. The maximum penalty is imprisonment for 10 years. The same penalty applies under s 321(2)(b) to a person who solicits, accepts, or agrees to accept any benefit on account of anything to be done or not done as a juror, or on account of not attending as a juror, intending to pervert the course of justice.
- **Threatening or intimidating jurors, judges or witnesses** – Section 322 of the *Crimes Act 1900* provides that a person who threatens, does or causes, any injury or detriment to any person intending to influence the conduct or attendance of any juror, whether he or she has been sworn as a juror or not, is liable to a maximum penalty of 10 years imprisonment.
- **Influencing witnesses and jurors** – Pursuant to s 323, a person who does any act intending, other than by the production of evidence and argument in open court, to influence any person's conduct as a juror, whether he or she has been sworn as a juror or not, is liable to a maximum of 7 years imprisonment.

It should be noted that a person who commits an offence against ss 321, 322 or 323 of the *Crimes Act 1900*, intending to procure the conviction or acquittal of any person of a serious indictable offence (ie. an offence punishable by imprisonment for five years or more) is liable to 14 years imprisonment.

- **Preventing, dissuading or obstructing jurors from attending** – A person who without lawful excuse wilfully prevents, obstructs or dissuades a person summoned as a juror from attending is liable to imprisonment for 5 years: s 325(2).
- **Reprisals or threats against jurors, judges or witnesses** – A person who threatens,

does, or causes any injury or detriment to any person on account of anything lawfully done by a witness or juror in any judicial proceeding commits an offence against s 326. The maximum penalty is imprisonment for 10 years. The same penalty applies where the person threatens, does, or causes, any injury or detriment because they believe the other person will or may serve as a juror.

4.7 Payment for jury service

Jurors are paid for jury service if they attend in accordance with the jury summons, unless they successfully apply to be excused from service: s 72 of the *Jury Act 1977*. The scales of daily fees and allowances are contained in Schedule 1 of the *Jury Regulation 2004*. For example, the attendance fee for the first day, if the person attends for more than four hours (whether or not the person is selected for jury service), is currently \$79.20. The rate of payment for attending *less* than four hours on the first day, if selected for jury service, is \$39.50. The attendance fee for the second to fifth day is \$79.20, rising to \$92.00 for the sixth to tenth day. \$107.40 is paid for the eleventh and subsequent days. No attendance fees apply if the person's employer pays their salary on the day(s) of attendance. A daily travelling allowance for the return journey between the juror's place of residence and the court is paid, whether or not public transport is used or a salary is being received.

5. JUROR MISCONDUCT

The accessibility of information through computerised resources, particularly the internet, has increased the danger of jurors uncovering details about criminal cases or the past activities of accused persons. The Court of Criminal Appeal in recent years has overturned several convictions for serious offences due to the inquiries undertaken by jurors. The Government responded by introducing legislative reforms to address the problem.

5.1 Concept of sequestering the jury

One hundred years ago, the procedure in felony cases was that the jury could not separate until they had delivered their verdict. The *Crimes (Amendment) Act 1924*, amending the *Jury Act 1912*, allowed a judge to permit a jury to separate *before* they considered their verdict in felony cases, except for murder or treason. The *Jury Act 1977* permitted the jury in criminal proceedings to separate at any time before retiring to consider their verdict, unless the judge ordered otherwise. Currently, if the judge orders, the jurors are also permitted by s 54 to separate at any time *after* they retire to consider their verdict, ie. during the period of deliberation. In practice, jurors are routinely permitted to separate during adjournments, overnight, and after they have retired to consider the verdict.³⁹

The unprecedented level of computer skills and access to electronic research methods among ordinary members of the community may provide grounds for reviving the concept of sequestering the jury, particularly for murder cases and other serious offences. The cost of accommodating jurors overnight is a relevant factor, but considerable expense is also involved when an appeal or retrial is caused by the jurors being ‘tainted’ by prejudicial publicity, intimidation, conducting their own research, or discussing the case with outsiders. In *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, Chief Justice Spigelman observed (at para 65): ‘In some cases it may be necessary to return to the past practice of sequestering the jury.’

5.2 Recent cases of juror misconduct

(i) *R v K*

The defendant in *R v K* (2003) 59 NSWLR 431 appealed to the Court of Criminal Appeal against his conviction for the murder of his first wife. At the trial, the judge had informed the jurors in his opening remarks that the case was actually a retrial, because an error had occurred in the original trial. (This avoided confusion when witnesses were cross-examined about evidence they had given in the earlier trial.) After the guilty verdict was delivered, most of the jurors went to a nearby hotel where they encountered the defence counsel and engaged in conversation.⁴⁰ Defence counsel learned that some of the jurors had discovered,

³⁹ Ian Barker QC, *Sorely Tried: Democracy and Trial by Jury in New South Wales*, Francis Forbes Lecture 2002, Dreamweaver Publishing, 2003, p 181.

⁴⁰ The Court of Criminal Appeal warned of the dangers of participants in a trial socialising (per Wood CJ at CL at p 450): ‘...I believe that the time has come for trial lawyers to consider very carefully whether it is appropriate for them to adjourn to hotels, in the near vicinity of

through internet research, that the defendant had previously been tried for the murder of his *second* wife, although he had been acquitted. The trial judge had instructed the jury about the irrelevance of any material apart from evidence called at the trial, but there was no specific requirement at the time to instruct jurors to refrain from making internet searches. The defendant appealed on the ground that the conduct of the jury caused a miscarriage of justice.

The Court of Criminal Appeal allowed the appeal. Wood CJ at CL (with whom Grove J and Dunford J agreed) explained the legal problems that occurred when the jurors considered material that was not part of the evidence:

Even though the appellant had been acquitted of that charge [ie. the murder of his second wife], it is not known whether the information which was recovered from the internet search revealed that circumstance, or was confined to a discussion of the fire and the death, and of the fact that the appellant had been charged. As I have earlier indicated, there was a risk of coincidence or tendency reasoning being employed, in those circumstances, by the relevant members of the jury, which had been totally uninstructed concerning these principles. There was also a risk of the matter having been viewed by those jury members as raising bad character, again without the benefit of any appropriate instructions.

Moreover, there is the circumstance that the jurors, who had undertaken the search, had not obeyed the preliminary direction by his Honour not to go beyond the evidence, which was presented in the trial. That they considered it appropriate to make the searches was clearly wrongful...: 59 NSWLR 431 at 448.

Wood CJ at CL advised that trial judges should specifically direct jurors not to undertake independent searches, by internet or otherwise:

I consider it highly desirable for judges now to routinely expand upon the direction, which it has become customary to give at the commencement of a trial, to the effect that the jury should not take into account any publicity, of which they may be aware, concerning the matter before them; to disregard, as being of no relevance, the fact that it involves a retrial (if that is the case); and to confine their deliberations to the evidence which is presented to them.

This direction should, in my view, now embrace an additional instruction that they should not undertake any independent research, by internet or otherwise, concerning the proceedings, or the law applicable thereto, with a suitable explanation as to why they should not do so: at 450.

Further amendments to the *Jury Act 1977* were suggested (at 449) in order to:

- Clarify and, if necessary, extend the application of s 68A (which prohibits soliciting information from a juror or former juror on the deliberations of the jury) to encompass

the trial courts, to which it seems to have become customary for some lawyers, police, media representatives, and jurors, to visit, at the conclusion of trials. There is a real risk of such an occasion developing into a general discussion, concerning the case and its outcome, in which the jurors are likely to join, possibly without any true awareness of the provisions of s 68A of the *Jury Act*. The possibility of an offence occurring in these circumstances is tangible.'

all aspects of the activities undertaken by the jury in the discharge of their duties, not simply the deliberative process after retiring to consider a verdict.

- Give the Office of the Sheriff express power to investigate, at the request of the court, and report back where a serious irregularity is suspected that may affect the integrity of the verdict.
- Prohibit jurors from making inquiries about the defendant on trial, until after the jury has given its verdict or the juror has been discharged by the judge.

(ii) *R v Skaf*

In *R v Skaf* (2004) 60 NSWLR 86, Bilal Skaf appealed against his conviction for aggravated sexual assault, while his brother, Mohammed Skaf, appealed his conviction as an accessory. The victim, a female acquaintance of Mohammed's, was driven to Gosling Park, Greenacre, where she was allegedly raped by Bilal Skaf and a second, unidentified male, in the presence of a group of men. A key issue in the trial was whether the victim had correctly identified Bilal Skaf. The adequacy of the lighting at the park was of relevance and evidence was given in that regard, including by a representative of the local council. The jurors retired to deliberate their verdict after 10 o'clock one morning. Later that afternoon, the foreman advised the judge that there was 'a little bit of frustration' among the jurors and asked if they could go home early. The jurors were released at 3.24 pm. The following day a guilty verdict was returned at 11.49 am. Some time after the trial, a solicitor unconnected with the proceedings received information that the foreman and another juror had visited Gosling Park together on the night before the verdict. There they inspected the lighting and conducted an experiment to assess if a person could be clearly recognised at night from a distance of about two to three metres.

The Skaf brothers appealed to the Court of Criminal Appeal on the ground, among others, that the trial miscarried because of the conduct of the jurors in visiting the park. The Court (Mason P, Wood CJ at CL and Sully J in a joint judgment) reasoned that:

Such information as the jurors obtained was not evidence and it was obtained in circumstances amounting to a want of procedural fairness (denial of natural justice) in that the accused were unable to test the material, comment upon it or call evidence to rebut or qualify it: 60 NSWLR 86 at 97-98.

...

The Court cannot be satisfied that the irregularity has not affected the verdict and that the jury would have returned the same verdict if the irregularity had not occurred...Attempts to reconstruct material events or to conduct experiments are fraught with danger, even if conducted under the control of the court. Conditions may be different in perceptible and imperceptible ways. This is especially the case where there may be movement and potentially variable lighting conditions or perspectives of view...These dangers increase exponentially when a view, coupled with an experiment, takes place in private and where its impact comes to be assessed years after the event: at 103-104.

The Court of Criminal Appeal held that the misconduct of the jurors caused the trial to miscarry, and ordered a new trial.

The Court also suggested that judicial directions be expanded, building on those already found in the *Criminal Trial Courts Bench Book* published by the Judicial Commission. The direction given to jurors to decide the case solely by reference to the evidence presented in court could be improved by adding two comments (at 105):

- (a) undertaking external research into the law or the factual background of the case may risk taking the juror to legal principles that do not apply in New South Wales, or to some commentary or statement of fact which was either inaccurate, or incomplete at the time that it was made; and
- (b) discussing the case with anyone other than fellow jurors will, almost inevitably, lead to such persons wishing to make some contribution or observation, which is of no value since they will not have heard or seen the evidence, or received the directions which are binding upon jurors, and will not be subject to the oath sworn or affirmation made by jurors.

Furthermore, the Court (at 105-106) outlined other instructions or explanations that it considered would be useful for trial judges to give to juries. These points related to jurors making independent inquiries (and some featured in subsequent legislative amendments):

- (a) jurors should not, individually or as a group, make a private visit to the scene of the alleged offence, or attempt a private experiment on any aspect of the case, as this would change their role from impartial jurors to investigators;
- (b) the only circumstances in which views or experiments are permitted are in the presence of all jurors, the legal representatives of the parties, and the judge, and where safeguards are taken to replicate (or point out differences in) the conditions existing at the time of the relevant events;
- (c) jurors must not cause or request anyone else to carry out inquiries, inspections, or experiments;
- (d) if it becomes apparent to any juror in the course of a trial that a fellow juror has made an independent inquiry, it should be brought immediately to the attention of the judge;
- (e) if any matter which is not in evidence has found its way into the jury room, then that should similarly be brought to the attention of the trial judge;
- (f) the reason for bringing such matters to the judge's immediate attention is that it may not be possible, otherwise, to put matters right.

The Court of Criminal Appeal's decision in the Skaf case was handed down in May 2004. Some of the immediate responses included:

- **Hon Bob Carr MP**, Premier of NSW, was quoted as saying, 'There's a warning here to everyone serving as a juror...the victim of this behaviour is the victim of the crime.'

The Premier reportedly ‘said the Government wanted to do all it could to prevent the rape victims having to relive their ordeals. This would include appeal courts putting themselves in the shoes of the jury, looking at the evidence that had been recorded, and coming to their own conclusion.’⁴¹

- **Nicholas Cowdery QC**, Director of Public Prosecutions (NSW), suggested that penalising jurors who defy the directions of the trial judge is one of the options that should be debated. Another option is ‘locking up’ jurors in sensitive cases, accommodating them overnight while they are in the process of deliberating their verdict, rather than allowing them to go home at the end of the day.⁴²
- **John Brogden MP**, Opposition Leader, supported the concept of legislation protecting sexual assault victims from having to give evidence again: ‘Where the evidence of an alleged victim is not found to be in question by an appeal court, the trial evidence should be accepted at retrial.’⁴³ In addition, the Government should legislate that a retrial can only be ordered over the conduct of jurors, if there is clear evidence that the jury was improperly influenced.⁴⁴
- **Andrew Tink MP**, Shadow Attorney General, advocated that assault cases should be videotaped at trial so the footage could be used in any retrial.⁴⁵

As a result of *R v K* and *R v Skaf*, the Jury Task Force, which advises the Chief Justice of New South Wales on jury matters, recommended amendments to the *Jury Act 1977*. The Criminal Law Review Division of the Attorney General’s Department sought the views of the Office of the Sheriff, the Law Society of New South Wales, the New South Wales Bar Association, the Public Defender’s Office, the Legal Aid Commission, the Office of the Director of Public Prosecutions, the Chief Judge of the District Court, and the Chief Justice of New South Wales in developing legal provisions.⁴⁶ The Attorney General, Hon Bob Debus MP, announced in Parliament on 2 September 2004 that a new offence would be introduced to prohibit jurors from conducting their own inquiries during trials: ‘The

⁴¹ Michael Pelly, ‘Maverick visit to park sparks rape retrial’, *The Sydney Morning Herald*, 7 May 2004, p 2.

⁴² No author, ‘DPP suggests penalties for disobeying jurors to protect trials’, ABC News Online, 1 April 2004, <<http://www.abc.net.au/news/newsitems/s1078651.htm>>

⁴³ Kylie Williams, ‘Jury visit to this park reignites girl’s ordeal’, *The Daily Telegraph*, 7 May 2004, p 9.

⁴⁴ No author, ‘Sydney brothers to face new rape trial’, ABC News Online, 6 May 2004, <<http://www.abc.net.au/news/newsitems/s1102397.htm>>

⁴⁵ Michael Pelly, ‘Maverick visit to park sparks rape retrial’, *The Sydney Morning Herald*, 7 May 2004, p 2.

⁴⁶ Tony Stewart MP, Jury Amendment Bill, Second Reading Speech, *NSWPD*, 27 October 2004, p 12097. The Law Society’s support for reform was also recorded in: ‘Activities of jurors should be further regulated’, *Law Society Journal*, Volume 42, Number 4, May 2004, p 8.

creation of this offence will provide a deterrent to jurors. It will remind them that they must not go outside the courtroom. They must not do their own experiments or investigations, or consult material, for example via the Internet, that is not part of the evidence before the court. This offence will carry a maximum penalty of two years.⁴⁷

The Attorney General also mentioned other steps that were being taken to discourage jurors from conducting their own inquiries. For example, the Judicial Commission of New South Wales was remodelling the standard directions a judge may give to a jury, whilst a jury handbook, explaining the responsibilities of juries in a clear manner, was being finalised by the Sheriff's Office.⁴⁸ Specifically in relation to juries in sexual assault cases, the Government engaged the Australian Institute of Criminology to research the effects that the use of video evidence might have on jury deliberations, including whether such evidence impacts upon witness credit in the eyes of the jury.⁴⁹ The Government also established a sexual offences task force in December 2004, with representatives from the legal profession, women's groups, police and other agencies, to examine issues such as the acquittal rate in sexual assault trials.⁵⁰

On 3 February 2005, the Supreme Court vacated the date scheduled for the retrial of the Skaf case (28 February 2005), after the prosecution informed the court that the complainant could not endure giving evidence again. The Director of Public Prosecutions, Nicholas Cowdery QC, had decided that without her testimony there was insufficient evidence to secure a conviction. In other words, the case could not proceed in the absence of the complainant.⁵¹

However, the Government responded by introducing statutory reforms that may allow a retrial to be held: see '**5.3 Jury Amendment Act 2004 and other new legislation**'.

⁴⁷ Attorney General, Hon Bob Debus MP, Questions Without Notice, 'Jury Service', 2 September 2004, *NSWPD*, p 10792.

⁴⁸ *Ibid*, p 10792.

⁴⁹ Premier, Hon Bob Carr MP, Questions Without Notice, 'Sexual Assault Victims', *NSWPD*, 31 August 2004, p 10511; Attorney General, Hon Bob Debus MP, Criminal Procedure Amendment (Evidence) Bill, Reply to Second Reading Debate, *NSWPD(LA)*, 23 March 2005, p 91 (proof). A report had not been released at the time of writing.

⁵⁰ Attorney General, Hon Bob Debus MP, Questions Without Notice, 'Transcript Use in Sexual Assault Retrials', *NSWPD*, 22 February 2005, p 13958; Attorney General, Hon Bob Debus MP, Criminal Procedure Amendment (Evidence) Bill, Reply to Second Reading Debate, *NSWPD(LA)*, 23 March 2005, p 91 (proof).

⁵¹ Charles Miranda and Nicolette Casella, 'No justice: Gang rape brothers escape their retrial', *The Daily Telegraph*, 4 February 2005, p 1; Charles Miranda, 'Let their evidence be set in stone', *The Daily Telegraph*, 4 February 2005, p 6; Michael Pelly, 'Girl can't go on, so Skafs clear on one rape', *The Sydney Morning Herald*, 4 February 2005, p 1; Martin Chulov, 'Gang rape pair avoid new trial', *The Australian*, 4 February 2005, p 1.

(iii) R v Fayka

Another incident of juror misconduct focused further attention on the problem in October 2004. The trial of Atilla Fayka on assault, affray and other charges relating to an altercation at a hotel in 2002, commenced in September 2004 in the District Court. Judge Graham Armitage instructed the jurors not to conduct their own investigations or consult the internet, and not to speak to their relatives about the case. The trial ran for 24 days and the jury was in the process of deliberating its verdict when the foreman alerted the judge, in a written note, that one of the jurors had admitted to researching the case on the internet. That juror had found a case involving a relative of the accused who was charged over the same incident but tried separately. Furthermore, a second juror had revealed to the jury that he/she had viewed the exterior of the hotel, discussed details of the case with his/her spouse and formed an opinion. Judge Armitage discharged the jury on 20 October 2004, noting that the trial had cost the public more than \$1 million. Daily costs were estimated at \$40,000 and one witness had travelled from Britain. The judge instructed the Sheriff's Office to consider further action against the jurors, and awarded costs to the defendant's lawyers.⁵²

5.3 Jury Amendment Act 2004 and other new legislation***(i) Legislation relating to juror disclosure and unauthorised research***

As a result of the controversial appeals in *R v K* (2003) 59 NSWLR 431 and *R v Skaf* (2004) 60 NSWLR 86, amendments to the *Jury Act 1977* were recommended by the Chief Judge at Common Law, Justice James Wood, and were endorsed by the Jury Task Force which is currently chaired by Justice Greg James.⁵³

The Jury Amendment Bill was introduced on 27 October 2004. The Second Reading Speech referred to the juror misconduct in *R v K*, *R v Skaf*, and *R v Fayka*:

...recent cases have demonstrated the danger in a jury's verdict being determined not by the evidence and the relevant law, but by external factors, such as personal experiments or inquiries or prejudicial material bearing on the case. It is a fundamental principle of our criminal law system that an accused is given a fair trial and is judged on the evidence given in court.

...

The bill will discourage jury misconduct and improve the procedures for investigating jury misconduct without discouraging participation in this important civic duty... There are three main legislative provisions to these amendments. Firstly, the bill creates a new offence of jurors conducting their own inquiries. Secondly, the bill expands the scope of the current offences of soliciting information from a juror and jurors disclosing information. Thirdly, and importantly, the bill empowers the Office

⁵² Les Kennedy, '\$1m trial aborted as jurors defy judge', *The Sydney Morning Herald*, 21 October 2004, p 3.

⁵³ Attorney General, Hon Bob Debus MP, Questions Without Notice, 'Jury Service', *NSWPD*, 2 September 2004, p 10792.

of the Sheriff to investigate jury irregularities and report back to the court.⁵⁴

The *Jury Amendment Act 2004* commenced on the date of assent, 15 December 2004.⁵⁵ The new provisions inserted in the *Jury Act 1977* were:

- **Section 55DA – Examination of juror for making private inquiries about trial matters:** A judge may examine a juror on oath to determine whether a juror has engaged in any conduct that may constitute a contravention of section 68C (which prohibits a juror in a criminal trial from making an inquiry for the purpose of obtaining information about the accused). The Second Reading Speech clarified that:

A juror will not be able to refuse to answer questions from the judge on the basis that the answers may incriminate the juror. However, the longstanding protection against self-incrimination is retained by providing that the answers given cannot be used against the juror in future prosecutions...A juror may still be prosecuted on the basis of other evidence, such as the testimony of other jurors. In most cases there will be other evidence against the juror because it is likely that the judge's questioning would arise out of material drawn to the judge's attention.⁵⁶

- **Section 68B – Disclosure of information by jurors:** A juror must not, except to another juror, or with the consent or at the request of the judge/coroner, wilfully disclose to any person *during* the trial/coronial inquest information about: (a) the deliberations of the jury; or (b) how a juror/jury formed any opinion or conclusion in relation to an issue arising in the trial/inquest. The maximum penalty is a fine of 20 penalty units (\$2200). If a juror or former juror, for a fee, gain or reward, discloses or offers to disclose information about those same matters (at any time), the maximum penalty rises to 50 penalty units (\$5500). The 'deliberations' of the jury include statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.
- **Section 68C – Inquiries by a juror about trial matters:** A juror in a criminal trial, from the time of being sworn as a juror until being discharged, must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror. The maximum penalty is 50 penalty units and/or two years imprisonment. The provision is intended to 'provide an appropriate deterrent to jurors who are tempted to disregard the directions of a judge.'⁵⁷ The concept of 'making an inquiry' includes:
 - (a) asking a question of any person;
 - (b) conducting any research, for example, by searching an electronic database or the

⁵⁴ Tony Stewart MP, Jury Amendment Bill, Second Reading Speech, *NSWPD*, 27 October 2004, p 12097.

⁵⁵ Pursuant to section 2 of the *Jury Amendment Act 2004*.

⁵⁶ Tony Stewart MP, Jury Amendment Bill, Second Reading Speech, *NSWPD*, 27 October 2004, p 12097.

⁵⁷ *Ibid*, p 12097.

- internet for information;
- (c) viewing or inspecting any place or object;
- (d) conducting an experiment;
- (e) causing someone else to make an inquiry.

- ***Section 73A – Investigation by the Sheriff of jury irregularities:*** If there is reason to suspect that the verdict of a jury in a criminal trial may be, or may have been, affected because of improper conduct by a juror, the Sheriff may, with the consent or at the request of the Supreme Court or District Court, investigate the matter and report to the court on the outcome of the investigation.⁵⁸ The Second Reading Speech confirmed:

This new section will formalise a process whereby the trial court or appeal court can ask the Sheriff to investigate a suspected irregularity. It is the function of the Sheriff to inform the court of the nature of an irregularity. The court will use this information to determine whether to discharge a jury, or whether to allow an appeal against a conviction.

It must be emphasised that the principal function of the Sheriff's investigation is to inform the court of the nature of any irregularity that may have affected a jury's verdict. It is not the place of the Sheriff to investigate a criminal offence, although any information he gathers will be used to assist the police in any subsequent investigation. Where it is reasonably suspected that an offence under section 68C has occurred, the matter should be referred to the police for investigation and prosecution.⁵⁹

(ii) Legislation relating to sexual assault cases

On 3 March 2005, the Attorney General, Hon Bob Debus MP, introduced the Criminal Procedure Amendment (Evidence) Bill in the Legislative Assembly, to address the predicament typified by the complainant in the Skaf case, when the conviction was overturned on appeal. The objective of the bill is to permit the record of a complainant's evidence in a sexual assault trial to be admitted in any retrial that is ordered following a successful appeal.

The Coalition supported the bill, but pointed out that the Government had initially been sceptical when the Opposition proposed such a reform in May 2004.⁶⁰ Replying to the Second Reading Debate, the Attorney General explained the competing principles at stake: the right of an accused to face his or her accuser; the importance of ensuring a fair trial; the need to protect complainants from psychological harm; and the risk that evidence *not* given in person could be regarded as less persuasive by juries and result in a higher acquittal rate

⁵⁸ The prohibitions against soliciting information from jurors, and against jurors disclosing information, do not apply to a Sheriff's officer conducting an investigation. Also, the Sheriff may, despite the usual anonymity of jurors, include a juror's name or other matter that identifies a juror in a report to the court under this section: ss 73A(2),(3)&(5).

⁵⁹ Tony Stewart MP, Jury Amendment Bill, Second Reading Speech, *NSWPD*, 27 October 2004, p 12098.

⁶⁰ Criminal Procedure Amendment (Evidence) Bill, Second Reading Debate, 23 March 2005, *NSWPD(LA)*, particularly Shadow Attorney General, Andrew Tink MP, p 81 (proof), and Andrew Constance MP, p 89 (proof).

in sexual assault trials. The Attorney General observed that ‘...there is an acute awareness in legal circles of the potential practical ramifications associated with the proposal to give a complainant’s evidence in some way other than in person... The Government has taken into account the potential ramifications and believes that the protection of the complainant and the overriding public interest lies in allowing the possibility for these cases to be retried, should that ultimately be the only way in which a matter can proceed.’⁶¹

The Criminal Procedure Amendment (Evidence) Bill passed the Legislative Assembly on 23 March 2005. (It had not yet been introduced in the Legislative Council at the time of finalising this briefing paper.) The bill’s intended amendments to the *Criminal Procedure Act 1986* include:

Prosecutor can tender original evidence – If a person is convicted of a sexual offence and, on a conviction appeal a new trial is ordered, the prosecutor may tender in the new trial a record of the original evidence of the complainant: proposed s 306B(1). If a record of the original evidence is admitted, the complainant is not compellable to give any further evidence in the proceedings: proposed s 306C.

Complainants may elect to give further evidence – Even if a record of the original evidence is admitted, the complainant may, with leave of the court, choose to give further oral evidence: proposed s 306D(1). The grant of leave depends on the court being satisfied that it is necessary for the complainant to give further oral evidence: to clarify matters relating to the original evidence; or to canvas material that has become available since the original trial; or in the interests of justice. If leave is given, the court is to ensure that the complainant is questioned only in relation to matters that are relevant to the reasons for the grant of leave: proposed s 306D(3).

Therefore, the complainant will have a choice whether to give their evidence afresh, give no further evidence, or give limited further evidence. The Attorney General observed: ‘It is important that complainants can choose to give evidence on a retrial. It empowers complainants and allows them a decision-making role in the court process. The prosecutor will no doubt advise complainants that the case will be stronger if they can manage to give all their evidence again in front of a new jury.’⁶²

Best available record – A record of the original evidence of the complainant must be the best available record of the evidence, meaning: an audiovisual recording of the evidence; or, if that is not available, an audio recording; or if neither of those is available, a transcript of the evidence: proposed s 306E. An audiovisual record has the highest status because it is the closest to evidence in person. The importance of the jury being able to visually assess the demeanour of the witness giving evidence is widely acknowledged, whereas printed transcript does not convey a witness’s tone of voice, facial expressions, physical

⁶¹ Attorney General, Hon Bob Debus MP, Criminal Procedure Amendment (Evidence) Bill, Reply to Second Reading Debate, 23 March 2005, *NSWPD(LA)*, p 92 (proof).

⁶² Attorney General, Hon Bob Debus MP, Criminal Procedure Amendment (Evidence) Bill, Second Reading Speech, *NSWPD*, 3 March 2005, p 14651.

mannerisms, and the like.⁶³

The Attorney General anticipated an expansion of audiovisual recording technology in sexual offence cases: ‘Within the next two years I expect that facilities will be available for the audiovisual recording of a complainant’s evidence in sexual assault trials. We will prioritise the rollout of facilities and ensure that the trial complexes that hear the greatest number of sexual assault trials have priority in the installation of recording facilities.’⁶⁴

Notice must be given – The record of the original evidence will be admissible only if the prosecution gives the court and the accused notice of the prosecution’s intention to tender the record: proposed s 306B.

Hearsay rule will not apply – The hearsay rule under s 59 of the *Evidence Act 1995* prevents the admission of representations made by a complainant in a previous trial to prove the facts upon which the prosecution seeks to rely in a retrial. There are limited exceptions under s 65, for example, if a witness is not available and has given evidence in prior proceedings. However, there was formerly no exception where the complainant was available but *unwilling* to give further evidence. The hearsay rule will cease to be a barrier to the tendering of a complainant’s record of evidence in a sexual offence retrial, when proposed s 306B(4) of the *Criminal Procedure Act 1986* is enacted.

Trials ordered before commencement – The changes also apply to new trials ordered *before* the commencement of the amendments, including retrials that have begun or been partly heard: proposed s 306B(9). This could enable the prosecution in the Skaf case to continue and a new one to be set down.

On 23 March 2005, the Attorney General introduced a further package of sexual assault reforms in the Legislative Assembly, under the Criminal Procedure Further Amendment (Evidence) Bill. They address such matters as strengthening the provisions in the *Criminal Procedure Act 1986*: to require the evidence of complainants in sexual cases to be given in ‘closed court’; to disallow improper questioning; to prevent the unauthorised copying and circulation of ‘sensitive evidence’; and to entitle complainants to have support persons present while giving evidence.

5.4 Judgments and other material on the internet

The Chief Justice of New South Wales, Hon James Spigelman AC, has acknowledged the advantages and disadvantages of legal resources becoming computerised, and the likelihood that problems will continue in the future as more documents are generated in

⁶³ This point was made by numerous legal practitioners and commentators in the media coverage leading up to the legislation, eg. John McIntyre, President of the Law Society of New South Wales, and Chris Craigie SC, Senior Public Defender: quoted by Michael Pelly and Anne Davies, ‘New law may allow Skaf rape retrial’, *The Sydney Morning Herald*, 5-6 February 2005, p 3.

⁶⁴ Attorney General, Hon Bob Debus MP, Criminal Procedure Amendment (Evidence) Bill, Reply to Second Reading Debate, 23 March 2005, *NSWPD(LA)*, p 93 (proof).

electronic form:

The opportunity of access by the general public has been transformed by electronic accessibility. In this respect, I refer not only to the possibility of access to final judgments, including criminal sentences. I also refer to the possibility of access to the process of a trial, even on a real-time basis, and the possibility of access to court files, which will increasingly be in electronic form, even prior to a trial.⁶⁵

...

Developments in technology pose new challenges to the ability to ensure a fair trial. By reason of on-line access and the efficiency of search engines, access to prior convictions and other information about the conduct of individual accused or witnesses has been transformed. The assumption that adverse pre-trial publicity will lose its impact on a jury with the passage of time may no longer be valid. Changes of venue may no longer work in the way they once did. In a number of proceedings, which will only grow, the ease of access to adverse information has arisen in applications for the discharge of a jury or in the context of an appeal against conviction...⁶⁶

Courts publish judgments on their own websites, and they also appear on the websites of other organisations such as the Australasian Legal Information Institute (at www.austlii.edu.au). If persons selected for jury service use these resources to locate information that exceeds the evidence presented in the case, their reasoning could be adversely affected. For example, the discovery of a sentencing judgment for another offence committed by the accused, would contravene the principle that the jury is to focus solely on the allegations before them and not have knowledge of prior convictions (unless the prosecution is presenting 'tendency' evidence to establish that the accused has a propensity to behave in a particular manner). Another type of judgment that could have a damaging impact if seen by jurors is the interlocutory judgment, which explains the judge's ruling on an issue that was ventilated during or at the beginning of the trial. These interlocutory rulings often deal with the admissibility of evidence and are therefore debated and determined in the absence of the jury. If the evidence in question is ruled inadmissible, the intention is that the evidence should *not* be known by the jury. Lawyers, however, have a keen interest in gaining electronic access to judgments that address significant points of law.

The Criminal Law Committee of the Law Society of New South Wales suggested in 2004 that there is an immediate need for the development of a judicial protocol on the publication of judgments on the internet. The delay of publication until all substantive issues in the case are dealt with would, the Committee reasoned, provide additional protection against prejudice to the accused and the process of achieving a fair trial.⁶⁷

⁶⁵ Honourable J.J. Spigelman AC, 'Open Justice and the Internet', *Judicial Officers' Bulletin*, Volume 16, Number 1, February 2004, p 2.

⁶⁶ *Ibid*, at pp 3-4.

⁶⁷ No author, 'Activities of jurors should be further regulated', *Law Society Journal*, Volume 42, Number 4, May 2004, p 8.

The availability of interlocutory judgments on law websites was recently considered in the case of *R v Crowther-Wilkinson* [2004] NSWCCA 249. Several pre-trial issues were heard and determined by the judge before the jury was empanelled in the defendant's murder trial. Two interlocutory rulings were published on the Supreme Court's website (at www.lawlink.nsw.gov.au/sc) before or during the trial. The defendant was convicted and appealed to the Court of Criminal Appeal. One of the questions on appeal was whether the trial miscarried by reason of the publication on the internet of the interlocutory judgments. The Court of Criminal Appeal (Wood CJ at CL, with whom Dowd J and Kirby J agreed) in dismissing the appeal, found that each case must be decided on its own facts. There is no general proposition that the possibility of access to material about the accused that is not before the jury will lead to a miscarriage of justice: at para 212. In the present case, there was nothing to suggest that the jurors had accessed the interlocutory judgments. The trial judge had directed the jury that they were to base their decision only on the evidence presented, and gave them a further specific instruction not to 'surf' the internet. The information contained in the two judgments was, for the most part, eventually placed before the jury or was innocuous. The Crown case against the appellant was 'absolutely compelling, such that his conviction would have been inevitable, whether or not the judgments were accessed by one or more members of the jury': at para 225.

The temporary removal of court judgments from the internet or the limiting of access to them does not, however, resolve the issue of other information available electronically, such as articles and opinions on criminal cases and accused persons. Another strategy could be to adopt a preventative approach and seek the removal of any relevant material on the internet. But whether such an endeavour would be completely effective, and which agency or party should bear the burden on their time and resources, are debatable points. In *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324, Chief Justice Spigelman suggested 'that it may be desirable for the Crown to conduct searches in advance of a trial and, where necessary, request Australian-based websites to remove references to an accused for the period of a trial': at para 65.

6. IMPACT OF PREJUDICIAL PUBLICITY ON JURIES

An ongoing issue connected with jury trials is the degree to which prejudicial publicity before or during the proceedings can influence the verdict. The case of *R v Sheikh* in March 2004 revived debate on this issue.

(i) *Law and Justice Foundation study*

Empirical studies may help to establish whether prejudicial publicity is a substantial problem for juries. A collaborative research project was undertaken on criminal trials by the Law and Justice Foundation and the University of New South Wales. The project directors were Professor Michael Chesterman, an expert in media law, and Associate Professor Janet Chan, from the School of Social Science and Policy at the University of New South Wales.

The study explored the likely impact of media publicity in 41 criminal trials heard by juries between mid 1997 and mid 2000 in New South Wales.⁶⁸ Judges, barristers, and former jurors involved in the trials were interviewed. Most of the trials (38 out of 41) attracted publicity before and/or during the trial that related specifically to the offence and/or the accused. This is termed ‘specific publicity’ in the study. The majority of the cases (31 out of 41) were heard in the Supreme Court, with the remainder heard in the District Court. 35 of the 41 trials took place in metropolitan Sydney. In 30 trials, the principal offence was described as unlawful homicide (although this is not the actual name of a charge in New South Wales).

The findings on jurors’ recall of pre-trial publicity included:

- In 78% of the trials in which media reports were in fact published, jurors recalled reports of the commission of the alleged offence. Jurors less frequently (in 50% of cases) recalled reports of the arrest of the accused.
- In 53% of the trials in which some form of pre-trial publicity was recalled by at least one juror, the publicity was discussed in the jury room.
- Jurors were more likely to recall pre-trial publicity in three situations: (a) when it related to accused people who were independently well-known in the community; (b) when it related to offences committed in an area where a juror lived; or (c) when jurors did not encounter the publicity, even though it was released before the trial, until after the trial began.

⁶⁸ Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales*, 2001, Justice Research Centre, Law and Justice Foundation of NSW. Findings are taken, in particular, from the Summary of Report on pp xi-xxii and Concluding Observations on pp 195-214. The descriptions of some of the findings were drawn from: Michael Chesterman, ‘Criminal Trial Juries and Media Reporting’, *Reform*, Issue 85, Summer 2004/05, Australian Law Reform Commission, p 23.

During the trial, despite judicial instructions, one or more members of the jury were likely to follow newspaper coverage of the trial itself. This occurred in all of the 34 trials that received coverage. In 32 of the 34 trials, the coverage was discussed, at least briefly, in the jury room. Publicity during the trial other than newspaper reports, such as TV or radio reports or commentary, was less likely to be noticed.

Jurors did not perceive that publicity had a great impact on them. In the 38 trials which received 'specific publicity' only 4% of the jurors interviewed considered that the publicity may have influenced them, and only 7% considered that it may have influenced their fellow jurors. These juror assertions were examined by the authors using other indicators, including: the existence of significant disagreements during the deliberations; the reaching of a verdict by compromise; a lack of active participation of jurors in the discussion; the opinions of the trial judge and counsel on whether the verdict was justifiable on the evidence; the extent to which the publicity was biased towards or against the accused; and the existence of any factual information in the publicity that was not replicated in the evidence at court. Some of the findings on the influence of publicity upon jurors were:

- In 22 of the 34 trials in which there was jury awareness of coverage (65%), one or more jurors, without being specifically asked, stated in their interview that the newspaper coverage of their trial was inaccurate or inadequate.
- In 30 of the 40 trials in which the jury was required to deliver a verdict, all of the judges/lawyers interviewed considered the verdicts to be 'safe' (ie. supported by the evidence). In two trials, the verdicts were considered unsafe by two or more of the judges/lawyers. The verdicts in these two cases were in line with the tenor of surrounding publicity.
- In three of the 40 trials, it seemed likely that publicity was determinative of the verdict, and in a further seven may possibly have been determinative.
- In five of the trials, unbeknownst to the judge or counsel, some or all of the jury discovered that the accused had previously been charged with or convicted of an offence similar to the one being tried. Although this appeared to have exerted an influence on the views of at least some of the jurors, it was not found to have led to a clearly unsafe verdict.

In conclusion, given that high-profile trials were selected for study, the proportion in which the verdict was considered likely to have been publicity-driven rather than based on the evidence was relatively small (8%). In a further group (10%) it was considered possible, rather than likely, that the verdict was publicity-driven. In a number of other cases, evidence of influence on the perceptions of individual jurors was found, but the jury as a whole succeeded in dealing with or managing this influence, so that ultimately it appeared not to be determinative of the verdict.

A second project at the University of New South Wales is exploring further the influence upon jurors of the knowledge of past convictions or other similarly prejudicial information

about the character of the accused.⁶⁹

(ii) *R v Sheikh*

Tayyab Sheikh was charged with sexual assault offences along with four alleged co-offenders. He was granted a separate trial, which commenced after the jury in the co-offenders' trial had retired to consider their verdicts. When that jury returned guilty verdicts there was extensive publicity, confirming the connection between the co-offenders' trial and the trial of Sheikh. Trial counsel for Sheikh applied to discharge the jury and delay the trial, but the trial judge rejected the applications.

On appeal, Sheikh submitted that the trial judge had erred by not adjourning Sheikh's trial and that the directions which had been given to the jurors to confine their consideration to the evidence before them were insufficient to remove the prejudice. The Court of Criminal Appeal (Mason P and Wood CJ at CL in a joint judgment; Sully J dissenting) allowed the appeal, set aside the conviction, and ordered a retrial: *R v Sheikh* (2004) 144 A Crim R 124.

The principles governing the impact of extraneous material on a fair trial were outlined in the majority judgment:

[20] The principles are not in doubt. The appellant bears the onus of establishing that he may have lost a chance which was fairly open to him of being acquitted (cf *Mraz v The Queen* (1955) 93 CLR 493 at 514). He was entitled to be tried solely on the evidence led in his trial.

[21] The criminal justice system proceeds on what McHugh J described as "*the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge*" (*Gilbert v The Queen* (2000) 201 CLR 414 at 425[35]). Merely because a jury gains access to inadmissible material does not mean that the trial miscarries even if that material is damaging in some way to the accused.

[22] But there are questions of degree. Sometimes the extraneous material is so overwhelming in its potential impact that a fair trial has been compromised...

[23]...The courts have used various remedies including adjournment and express directions to the jury to exclude from their minds anything heard or perceived outside the courtroom. In some instances none of these remedies will be fully or sufficiently effective (*Murphy v The Queen* (1989) 167 CLR 94 at 98-99)...

[26]-[27] Appellate courts give broad deference to the decisions of trial judges faced with applications for discharge and/or adjournment. But there is undoubted jurisdiction under s 6 of the *Criminal Appeal Act* to set aside a conviction in an extreme case if the trial has miscarried because of the atmosphere of external hostility in which it was conducted...In our view, this was such a case...

⁶⁹

Michael Chesterman, 'Criminal Trial Juries and Media Reporting', *Reform*, Issue 85, Summer 2004/05, Australian Law Reform Commission, p 23.

The majority found that the judicial directions to the jury did not remove the prejudice of the media coverage:

[40] The directions given to the jury in the appellant's trial did not, in our view, remove the prejudice to a degree that enables us to be confident that the trial was not compromised... The feelings of anger, revulsion and general hostility to young Lebanese men that emanated from the media coverage of the earlier trial would have lingered heavily in the atmosphere of the appellant's trial. Its fairness and the appearance of its fairness were undermined to an unacceptable degree due to the unnecessary decision to direct back-to-back trials.

[41] It is always regrettable that a new trial should be ordered, especially in a sexual assault case. But a conviction following an unfair trial is a conviction obtained at too high a price. The law must ever strive to uphold this standard, in the interests of all.

In a dissenting judgment, Justice Sully reasoned that:

[121] The chance of acquittal that was fairly open to the appellant was, essentially, that the jury, having seen, heard and assessed the evidence of the complainant and his own contradictory evidence, would conclude that there remained a reasonable possibility that his version was correct. The jury, plainly, accepted the complainant's evidence and rejected the contrary evidence of the appellant.

[122] It follows that the appellant's present argument must be that he lost that fair chance of acquittal because the refusal to discharge the jury entailed that the assessment of the competing cases was made by jurors whose fairness and objectivity had been subverted by the media coverage of which the appellant now complains.

[123] There are in my opinion two flaws in this argument.

[124] First: there being no submission that the verdicts cannot be supported reasonably on the evidence, the argument itself entails, not the drawing of a rational inference from facts admitted or proved, but giving effect to unsubstantiated speculation.

[125] Secondly: the argument does not give due weight to his Honour's instructions to the jury.

(iii) Private Member's Bill

On 9 December 2004, the Shadow Attorney General, Andrew Tink MP, introduced a Private Member's Bill in response to the Sheikh case. The object of the *Criminal Appeal Amendment (Jury Verdicts) Bill* is to limit the circumstances in which a court can determine that there has been a miscarriage of justice in a criminal trial because of prejudicial media publicity.

The proposed legislation would amend the *Criminal Appeal Act 1912* (inserting s 6AAA) to provide that 'the court must not allow an appeal against the verdict of a jury on the ground that there was a miscarriage of justice due to prejudicial material published or broadcast relating to the case, unless it is satisfied that the material actually influenced an

opinion or conclusion formed by the jury or a member of the jury causing a miscarriage of justice.’

For the purpose of deciding whether to allow the appeal, the court may examine a juror on oath to determine:

- (a) whether the juror read, saw or heard the alleged prejudicial material; and
- (b) whether the juror was influenced by the material.

Introducing the bill, Mr Tink emphasised the importance of the jury being properly instructed, and the impact of media reports being objectively assessed:

The onus is on Parliament to craft rules that make it clear to jurors what their responsibilities are. The onus is on the judiciary to ensure that those rules and the law that develops around them are explained to jurors in such a way that honest, reasonable, conscientious jurors of ordinary ability understand exactly what they have to do, what they have to consider and what they have to put out of their minds. That is where we must focus our attention. It is important to give juries the benefit of the doubt regarding media comment and that a jury’s verdict be overturned only if there is actual evidence of inappropriate media influence on jurors. The Court of Criminal Appeal should step in only in that circumstance.⁷⁰

In support of the proposed reform, Mr Tink referred to the minority decision of Justice Sully in *R v Sheikh* (2004) 144 A Crim R 124 at paras 122-125 (quoted above), as well as the comments of Chief Justice Spigelman in *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324 (NSW Court of Appeal, 15 September 2004):

There are now a significant number of cases in which the issue has arisen as to whether or not an accused was able to have a fair trial in the light of substantial media publicity... Those cases have decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice. Trial judges of considerable experience have asserted, again and again, that jurors approach their task in accordance with the oath they take, that they listen to the directions that they are given and implement them. In particular that they listen to the direction that they are to determine guilt only on the evidence before them: at para 103.

⁷⁰ Andrew Tink MP, Criminal Appeal Amendment (Jury Verdicts) Bill, Second Reading Speech, 3 March 2005, *NSWPD*, p 14607.

7. MAJORITY VERDICTS

7.1 Issues relating to majority verdicts

(i) Arguments for and against majority verdicts

Various arguments have been raised in favour of introducing majority verdicts in criminal trials in New South Wales. Some of the supporting arguments involve criticisms of unanimous verdicts:⁷¹

- Majority verdicts have operated in other Australian jurisdictions without controversy for many years. They were first introduced in South Australia in 1927, and are also available in Victoria, Western Australia, Tasmania and the Northern Territory. None of the States or Territories that introduced majority verdicts have reversed their decision and returned to unanimous verdicts.
- Majority verdicts avoid the injustice of a single ‘rogue’ juror holding out against the otherwise common view of the remaining jurors, on peculiar or unreasonable grounds, or because of personal beliefs, or due to a deliberate or perverse decision to not cooperate.
- Being able to omit the dissenting vote of one juror also allows for the possibility of a juror being corrupted, influenced, or bribed.
- The increased expenses, wasted resources, and delays caused by hung juries could be avoided, at least in some cases, by majority verdicts. The impact on court statistics would depend on whether majority verdicts of 11:1 or 10:2 were allowed.
- The concept of ‘beyond reasonable doubt’ does not depend on having a unanimous jury. In other words, reasonable doubt cannot be quantified in a numerical way to mean that 100% of jurors, no matter what the size of the jury, must agree unanimously. Rather, each juror, in his or her own mind, is required to find the accused guilty beyond reasonable doubt. Whether to allow a majority of those jurors’ determinations to become the verdict is a separate issue.
- Unanimity is undemocratic, allowing a small minority to frustrate the decision of the majority. There are numerous situations in the justice system when a majority decision is imposed, such as among appellate judges in the Supreme Court of New South Wales and the High Court of Australia. A majority vote also applies to the passage of legislation by Parliament.
- Unanimity may reflect that some jurors have been pressured or have compromised

⁷¹ The arguments presented were substantially derived from: Gareth Griffith, *Majority Jury Verdicts*, NSW Parliamentary Library Briefing Paper No 6/96 (1996) and *Majority Jury Verdicts*, Update to Briefing Paper No 6/96 (2000).

their views. It creates the incentive to intimidate or improperly influence jurors.

Some key arguments against adopting majority verdicts are:

- They contravene the time-honoured principle of the unanimous verdict, which can be regarded as an essential ingredient of trial by jury and an important protection against wrongful conviction. Public confidence in jury decision-making will be shaken if verdicts are not unanimous.
- Majority verdicts create a danger that the issues involved in the trial will not be debated as thoroughly, and the views of each individual juror will not be heard and discussed to the same extent, as occurs when the verdict must be unanimous. The emphasis shifts to ‘getting the numbers’ required (eg. 10 out of 12) and once this is achieved the views of the one or two remaining jurors, who could conceivably be correct, will be disregarded.
- In criminal trials, majority verdicts do not provide sufficient certainty. It has been argued that they compromise the criminal standard of proof, namely, that the accused is guilty beyond reasonable doubt. Or similarly, it is argued that a majority verdict carries a greater risk of convicting an innocent person and therefore undermines the presumption of innocence (ie. that the accused is assumed innocent until proven guilty).

(ii) BOCSAR studies

Studies by the NSW Bureau of Crime Statistics and Research (BOCSAR) suggest that majority verdicts of 11:1 or even 10:2 would not have a great impact on the rate of hung juries. For example, in a study published in 1997, BOCSAR found that approximately 10% of criminal jury trials ended with the jury hung on one or more charges.⁷² This translated to a figure of 33 hung trials out of 343 trials analysed in late 1996 and early 1997. It was estimated that introducing majority verdicts in criminal trials would provide savings in court time of around 2.1% where either a majority of 11:1 or 10:2 was permitted, but around 1.4% where the majority was restricted to 11:1. These figures fell to 1.7% and 1.1% respectively when it was taken into account that six of the 33 hung trials involved Commonwealth offences, which require a unanimous verdict.⁷³

More recently, in a study published in 2002, BOCSAR examined trial records between 1 July 1997 and 30 June 2000.⁷⁴ Some of the study’s findings on criminal trials in the

⁷² Pia Salmelainen, Roseanne Bonney and Don Weatherburn, ‘Hung Juries and Majority Verdicts’, *Crime And Justice Bulletin*, Number 36, July 1997, NSW Bureau of Crime Statistics and Research.

⁷³ The High Court of Australia has interpreted s 80 of the Australian Constitution as requiring a jury verdict to be unanimous in a trial on indictment for an offence against a Commonwealth law: *Cheatle v The Queen* (1993) 177 CLR 541.

⁷⁴ Joanne Baker, Adrian Allen and Don Weatherburn, ‘Hung Juries and Aborted Trials: An Analysis of their Prevalence, Predictors and Effects’, *Crime and Justice Bulletin*, Number 66, March 2002, NSW Bureau of Crime Statistics and Research.

District Court were:

- About 16% of criminal trials failed to reach a conclusion either because the jury was unable to reach a verdict or the judge aborted the trial.
- In 1999, hung juries resulted in 176 days of court time wasted, while aborted trials resulted in wastage of about 238 days. If the prevalence of hung juries and aborted trials in New South Wales were halved, the District Court would be able to dispose of an additional 44 trial cases a year.
- Juries were more likely to be *hung* if: the trial was held in the Sydney metropolitan area; the trial was long; or no adjournment was sought before the trial. The authors suggested explanations for these findings. For example, metropolitan courts attract a more diverse range of jurors, whereas jurors in country trials may be more likely to know each other and therefore less inclined to disagree. One reason why longer trials are more likely to end in a hung jury is that the greater the volume and complexity of the evidence, the greater the chance that jurors will disagree on its interpretation.
- Trials were more likely to be *aborted* if: they were held in Sydney; they involved multiple offence counts; they were for sex offences, violence-related offences, or fraud offences; there were multiple accused; or there was a *voir dire* (an examination and determination of a matter of law by the judge in the absence of the jury). The most common reasons given by judges for aborting trials related to the introduction of inadmissible evidence, or to a jury-related factor, such as a juror knowing a person involved in the trial.

On the issue of whether the introduction of majority verdicts would help to reduce the incidence of hung juries, the authors stated: ‘The evidence we have reviewed provides few grounds for confidence in this conclusion. It is possible that improvements in the instructions to jurors or changes i[n] the way the jury spokesperson is selected... would be just as effective, if not more effective, than the introduction of majority verdicts in reducing the incidence of hung juries.’⁷⁵

7.2 Overview of interstate jurisdictions

Majority verdicts are permitted to some degree in criminal trials in all States and Territories except New South Wales, Queensland, and the Australian Capital Territory. All jurisdictions that have retained juries in civil trials allow majority verdicts (only South Australia and the ACT have abolished civil juries).

Jurisdiction	Criminal trials	Civil trials
NSW	Unanimous verdicts are required in criminal trials heard by a jury.	Civil juries consist of 4 persons, although either party in the Supreme Court may apply for a jury of 12: s 20 of <i>Jury Act 1977</i> . Majority verdicts are

⁷⁵ Ibid, p 11.

		permitted if the jury has retired for more than 4 hours, and 3 of the 4 jurors agree. If the jury consists of 12 (or has been reduced to 9, 10 or 11), 8 jurors must agree s 57.
VIC	Majority verdicts were introduced in criminal cases in 1994, ⁷⁶ but are <i>not</i> allowed for murder, treason, and drug trafficking or cultivation of narcotic plants in large commercial quantities. Jurors must deliberate for at least 6 hours. ⁷⁷ 11 out of 12 jurors must agree (or 10 out of 11, or 9 out of 10 if the jury has been reduced): s 46 of <i>Juries Act 2000</i> .	The standard number of jurors in a civil trial is 6: s 22 of <i>Juries Act 2000</i> . Majority verdicts are permitted after at least 3 hours deliberation. 5 out of 6 jurors must agree (or 4 out of 5 if the jury has been reduced): s 47.
QLD	Unanimous verdicts are required: s 59 of <i>Jury Act 1995</i> .	Majority verdicts are permitted after 6 hours deliberation. 3 out of 4 jurors must agree: ss 32 & 58 of <i>Jury Act 1995</i> .
SA	Majority verdicts have been permitted since 1927, except in murder or treason cases. The jury must have deliberated for at least 4 hours. A majority of at least 10 out of 12 jurors is allowed. If the jury has become reduced, a majority of 10 out of 11, or 9 out of 10 is required: s 57 of <i>Juries Act 1927</i> .	Civil trials are <i>not</i> to be held before a jury: s 5 of <i>Juries Act 1927</i> . (The <i>Juries Act Amendment Act 1984</i> abolished civil juries.)
WA	Majority verdicts are permitted, except in trials for murder or an offence punishable with 'strict security life imprisonment'. Jurors must deliberate for at least 3 hours. 10 or more jurors must agree: s 41 of <i>Juries Act 1957</i> .	The standard number of jurors in civil trials is 6, but must not be reduced to less than 4: ss 19, 46 & 48 of <i>Juries Act 1957</i> . Majority verdicts are permitted after 3 hours deliberation. 5 out of 6 jurors must agree. If the jury has been reduced to 4 or 5 jurors, 4 must agree: s 49.
TAS	Majority verdicts are <i>not</i> available for murder or treason. In other cases, 10 jurors must agree, and the jury must deliberate for at least two hours: s 48 of <i>Jury Act 1899</i> .	Civil juries shall consist of 7 jurors (but may decrease to 6): ss 38 & 38A of <i>Jury Act 1899</i> . Majority verdicts of 5 jurors are permitted, provided that the jury has deliberated for at least 3 hours: s 48.
NT	Juries must deliberate for at least 6 hours. A majority of at least 10	A jury in a civil case consists of 4 jurors: s 7 of <i>Juries Act</i> . Majority

⁷⁶ *Juries (Amendment) Act 1993* (Vic). The relevant provisions commenced on 1 February 1994.

⁷⁷ However, the judge 'must refuse to take' a majority verdict if the judge considers that the jury has not deliberated for a reasonable period of time, having regard to the nature and complexity of the trial: s 46(3) of *Juries Act 2000* (Vic).

	jurors must agree in a jury of 12 or 11. If the jury has been reduced to 10 jurors, 9 must agree: s 368 of <i>Criminal Code</i> .	verdicts are allowed if the jury has deliberated for at least 6 hours, and 3 of the jurors must agree on the verdict: s 49.
ACT	There is no provision in the <i>Juries Act 1967</i> for majority verdicts in criminal trials.	Civil juries were abolished by the <i>Civil Law (Wrongs) Act 2002</i> .

7.3 Recent developments

(i) *Speech by Justice Dunford*

On 27 July 2004, Justice John Dunford of the Supreme Court of New South Wales, gave an address at a criminal law conference in Sydney, during which he expressed support for majority verdicts.⁷⁸ The comments had a significant impact, contributing to the decision by the Premier, Hon Bob Carr MP, to refer the issue to the Law Reform Commission, and prompting the Shadow Attorney General, Andrew Tink MP, to introduce a Private Member's Bill. Justice Dunford stated:

...I support the introduction of majority verdicts after a specified period of deliberation. I understand the proposal presently before the government is for an 11-1 majority, whereas in England and various other places a 10-2 majority is sufficient. I understand that in Scotland they have juries of 15, and an 8-7 majority is sufficient for conviction or acquittal, but I gather there are other safeguards.

The object of the 10-2 or 11-1 majority is to avoid new trials in cases where the jury is hamstrung by a perverse, disinterested or unreasonable, or simply incompetent juror, where the result of the new trial is going to be that of the overwhelming majority in the original trial. Bear in mind that the judge often knows the voting figures in the hung jury situation because it is at times included in the note he or she receives from the jury, although such figures are not disclosed to counsel, and it would be inappropriate to do so. No one so far as I am aware has suggested that say 8-4 or 7-5 majority should be sufficient for a conviction, or an acquittal.

One possible amendment which, so far as I am aware, has not been seriously floated is that where a jury is unable to agree between conviction on a more serious and a lesser offence, for example, murder, or manslaughter, armed robbery or steal from the person, the judge should have the power to enter a conviction for the lesser offence, but only if, on his or her consideration of all the evidence, he or she considers it appropriate to do so...

(ii) *NSW Law Reform Commission inquiry*

On 16 September 2004, the Premier, Hon Bob Carr MP, announced that the Government would refer the issue of majority verdicts to the New South Wales Law Reform

⁷⁸ Justice John Dunford, Supreme Court of New South Wales, 'Looking Forward – The Direction of Criminal Law', Keynote presentation at the Criminal Law Conference 2004, Sydney, 27 July 2004. The speech is available on the Supreme Court website at <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/speeches_index>

Commission to report back within six months. The Commission will consult with senior members of the judiciary, will study local and overseas experience, and will invite submissions from interested parties and the general public.⁷⁹ The Premier outlined some of the matters that need to be investigated, and made reference to his long-standing support for unanimous verdicts:

One of the central planks of the New South Wales justice system is unanimous verdicts – long accepted as one of the key guarantees of a fair trial and certainly the position to which I have always subscribed. But I was interested to hear Supreme Court Justice John Dunford recently make the case for a specific form of majority verdicts... Given that the last Law Reform Commission report on this issue was back in 1986, the Attorney General and I have agreed that this issue may justify another look. Certainly in those two decades a lot has changed here and overseas. In New South Wales the percentage of hung juries has more than doubled from 3.55 per cent in 1985 to around 8 per cent today... So there are emerging precedents for majority verdicts and there are questions that need to be answered. Should there be a majority of 10 or 11? Should there be time limits and, if so, how long? Should murder or other serious crimes still require unanimity from the jury? In addition, we must consider the impact of long trials on hung juries... There are arguments on both sides. We do not want to relinquish an ancient institution lightly.

The Terms of Reference for the inquiry are:⁸⁰

That the NSW Law Reform Commission inquire into and report on whether the unanimity requirement in criminal trials should be preserved in New South Wales.

In undertaking this inquiry, the Commission should have regard to:

- arguments for and against preserving the unanimity rule;
- the incidence of hung juries in New South Wales and the possible effect of majority verdicts on hung juries;
- the operation of majority verdicts in other Australian and international jurisdictions;
- the advantages and disadvantages of different models for majority verdicts currently operating in other jurisdictions;
- whether any other procedures or measures could decrease the incidence of hung juries in New South Wales; and
- any other related matter.

The Law Society of New South Wales, in its initial submission to the Law Reform Commission, supported the retention of unanimous verdicts in criminal trials:⁸¹

⁷⁹ Premier, Hon Bob Carr MP, Questions Without Notice, 'Majority Verdicts', *NSWPD*, 16 September 2004, p 11054.

⁸⁰ Obtained from the Law Reform Commission website at <www.lawlink.nsw.gov.au/lrc> The reference was received on 17 September 2004.

⁸¹ No author, 'Majority verdicts diminish standard of proof', *Law Society Journal*, Volume 43,

The Society holds the view that majority verdicts diminish the standard of proof in criminal cases. The Society also argued against the view that allowing majority verdicts would reduce the amount of court time wasted when juries are hung, citing research studies undertaken in 1997 that concluded a potential net saving of only 1.1 per cent of criminal court time would be achieved by avoiding trials where one juror dissents.

Pauline Wright, the chairperson of the Criminal Law Committee of the Law Society, asserted that unanimous verdicts are a fundamental safeguard: 'Majority verdicts lack a standard of proof that we think risks innocent people being convicted. If even one person on a jury dissents clearly there is some reasonable doubt.' She also pointed to studies by the NSW Bureau of Crime Statistics and Research that suggested that majority verdicts were unlikely to make a substantial impact on hung juries as they rarely involved one or two dissenters.⁸²

Other spokespersons who expressed opinions on majority verdicts, in response to the Premier's announcement of a Law Reform Commission inquiry, included Ian Harrison QC, President of the NSW Bar Association. His preference was for unanimous verdicts to remain, but there were 'circumstances where, for example, the intransigence or unreasonableness of a single juror can subvert the efficient administration of justice. In that case majority verdicts can have a role to play. However, the significance of the changes are unlikely to be great.'⁸³ In the past, prominent figures in the legal profession who have publicly supported the introduction of majority verdicts have included the NSW Director of Public Prosecutions, Nicholas Cowdery QC, and the Chief Judge of the District Court of NSW, Reg Blanch QC. Opponents have included the Council for Civil Liberties and private barristers such as Ian Barker QC.⁸⁴

(iii) Private Member's Bill

On 21 October 2004, the Shadow Attorney General, Andrew Tink MP, introduced the Jury Amendment (Majority Verdicts) Bill 2004. The bill proposes to amend the *Jury Act 1977* to provide for majority verdicts by juries in criminal trials. Mr Tink explained that, 'Some years ago I introduced a bill along similar lines but I reintroduce such a bill into the Parliament today in light of what I believe are some very important comments made by one of the most experienced criminal court judges in New South Wales and indeed the country, the Hon Mr Justice John Dunford.' Previously Mr Tink introduced the Jury Amendment

Number 1, February 2005, pp 6-7. The item also states that the Law Reform Commission is expecting to release a discussion paper early in 2005.

⁸² Anne Davies and Michael Pelly, 'Uneasy Carr explores majority jury verdicts', *The Sydney Morning Herald*, 17 September 2004, p 3.

⁸³ Anne Davies and Michael Pelly, 'Uneasy Carr explores majority jury verdicts', *The Sydney Morning Herald*, 17 September 2004, p 3.

⁸⁴ Frank Walker, 'Chika vows to push majority verdicts', *The Sun-Herald*, 17 January 1999, p 10.

(Majority Verdicts) Bill in September 1996 but it lapsed. The former Leader of the Opposition, Kerry Chikarovski MP, also proposed the introduction of majority verdicts in the Jury Amendment (Dissenting Juror) Bill. It was introduced in August 2000 but was defeated.

The chief amendments proposed by the Jury Amendment (Majority Verdicts) Bill 2004 would:

- Insert s 55F in the *Jury Act 1977* to enable juries in criminal trials to deliver a majority verdict, if 11 out of 12 jurors agree on the verdict. This only applies to offences against the law of New South Wales, not Commonwealth offences which would continue to require unanimous verdicts.
- Make provision (under proposed s 55F) for the court to refuse to accept a majority verdict if it appears that the jury has not deliberated for a period of time that the court thinks reasonable having regard to the nature and complexity of the criminal proceedings.
- Amend s 56 to require a jury of 12 persons to have retired for more than six hours before the court may discharge them if it finds, after examination on oath of one or more of the jurors, that they are not likely to reach either a unanimous or a majority verdict. The time frame of six hours does not apply if the jury is constituted by fewer than 12 persons. Previously, from 1947 to 1987 a minimum deliberation period of six hours applied, until it was abolished by the *Jury (Amendment) Act 1987*.

Mr Tink outlined the reasons for his preference for a majority of 11:1 rather than 10:1 jurors:

My bill is for a simple 11:1 majority verdict, which, I suppose, is the most conservative of all possible alternatives to the current unanimous verdict requirement...I feel most comfortable with the virtual unanimous majority bar one rogue juror...

Around the Commonwealth there is strong precedent for one juror who cannot agree with the rest being discounted for the purpose of a decision. It has not been said anywhere in any other jurisdiction in this country that that has caused a problem to the administration of justice.⁸⁵

...

The Coalition has had its mind made up for some time now that we should follow the overwhelming majority of other States that have majority verdicts; that we should come into line with them and have the same standard of practical and effective justice in New South Wales that those jurisdictions have.⁸⁶

⁸⁵ Andrew Tink MP, Jury Amendment (Majority Verdicts) Bill, Second Reading Speech, *NSWPD*, 21 October 2004, p 11813.

⁸⁶ *Ibid*, p 11816.

8. PROPOSAL TO INVOLVE JURY IN SENTENCING PROCESS

On 31 January 2005 in Sydney, during an address at the annual Opening of Law Term dinner, the Chief Justice of New South Wales, Hon James Spigelman AC, outlined a concept to allow consultation on sentencing issues between the trial judge and jurors ‘in camera’ after a verdict has been reached in a criminal trial. The actual sentence would remain a matter of judicial discretion.⁸⁷

What I have in mind is the development of a system in which judges consult with juries about sentencing. There was a tradition in the United States that many states had juries which actually imposed sentences. Now, only half a dozen states continue that tradition, although there have been recent calls for its return. I am not suggesting anything of that character here. The scope of relevant considerations is such that sentencing requires the synthesis of a range of incommensurable factors. This cannot be done by a group, without an undesirable process of compromise. Ultimately, an experienced criminal judge must decide, often quite instinctively, where the balance should lie.

What I am proposing is an in camera consultation process, protected by secrecy provisions, by which the trial judge discusses relevant issues with the jury after evidence and submissions on sentence and prior to determining sentence. [Emphasis added]

...I have come to the view, that a process of consultation can improve both the jury decision-making process and the judicial sentencing process, as well as enhancing public confidence in the administration of criminal justice. Jurors are interested in what happens. Indeed many turn up for the sentencing.

I have not myself been a criminal trial judge. However, those with whom I have spoken all emphasise the considerable difficulty and loneliness involved in the sentencing exercise. **Consultation with judicial colleagues is possible, but many of the matters that arise for determination in the sentencing process are such that, in my opinion, judges would welcome assistance from a spectrum of opinion reflecting a diversity of experience...** [Emphasis added]

Furthermore, there are occasions when the judge has to make assumptions about the jury’s reasoning process. For example in a manslaughter case it is necessary for the judge to make a finding beyond a reasonable doubt as to the basis on which a conviction of manslaughter rather than murder was entered... Whilst it is true that the jury does not have to be unanimous as to the basis on which a charge of murder is reduced to manslaughter, it will assist the sentencing exercise for the judge to understand why the verdict was as it was.

... It is quite likely that, if there has been some fundamental defect, the trial judge will discover it during the course of consulting with the jury about sentence. I do not think that that is a bad thing. The process could lead to a report for the purposes of the Court of Criminal Appeal. Such a report could also include information about the significance, or lack of significance, of any error on the jury’s decision-making process. This could assist an appeal court to refuse an appeal on the basis of some technical breach, by the application of the proviso.⁸⁸

⁸⁷ The speech is available on the website of the Supreme Court at <www.lawlink.nsw.gov.au/sc/sc.nsf/pages/spigelman_310105>

⁸⁸ The proviso is contained in s 6(1) of the *Criminal Appeal Act 1912*, which sets out the grounds on which the Court of Criminal Appeal shall allow a conviction appeal and set aside

...

I put forward this proposal tentatively. It requires detailed working out, perhaps by means of a reference to the Law Reform Commission. It is not possible to predict all the ramifications of such a significant change. Legislation should authorise the adoption of the system at first on a trial basis. This is what occurred a few years ago with a system of Sentence Indication Hearings, which looked good on paper but which was eventually abandoned.

I should note that the proposal has resource implications. It will not work without additional resources. It will require the recall of such proportion of the jury as is able to return to hear the evidence on sentencing...

... I am of the view, after a limited process of consultation with others more experienced in the criminal jurisdiction than myself...that this idea offers real prospects of improving the quality of sentence decision-making in this State and enhancing public confidence in the administration of criminal justice. As far as I am aware, no such system exists anywhere else. It is, in my opinion, worth a trial.

In a subsequent article published in the press, Chief Justice Spigelman elucidated on some of the sentencing issues that could be discussed by the trial judge and the jurors:⁸⁹

I do not put forward this proposal as a means of increasing the general level of sentences. I do not believe it will have that effect, although sentence patterns could change....

At present sentences are determined by judges acting alone on a case-by-case basis, taking into account the law and principles governing sentencing, the particular proved facts of the case and the submissions put to the court by both the prosecution and defence. A judge is required to take into account all the circumstances of the offence and of the offender. The factors include the gravity of the offence, the maximum penalty, the prior criminal history of the offender, any plea of guilty, any assistance to the police to apprehend other offenders, the effects on the victim, the prospects of rehabilitation...

Each case raises its own unique combination of issues. The judge could raise those issues, one by one in a logical sequence, with the jury to ascertain their views.

He could also inform the jury of the range of sentencing options, such as imprisonment, periodic detention, home detention, as well as information about any sentencing range established in previous cases and seek views of the jurors in these matters.

The immediate responses to Chief Justice Spigelman's proposal included:

- **Hon Bob Debus MP**, Attorney General, was quoted as saying, 'Chief Justice Spigelman has put forward a very interesting proposal which has provoked some stimulating debate.'⁹⁰ The Attorney General indicated that his department would refer

the verdict of the jury. The proviso is that 'the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

⁸⁹ James Spigelman, 'Helping hand from jury deserves a fair trial', *The Daily Telegraph*, 2 February 2005, p 25.

⁹⁰ Nicolette Casella, 'Sentence by jury a good idea: Carr', *The Daily Telegraph*, 2 February

the concept to the NSW Law Reform Commission, with a view to an issues paper being released in mid-2005. Consultation with the legal profession and the community would then take place. The Attorney General also observed that, ‘The Government’s approach will be to advance with abundant caution and only after extensive consultation.’⁹¹

- **Hon Bob Carr MP**, Premier, reportedly thought the proposal was a good idea,⁹² and that the Government might consider running it on a limited trial basis before deciding whether to introduce it more widely.⁹³
- **Nicholas Cowdery QC**, Director of Public Prosecutions (NSW), expressed concern that the concept ‘might create more uncertainty and anxiety than it resolves’.⁹⁴
- **Peter Zahra SC**, Senior Public Defender, asserted that the in-camera aspect of consultation between the judge and jury was ‘contrary to sound traditions of criminal justice as administered in the open public courts of a democratic society.’⁹⁵
- **Pauline Wright**, Chairperson of the Criminal Law Committee, Law Society of NSW, reportedly stated: ‘I am so opposed to it. It would be a really big mistake.’ According to Ms Wright, the complex issues that arise during sentencing should be left to a judge. ‘Groups of people can be far more harsh. We would be heading into the mindset of the mob, and we do not want mob sentencing.’⁹⁶ Ms Wright also thought that the prospect of involvement in the sentencing process could distract jurors from their primary role of determining guilt: ‘...what might happen is that they start thinking “I’m not really convinced this person is guilty but I’m pretty convinced, but what the heck I’ll convict him and I’ll have an input into sentencing.”’⁹⁷
- **John North**, President of the Law Council of Australia, pointed out that sentencing

2005, p 7.

⁹¹ Michael Pelly, ‘Lawyers uneasy over jury sentencing plan’, *The Sydney Morning Herald*, 2 February 2005, p 5.

⁹² Nicolette Casella, ‘Sentence by jury a good idea: Carr’, *The Daily Telegraph*, 2 February 2005, p 7.

⁹³ No author, ‘NSW to consider involving juries in sentencing’, AAP News bulletin, 1 February 2005.

⁹⁴ Michael Pelly, ‘Lawyers uneasy over jury sentencing plan’, *The Sydney Morning Herald*, 2 February 2005, p 5.

⁹⁵ Pelly, *ibid.*

⁹⁶ Michael Pelly, ‘Give jury a say in sentence: top judge’, *The Sydney Morning Herald*, 1 February 2005, p 3.

⁹⁷ Michael Pelly, ‘Lawyers uneasy over jury sentencing plan’, *The Sydney Morning Herald*, 2 February 2005, p 5.

often takes place months after the verdict, when jurors may have discussed the case with their friends. He considered that, 'Unless the process took place almost immediately, it would be impractical.'⁹⁸

- **Roland Day**, defence lawyer, thought the proposal could actually lead to lighter sentences: 'I believe juries are capable of great compassion, even more so than hardened judges.' However, 'It has the potential to cause excessive delays because it will add an extra step in the process.'⁹⁹
- **Robyn Cotterell-Jones**, Executive Director, Victims of Crime Assistance League (VOCAL), believed the community would relish the opportunity to get involved and would facilitate more appropriate sentencing than judges alone. 'What does the legal profession have to fear by having community involvement? We live in a multicultural society and there are lessons to be learned by what the community thinks.'¹⁰⁰
- **The Sydney Morning Herald**, Editorial, stated: 'One suspects the Spigelman suggestion is directed as much at getting politicians off judges' backs as at restoring public trust in the judicial system... If judges are out of touch with public sentiment and expectation, who better than jurors who have heard the trial evidence to bring worthy observations to sentencing considerations? Justice Spigelman, of course, does not believe judges are out of touch... But he is right to identify diminution of public trust in institutions of social capital and to articulate possible reforms.'¹⁰¹

The NSW Law Reform Commission received a reference from the Attorney General on 25 February 2005. The Terms of Reference are:

That the NSW Law Reform Commission inquire into and report on whether or not a judge in a criminal trial might, following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing.

In conducting this inquiry the Commission should have regard to:

1. the jury decision making process, including the jury's role in determining guilt or innocence of the accused, and the secrecy and protection of jury deliberations;
2. the judicial sentencing process, and the enhancement of public confidence

⁹⁸ Pelly, *ibid.*

⁹⁹ Nicolette Casella, 'Sentence by jury a good idea: Carr', *The Daily Telegraph*, 2 February 2005, p 7.

¹⁰⁰ Casella, *ibid.*

¹⁰¹ Editorial, 'Cooling hysteria over sentencing', *The Sydney Morning Herald*, 2 February 2005, p 12.

in the administration of justice.

The Commission may also report on any related matters that arise in the context of its inquiry.¹⁰²

¹⁰² The text of the reference was obtained from the Law Reform Commission website at <www.lawlink.nsw.gov.au/lrc>

9. CONCLUSION

Numerous significant developments relating to juries occurred in 2004-2005. Incidents of juror misconduct prompted several legislative reforms. For example, the Court of Criminal Appeal overturned the convictions in *R v K* (2003) 59 NSWLR 431 and *R v Skaf* (2004) 60 NSWLR 86 due to the conduct of jurors who, respectively, researched the accused on the internet, and visited the crime scene to carry out an experiment. The *Jury Amendment Act 2004* prohibits jurors from making their own inquiries about the accused or the evidence in a case, and gives the Sheriff's Office explicit powers to investigate suspected irregularities. Indirectly, the juror misconduct in the Skaf case also led to the *Criminal Procedure Amendment (Evidence) Bill*, which passed the Legislative Assembly on 23 March 2005. It will allow the record of a sexual assault complainant's evidence to be admitted in a retrial rather than the complainant having to repeat the ordeal of giving evidence.

The Shadow Attorney General, Andrew Tink MP, introduced two Private Member's Bills in late 2004 relating to jury issues. One bill confirms the Opposition's support for the introduction of majority verdicts in criminal trials in New South Wales, while the other proposes that, in criminal cases where it is alleged that media publicity has influenced the deliberations of the jury, objective evidence should be required before the court can find that a miscarriage of justice occurred.

In the past year, some Supreme Court judges have also expressed views on various aspects of the jury system. For example, in January 2005, Chief Justice Spigelman suggested broadening the jury's functions to allow trial judges to consult with jurors on sentencing issues after a guilty verdict is delivered. This concept has been referred to the Law Reform Commission of New South Wales. In addition, the Commission is currently conducting two other inquiries on questions of relevance to juries: whether unanimous verdicts should be retained in criminal cases in New South Wales, and whether deaf and blind people should be able to participate in jury service.

Many of the issues explored in this briefing paper are likely to remain ongoing challenges for the jury system. These include preventing jurors from obtaining information beyond the evidence in the case; the protection of the jury against sources of influence or intimidation; and the capacity of the jury to cope with lengthy or complex trials.

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