How Might the Jury Function in the Future in Australia?

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The nature of a jury trial in criminal proceedings has evolved over time from jurors being exclusively drawn from within a class of all male property owners to the emergence of majority verdicts and the abandonment of jury unanimity. In some Australian jurisdictions, cases dealing with defendants who have a diagnosed mental condition are routinely referred to Mental Health Courts which comprise a judge assisted by one or two clinicians. In addition, there would appear to be growing support for an expansion of trials by judge alone. This article examines how the operation of the jury might alter in the future in Australia, particularly considering the rapid changes in technology, the prevalence of social media, the level of understanding by juries of judicial directions, and the prospect of greater interrogation in jury selection through a voir dire. Such an examination of the role of the jury is complicated by the legislated secrecy surrounding the deliberations and verdicts of juries, which increases the difficulty in assessing the accountability and effectiveness of the jury an historic legal institution that lies at the heart of the Australian criminal justice system.

I. Introduction

> The only real lawyers are trial lawyers, and trial lawyers try cases to juries.
>
> Clarence Darrow

Over the years, there has been a copious amount of material written on juries in the form of law reform commission reports,[1] research investigations,[2] books[3] and articles,[4] which is unsurprising given the central role of the jury in criminal trials in Australia. So why yet another article on the future of the jury? The prime reason is the impact of artificial intelligence (AI or machines acting intelligently),[5] the pervasive nature of social media, and the changing nature of Australian society both in terms of diversity and the age composition of Australia. These technological impacts and societal changes provide a timely

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[1] Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (December 2009); New South Wales Law Reform Commission, *Jury Directions*, Report No 136 (November 2012); Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial*, Final Report No 30 (January 2020); Victorian Law Reform Commission, *Artificial Intelligence in Victoria's Courts and Tribunals*, Consultation Paper (October 2024).

[2] J Goodman-Delahunty et al, *Practices, Policies and Procedures That Influence Juror Satisfaction in Australia* (Research and Public Policy Paper No 87, Australian Institute of Criminology, 2007); L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials* (Crime and Justice Bulletin No 119, NSW Bureau of Crime Statistics and Research, 2008).

[3] J Horan, *Juries in the 21st Century* (Federation Press, 2012); R Susskind, *Online Courts and the Future of Justice* (OUP, 2019).

[4] E Najdovski-Terziovski, J Clough and J Ogloff, "In Your Own Words: A Survey of Judicial attitudes to Jury Communication" (2008) 18(2) JJA 65; J O'Leary, "Twelve Angry Peers or One Angry Judge: An Analysis of Judge Alone Trials in Australia" (2011) 35(3) Crim LJ 154; K Braun, "Yesterday Is History, Tomorrow Is Mystery – The Fate of the Australian Jury System in the Age of Social Media Dependency" (2017) 40(4) *UNSW Law Journal* 1634; J Croucher and S Hon, "Judge or Jury? A Legal Conundrum" (2022) 17(1) *International Journal of Criminal Justice Science* 83.

[5] AI is "a machine-based system that, for explicit or implicit objectives, infers from the input it receives how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment": OECD, *Recommendation of the Council on Artificial Intelligence* (Report No OECD/LEGAL/0449, 2024) 7.

opportunity to review how the centuries old jury system grounded in a trial by one's peers[6] might operate more efficiently and with greater integrity in a future world where those same peers increasingly interact with technology.

Efficiency in the context of jury trials appears to mean fewer mistrials and a reduction in the time before a case comes to court. For example, the adoption of majority verdicts in Australia[7] was based on efficiency grounds in the form of reduced costs and time savings resulting from the elimination of the alleged incidence of the "rogue" juror rather than on justice or equity grounds. The notable exception to the introduction of majority verdicts is the Commonwealth following the High Court decision in *Cheatle v The Queen*[8] which held that the right to a trial by a jury in s 80 of the *Australian Constitution* encompassed a unanimous verdict because unanimity reflected a fundamental thesis of Australia's common law. The political dimension to the introduction of majority verdicts can clearly be seen when the New South Wales (NSW) Government rejected the NSW Law Reform Commission's recommendation that unanimous jury verdicts be retained in 2005.[9]

If efficiency in jury trials was the overriding consideration, then the prospect of AI juries would emerge as an option. As Hodgson has observed in the context of the backlog of 65,000 cases waiting to be heard in the Crown Courts in England and Wales, the supreme efficiency of an AI jury could be the solution to the Crown Courts' backlog:

> Philosopher Nick Bostrum wrote that "biological neurons operate at a peak speed of about 200 Hz, a full seven orders of magnitude slower than a modern microprocessor (~2 GHz)". An AI jury, then, could reach a decision around seven times faster than a human one, and drastically reduce the average hearing length [19.4 hours]. An AI jury, which would never be late, nor need to take days off, and could process information for 24 hours a day, with the need for little more than a reliable power supply and internet connection, could be the solution to the Crown Courts' backlog.[10]

Hodgson goes on to point out that an AI jury would always follow the same set of rules and thereby reach entirely the same verdict if the same trial was played out repeatedly in front of an AI jury, thereby resulting in more objective and consistent outcomes. However, AI juries are beyond the scope of this article, and the following is a summary of the five issues to be developed in this article which impact on the future operation of the human jury in Australia.

First, whether utilising developments in technology could act as an aid to a jury's understanding of the legal arguments being put forward by both parties, such as the provision to juries of daily summaries of the evidence presented in court. If each juror was provided with a screen and could make electronic notes, then the evidence could be presented by the parties in different more user-friendly ways.[11] Moreover, jurors in the future are likely to feel ever more comfortable with having a personal screen in the jury box given that in today's environment most people have a mobile phone and a personal computer, which could lead to improved juror engagement and shorter trials. In addition, widespread use of technology by the courts raises the prospect of online trials and panels of expert jurors, although as Rossner and

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[6] Whether juries are truly representative of a defendant's peers is an open question given the overrepresentation on juries of the unemployed, students, retirees and persons engaged in home duties. See, eg, Daniel Hurst, "Jury Duty? Sorry We're Busy That Day", *Brisbane Times*, 29 April 2010. "Nearly 90 per cent of Queenslanders selected for jury duty avoid having to front up to a courthouse, sparking fresh concerns that juries do not truly represent the broader community. Justice Department figures released to brisbanetimes.com.au show 241,480 people received juror notices last financial year, but only 26,954 were summonsed to serve." (Hurst, n 6).

[7] See, eg, *Jury Act 1977* (NSW) s 55F which permits 11-1 jury verdicts if after eight hours a unanimous verdict has not been reached and the court is satisfied that it is unlikely that the jurors will reach a unanimous verdict after further deliberation.

[8] *Cheatle v The Queen* (1993) 177 CLR 541.

[9] New South Wales Law Reform Commission, *Majority Verdicts*, Report No 111 (August 2005) 55.

[10] E Hodgson, *The (Electric) Lamp… Is It Time for Juries to Be Replaced by AI?* (5 September 2024) CorkerBinning <https://corkerbinning.com/the-electric-lamp-is-it-time-for-juries-to-be-replaced-by-ai/>.

[11] The NSW Government's Communities and Justice website lists the following as one of responsibilities of jurors: "You will be provided with a notebook to take notes as needed. You will have to hand this in each day, and at the end of the trial. Once the matter has been finalised, all the notebooks are destroyed." NSW Government, Communities and Justice, *Jury Trial and Verdict* <https://courts.nsw.gov.au/for-jurors/for-individuals-/jury-trial-verdict.html>.

Tait warn "[i]ntroducing monitors into the courtroom requires a reimagining of courtroom spaces, social cues, symbols and performances".[12]

On the other hand, as the Victorian Law Reform Commission has noted, "[g]enerative AI can be used to create 'deepfake' materials including text, audio, photos and videos".[13] Deepfakes[14] present obstacles for the courts as deepfakes may be submitted as evidence and are difficult to detect.[15] This means the Crown, defence counsel and judicial officers will have to decide "whether experts are competent to explain whether evidence tendered in court is legitimate or fabricated".[16] Then, in turn, juries may need to reach a verdict based on such expert evidence.

Second, whether harnessing technology could aid jury understanding of judicial directions. The trial judge would be able to explain the legal issues as they develop during the trial as part of the daily summaries rather than focus on a long judicial summary at end of the trial after each party has closed its case. The trial judge would then be able to remind the jury of the earlier legal explanations when summarising her or his judicial directions. Essentially, the trial judge would be more involved in the daily legal mechanics of the trial by virtue of regular legal summaries as the case unfolded. The danger would be that the trial judge might encroach on the position of the parties which may only emerge as the evidence is presented. This danger might be overcome if jurors were able to ask questions more easily during the trial, such as via the chat box which the judge could monitor and allow as appropriate.

Third, whether in order to minimise the potential prejudicial impact of social media coverage of the trial, it may be necessary to introduce greater penalties for failure to comply with judicial directions to jurors at the beginning of the trial not to engage with social media or conduct internet searches of coverage of the trial.[17] Of course, the only conclusive method to remove the prejudicial impact of social media on juries is to turn to a trial by judge alone,[18] an option that will be fully considered in Part IV of this article.

In passing, it should also be noted that the jury model has been further eroded by the introduction in some Australian jurisdictions of Mental Health Courts. In Queensland, the Mental Health Court is constituted under s 638 of the *Mental Health Act 2016* (Qld) and is comprised of a Supreme Court Judge

[12] M Rossner and D Tait, "Courts Are Moving to Video during Coronavirus, But Research Shows It's Hard to Get a Fair Trial Remotely", *The Conversation*, 8 April 2020 <https://theconversation.com/courts-are-moving-to-video-during-coronavirus-but-research-shows-its-hard-to-get-a-fair-trial-remotely-134386>.

[13] Victorian Law Reform Commission, n 1, 45 [4.64], citing R Chesney and D Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 *California Law Review* 1753, 1785–1786.

[14] "A deepfake is a digital photo, video or sound file of a real person that has been edited to create an extremely realistic but false depiction of them doing or saying something that they did not actually do or say": Australian Government, eSafety Commissioner, *Deepfake Trends and Challenges – Position Statement* <https://www.esafety.gov.au/industry/tech-trends-and-challenges/deepfakes>.

[15] A McPeak, "The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood" (2021) 23(2) *Vanderbilt Journal of Entertainment & Technology Law* 433, 438–439.

[16] Victorian Law Reform Commission, n 1, 45 [4.66].

[17] See, eg, *Juries Act 1995* (Qld) s 69A which prohibits inquiries by a juror about the accused and provides for a maximum term of imprisonment of two years imprisonment; s 68C Inquiries by juror about trial matters prohibited of the *Jury Act 1977* (NSW) with a maximum penalty of 50 penalty units or two years' imprisonment or both; and s 78A Panel member or juror must not make enquiries about trial matters of the *Jury Act 2000* (Vic) with a penalty of 120 penalty units.

[18] See, eg, *Criminal Code 1899* (Qld) s 615(4)(c) under which the court may make a no jury order if it considers "that there has been significant pre-trial publicity that may affect jury deliberations". Although, under s 615(5), "the court may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness". Similar language applying objective community standards is found in *Criminal Procedure Act 2004* (WA) s 118(6). See also *Criminal Procedure Act 1986* (NSW) s 132(2) which states: "The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone." However, trial by judge alone is not available in all jurisdictions such as Victoria. In Western Australia, trial by judge alone is only available in limited circumstances and an applicant must convince the Court that it is in the interests of justice to have a trial by judge alone: *Criminal Procedure Act 2004* (WA) s 118(4): see *Western Australia v Wark* [2017] WASC 154.

who is assisted by one or two clinicians.[19] The reference of a person's mental state to the Mental Health Court may be made by the person or an authority as defined under s 110 of the *Mental Health Act*.[20] During 2022–2023, 200 references were filed.[21]

Fourth, the issue of jury selection. At present, depending on the jurisdiction and the offence, the Crown and the defence have a number of challenges without cause.[22] For example, s 42(1) of the *Jury Act 1977* (NSW) allows the Crown and the defence to have three peremptory challenges each in criminal proceedings, but s 42(2) states: "Any number of peremptory challenges may be made if the Crown and all the persons prosecuted agree to the challenges." Under s 42(3) of the *Jury Act 1995* (Qld) "in a criminal trial, the prosecution and defence are each entitled to 8 peremptory challenges".[23] The High Court has stated that "an accused's right to peremptory challenge is both ancient and important, being fundamental to our system of trial by jury".[24] Peremptory challenges permit counsel "to choose jurors before whom they feel comfortable trying the case"[25] and allow counsel to choose a jury that will be receptive to counsel's case theory.[26] Two alternative options to be considered here are either the removal of the challenge without cause so the jury comprises the first twelve jurors balloted from the jury pool, or the adoption of a version of the *voir dire* for selection of potential jurors employed in the United States.

Fifth, there is the issue of transparency in jury deliberations. In a trial by judge alone, the trial judge is required to give reasons for her or his verdict, while a jury verdict has no such accountability. The jury foreperson simply announces the verdict in open court, following which the jury is discharged by the trial judge. In order to preserve the secrecy surrounding jury decisions, there are penalties for jurors who disclose jury deliberations.[27] Two options present themselves to yield greater transparency in jury deliberations: (1) greater attention paid by courts to improving juror education; (2) easier approvals to researchers to access jurors and discover how juries reached their verdicts.

With option (1), as discussed in Part II, in the future AI-powered tools may support juror education and guidance as part of a comprehensive pre-trial education program. With option (2), typically the researcher is required to convince the Attorney-General of the jurisdiction concerned to apply to the respective Supreme Court to authorise "(a) the conduct of research projects involving the questioning of members or former members of juries; and (b) the publication of the results of the research": s 70(9) of the *Jury Act 1995* (Qld). Such a reform would open the prospect of discovering whether the so-called "rogue" juror is a real issue which was the justification for introducing majority verdicts.[28]

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[19] The primary functions of the Mental Health Court are to determine: (1) references concerning questions of unsoundness of mind and fitness for trial in relation to persons charged with criminal offences; (2) whether or not a person charged with murder ought only stand charged with manslaughter by reason of diminished responsibility.

[20] Under *Mental Health Act 2016* (Qld) s 110, a relevant person includes the person, the person's lawyer, the Director of Public Prosecutions, the Chief Psychiatrist or the Director of Forensic Disability.

[21] Mental Health Court Queensland, *Annual Report 2022-2023* <https://www.courts.qld.gov.au/__data/assets/pdf_file/0010/795700/mhc-ar-2022-2023.pdf>.

[22] Goodman-Delahunty et al, n 2, 34; L McCrimmon, "Challenging a Potential Juror for Cause: Resuscitation or Requiem?" (2000) 23(1) *UNSW Law Journal* 127, 130–134; Victorian Law Reform Commission, *Inclusive Juries – Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision*, Report (July 2022) 192–200.

[23] The Queensland Law Reform Commission considered that peremptory challenges are one of the fundamental safeguards in the *Jury Act 1995* (Qld) against the selection of a jury that is, or is perceived to be, biased or unfairly unrepresentative. It therefore recommended that s 42 of the Act should continue to provide for the parties' rights to exercise peremptory challenges and should not be amended to reduce the current maximum number of peremptory challenges that are available to the parties. Queensland Law Reform Commission, n 1, iv.

[24] *Johns v The Queen* (1979) 141 CLR 409, 429 (Stephen J).

[25] J Gobert, "The Peremptory Challenge – An Obituary" [1989] *Criminal Law Review* 528, 529.

[26] D Tanovich, "Rethinking Jury Selection: Challenges for Cause and Peremptory Challenges" (1994) 30 *Criminal Reports (4th)* 310, 322–323.

[27] See, eg, *Jury Act 1995* (Qld) s 70(2) which deals with the confidentiality of jury deliberations and provides a maximum penalty of two years imprisonment for publishing jury information to the public.

[28] Majority verdicts do not apply to Commonwealth offences: *Cheatle v The Queen* (1993) 177 CLR 541.

II. The Impact of Technology in the Future on the Operation of the Jury in Australia

> Juries are not computers. They are composed of human beings who evaluate evidence differently.
>
> Alan Dershowitz

It is a measure of the impact of technology that the Victorian Law Reform Commission (VLRC) received a reference "to make recommendations on legislative reform opportunities and principles to guide the safe use of AI in Victoria's courts and tribunals".[29] In particular, the VLRC in developing its recommendations was asked to consider:

- the benefits and risks of using AI in Victoria's courts and tribunals, including risks relating to accountability, privacy, transparency, and the accuracy and security of court records.
- the need to maintain public trust in courts and tribunals, and ensure integrity and fairness in the court system.[30]

The benefits and risks of AI have been extensively discussed in the literature.[31] As Hodge has observed, AI has altered the way lawyers do business: "Instead of having a 'battle of forms', attorneys will now be confronted with the 'battle of computers'."[32] In the same vein, Legg and Bell point out that while AI can assist in routine legal processes, there remains a need to closely oversee and question AI:

> For the legal profession in the 21st century, AI will change the practice of law by automating parts of the lawyering process and lawyers will need to be able to use those new tools to enhance their professional offering, but also supervise, question and interpret AI.[33]

In the United States, AI is already operating in law enforcement and the criminal justice system, "including algorithms used for predictive policing, facial recognition, bail setting, and sentencing decisions".[34] Grimm et al draw attention to the problem of bias with AI:

> Bias leading to sometimes intended - but more often unintended - discriminatory outcomes is a serious problem with AI. There are multiple places where bias can impact AI systems, from the inputs to the outputs of such systems, and even in the ways in which the outputs are interpreted and used by humans.[35]

As to public trust, the VLRC has observed that malicious actors may conduct cyberattacks which "may attempt to access and exploit personal data, disrupt court operations or simply cause enough reputational damage to reduce public trust".[36] The use of AI in courts also impacts on judicial independence and public trust, as the human element involved in judicial decision-making is important in maintaining trust in courts. By extension, to the extent that the jury may come to rely on evidence generated by AI in reaching its verdict, this raises ethical questions as to whether machines can possess "the rational and emotional authority to make decisions in place of a human judge".[37]

In the context of expert opinion evidence, the VLRC raised the difficult question of "what kind of expert evidence is required to establish the reliability and admissibility of AI-related evidence?".[38] This

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[29] Victorian Law Reform Commission, n 1, v.

[30] Victorian Law Reform Commission, n 1, v.

[31] See, eg, the following: S Hodge, "Revolutionizing Justice: Unleashing the Power of Artificial Intelligence" (2023) 26(2) *Southern Methodist University Science and Technology Law Review* 217; LexisNexis, *Generative AI and the Future of the Legal Profession* (LexisNexis, 2024); M Legg and F Bell, "Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer" (2019) 38(2) *University of Tasmania Law Review* 34; Susskind, n 3; P Grimm, M Grossman and G Cormack, "Artificial Intelligence as Evidence" (2021) 19(1) *Northwestern Journal of Technology and Intellectual Property* 9.

[32] Hodge, n 31, 217.

[33] Legg and Bell, n 31, 35.

[34] Grimm, Grossman and Cormack, n 31, 36.

[35] Grimm, Grossman and Cormack, n 31, 42.

[36] Victorian Law Reform Commission, n 1, 21 [3.20].

[37] T Sourdin, *Judges, Technology and Artificial Intelligence: The Artificial Judge* (Elgar, 2021) 249.

[38] Victorian Law Reform Commission, n 1, 92 [7.32].

question was considered in *Trivago NV v Australian Competition and Consumer Commission*[39] where the issue was whether Trivago's online search and price comparison website for hotel accommodation was misleading or deceptive, which in turn involved expert evidence concerning Trivago's Algorithm which determined the Top Position Offer. Both sides called expert witnesses who were required to respond to nine common questions. There was general agreement between the experts that Trivago's Algorithm calculated a "composite score" for each offer made by an Online Booking Site with respect to a hotel listing. The main area of disagreement was the weighting given to each factor that made up the "composite score". Critical to the outcome of the litigation was that the contractual terms between Trivago and the Online Booking Sites required the latter to pay Trivago a fee if a consumer clicked on the advertiser's offer on Trivago's website. This fee was described as the CPC or "cost per click".

In finding for the Australian Competition and Consumer Commission (ACCC), the trial judge (Moshinsky J) and the Full Court of the Federal Court of Appeal relied on the experts agreeing that CPC bids were an important component of the Algorithm which selects the Top Position Offer. Consequently, the ACCC established its case "that Top Position Offers were determined by Trivago's Algorithm, which 'placed a significant weighting on the value' of an Online Booking Site's CPC bid, and filtered out offers which did not meet a minimum gain threshold".[40] As the VLRC has observed, "*ACCC v Trivago* provides an example of how the Federal Court has managed issues relating to commercial sensitivity and algorithmic outputs"[41] and "how courts can examine expert evidence about AI".[42]

Writing in the context of the experience of AI in the United States, Horres and Bashor have stressed the importance of the need for transparency and comprehension in the legal use of AI algorithms for predictive purposes:

> AI algorithms should be transparent and intelligible, allowing judges and attorneys to understand and evaluate the reasoning behind AI-generated recommendations or predictions. As AI systems become more complex and autonomous, it becomes essential to ensure that their decision-making processes are understandable and auditable. Judges and attorneys must be able to comprehend how an AI system arrived at a particular prediction or recommendation.[43]

This warning applies a fortiori to the need for judges and counsel to properly communicate to juries the import and authenticity of expert evidence about AI. Under Australia's adversarial criminal justice system, as in other common law countries like the United States, the parties are responsible for adducing evidence relevant to the facts in issue in criminal proceedings, with the judge's neutral non-inquisitorial role confined to ensuring a fair trial, ruling on applications to admit contested evidence, and in the summing-up giving the jury directions on the law relevant to the case.[44] With the advent of AI, Gless, Lederer and Weigend have recommended that courts in the United States appoint neutral experts and Federal Rule of Evidence 706[45] be revised:

> We recommend that Federal Rule of Evidence 706 be revised to encourage the appointment of experts by the court and to establish a procedure whereby the judge calls and neutrally examines the court-appointed expert when there are questions about the validity of scientific or technological evidence. Such

[39] *Trivago NV v Australian Competition and Consumer Commission* (2020) 384 ALR 496; [2020] FCAFC 185.

[40] *Trivago NV v Australian Competition and Consumer Commission* (2020) 384 ALR 496, [242] (Middleton, McKerracher and Jackson JJ); [2020] FCAFC 185. The Federal Court ordered Trivago to pay penalties of $44.7 million for making misleading representations about hotel room rates on its website which as a result often did not highlight the cheapest rates for consumers. Trivago admitted that between December 2016 and September 2019 it received approximately $58 million in cost-per-click fees from clicks on offers that were not the cheapest available offer for a given hotel, causing consumers to overpay hotel booking sites approximately $38 million for rooms featured in those offers.

[41] Victorian Law Reform Commission, n 1, 22 [3.27].

[42] Victorian Law Reform Commission, n 1, 92 [7.34].

[43] S Horres and K Bashor, "AI and the Future of Jury Trials", *Claims and Litigation Management*, 18 October 2023 <https://www.theclm.org/Magazine/articles/ai-and-the-future-of-jury-trials/2731#:~:text=Human%20Judgment,-While%20AI%20can&text=In%20the%20future%20of%20jury,and%20aid%20in%20evidence%20evaluation>.

[44] *Alford v Magee* (1952) 85 CLR 437, 466 (Dixon, Williams, Webb, Fullagar and Kitto JJ).

[45] *Federal Rule of Evidence 706* deals with court appointed experts.

> examination would be followed by examination by the parties and then testimony of expert witnesses retained by the parties.[46]

The appointment of neutral experts by courts in Australia would appear to hold out an additional safeguard in ensuring the trial judge and the jury are properly informed about the validity of machine-generated evidence, such as "devices that collect, store, and 'interpret' data".[47]

Somewhat ironically in the context of the need to identify AI-generated "deepfakes" and to establish the reliability and admissibility of AI-related evidence, in the future AI-powered tools may support juror education and guidance as part of a comprehensive pre-trial education program to familiarise jurors with the principles of criminal responsibility, criminal procedures and in understanding relevant evidence:

> AI-powered tools could assist in providing tailored explanations, simplifying complex information, and ensuring jurors have a clear understanding of their role and responsibilities. Additionally, during the trial, jurors may have access to real-time explanations, legal definitions, and annotations to aid in their decision-making.[48]

The use of AI in the courtroom is both inevitable and a double-edged sword, requiring careful judicial monitoring and auditing if justice is to be served. In the future, juries will likely be dependent on both neutral experts and improved juror education to arrive at fully informed verdicts. The latter leads into Part III below dealing with the capacity of technology to aid jury understanding of judicial directions.

III. The Harnessing of Technology to Aid Jury Understanding of Judicial Directions

> The jury has the power to bring a verdict in the teeth of both the law and the facts.
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> Justice Oliver Wendell Holmes, *Horning v District of Columbia*, 1920.

As Hunter has observed, "[t]he jury system depends upon compliance by jurors with judicial commands".[49] More generally, judges have regularly commented on public confidence in jury verdicts being dependent on juries being properly constituted. In a case where a successful appeal was based on the procedures adopted by the trial judge in selecting a jury in a criminal trial contravened the provisions of the *Juries Act 2000* (Vic), Vincent JA followed previous High Court authority in *Wilde v The Queen*[50] that the effect of an irregularity, which departed from the essential requirements of the law, upon the jury's verdict meant the accused had not had a proper trial and constituted a substantial miscarriage of justice:

> The integrity and the perception of the integrity of that system is a matter of considerable importance. Only if the community can be entirely confident that the proper procedures have been followed will the reality and perception of integrity of the process be maintained.[51]

Integral to the integrity of the proper procedures is juror compliance with judicial instructions.[52] Such juror compliance is an article of faith or an assumption which cannot be tested given the secrecy surrounding jury deliberations. Judges have acknowledged the assumption of jury compliance with judicial directions. In *Gilbert v The Queen*,[53] Gleeson CJ and Gummow J opined that "[t]he system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges".[54] In the same case, McHugh J

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[46] S Gless, F Lederer and T Weigend, "AI-based Evidence in Criminal Trials?" (2024) 59(1) *Tulsa Law Review* 1, 36.

[47] Gless, Lederer and Weigend, n 46, 3.

[48] Horres and Bashor, n 43.

[49] J Hunter, "Juries in the Digital Age" (2024) *Hearsay* Issue 97. <https://www.hearsay.org.au/author/jeffrey-hunter-kc/> Hunter argues this assumption is open to challenge, citing inter alia Tasmania Law Reform Institute, n 1, in support.

[50] *Wilde v The Queen* (1988) 164 CLR 365, 373.

[51] *R v Panozzo* (2003) 8 VR 548, [28] (Vincent JA); [2003] VSCA 184.

[52] Trimboli, n 2, cited research that showed Jurors have difficulty in understanding concepts such as "circumstantial evidence", "reasonable doubt", "presumption of innocence" and "intent".

[53] *Gilbert v The Queen* (2000) 201 CLR 414; [2000] HCA 15.

[54] *Gilbert v The Queen* (2000) 201 CLR 414, [13] (Gleeson CJ and Gummow J); [2000] HCA 15.

made the same point more bluntly: "unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials."[55]

The above assumption that juries understand and follow judicial directions was challenged "by the perception that directions had become excessively long and complex, reflecting a tendency on the part of appellate judges to over-intellectualise the criminal law".[56] In Victoria, such a perception led to the *Jury Directions Act 2015* (Vic). Section 5(4) of the Act sets out the guiding principles in relation to judicial directions to a jury:

> (4) It is the intention of the Parliament that a trial judge, in giving directions to a jury in a criminal trial, should –
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> (a) give directions on only so much of the law as the jury needs to know to determine the issues in the trial; and
> (b) avoid using technical legal language wherever possible; and
> (c) be as clear, brief, simple and comprehensible as possible.

In the age of the internet, a major unknown strand in juror compliance with judicial instructions is the dearth of knowledge as to whether jurors follow judicial warnings not to access the internet and social media on matters dealing with the case they are trying. The issue of juror misconduct in conducting their own research and accessing news articles on the trial will be addressed in Part IV of this article. The focus of this Part is on the other side of the coin: how developments in technology may aid jury understanding of judicial directions.

The extent of juror comprehension of judicial directions on the law can be gauged from a research report undertaken in 2010 for the Ministry of Justice in the United Kingdom.[57] The study involved 797 jurors at three courts (Blackfriars, Winchester and Nottingham) who all saw the same simulated trial and heard exactly the same judicial directions on the law. The results of the study showed there was no consistent view among jurors as to their ability to understand judicial directions:

> Most jurors at Blackfriars (69%) and Winchester (68%) felt they were able to understand the directions, while most jurors at Nottingham (51%) felt the directions were difficult to understand.[58]

As to jurors' actual comprehension of the judge's legal directions:

> While over half of the jurors perceived the judge's directions as easy to understand, only a minority (31%) actually understood the directions fully in the legal terms used by the judge. Younger jurors were better able than older jurors to comprehend the legal instructions, with comprehension of directions on the law declining as the age of the juror increased.[59]

However, when a one-page written summary of the judge's legal instructions was given to jurors at the time of the judge's oral instructions, juror comprehension of the law improved: "The proportion of jurors who fully understood the legal questions in the case in the terms used by the judge increased from 31% to 48% with written instructions."[60]

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[55] *Gilbert v The Queen* (2000) 201 CLR 414, [31] (McHugh J); [2000] HCA 15 (*Gilbert v The Queen*). The issue in the appeal was whether, in a case where the accused was convicted of murder, the trial judge's failure to leave manslaughter with the jury constituted a substantial miscarriage of justice. The majority of the High Court allowed the appeal and ordered a re-trial. McHugh J dissented: "the fundamental assumption of the criminal jury trial requires us to proceed on the basis that the jury acted in this case on the evidence and in accordance with the trial judge's directions and that they would have done so even if manslaughter had been left as an issue." (*Gilbert v The Queen*, [32]).

[56] V Bell, "Reform of the Law Governing Jury Directions and the Determination of Criminal Appeals" (Paper presented at the NSW Supreme Court Judges' Conference, 24 August 2019) 1.

[57] C Thomas, "Are Juries Fair?" (Ministry of Justice Research Series 1/10, Ministry of Justice, 2010) <https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/are_juries_fair.pdf>.

[58] Thomas, n 57, iv.

[59] Thomas, n 57, vi.

[60] Thomas, n 57, vi.

In Australia, it is now commonplace for a trial judge to provide the jury with an *aide memoire* in criminal trials, setting out the elements of each offence (and alternative offences) under the relevant law of the respective jurisdiction, and highlighting the matters in dispute.[61] Indeed, in the re-trial of Dr Patel after the High Court had quashed his conviction for criminal negligence manslaughter,[62] Fryberg J provided the jury with a flowchart which contained a series of 25 steps in the form of questions, where the juror was told to select "yes" only if satisfied of that answer beyond reasonable doubt.[63] The advances in technology provide greater opportunities for interaction between the trial judge and the jury when, for example, while considering their verdict the jury returns to seek clarification from the trial judge on a point of law, as occurred in the second trial of Dr Patel on the test for criminal negligence.[64]

In the future, if jurors were to be provided with a personal tablet to take into the jury room that contained at a minimum their notes on the case and the trial judge's instructions, then there would be the prospect of the trial judge communicating electronically with the jury if the jury sought clarification on points of law. This development would make it easier for juries to clarify points of law with the trial judge quickly and directly rather than the jury sending out a note and then having the jury return to open court to hear the judge's explanation.

However, there are reasons for caution in providing jurors with tablets, as identified by McDonald et al:

> [W]hile juror recall of evidence may be enhanced, or deliberation time decreased, some jurors may be disadvantaged if they are unfamiliar with such technology, and consequently may disengage from deliberations. In addition, the use of technology may result in undue weight being given to some pieces of evidence over others. If electronic evidence comes largely from the prosecution, these issues may compromise the right to a fair trial.[65]

The introduction of improved technology into the courtroom poses the same risks as the use of AI discussed previously in Part II. On the one hand, technological aids may improve the thoroughness of jury deliberations through well-informed and critical discussion,[66] while on the other hand group processes may suffer as jurors rely too heavily on their tablets at the expense of applying their own analysis to the evidence.[67]

As McDonald et al have observed, "[w]hile the introduction of new technologies in the justice process may serve to enhance efficiency and understanding in the running of a trial, there can be an ongoing tension between these principles and that of fairness".[68] Mulcahy has emphasised the ways in which the courtroom as the prime site of legal practice is in danger of being dematerialised and the effect this is likely to have on the legitimacy of the trial as an authentic legal and public ritual.[69]

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[61] See, eg, Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (May 2009) App D Examples of outline of charges.

[62] *Patel v The Queen* (2012) 247 CLR 531; [2012] HCA 29.

[63] For a fuller explanation, see Andrew Hemming, "The Patel Trials: Further Evidence of the Need to Reform the Griffith Codes" (2014) 38 Crim LJ 218, 224–225.

[64] Hemming, n 63, 225–226.

[65] L McDonald et al, "Digital Evidence in the Jury Room: The Impact of Mobile Technology on the Jury" (2015) 27(2) *Current Issues in Criminal Justice* 179 <https://classic.austlii.edu.au/au/journals/CICrimJust/2015/20.html>.

[66] N Marder, "Juries and Technology: Equipping Jurors for Twenty-first Century" (2001) 66(4) *Brooklyn Law Review* 1257. "Courts should introduce these [technological] tools into the courtroom to enable jurors to move from the passive model that has characterised the juror's role throughout much of our modern-day history, to an active model that should become the model of the juror in the twenty-first century." (1299).

[67] H Cole and D Stanton, "Designing Mobile Technologies to Support Co-present Collaboration" (2003) 7(6) *Personal and Ubiquitous Computing* 365. J Rijnbout and B McKimmie, "Deviance in Organisational Group Decision-making: The Role of Information Processing, Confidence, and Elaboration" (2012) 15(6) *Group Processes & Intergroup Relations* 813.

[68] McDonald et al, n 65.

[69] L Mulcahy, "The Unbearable Lightness of Being?: Shifts towards the Virtual Trial" (2008) 35(4) *Journal of Law and Society* 464.

It is inevitable that technology will transform the way courts administer justice, the more so as jurors from all walks of life are becoming increasingly comfortable with electronic devices. In anticipation of this likely development, McDonald et al raised two cautions with jurors having tablets or iPads:

> First … iPads might encourage jurors to pay more attention to the evidence they get in digital form and less to the oral evidence that is retrievable only through trial transcripts. Second, and closely related to this, such easy access to the evidence file could make it easier for the jury to abandon the interpretation that emerges from courtroom exchanges in examination-in-chief and in cross-examination to form their own interpretation of scientific diagrams and other computer-generated representations, rather than the interpretation that emerges from the verbal exchanges in examination and cross-examination.[70]

In the final analysis, it is an open-ended question as to whether justice is better served with or without the extensive introduction of technological devices into courtrooms. What can be said is that rather like the apocryphal anecdote concerning King Canute and the futility of turning back the tide,[71] the inexorable advance of technology will have to be properly managed rather than resisted by the courts within the overall objective of ensuring the accused receives a fair trial according to law.

As part of the appropriate management of technology in the courtroom, there would appear to be grounds for optimism that the existing practice of trial judges providing *aid memoires* and flow charts to juries could be usefully supplemented by the provision of tablets or iPads to jurors with the aim of (1) achieving a better understanding of the trial judge's directions to the jury (the legal issues); and (2) facilitating the provision of the evidence in the case in the most comprehensible manner (the factual issues).

IV. Minimising the Potential Impact of Social Media Coverage on a Trial

> A jury is more apt to be unbiased and independent than a court, but they very seldom stand up against strong public clamour. Judges naturally believe the defendant is guilty.
>
> Clarence Darrow

In Australia, jury members are required to be sworn to give a true verdict according to the evidence, on the issues to be tried.[72] The key words here are "according to the evidence" which means according to the evidence presented in court. At the outset of the trial, the judge will warn members of the jury that the oath or affirmation they have sworn requires them not to engage in their own private research or access social media on the case they are about to try:[73]

> Unless I tell you otherwise, you must not base your decision on any information you obtain outside this courtroom … Most importantly, you must not make any investigations or enquiries, or conduct independent research, concerning any aspect of the case or any person connected with it. That includes research about the law that applies to the case … You must not search for information about the case on Google or conduct similar searches.[74]

As was mentioned previously in Part III when discussing *Gilbert v The Queen*[75] and the assumption that juries follow judicial directions, there are increasing indications that this assumption is not matched by reality.[76] As Percy and Barns have pointed out in an age when internet use is widespread,[77] mere warnings are inadequate:

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[70] McDonald et al, n 65.

[71] In the story recorded in the 12th century by Henry of Huntingdon, King Canute demonstrated to his flattering courtiers that he had no control over the elements (the incoming tide), explaining that secular power is vain compared to the supreme power of God.

[72] See, eg, *Jury Act 1995* (Qld) s 50: "The members of the jury must be sworn to give a true verdict, according to the evidence, on the issues to be tried, and not to disclose anything about the jury's deliberations except as allowed or required by law."

[73] See, eg, the model direction dealing with "No Outside Information" as part of 11.1 Consolidated Preliminary Directions of the *Victorian Criminal Charge Book* produced by the Judicial College of Victoria. <https://judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm> (*Victorian Criminal Charge Book*).

[74] *Victorian Criminal Charge Book*, n 73.

[75] *Gilbert v The Queen* (2000) 201 CLR 414; [2000] HCA 15.

[76] Hunter, n 49, [5].

[77] There were 25.21 million internet users in Australia at the start of 2024, when internet penetration stood at 94.9%. Australia was home to 20.80 million social media users in January 2024, equating to 78.3% of the total population. *Digital 2024: Australia*.

> Merely warning a jury not to conduct its own investigations is therefore a simplistic and unrealistic approach to the issue, given that monitoring whether juries are conducting their own investigations, particularly through the internet, is almost impossible. Additionally, even where jurors do not decide to actively conduct their own investigations, the information may still inadvertently appear on their newsfeed.[78]

The inadequacy of mere warnings has been supported by law reform bodies and by research into high-profile cases.[79] The Tasmania Law Reform Institute cited the Legal Aid Commission of Tasmania's submission that "because the extent of such inappropriate use [of social media/the internet] is very difficult (if not impossible) to accurately measure, use should be treated as endemic … the assumption should be that … inappropriate social media use will occur in every trial".[80] The Institute also cited the Australian Lawyers Alliance's submission that juror misconduct of this kind currently poses "an unacceptably high risk of miscarriage of justice … its effect is insidious, and only a relatively small number of jurors need to use social media in order to produce miscarriages of justice, and to erode confidence in the judicial system".[81]

The Institute endorsed the position of the Australian Lawyers Alliance, highlighting the apparent risk of inappropriate juror use of social media extended "to both high-profile and routine criminal trials".[82] The Institute concluded that "the gravity of the risk posed by juror misconduct of this kind, coupled with the fact that general perception is that such misconduct is prevalent, necessitates that this problem is acknowledged and addressed in order to retain confidence in the administration of justice by jury trial".[83]

As Hunter has pointed out, it should come as no surprise that when a juror is confronted with unfamiliar concepts in a trial, "the first thing a juror wants to do when they have access to a computer or – more likely – their phone on the train home, is to look it up".[84] Juror curiosity is not limited to unfamiliar concepts such as medical terms, but encompasses searches about the defendant, the complainant, witnesses, the trial judge, the Crown prosecutor, the defence counsel, the crime scene and the relevant law such as the meaning of "beyond reasonable doubt".[85]

However, while recognising the endemic nature of inappropriate internet and social media use by jurors, the critical question is whether such prevalence equates to an adverse impact on an accused's right to a fair trial:

> [T]he percentage of jurors who use social media and/or internet platforms inappropriately to access information about the trial in which they are serving, does not, in and of itself, indicate whether or to what extent, that information influenced the jury verdict. It might seem a logical assumption that such an influence would follow, but ascertaining the nature and extent of that influence would require further investigation into the process of deliberation.[86]

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[78] T Percy and G Barns, "Trial by Judge Alone" (2020) 161 *Precedent (Australian Lawyers Alliance* 18 <https://www5.austlii.edu.au/au/journals/PrecedentAULA/2020/69.html#fnB6>.

[79] For example, in *R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37 two of the jurors inspected the scene of the crime and conducted experiments to discern the visibility/lighting at night to establish whether the complainant's claim that she could see the identity of the assailants was true.

[80] Tasmania Law Reform Institute, n 1, 40 [1.4.37].

[81] Tasmania Law Reform Institute, n 1, [1.4.38].

[82] Tasmania Law Reform Institute, n 1, [1.4.39].

[83] Tasmania Law Reform Institute, n 1, 41 [1.4.44].

[84] Hunter, n 49, [9]. The Tasmanian Law Reform Institute, n 1, 5–6 [1.2.4], listed some examples of juror searches. "Jurors have conducted searches on the retention of body heat in an infant, 'retinal detachment' and on scientific terms related to how blood flows after death ('livor mortis' and 'algor mortis'). They have also been found to have searched 'rape trauma syndrome' and sexual assault; 'The Feminist Position on Rape' and 'Rape and the Criminal Justice System'; as well as information about the types of physical injuries typically suffered by young sexual assault victims. Jurors have also conducted online research on methylamphetamine production, 'generalities on drug addiction and usage', information about different types of prescription medications, and mobile phone records."

[85] Hunter, n 49, [10].

[86] Tasmania Law Reform Institute, n 1, 40 [1.4.40], citing Submission #10 from J Johnston, A Wallace and P Keyzer.

The significance of the above observation concerning further investigation into the jury's process of deliberation will be discussed in Part VI dealing with transparency in jury deliberations. As to whether accessing social media or undertaking private research constitutes a miscarriage of justice, this issue was the focus of an appeal in *Folbigg v The Queen*[87] based on two grounds of irregularity in her trial. Kathleen Folbigg had been convicted of killing her four infant children by suffocation:

1. The trial miscarried by reason of a juror or jurors obtaining information from the internet, which revealed that the appellant's father had killed her mother.
2. The trial miscarried as a result of a juror or jurors informing themselves, away from the trial, as to the length of time an infant's body is likely to remain warm to the touch after death.

There was no dispute between the parties as to the facts. McClellan CJ at CL gave the leading judgment (with whom Simpson and Bell JJ agreed), and on the first ground rejected the appellant's submission that with the knowledge that Kathleen's father killed her mother the jury may have engaged in impermissible coincidence or tendency reasoning:

> Even though the appellant was the child of a person who killed another I do not believe there was any likelihood that a juror would reason that it was more likely that the appellant would kill her own children. The killing of a spouse may tragically occur in circumstances of the breakdown of a relationship or be occasioned by temporary loss of control accompanied by a violent and fatal act. The circumstances and motive for the killing are likely to be quite different from those which will exist if a mother has killed her own children. There could be no suggestion that the killing of the appellant's mother by her father indicated any tendency in the appellant to kill her own children. In my judgment the knowledge obtained by the juror did not lead to a miscarriage of justice.[88]

On the second ground, the inquiry by a juror to a nursing friend as to the length of time a body remains warm to the touch after death, the appellant suggested that the reason behind the inquiry was a dissatisfaction with the material before the jury in court. Again, McClellan CJ at CL did not believe this "curiosity" could have affected the jury's verdicts. Indeed, McClellan CJ at CL argued that the inquiry assisted the appellant:

> If a child's body lost heat quickly following death it would increase the likelihood that the appellant was present at the death. If, as the information given by the nurse revealed, the body would remain warm for some time, the likelihood that the appellant was telling the truth was enhanced.
>
> In my judgment if it had any impact at all the information obtained by the juror would have tended to assist rather than prejudice the appellant. The longer the time for the deceased's body to go cold the more likely was the possibility that the appellant discovered each child and raised the alarm well after their death.[89]

As a result of McClellan CJ at CL's rejection of both of the appellant's grounds of appeal, his Honour concluded that there was no material irregularity and therefore no miscarriage of justice and dismissed the appeal. Leaving aside the questionable subjective assumptions underpinning McClellan CJ at CL's findings, even where there have been two juror breaches of their oath/affirmation "to give a true verdict according to the evidence" and the trial judge's instructions not to engage with the internet/social media or conduct their own research, each breach is to be assessed on its merits in accordance with the test set out in *Webb v The Queen* (*Webb*)[90] which was recently affirmed by the High Court in *HCF v The Queen*:[91]

> Irregular conduct by a jury or juror, whether described as procedural or otherwise, involves a miscarriage of justice if a fair-minded and informed member of the public might reasonably apprehend that the jury (or juror) might not discharge its function of rendering a verdict according to law, on the evidence, and in accordance with the directions of the judge. If the jury or juror misconduct would give rise to such a reasonable apprehension then, *for that reason*, the misconduct will involve a "failure to observe the requirements of the criminal process in a fundamental respect". In such a case, satisfaction of the reasonable apprehension test means that the "shadow of injustice over the verdict" cannot be dispelled,

[87] *Folbigg v The Queen* [2007] NSWCCA 371.

[88] *Folbigg v The Queen* [2007] NSWCCA 371, [55] (McClellan CJ at CL).

[89] *Folbigg v The Queen* [2007] NSWCCA 371, [58]–[59] (McClellan CJ at CL).

[90] *Webb v The Queen* (1994) 181 CLR 41, 53 (Mason CJ and McHugh J).

[91] *HCF v The Queen* (2023) 97 ALJR 978; [2023] HCA 35.

> that the trial is "incurably flawed", that there has been a "serious breach of the presuppositions of the trial", and that "the irregularity [is] so material that of itself it constitutes a miscarriage of justice without the need to consider its effect on the verdict".[92]

The current position dealing with juror misconduct would appear to be a combination of the application of the *Webb* test above and the imposition of penalties for breach of a juror's oath/affirmation,[93] with the availability of a trial by judge alone if either the relevant statutory criteria for a no jury order are met,[94] or as in South Australia and the Australian Capital Territory an accused can elect to be tried by a judge alone without any discretion being vested in the Crown prosecutor or the court to refuse such an election.[95] Short of an unrestricted right to elect to be tried by judge alone, one reform would be to reverse the onus of proof following an application from an accused for a judge only trial which would require a court to make the requested order unless the court was satisfied it was not in the interests of justice.[96] Such a reform would have allowed Cardinal Pell[97] to apply for judge only trial in 2018, an option which is unavailable in Victoria.[98] To place no jury orders in perspective, in New South Wales in 2014 judge only trials accounted for a quarter of all trials.[99] An obvious factor in determining whether to apply for a trial by judge alone (assuming this option is available) is the tactical assessment of the best option for the defendant to maximise their chance of acquittal.[100]

Hunter[101] was able to identify only two cases where jurors were dealt with for disobeying judicial directions, and in each case the juror was fined.[102] In *Registrar of the Supreme Court of South Australia v S*,[103] two jurors had conducted internet searches in relation to the case and were fined $3,000 each for contempt. While finding their offending was serious, Doyle J considered a term of imprisonment

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[92] *HCF v The Queen* (2023) 97 ALJR 978, [11] (Gageler CJ, Gleeson and Jacot JJ); [2023] HCA 35 (original emphasis and citations omitted).

[93] See n 17.

[94] See n 18.

[95] See *Juries Act 1927* (SA) s 7(1) and *Supreme Court Act 1933* (ACT) s 68B. However, s 68B(1) excludes certain offences in the Australian Capital Territory such as murder, manslaughter and rape, which was the reason why Bruce Lehrmann, who was charged with the alleged rape of Brittany Higgins, was unable to apply for a judge only trial. In the Lehrmann case, McCallum CJ dismissed the jury after a juror was found to have brought into the jury room a research article on sexual assault. In the Australian Capital Territory there are no penalties for juror misconduct. The ACT Director of Public Prosecutions decided not to retry Lehrmann.

[96] See *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017* (WA). The Bill had four policy objectives: (1) Increase individual liberty by allowing the accused and his or her defence team the option of trial by judge alone; (2) Increase transparency, given that judges are required to set down their reasoning, whereas juries are not; (3) Reduce average trial times, by removing the need to empanel and instruct juries; (4) Reduce the impost on the public purse, given that shorter trials are generally less expensive. Explanatory Memorandum, *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017* (WA) 1. The Bill also proposed removing three criteria listed in the *Criminal Procedure Act 2004* (WA) which the court may currently consider when determining whether it is appropriate to make an order for trial by judge alone. They are: (1) when the trial is expected to be an unreasonable burden on the jury due to being particularly long or complex (s 118(5)(a)); (2) there is a risk that jurors will be threatened or interfered with (s 118(5)(b)); (3) the trial will involve a factual issue that requires the application of objective community standards (s 118(6)). The first two criteria weigh in favour of a trial by judge alone, while the third factor favours a trial by jury. See Standing Committee on Legislation, Legislative Council, Western Australia Parliament, *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017* (Report No 42, 2020) i.

[97] See *Pell v The Queen* (2020) 268 CLR 123; [2020] HCA 12.

[98] In 2020, Victoria passed legislation allowing judge only criminal trials, but as a short-term measure to deal with the absence of court sittings during the COVID-19 lockdown.

[99] Felicity Gerry, "Jury Is Out: Why Shifting to Judge-alone Trials Is a Flawed Approach to Criminal Justice", *The Conversation*, 5 May 2020 <https://theconversation.com/jury-is-out-why-shifting-to-judge-alone-trials-is-a-flawed-approach-to-criminal-justice-137397>.

[100] For a discussion of the factors governing the probabilities of a favourable decision see Croucher and Hon, n 4. The identified factors include the majority verdict rule (12-0, 11-1 or 10-2), the severity of the charge(s), the quality and reputation of the defence counsel, the characteristics of the defendant, and the composition of the jury.

[101] Hunter, n 49.

[102] *Registrar of the Supreme Court of South Australia v S* (2016) 125 SASR 207; [2016] SASC 93; *Attorney-General (WA) v Marijanich* [2024] WASC 312.

[103] *Registrar of the Supreme Court of South Australia v S* (2016) 125 SASR 207; [2016] SASC 93.

was not warranted because both jurors promptly acknowledged their wrongdoing, expressed genuine contrition for their conduct, and were employed people of good character with caring responsibilities.[104] In *Attorney-General (WA) v Marijanich*,[105] McGrath J followed the approach of Doyle J and imposed a fine of $8,000.[106]

Braun has suggested options to address juror misconduct could include the introduction of a *voir dire* process in Australia (discussed in Part V) and the sequestration of the jury but concluded that they appear "financially unattainable and politically unrealistic", while electronic sequestration is "difficult to monitor" and penalties "are likely to have little effect in practice".[107] As to an unabridged right of the accused to elect to be tried by judge alone, writing in 2017 Braun concluded that there seemed "little consensus for a holistic overhaul of the criminal jury system".[108] This lack of consensus reflects the tension between the protection of the rights of the accused and the participation of the community in the administration of justice. As O'Leary has observed, "there is a dispute over the weight that should be afforded to the accused's right to choose or whether a presumption of a jury trial exists".[109] Regarding the different criteria that are applied in Australian jurisdictions to the availability of a judge only trial, O'Leary has argued that "[t]he acceptable reasons for granting judge alone trials and the grounds for excluding matters from their ambit are applied inconsistently, depending on whether the protection theory or the community participation theory is preferred".[110] Thus, Victoria which does not permit trial by judge alone firmly embraces the community participation theory, while South Australia has completely adopted the protection theory.[111]

Clearly, the Australian public's increasing use of social media and internet searches represents a danger that the accused may not receive a fair trial and therefore falls squarely within the protection theory.[112] Yet, the only relevant criterion for a trial judge granting the accused's application to be tried by judge alone is "there has been significant pre-trial publicity that may affect jury deliberations",[113] but this does not deal *ex ante* with the possibility of jurors ignoring the trial judge's directions not to engage with social media and internet commentary about the case, especially if the case is a high-profile one.

Considering this lacuna in the law, the authors support the adoption in all Australian jurisdictions of the South Australian protection theory approach as set out in s 7(1) of the *Juries Act 1927* (SA):

> (1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court (a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and (b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner, the trial will proceed without a jury.

By the same token, the authors contend for consistent stronger penalties for juror misconduct across Australian jurisdictions as found in s 68C Inquiries by juror about trial matters prohibited of

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[104] *Registrar of the Supreme Court of South Australia v S* (2016) 125 SASR 207, [27]–[28] (Doyle J); [2016] SASC 93. Doyle J distinguished the case from two English cases, *Attorney-General v Fraill* [2011] EWCA Crim 1570 and *Attorney-General v Dallas* [2012] 1 WLR 991; [2012] EWHC 156 (Admin), where each juror had engaged in more serious contempts and had been imprisoned for eight months and six months respectively.

[105] *Attorney-General (WA) v Marijanich* [2024] WASC 312.

[106] *Attorney-General (WA) v Marijanich* [2024] WASC 312, [85]–[86] (McGrath J).

[107] Braun, n 4, 1661.

[108] Braun, n 4, 1662.

[109] O'Leary, n 4, 154.

[110] O'Leary, n 4, 154.

[111] See *Juries Act 1927* (SA) s 7(1).

[112] See *R v K* (2003) 59 NSWLR 431; [2003] NSWCCA 406, where the court set aside a conviction in light of evidence that jurors had conducted internet searches disclosing inadmissible and prejudicial material about the accused.

[113] See, eg, *Criminal Code 1899* (Qld) s 615(4)(c). For a case where the trial judge's confidence in the jury's capacity to deliver a true verdict despite the extraneous influence of the "corrosive and prejudicial effect of pre-trial publicity" was misplaced, see *R v Fardon* [2010] QCA 317, [75] (Chesterman JA).

the *Jury Act 1977* (NSW) with a maximum penalty of 50 penalty units[114] or two years' imprisonment or both.

V. Jury Selection

> Jury selection is strictly an emotional process. They're looking for people they can manipulate. Both sides are.
>
> Joseph Wambaugh

In this Part of the article the focus is upon peremptory challenges (challenges without cause) to prospective jurors. As mentioned in the Introduction (Part I), the number of peremptory challenges available to the parties varies across Australian jurisdictions, ranging from three in New South Wales,[115] South Australia,[116] Victoria,[117] and Western Australia[118] to six in the Northern Territory[119] and Tasmania[120] and eight in the Australian Capital Territory[121] and Queensland.[122]

New South Wales is unusual as under s 42(2) of the *Jury Act 1977* (NSW) "any number of peremptory challenges may be made if the Crown and all the persons prosecuted agree to the challenges". The efficacy of allowing unlimited peremptory challenges was considered by the NSW Law Reform Commission.[123] The Commission recommended: "The ability of trial counsel to agree to an extension of the statutory number of peremptory challenges should be subject to leave being given by the judge, pursuant to application made before the date fixed for trial."[124]

This recommendation was opposed by The Law Society of New South Wales who argued that the Crown and the defence were generally able to agree to an additional number of peremptory challenges without problems:

> The current system is flexible enough to work in a fashion that the parties to criminal litigation can exercise some discrimination in the constitution of the jury. At the same time, the current limitation on challenges avoids real manipulation of the jury pool. Recommendation 43 and the suggestion by the Chief Justice would impose a statutory cap of three on the number of additional peremptory challenges and would require the court's leave to vary this. This would introduce a rigidity to the system, and the burden and cost to all of an extra pre-trial mention … The flexibility of the current system (with an extension to the number of challenges by consent and without leave) enables parties to deal with unexpected difficulties presented in a particular jury pool. A need to make application in advance of the trial to seek leave is cumbersome and would not cater to the unexpected situation.[125]

The thrust of the NSW Law Society's submission was there appeared to be no utilitarian purpose in changing the current system of peremptory challenges. This view prevailed and s 42(2) of the *Jury Act 1977* (NSW) was not amended. The philosophy behind peremptory challenges would seem to be based on the equality of challenges between the parties rather than the number of challenges per se.

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[114] The value of a penalty unit is prescribed by the *Crimes Act 1914* (NSW) and is currently $330 for offences committed on or after 7 November 2024. So, 50 penalty units is $16,500.

[115] *Jury Act 1977* (NSW) s 42(1).

[116] *Juries Act 1927* (SA) s 61.

[117] *Juries Act 2000* (Vic) s 39(1)(a).

[118] *Criminal Procedure Act 2004* (WA) s 104(3)(a) and (4).

[119] *Juries Act 1962* (NT) s 44(1)(b). In the case of a capital offence, it is 12 jurors: s 44(1)(a).

[120] *Juries Act 2003* (Tas) reg 35.

[121] *Juries Act 1967* (ACT) s 34(1)(a) and (2)(a).

[122] *Jury Act 1995* (Qld) s 42(3).

[123] New South Wales Law Reform Commission, *Jury Selection*, Report No 117 (September 2007).

[124] New South Wales Law Reform Commission, n 123, Recommendation 43, 181.

[125] Letter Re: Peremptory challenges from Michael Tidball, Chief Executive Officer, The Law Society of New South Wales, to Laurie Glanfield, Director General, NSW Attorney General's Department, 30 March 2009 <https://www.lawsociety.com.au/sites/default/files/2020-01/Peremptory%20Challenges_Mar_2009.pdf>.

"Peremptory challenges allow both the prosecution and defence to remove the perception of juror bias by eliminating extremes of partiality on both sides."[126]

The NSW Law Reform Commission helpfully listed the arguments for and against peremptory challenges.[127] Arguments against peremptory challenges: (1) Potential cause of juror frustration and humiliation; (2) the arbitrary and subjective nature of the challenge; (3) wasted resources; (4) the possibility of discrimination; (5) abuse by potential jurors;[128] (6) other forms of challenge meet the needs of justice. Arguments in favour of peremptory challenges: (1) Alternatives not a sufficient answer; (2) involvement of the accused; (3) securing a representative jury; (4) corrective against a failure to grant a challenge for cause.

As to alternatives to the complete abolition of peremptory challenges, in line with Recommendation 43 discussed above, the Commission identified two alternatives:

- not allowing trial counsel to agree to enlarge the permitted number of peremptory challenges;
- further reducing the number of peremptory challenges, for example, to one per party, so as to cater for the case of someone who is manifestly unfitted to serve but who has not been excluded either in the lead up to empanelment or by the judge.[129]

Ultimately, the Commission accepted there was general support for the retention of peremptory challenges, and in addition to Recommendation 43 confined itself to recommending "the continued availability of the right of peremptory challenge be kept under review to ensure that it does in fact advance the fairness of trial by jury and does not in fact involve a distortion of the process".[130]

More generally across Australian jurisdictions, the accepted policy appears to be that whether there are three, six or eight peremptory challenges available to each party is of little importance, because each side is seeking to select a "representative" jury they consider most suits their case and may neutralise each other. Indeed, the VLRC noted that "because jury deliberations in Victoria are confidential, there are no studies that indicate the effectiveness of peremptory challenges in achieving an impartial jury".[131] Horan has argued that peremptory challenges are guesswork because barristers have no knowledge of jurors' values and attitudes and it is not possible to know whether a juror will be favourable based on appearance and occupation.[132]

In other words, peremptory challenges are arbitrary and devoid of logic,[133] leading to the conclusion that while peremptory challenges serve no objective purpose, if Crown prosecutors and defence counsel are wedded to the principle of the availability of a limited number of peremptory challenges then there appears to be no pressing reason to press for reform.

The alternative option would be to address the lack of knowledge of jurors' values and attitudes by adopting the *voir dire* process of jury empanelment undertaken in the United States. Questions can be asked about "marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests".[134] However, the VLRC found research in the United States

[126] Letter Re: Peremptory challenges from Michael Tidball, Chief Executive Officer, The Law Society of New South Wales, to Laurie Glanfield, Director General, NSW Attorney General's Department, 30 March 2009 <https://www.lawsociety.com.au/sites/default/files/2020-01/Peremptory%20Challenges_Mar_2009.pdf>.

[127] New South Wales Law Reform Commission, n 123, 175–180.

[128] This is a reference to "anecdotal evidence to the effect that jurors who wish to avoid jury service can adopt a ploy of dressing or behaving in a way that is likely to provoke a challenge": New South Wales Law Reform Commission, n 123, 179 [10.34].

[129] New South Wales Law Reform Commission, n 123, 180–181 [10.41].

[130] New South Wales Law Reform Commission, n 123, Recommendation 44, 181 [10.42].

[131] Victorian Law Reform Commission, n 22, 194 [17.12].

[132] Horan, n 3, 29–42.

[133] M Findlay and P Duff, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994) 52.

[134] P Bamberger, "Jury Voir Dire in Criminal Cases" (2006) 78(8) *New York State Bar Association Journal* 24, 26.

"highlighted that the peremptory challenge process is still no better than a guessing game",[135] citing Kessel and Kessel: "Most of the time, attorneys have little idea how specific jurors are apt to respond to the arguments and evidence they offer at trial."[136]

At one level a *voir dire* process for jury selection can improve the identification of jurors who are more likely to be fair and impartial, rather than unfair and biased, simply because there is the capacity to probe deeper as to jurors' values, attitudes, backgrounds and experiences rather than relying on arbitrary peremptory challenges based on appearance and occupation.[137] At another level, there are significant practical objections to adopting a *voir dire* model of jury selection, the most obvious being the intrusive nature of the questioning of a prospective juror which would likely have the effect of increasing the number of people seeking to avoid jury service. Furthermore, it would be relatively easy for a juror who did not want to serve on a jury to answer questions in a way that invited challenge from either party. Then again, there is the length of time required to interrogate each juror and whether legal objections might arise for the trial judge to determine as to the manner and type of questions being asked by the parties, which would be magnified where there are multiple defendants.[138]

The laudable objective of selecting fair juries, which is the purpose of the *voir dire* process in the United States, is not without its difficulties, such as an estimated to 12% to 15% non-response rate to the jury summons process,[139] and problems in language proficiency affecting the likelihood that a prospective juror will be seated on a jury.[140] Also, jury selection procedures vary across jurisdictions in the United States:

> On one end of the spectrum is limited *voir dire*. Limited *voir dire* is characterized by judges rather than attorneys questioning potential jurors without the benefit of a pre-trial questionnaire and doing so in groups of jurors rather than individually. The questions tend to be closed - calling for only yes or no responses - and the subject matter of the questions tend to be closely related to the trial.
>
> On the other end of the spectrum is expansive *voir dire*. Expansive *voir dire* involves both the judge and the attorneys asking questions. The range of topics covered in expansive *voir dire* is broader and includes more open questions than does limited *voir dire*. The venire [potential juror] members will have completed a written juror questionnaire before the trial, allowing the judge and lawyers to focus their inquiries on particular responses of interest. Finally, prospective jurors are questioned individually – sequestered from the others – rather than in groups.[141]

Thus, even in the United States there is recognition of the court's time and resources involved in undertaking a *voir dire*, with some jurisdictions opting for a limited *voir dire*. The latter choice appears to be a recognition of the limited human capacity to assess other people:

> Ample evidence suggests, however, that lawyers are not good at assessing jurors' competence or biases. That may be due to shortcomings in the *voir dire* process (which often has a heavy reliance on closed questions or questioning jurors in groups rather than individually), as well as limits on people's general inability to assess others.[142]

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[135] Victorian Law Reform Commission, n 22, 195 [17.16].

[136] N Kressel and D Kressel, *Stack and Sway: The New Science of Jury Consulting* (Basic Books, 2004) 128.

[137] The type of questions asked in the *voir dire* in the United States may take the following pattern: (1) Educational background, starting with high school. (2) Employment background from high school on, including reasons for career changes and plans for future employment/career changes. (3) Life choices – what the juror likes to do in their free time when they are not working, that is family time, travel, reading (what), church, etc. <https://2ndcircuit.leoncountyfl.gov/resources/Voir_Dire.pdf>.

[138] See, eg, *Florida Rules of Civil Procedure*, r 1.431(b) which authorises the judge and the trial lawyers to question the prospective jurors on the *voir dire*. Generally, the trial judge has discretion to decide how the *voir dire* examination will be conducted, the types of questions that will be permitted, and the extent of the questioning.

[139] S Diamond and V Hans, "Fair Juries" (2023) 3 *University of Illinois Law Review* 879, 903.

[140] Diamond and Hans, n 139, 909.

[141] B O'Brien and C Grosso, "Judges, Lawyers, and Willing Jurors: A Tale of Two Jury Selections" (2024) 98(1) *Chicago-Kent Law Review* 111, 113-114.

[142] O'Brien and Grosso, n 141, 113.

Consequently, the ambivalent evidence of the *voir dire* model in the United States resulting in the selection of fair juries is such as to discourage its adoption in Australia. This leads to the conclusion that the current system of limited peremptory challenges in Australia cannot realistically be improved upon and subject to ongoing review, is likely to continue in the future.

VI. Transparency in Jury Deliberations

> The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury.
>
> Mark Twain, *Roughing It*.

Jury secrecy[143] is a bulwark of the jury system in Australia.[144] Such secrecy takes two forms: (1) prohibitions on discussing the case with anyone other than fellow jurors; (2) prohibitions on revealing jury deliberations to anyone after a verdict had been reached and the jury discharged by the trial judge.[145] The penalties range from as low as $5,000 in Western Australia and 20 penalty units in New South Wales to two years imprisonment in Queensland and 600 penalty units or imprisonment for five years in Victoria. Thus, there is no consistency in penalties for breaching jury secrecy, ranging from a low fine to a lengthy prison sentence.

There are exemptions from the jury secrecy rule as, for example, those set out in s 49A(5) of the *Juries Act 1962* (NT):

> (5) Subsection (2) does not prohibit disclosing protected information:
>
> (a) to a court; or
> (b) to a Royal Commission, Commission of Inquiry or Board of Inquiry; or
> (c) to the Director of Public Prosecutions, a member of the staff of the Director's Office or a member of the Police Force for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations; or
> (d) as part of a fair and accurate report of an investigation referred to in paragraph (c); or
> (e) to a person in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or
> (f) to a health practitioner in the course of the treatment of a person in relation to issues arising out of the person's prior service as a juror.

"Protected information" in the above section is defined as meaning: "particulars of statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court."

In *R v Skaf*,[146] the NSW Court of Criminal Appeal set out four reasons justifying jury secrecy:

> The exclusionary principle is based on the need to promote full and frank discussion amongst jurors, to ensure the finality of the verdict, to protect jurors from harassment, pressure, censure and reprisals, and (to a degree) to maintain public confidence in juries.[147]

However, as Hunter has pointed out, there is a flip side to the secrecy argument:

> Public confidence in jury trials is also enhanced by greater transparency and scrutiny of criminal justice processes. As Lord Steyn observed in *R v Mirza*; *R v Connor*, the response to an accused or an appellant

[143] The jury secrecy rule had its origins in *Vaise v Delaval* (1785) 99 ER 944.

[144] Jury secrecy does not apply in all common law countries such as in the United States, where jurors are not prevented from giving interviews and publishing material after a verdict has been reached. By contrast, *Evidence Act 2006* (NZ) s 76 adopts the same approach to jury secrecy as Australia. See also Canadian *Criminal Code*, RSC 1985, c C-46, cl 649.

[145] *Juries Act 1967* (ACT) s 42C(2); *Jury Act 1977* (NSW) s 68B; *Juries Act 1962* (NT) s 49A(2), (3), (4); *Jury Act 1995* (Qld) s 70(2), (4); *Criminal Law Consolidation Act 1935* (SA) s 246(2); *Juries Act 2003* (Tas) s 58(2), (3); *Juries Act 2000* (Vic) s 78(2), (7); *Juries Act 1957* (WA) s 56B(1).

[146] *R v Skaf* (2004) 60 NSWLR 86; [2004] NSWCCA 37.

[147] *R v Skaf* (2004) 60 NSWLR 86, [211] (Mason P, Wood CJ at CL and Sully J); [2004] NSWCCA 37. See also J Tunna "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 *Canterbury Law Review* 79, 83.

> alleging a serious irregularity in jury deliberations that "'[w]e shall never know' fits uneasily with modern conceptions of fairness and due process in the criminal justice system.[148]

Hunter concluded that the jury secrecy rule is anachronistic, drawing on the English case of *R v Thompson*[149] where Judge LCJ observed the jury secrecy rule was subject to "two narrow exceptions", namely, a complete repudiation of the oath taken by jurors to try the case according to the evidence and where extraneous material has been introduced into the jury deliberations:[150]

> Mystery and a black box theory of justice may have suited bygone eras, but where a real possibility of serious irregularity is evident, it becomes anachronistic for the simple reason that it smacks of justice in the dark.[151]

This raises the issue of whether jury secrecy is indeed a "black box" or whether lifting the lid on jury secrecy opens a Pandora's box.[152] More particularly, whether the exceptions to the secrecy rule such as those set out in s 49A(5) of the *Juries Act 1962* (NT) above are sufficiently robust to remedy instances of alleged juror misconduct or to allow ready access to "conduct research into matters relating to juries or jury service" (s 49A(5)(e) above). At the heart of the argument for greater transparency in jury deliberations is the lack of accountability as to how juries arrive at their verdicts because, unlike judges, juries are not required to give reasons. However, juries are not comprised of trained lawyers and are given the role of finders of fact while the trial judge has the role of directing the jury on the relevant law. The question for the jury is always binary: guilty or not guilty.

As previously discussed in Part II dealing with the impact of technology in the future, there should be greater attention paid by courts to improving the education of the jury.[153] The latter would have the dual benefit of greater accountability and combating the malign influence of social media:

> Perhaps, the unjust convictions of Lindy Chamberlain and Cardinal Pell would not have been avoided even if their juries were specifically educated on the essentiality of jury impartiality and the risks of subliminal prejudice. However, such training presents a reasonable modern way to inoculate jurors against viral social media commentary, including commentary and misinformation created for misinformation purposes.[154]

Helm has recommended a combination of improved juror education and a modernisation of court procedures to improve the work of juries.[155] Helm's recommendations include changes to jury directions and guidance, changes to the way expert evidence is introduced, the utilisation of targeted decision aids, the utilisation of agreed questions for cross-examination, and more careful design of legal standards.

As to "authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service", such authorisation can take the form of government-initiated references as exampled by the then Attorney General of NSW, the Hon RJ Debus, making a request in 2007 that both the NSW Law Reform Commission and the NSW Bureau of Crime Statistics and Research "inquire into and report on directions and warnings given by a judge to a jury in a criminal trial".[156]

Thus, for the future, the most fruitful path to make juries work better would appear to be improved juror education and a targeted modernisation of court procedures harnessing advances in technology and AI

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[148] J Hunter, "Jury Deliberations and the Secrecy Rule: The Tail that Wags the Dog?" (2013) 35(4) *Sydney Law Review* 809, 811, citing *R v Mirza* [2004] 1 AC 1118, [12] (Lord Steyn, dissenting); [2004] UKHL 2.

[149] *R v Thompson* [2011] 1 WLR 200; [2010] EWCA Crim 1623.

[150] *R v Thompson* [2011] 1 WLR 200, [4], [5] (Judge LCJ); [2010] EWCA Crim 1623.

[151] Hunter, n 148, 826.

[152] In Greek mythology, Pandora's box contained all the evils of the world and were released when Pandora opened the box, but the box also contained hope which remained inside the box. The modern equivalent would be "to open a can of worms".

[153] See also K Thompson, "Should We Reform the Jury? An Australian Perspective" (2024) 33 *Washington International Law Journal* 165.

[154] Thompson, n 153, 215.

[155] R Helm, *How Juries Work: And How They Could Work Better* (Oxford Academic, 2024).

[156] Trimboli, n 2.

tools, rather than lifting the lid on jury secrecy and risking the law of unintended consequences. This process can always be supplemented by authorised research into matters relating to juries or jury service.

One obvious reform in this area would be greater consistency in penalties for juror misconduct across Australian jurisdictions, which currently reflect an ambivalence as to the seriousness of the offence. With improved juror education comes increased juror responsibility to comply with judicial directions. Retrials for juror misconduct involve a considerable waste of public resources and punishments should reflect the seriousness of the misconduct, especially after multiple judicial warnings.

VII. Conclusion

> I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.
>
> Thomas Jefferson

Historically, there have been regular calls to either abolish the jury system and replace it with judge only trials or to amend jury secrecy laws to permit greater transparency of jury deliberations. Short of a constitutional amendment, s 80 of the *Australian Constitution* enshrines the right to a jury trial for any Commonwealth offence. Whether, in the future, jury trials will wither on the vine in the States and Territories has been the subject of this article.

The conclusion drawn here is that the dangers assailing the jury system, such as the prevalence of social media, difficulties with juror understanding of judicial instructions, juror misconduct, lack of transparency in jury decisions and the changing nature of Australian society, can be addressed with a comprehensive suite of technological innovations, reforms to court procedures, improved juror education and more severe penalties for juror misconduct.

In this context, while recognising the obstacles presented by "deepfake" materials, with suitable court oversight and due diligence artificial intelligence can be harnessed to improve the quality of admissible evidence as well as assisting with better juror education. Widespread court use of improved technology and the provision of tablets and Ipads to an increasingly electronically aware pool of jurors, opens the prospect of greater juror engagement in the trial, from closely following counsel arguments to asking questions through the trial judge.

Finally, the authors support the adoption in all Australian jurisdictions of the South Australian protection theory approach as set out in s 7(1) of the *Juries Act 1927* (SA), which would address any fears an accused might have of a jury trial by allowing an unabridged right of the accused to elect to be tried by judge alone.