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Decisions Without Reasons – Rethinking Jury Secrecy
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Decisions Without Reasons – Rethinking Jury Secrecy

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Published by: BookPal

Unit 4, 28 Boyland Avenue, Coopers Plains, QLD 4108

Tel: (07) 3712 2800

Web: www.bookpal.com.au

National Library of Australia Cataloguing-in-Publication entry:

Author: Donnelly, Jason

Title: Decisions without reasons – rethinking jury secrecy / Jason Donnelly

Edition: 1st ed.

Subject: Jury. Trial practice.

Dewey Number: 347.0752

ISBN 978-1-921300-96-7

For my Grandmother, Irmgard Napieracz

Abstract

It has often been asserted that the system of trial by jury in the Australian common law tradition represents a fundamental component of the criminal justice system. Yet, interestingly, the number of criminal and in particular civil jury trials has steadily declined in recent years. In an effort to instil newfound confidence and strength in a system in decline, this dissertation examines whether and to what extent jurors should provide a rational and cogent set of reasons for any decision that they reach.

Rather than undermine public confidence in the mandatory provision of reasons, an explanation for a particular verdict by a jury will bring these decision-makers in line with most other fact-finders in the Australian legal system, where reasons for a decision is compulsory. Besides examining the substantive arguments for and against the jury secrecy rule, an extensive survey of the system of trial by jury will be examined in light of both international law and those nation states around the world that make use of the jury system. Surprisingly, little academic and judicial treatment has been given to the implications of the jury secrecy rule in Australia in light of Australia's obligations within the spectrum of international law.

With the development of the common law, there has been a growing trend in recent times within the area of administrative law that administrators provide reasons for their decisions. It is argued that the rationale behind this increasing obligation upon administrators can also be extended to jurors, who paradoxically make more important decisions without the need to provide reasons for their verdicts in a criminal trial.

Moreover, an outline of the fundamental importance in the giving of reasons for a decision by fact-finders will be examined in light of the overarching principles of the rule of law. Finally, given the great difficulty in changing a system that has itself remained predominantly unchanged for hundreds of years, a range of reforms will be offered to the current Australian trial by jury system, with a focus on the mandatory provision of reasons by a jury verdict of guilty at the very least.

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Chapter 1 – The Nature of Jury Secrecy

"It may be that the abandonment of secrecy, far from destroying the system, may be all that will save it. The jury system will only survive in the end if the community accepts that it is in the public interest that it should survive. That, I suggest, can only be determined when the community knows what juries do in the jury room." ¹

1.1 Introduction

Trial by jury in a criminal case is not a topic where it is possible to say anything very novel or profound.² Yet, interestingly, there appears to be a lack of public debate in contemporary times about the matter of jury deliberations and whether jurors should provide at least a minimal set of reasons for any verdict they reach in a criminal trial.³

Every proposed amendment or modification of the Australian jury system should be cautiously examined, and except proved to be necessary, rejected.⁴ As a result, in order to appreciate a recommendation such that jurors in an Australian criminal trial should provide reasons for any guilty verdict they deliver, a vast range of legal themes relevant in both a domestic and international light will need to be examined.⁵

The jury is unique among decision-makers in the Australian criminal law trial process, in that it does not have to explain its verdict.⁶ This protection of jury deliberations from disclosure has become recognised as the exclusionary rule.⁷ Conventionally, the prevailing position within the Australian legal system is that for a jury to make available its considerations and reasons for a verdict is either not possible on practical legal grounds, or for other, less accurate conceptions, to do with a range of possible human

^{*} The author wishes to thank Professor Michael Adams, Head of Law at the University of Western Sydney, for his valuable comments regarding this research dissertation.

¹ McHugh, M., "Jurors' Deliberations, Jury Secrecy, Public Policy and the Law of Contempt," in *The Jury Under Attack*, edited by Findlay, M & P. Duff, Sydney, Butterworths, 1988, at 71.

² Devlin, P., *Trial by Jury*, London, Stevens, 1966, at 3.

³ Cassidy, B., "Juries Speaking" (2000) 25(1) Alternative Law Journal 9, at 10.

⁴ Bar Council., Your right to a Jury Trial: Statement of the Bar Council of N.S.W, Sydney, The Council, 165, at 13.

⁵ Ibid.

⁶ Boniface, D., "Juror misconduct, secret jury business and the exclusionary rule" (2008) 32(1) *Criminal Law Journal* 18, at 26.

⁷ McNicol, S.B & D. Mortimer., Evidence, 3rd ed, Sydney, LexisNexis Butterworths, 2005, at 2-3.

frailties including lack of ability, oversensitivity, prejudice, and ignorance.⁸

1.2 History of the Jury

Whether or not the disclosure of jurors' deliberations is feasible, is a question that can hardly be understood, let alone answered, without some awareness and knowledge of the origins of the criminal jury system. An examination of the course of the jury's development will illustrate evidently that the jury is an institution that can evolve to serve changing state of affairs without detriment to its important nature.

Initially, a juror was an individual who the King obliged to take an oath in order to extract information for administrative purposes.¹¹ The Normans introduced this method of gathering for fiscal and managerial purposes.¹² Historically, therefore, jurors were a body of men in the practice of inquisitorial type activities by the Crown.¹³

With the development of time, these same local men, in groups of twelve, would also be sworn and required to notify the King's itinerant judges of suspected criminals.¹⁴ These collection of individuals became recognised as juries of accusation.¹⁵ Suspected criminals were then tried by one of several ordeals in which 'God' was summoned to differentiate the innocent from the guilty.¹⁶

The criminal jury also has historical roots in the grand jury.¹⁷ When individuals were accused of a crime, the grand jury was called together to decide whether there was sufficient evidence to put individuals on trial before judges.¹⁸ Thus, the essential form of the jury can be found in a range of legal practices that offered methods suitable to

⁸ Abramson, J., We the Jury, Harper Collins, New York, 1994, at 1.

⁹ New South Wales Law Reform Commission., Criminal procedure: The Jury in a Criminal Trial – Discussion Paper for Community Consultation, Sydney, N.S.W. Law Reform Commission, 1985, at 13.

¹⁰ McHugh, n 1 above at 56.

¹¹ Gillies, P., "Directions to Convict" (2007) 31(5) Criminal Law Journal 295, at 295.

¹² Ibid

¹³ Stone, J., *Evidence: Its History and Policies*, Revised by W. Wells, Sydney, Butterworths, 1991, at 16-17.

¹⁴ Baker, J.H., An Introduction to English Legal History, London, Butterworths, 2nd edition, 1979, at 64.

¹⁵ Ibid.

¹⁶ ibid.

¹⁷ New South Wales Law Reform Commission, n 9 above at 14.

¹⁸ Baker, n 14 above at 415.

criminal trials. 19 Over the ensuring centuries, with the evolution of criminal law, the qualities of the jury also changed. 20

When trial by ordeal of water was virtually removed by the Pope's order at the Fourth Lateran Council of 1215, with the effect that priests were no longer able to participate in judging accused persons, English judges had to find another way than relying on God and religious conviction of trying the question of guilt.²¹

Over time the jury of accusation began to be used to swear the facts and make a decision in a criminal case.²² By the end of the thirteenth century, this collection of individuals became the trial jury and the petty jury of twelve countrymen.²³ Of particular importance was the *Magna Carta* of 1215, which offered another model for the trial by jury.²⁴ Amongst other things, the *Magna Carta* guaranteed the nobility trial by their peers.²⁵

It was not until 1352 that an individual who was accused of a criminal offence could object that members of the trial jury had also been members of the jury of accusation.²⁶ During the fourteenth century jurors were vigorously encouraged to inform themselves previous to trial.²⁷ Slowly but surely, though, it became an irregularity for a party to converse privately with jurors, at least once presented alone.²⁸

Notably, it was not until 1833 that criminal trial by civilian juries of twelve was made accessible on request to all people, free settlers and convicts alike, charged with crime misdemeanors or offences in the Supreme Court.²⁹ As a result, jury trials became offered in courts throughout Parramatta, Campbelltown, Windsor, Bathurst and Maitland where

¹⁹ New South Wales Law Reform Commission, n 9 above at 15.

²⁰ Ibid.

²¹ Pennington, K., "The Development of Criminal Procedure in the Ius Commune", available from http://faculty.cua.edu/pennington/Law508/CriminalProcedure.htm [Accessed 26/07/2008].

²² New South Wales Law Reform Commission, n 9 above at 15.

²³ Ibid.

²⁴ ibid.

²⁵ Dickey, A., "The Jury and Trial by One's Peers" (1973-1974) 11 *University of Western Australia Law Review* 205, at 207.

²⁶ Foster, H., "Trial by Jury: The Thirteenth-Century Crisis in Criminal Procedure" (1979) 13 *University of British Columbia Law Review* 280, at 291.

²⁷ New South Wales Law Reform Commission, n 9 above at 16.

²⁸ Ibid.

²⁹ ibid, at 20.

individuals were summoned from local residents in New South Wales.³⁰

Although the discussion above of the history surrounding trial by jury in criminal law cases is by no means extensive, it illustrates two vitally significant points. First, although the origin of the jury secrecy exclusionary rule is uncertain, its historical justification may lie in a belief of ancient jurists that when jurors went into the precincts of the jury room the presence of God led them to the correct decision.³¹ Secondly, the history of the common law jury demonstrates how imperative it is to leave scope for evolution.³²

With respect to the first point, therefore, if it is accepted that a fundamental reason why jurors historically were forbidden to disclose their deliberations is because attempts to investigate jury considerations would be questioning the judgment of God, than we can already identify a major flaw in the jury secrecy rule. That is, of cause, it is simply illogical to justify the innocence or guilt of an individual on religious grounds. We will see in *Chapter 2* that although modern courts in Australia and elsewhere have recognised this flaw, they have substituted conviction of religious ideology in the jury secrecy rule for other justifications mainly based on public policy grounds that are also quite unreasonable and illogical.

In relation to the second point, as history itself has demonstrated, the role and particular features of the jury system have changed to meet the needs of the particular economic, political and social ideas of the time. Applying this principle in contemporary times, one may observe that the Australian legal system of the twenty–first century has aptly pushed towards fact-finders³³ providing reasons for their decision.³⁴ On this basis, therefore, such a suggestion that jurors 'join the party' and provide reasons for their decisions when they make adverse verdicts in criminal law trials can be seen as a move in the right direction.

³⁰ ibid.

³¹ Ballew v Georgia 435 US 223 (1978); Bagley, W.R., "Jury Room Secrecy: Has the Time Come to Unlock the Door?" (1998) 32 Suffolk University Law Review 481, at 494.

³² Chesterman, M., "A Reformers View of Jury Secrecy", in *The Jury: Proceedings of Seminar on the Jury 20-22 May 1986*, Canberra, Australian Institute of Criminology, 1986, at 136.

³³ Reference to fact-finders here includes judges, magistrates and administrators such as delegated officers of various governmental ministers.

³⁴ Chapters 3–4 will explore and give extended treatment to this point.

1.3 Role of the Jury in a Criminal Trial

In *John Fairfax & Sons Ltd v Police Tribunal of New South Wales*,³⁵ McHugh J outlined that it is a fundamental rule of the common law that the administration of justice ought to take place in open court.³⁶ As McDonald J made clear in *Wandin Springs v Wagner*,³⁷ this embraces most notably the delivery of the judgment of the court with the provision of reasons for the decision.³⁸

Yet, quite ironically, although a jury in an Australian criminal trial will deliver a verdict of guilty or not guilty in open court,³⁹ they would not be required to provide reasons for their decision.⁴⁰ This conclusion is also said to promote the 'administration of justice.'⁴¹ However, this latter conclusion seems questionable when we take a closer look at the jury, as Baldwin and McConville make clear:

".....the very conception of a jury might be thought absurd. Twelve individuals, often with no prior contact with the courts, are chosen at random to listen to evidence (sometimes of a highly technical nature) and to decide upon matters affecting the reputation and liberty of those charged with criminal offences. They are given no training for this task, they deliberate in secret, they return a verdict without giving reasons, and they are responsible to their own conscience but to no one else." ⁴²

Juries in a modern criminal trial are expected to weigh up the admissible evidence and be the judge of the facts alone.⁴³ Throughout the trial, jurors are expected to be unbiased, impartial, and removed from emotion.⁴⁴ Despite this, as Bagaric points correctly out,

³⁵ John Fairfax & Sons Ltd v Police Tribunal of New South Wales (1986) 5 NSWLR 465, at 476.

³⁶ This principle has been expressly approved and outlined in a number of cases: *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, at 345-6 (per Mahoney JA); *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, at 299 (per Street CJ).

³⁷ Wandin Springs v Wagner [1991] 2 VR 496, at 498-9.

³⁸ See further *Reidy v Herry* (1897) 23 VLR 508.

³⁹ The jury shall be discharged without delay after delivering their verdict: *Jury Act* 1977 (NSW) s 55E(1).

⁴⁰ Spigelman, J.J., "Reasons for Judgment and the Rule of Law - The National Judicial College, Beijing and The Judges' Training Institute, Shanghai," available from

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_101103 [Accessed 25/07/2008].

⁴¹ Chesterman, n 32 above at 134.

⁴² Baldwin, J & M. McConville., *Jury Trials*, Oxford University Press, Oxford, 1979, at 1.

⁴³ Findlay, M., "Juror Comprehension and Complexity: Strategies to Enhance Understanding" (2001) 41(1) *British Journal of Criminology* 56, at 56.
⁴⁴ Ibid.

regrettably we will never know because of an obsolete, irrational quirk in our system of justice.⁴⁵

Findlay argues that the system of trial by jury as lay participant in the legal system is expected to open up the courtroom and the trial process to public scrutiny. ⁴⁶ In spite of this unfounded assertion, how can a jury's decision provided without reasons open up the courtroom and trial process in which jurors partake in when the very essence of the jury secrecy exclusionary rule hides from the public the performance of the jury?

To take the last point in the previous paragraph one step further, a brief examination of the duty of a judge to give reasons will be examined. The Australian courts have made clear time and time again that a judge has an obligation to give sufficient reasons for his or her decision.⁴⁷ The reasons must be adequate so as to explain to the parties the broad outline and element facts of the reasoning upon which the court has acted.⁴⁸

As such, the mandatory requirement that judges give reasons for their decisions directly allows public scrutiny of the judicial and trial process, ⁴⁹ because it allows lay participants to examine what facts and evidence have been considered, and more importantly, to determine whether a verdict of guilty or not guilty is logically based in reason. To the contrary, as jurors do not give reasons for the verdict that they reach, lay participants and indeed members of the legal community are left at best to speculate, hypothesize and wonder whether the jury's final decision was really the correct result.

¹⁴

⁴⁵ Bagaric, M., "Should juries explain?," available from http://www.news.com.au/heraldsun/story/0,21985,23351581-5000117,00.html [Accessed 25/07/2008].

⁴⁶ Findlay, M., "Policies of Secrecy and Denial: Barriers to Jury Reform" (1996) 7(3) Current Issues in Criminal Justice 368, at 370.

⁴⁷ Pannizutti v Trask (1987) 10 NSWLR 531; Mifsud v Campbell (1991) 21 NSWLR 725; Apps v Pilet (1987) 11 NSWLR 350 at 356 (per McHugh JA); Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247; Geister v Police [2008] SASC 177, at 18-19 (per White J).

⁴⁸ Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247; Commonwealth v Pharmacy Guild of Australia (1989) 19 ALD 510; Lawson v Lee (1978) 19 SASR 442 at 446; T v Medical Board of South Australia (1992) 58 SASR 382, at 392 (per Matheson J).

⁴⁹ The duty of judges to provide reasons for their decisions has been described as an incident of the judicial process: *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, at 386 (per Mahoney JA); *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, at 667 (per Gibbs CJ); *Australian Securities Commission v Schreuder* (1994) 14 ACSR 614, at 619 (per Underwood J).

Chapter 2 – A Critique of the Arguments Supporting Jury Secrecy

"The veil of secrecy around jury room deliberations..... and the mystique of jury traditions make any informed and critical assessment of the jury within criminal justice both difficult and discouraging." ⁵⁰

2.1 The Law of Jury Secrecy in Australia

Statutory Framework on Jury Deliberations

Section 68B of the *Jury Act* 1977 (NSW) is the key provision dealing with the disclosure of jury deliberations during and after a jury trial has finished. That section provides:

- (1) A juror must not, except with the consent of or at the request of the judge or coroner, wilfully disclose to any person during the trial or coronial inquest information about:
- (a) the deliberations of the jury, or
- (b) how a juror, or the jury, formed any opinion or conclusion in relation to an issue arising in the trial or coronial inquest.
- (2) A person (including a juror or former juror) must not, for a fee, gain or reward, disclose or offer to disclose to any person information about:
- (a) the deliberations of a jury, or
- (b) how a juror, or a jury, formed any opinion or conclusion in relation to an issue arising in a trial or coronial inquest.
- (3) 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.
- (4) Subsection (1) does not prohibit a juror from disclosing information to another member of the jury during a trial or coronial inquest.

Consequently, unless a judge or coroner has given consent, members of a jury during a trial cannot reveal their deliberations in reaching verdict to anyone besides those jurors also partaking in the jury trial.⁵¹ Notably, section 68B of the *Jury Act* 1977 (NSW) is

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⁵⁰ Findlay, n 46 above at 369.

⁵¹ Jury Act 1977 (NSW) s 68B(1).

silent on the question of whether jurors may publish and disclose their reasons for reaching the verdict they did after a trial has ended.

Accordingly, it is submitted that the failure of the legislature to enact statutory provisions in New South Wales prohibiting jurors publishing or disclosing their deliberations in relation to a jury verdict after a jury trial has ended reveals a fundamentally important point. If jury secrecy was so vital that jurors should be forbidden from disclosing any reasons and considerations for a particular verdict to the public, particularly after a trial was completed, than the NSW parliament would have legislated to this effect.

Conversely, in the Australian Capital Territory,⁵² Northern Territory,⁵³ Queensland,⁵⁴ South Australia,⁵⁵ Tasmania,⁵⁶ and Western Australia,⁵⁷ jurors who are or were a member of a jury must not disclose information relating to their deliberations of a verdict, during or after the trial has ended if the juror believes such disclosure would likely or will be published to the public.

In Victoria, it is an offence for a juror or former juror to disclose any statements made in relation to deliberations regarding the jury verdict after trial if that information is likely to be or will be published to the public and identifies a juror or the relevant legal proceedings.⁵⁸

Therefore, only New South Wales⁵⁹ and Victoria allow jurors to disclose information in relation to their deliberations regarding verdict consideration⁶⁰ after the trial has finished, notwithstanding the fact that the jury's disclosure will be published or not. The only limitation is that in New South Wales, the jury disclosure cannot be for a fee, gain or

⁵² Juries Act 1967 (ACT) s 42C(2).

⁵³ Juries Act 1962 (NT) s 49A(2).

⁵⁴ Jury Act (Qld) 1995 sections 70(2), (70)(4).

⁵⁵ Criminal Law Consolidation Act 1935 (SA) s 246(2).

⁵⁶ Juries Act 2003 (Tas) sections 58(2), 58(3).

⁵⁷ Juries Act 1957 (WA) s 56B(1).

⁵⁸ Juries Act 2000 (Vic) s 78(2), 78(7).

⁵⁹ Any publication of a juror's deliberations, although not prohibited after a trial has completed, must refrain from wilfully publishing any material which is likely to lead to the identification of a juror or former juror in a particular trial: see section 68(1) of the *Jury Act* 1977 (NSW).

⁶⁰ Reference to 'verdict consideration' is taken to mean those considerations taken into account by jurors when reaching a verdict after the trial.

reward, 61 and in Victoria, jurors cannot identify a juror or the relevant legal proceedings. 62

Jury Secrecy and Contempt Proceedings

As we can see from the previous section, the parliament has in the area of jury deliberations and the jury secrecy exclusionary rule sought an overall intention to cover the field in this area. Every Act in the various states and territories throughout Australia have provided comprehensive clear provisions regarding whether and in what circumstances jurors can disclose or publish considerations regarding their verdicts.

One may ask, then, what is the point of providing treatment to the common law regarding the legitimacy of a jury disclosing their considerations of a verdict? The answer to this question lies in a discussion of two major points. First, as noted earlier, the *Jury Act* 1977 (NSW) has left open the question whether jurors can disclose considerations regarding how they arrived at the verdict they reached when a trial has ended. A survey of the common law cases dealing with contempt of court for disclosure by jurors may outline whether jurors in NSW can disclose considerations in relation to how they reached their verdict after a trial has ended. Secondly, by providing a discussion of the case law in this area, one can reconcile the similarities and differences between the common law and statutory rules regarding jury secrecy.

In Australia, it is unsettled whether the disclosure by a juror regarding their deliberations after the verdict has been given constitutes a contempt of court. For example, in *Re Mann; Re King; Ex parte A-G*, Cussen J held that a juror who had procured the signatures of fellow jury members in relation to a petition addressed and forwarded to the Attorney-General containing a discussion of the jury deliberations in the jury room did not amount to a contempt of court.

⁶¹ Jury Act 1977 (NSW) s 68B(2)

⁶² Juries Act 2000 (Vic) s 78(2), 78(7).

⁶³ LexisNexis, *Halsbury's Laws of Australia*, (at 01 January 2008) 105 Contempt, 'Disclosure by jurors' [105-240].

⁶⁴ Re Mann; Re King; Ex parte A-G [1911] VLR 171, at 176-7.

Similarly, in *Re Donovan's Application*,⁶⁵ Barry J had the following to say about jurors disclosure of their verdict after trial:

"Of course, no constraint can be placed upon a juror who wishes to discuss his [or her] experiences at the trial, and views he [or she] formed in the deliberations which took place in the jury room." ⁶⁶

Despite the failure of Australian courts to find the disclosure by a juror of their deliberations after the verdict has been delivered as constituting a contempt of court, there is authority suggesting that jury deliberations should be discouraged.⁶⁷ Three overseas cases from England and Canada, however, appear to shed more light on the issue of whether a juror who discloses jury deliberations after the verdict has been delivered constitutes a contempt of court.⁶⁸

In *Ellis v Deheer*,⁶⁹ Bankes LJ made clear that a juror who discloses their own considerations or the deliberations of other jury members in the case after the verdict has been given, violates a 'rule of conduct.'⁷⁰ In a more recent English decision, *Attorney-General v New Statesman and Nation Publishing Co Ltd*, ⁷¹ Widgery CJ stated a juror's responsibility to observe secrecy was a 'solemn obligation.'⁷²

Furthermore, as Haines J made clear in $R \ v \ Dyson$, ⁷³ a Canadian decision, contempt of court may be found where a jury has committed gross breaches of the duty to preserve secrecy of jury deliberations when a judge in a particular case has expressly told the jury they must not disclose their deliberations after a verdict has been given. ⁷⁴

⁶⁵ Re Donovan's Application [1957] VR 333.

⁶⁶ Re Donovan's Application [1957] VR 333, at 337.

⁶⁷ See *Re Matthews* [1973] VR 199, at 212-13; *R v Gallagher* [1986] VR 219, at 249; *Ellis v Deheer* [1922] 2 KB 113, at 117-18 per Bankes LJ, at 121-2 per Atkin LJ; *R v Armstrong* [1922] 2 KB 555, at 568-9; *Attorney-General v New Statesman and Nation Publishing Co Ltd* [1981] QB 1 at 6-11.

⁶⁸ See further *Hegherty v National Mutual Life Assn* (1892) 8 WN (NSW) 122, at 123, where Darley CJ noted that jurors have no right to disclose what takes place when they are in consultation. However, his honour failed to give treatment to the effect of juror deliberations of a verdict after it had been given.

⁶⁹ Ellis v Deheer [1922] 2 KB 113.

⁷⁰ Ellis v Deheer [1922] 2 KB 113, at 118.

⁷¹ Attorney-General v New Statesman and Nation Publishing Co Ltd [1981] 1 All ER 644.

⁷² Attorney-General v New Statesman and Nation Publishing Co Ltd [1981] 1 All ER 644, at 646 (Park J agreeing).

⁷³ R v Dyson [1972] 1 OR 744.

⁷⁴ R v Dyson [1972] 1 OR 744, at 753 (Note these comments from Haines J were *obiter dicta*).

In light of the cases that have just been examined, therefore, it is difficult to find any clear authority from the common law that advocates the position that a juror in New South Wales or Victoria who discloses deliberations of their verdict after it has been given would be guilty of contempt of court.

With respect to the similarities and differences between the common law position and the relevant statutory provisions regarding jury deliberations of their verdicts, it is quite apparent that the legislative provisions in this area appear to be vastly more restrictive on allowing jurors to disclose their deliberations after a verdict.

In contrast, the common law in several cases has taken a more liberal view in allowing jurors to disclose deliberations regarding their verdict after it has been given.⁷⁵ However, some cases have gone the other way,⁷⁶ favouring the restrictive view taken by most states and territories in Australia besides New South Wales and Victoria. Accordingly, it appears that the common law in the area of jury secrecy paints a much more mystifying picture than the comprehensive and clear statutory provisions regulating juries.

2.2 Four Golden Factors

Introduction

In *R v Skaf*,⁷⁷ Mason P, Wood CJ and Sully J outlined that the jury secrecy exclusionary principle is based upon four considerations: ⁷⁸

- 1. the need to promote full and frank discussion amongst jurors,
- 2. to ensure the finality of the verdict,
- 3. to protect jurors from harassment, pressure, censure and reprisals, and
- 4. to a degree maintain public confidence in juries.

⁷⁵ See for example *Re Mann; Re King; Ex parte A-G* [1911] VLR 171,at 176-7; *Re Donovan's Application* [1957] VR 333, at 337.

⁷⁶ See for example *Re Matthews* [1973] VR 199, at 212-13; *R v Gallagher* [1986] VR 219, at 249; *Ellis v Deheer* [1922] 2 KB 113, at 117-18 per Bankes LJ, at 121-2 per Atkin LJ; *R v Armstrong* [1922] 2 KB 555, at 568-9; *Attorney-General v New Statesman and Nation Publishing Co Ltd* [1981] QB 1, at 6-11; *R v Dyson* [1972] 1 OR 744.

⁷⁷ R v Skaf (2004) 60 NSWLR 86.

⁷⁸ R v Skaf (2004) 60 NSWLR 86, at 211.

Accordingly, these four justifications are what I have termed the 'four golden factors', because in truth, they are the main rationalisations put forward in protecting and giving validation to the jury secrecy rule. A consideration of these four primary factors forms the basis for discussion of this section.

Need to promote full and frank discussion amongst jurors

One of the chief arguments used to justify jury secrecy is that to allow jurors to disclose details of their deliberations would be to inhibit full and frank discussion within the jury room.⁷⁹ It is assumed that freedom of debate could potentially be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be unreservedly published to the world.⁸⁰

Individual jurors, fearful that their potentially unpopular views may become subject to public scrutiny and scorn, will be less inclined to participate actively in the deliberation procedure.⁸¹ It is said that sensitive jurors will not engage in jury deliberations without some assurance that it will never reach a larger audience.⁸²

Despite these strong assertions regarding the stifling of frank discussion amongst jurors, there are quite a range of arguments that can be mounted against the first golden factor. First, this argument assumes that the current system where jurors deliberate and vote in secret promotes freedom of thought and participation. 83

Given that we are not allowed to know what takes place in the jury room, one cannot be sure that each juror is able to discharge their duties properly as a juror. Indeed, there is no empirical evidence to even suggest that publication of jury deliberations would inhibit and hinder the full and frank discussion amongst jurors of the relevant facts that are in issue within in a criminal or civil trial.

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⁷⁹ Tunna, J., "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 *Canterbury Law Review* 79, at 82.

⁸⁰ Clark v United States 289 US 1 36 (1933) (per Cardozo J).

⁸¹ Schnapper, E., "Public Disclosure of Jury Deliberations" (1983) 96(4) Harvard Law Review 886, at 890.

⁸² New South Wales Law Reform Commission., "Report 48 – Criminal Procedure: The Jury in a Criminal Trial" (1986) Available from http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R48CHP11 [13/08/2008].

⁸³ Tunna, n 79 above at 82-83.

Tillett and French state:

"Power conflict results from a desire to gain or maintain power.... There is, arguably, a basic human need to have power, and some individuals need (sometimes to a pathological degree) to exercise, maintain, and gain power frequently, even in situations in which 'winning' is largely meaningless, may provoke further conflict, or even have destructive long-term effects." ⁸⁴

In this sense, it is evident that there is a natural human tendency that some individuals need to have power.⁸⁵ In the context of a jury room, amongst twelve jurors, there is undoubtedly going to be a power struggle in the sense that some jurors will seek to have their voices heard above and beyond those of others. This is inherent in a system where twelve random individuals are brought together. Accordingly, with group and power dynamics being played out by the relevant jurors, freedom of expression, thought and active contribution by all jurors will surely be hampered.

Further, it may be argued that publication of jury deliberations would lead to more extensive and fulfilling discussion amongst the various jurors. As the jury would be aware that their deliberations will be revealed, they may feel the need to justify and ensure confidence in the verdict by ensuring all jury members have had their voice heard.

Certainly, full and frank discussion amongst jurors is less likely to occur in an environment where such deliberations are kept secret. There is no need to justify why a particular verdict was reached, which in itself hides as a cloak the unequal participation of all jurors in a trial.

Finality of verdict as a guarantee

Disclosure of deliberations is discouraged as it is often asserted that the fear of disclosure could imperil the finality of verdicts. 86 This argument maintains that to the extent juries have to reveal their deliberations, this could lead to official or unofficial questioning of

⁸⁴ Tillett, G & B. French., *Alternative Dispute Resolution – A Workbook*, Part 1, 2007, University of Western Sydney School of Law, 2007, at 39.

⁸⁵ Tunna, n 79 above at 82-83.

⁸⁶ Re Matthews [1973] VR 199, at 210 (per Barber & Mcinerney JJ, Norris AJ); Ellis v Deheer [1922] 2 KB 113, at 121 (per Atkin LJ).

verdicts once reached.⁸⁷ It is said that unless jury deliberations remain secret, one will never be able to say that a case is concluded when the verdict is delivered.⁸⁸

It is true that there is a public interest in finality of litigation and parties should not, by proceeding to impugn a judgment, be allowed to relitigate issues that were the subject of the previous proceedings giving rise to the judgment. 89 However, it is also true that there are various problems with the finality argument being associated with jury verdicts.

If disclosure of a jury's deliberation were to reveal that it was unfounded and decided not entirely on the admissible evidence and proper application of the facts to the law, then surely, although this would give rise to X appealing a guilty verdict, the finality of verdict argument would be outweighed by ensuring the accused is given a fair trial. In the words of the Spigelman J, Chief Justice of the Supreme Court of New South Wales:

> ".... The principle of a fair trial has become so fundamental an axiom of Australian law as to be entitled to constitutional significance." ⁹⁰

Now, let us consider the only other conclusion in light of the above paragraph. In the event that a jury was to reveal their verdict deliberations, and no legal problem can be associated with the jury deliberations, then, not only will the finality verdict prevail, but also the accused or convicted person will know why the jury reached the verdict they did.

Another problem with the finality of verdict argument is that is fails to measure up when discussed in the context of judges. In this sense, it is interesting that the deliberation of reasons by a judge for their decisions is not seen as a major hazard to a final verdict, but is rather viewed as a fundamental aspect of the judicial process.⁹¹

88 McHugh, n 1 above at 63.

⁸⁷ Duke of Buccleuch v Metropolitan Board (1872) LR 5 HL 418, at 434.

⁸⁹ Wentworth v Rogers (No 5) (1986) 6 NSWLR 534, at 538 (per Kirby P, as he was then known). See also Owens Bank Ltd v Bracco [1992] 2 AC 443, at 483 (per Lord Bridge).

⁹⁰ Spigelman, J., "The Truth Can Cost Too Much: The Principle of a Fair Trial," 2003, extracted in Hunter, J.B et al., Litigation II - Evidence and Criminal Process, Chatswood, NSW, LexisNexis Butterworths, 2005, at 783.

⁹¹ Carlson v King (1947) 64 WN (NSW) 65, at 66 (per Jordan CJ); Brittingham v Williams [1932] VLR 237; Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, at 385-6 (per Mahoney JA); Tatmar Pastoral Co Pty Ltd v Housing Commission of New South Wales (1984) 54 ALR 155; Wright v Australian Broadcasting Commission [1977] 1 NSWLR 697.

In *Re Matthews and Ford*, ⁹² the Court said that it might be that the interests of the community in the finality of verdicts outweigh the interest of the litigant in an individual case. ⁹³ It is submitted that such a proposition should never be accepted. To suggest that the interest and rights of an accused in a criminal law trial can ever be compromised at the expense of the wider community, is to deny an accused the right to a fair and proper hearing on the evidence available. Given the serious and grave implications that follow from a conviction of a criminal offence, an individual's interest in a criminal trial should always prevail to those of the wider community.

Protect jurors from harassment, pressure, censure and reprisals

In *Prothonotary v Jackson*, 94 Street CJ, Moffitt P and Samuels JA noted:

"We consider that the privacy of those who have served as jurors must be respected, and that, once their public service in the court is at an end, they must be protected from attempts to involve them further in the affairs of the litigants whose disputes they were called to try. And they should serve in the expectation that this immunity will be preserved." ⁹⁵

It is maintained by the third golden factor argument that if a jury had to make clear the deliberation upon which the verdict was reached, there is a danger that jurors will be pressured by family, friends and members of the wider community to defend the reasons expressed in their deliberations. ⁹⁶

However, a consideration of three particular points may help us to understand why the third golden factor argument cannot be maintained to justify the jury secrecy rule. First, as evident in all jurisdictions, it is an offence to solicit or to obtain certain, prescribed information for the purpose of publication.⁹⁷

⁹² Re Matthews and Ford [1973] VR 199.

⁹³ Re Matthews and Ford [1973] VR 199, at 211.

⁹⁴ Prothonotary v Jackson [1976] 2 NSWLR 457.

⁹⁵ Prothonotary v Jackson [1976] 2 NSWLR 457, at 462. See also Re Matthews [1973] VR 199, at 210; R v Gallagher [1986] VR 219, at 249; McDonald v Pless 238 US 264 (1915) at 267-8 (per Lamar J).

⁹⁶ Robertson, G & A.B.L Nicol., *Media Law*, Oyez Longman, London, 1984, at 179.

⁹⁷ Juries Act 1967 (ACT) s 42C(3); Juries Act 1962 (NT) s 49A(3); Jury Act 1977 (NSW) s 68A(1); Jury Act 1995 (Qld) s 70(3); Criminal Law Consolidation Act 1935 (SA) ss 246(3), 247(1); Juries Act 2003 (Tas) s 58(1)(b); Juries Act 2000 (Vic) s 78(1)(b); Juries Act 1957 (WA) s 56C(1).

Accordingly, there are already in place various laws from the states and territories throughout Australia that limits the ability of persons to harass and solicit information from jurors about their jury deliberations. In this sense, these laws serve as an appropriate mechanism in order to assist protect jury privacy to some extent.

Secondly, a proposal that jurors provide reasons for their jury deliberations, would, not in the form proposed by the current author extend to the supply of jurors names in association with their verdict. As a result, despite jurors providing reasons for their decisions, their names and privacy would still be protected.

Thirdly, as Cassidy points correctly out:

"The question of being identified and made the subject of stressful publicity should not be an issue, as it is within both the court's and the Parliament's power to suppress the names of the jurors irrespective of how their deliberations are delivered to the court, and ultimately to the public."

Another interesting point to consider also is that despite the fact judges provide reasons for their decisions, this is not called into question on the basis that to outline their names in a judgment would motivate harassment, pressure and major reprisals against those judges. On the contrary, although their may be those in the community who do not agree with certain judges' opinions, this has not led to a substantial increase in pressure, harassment and reprisals against those decision-makers whose names are published.

Further, we should have confidence in the general criminal and civil laws of Australia in the following way..... those people who are not happy with a decision reached would still be deterred from acting in an irrational way on the basis of the laws where such individuals reside. To suggest that an Australian jury should provide reasons for their decisions, without their names being published, in conjunction with laws that prohibit persons from harassing jurors about their verdicts in anyway, would in all, make superfluous and unessential the third golden factor argument.

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⁹⁸ Cassidy, n 3 above at 11.

Jury deliberations and public confidence

The fourth and final golden factor suggests that the jury system relies completely on the silent nature of jury deliberations for the public's continued faith in the legitimacy of the system. Supporters of jury secrecy argue that 'exposure of jurors' deliberations inevitably undermines public confidence in trial by jury and could eventually lead to the destruction of the jury system.

Williams argues that jury secrecy serves a desire to preserve public confidence in a system which more intimate knowledge might destroy. However, there are quite a range of arguments and considerations that tend to suggest that the fourth golden factor argument should not be accepted.

Jaconelli notes that failure to examine jury misconduct cannot prevent public discussion and speculation, and, further, public confidence in the jury system will be undermined by disclosure only if the system deserves to be undermined.¹⁰³ As McHugh J has observed:

"It those who think that the trappings of trial by jury are a cloak for an elaborate farce are right, it would be better if verdicts were reached by a less expensive and less time-consuming procedure." ¹⁰⁴

Indeed, the 'public confidence' argument is only viable if it can be presumed that breaching jury secrecy will have the inevitable effect of leading the wider community to draw false and/or embellished conclusions as to the efficacy of the jury system. Nonetheless, to propose that reasonable members of the public will unavoidably and consistently conclude that the jury system is not worthy of their confidence simply because they disagree with some of the reasoning behind a verdict is an exceedingly inappropriate conclusion to draw.

¹⁰⁵ Tunna, n 79, at 87.

⁹⁹ Tunna, n 79, at 87.

¹⁰⁰ See, for example, *Re Matthews* [1973] VR 199, at 212-13; *R v Armstrong* [1922] 2 KB 555, at 568-9; *Attorney-General v New Statesman and Nation Publishing Co Ltd* [1981] QB 1, at 10.

¹⁰¹ R v Laws [2000] NSWSC 885 citing the Honourable Terry Sheahan MLA in the Legislative Assembly.

¹⁰² Williams, G., The Proof of Guilt: A Study of the English Criminal Trial, London, 1963, at 268.

¹⁰³ Jaconelli, J., "Some Thoughts on Jury Secrecy" (1990) *Legal Studies* 91, at 99-100.

¹⁰⁴ McHugh, n 1 above, at 17. The same point is also made by Smith, J., "Is Ignorance Bliss? Could Jury Trial Survive Investigation?" (1998) 38 *Medical Science Law* 98.

Accordingly, if the community rightly perceives problems with the system at large when the workings of the jury are exposed, than surely the public should be entitled to pressure the government for reform as a basic democratic right. To borrow the words of McHugh J, it appears that the jury secrecy rule acts as a "cloak" to hide the inherent problems of the jury system.

Further, it may be questioned whether it can be said with assurance that the public has any substantial degree of confidence in the jury system anyway. One survey conducted showed that two out of five citizens lacked faith in the jury system. Indeed, with the growing trend in recent times for the reduction of trial by jury in civil and criminal trials, perhaps this fact itself can be taken as evidence of the lack of public confidence in the jury system. If the public had a large degree of confidence in the system of trial by jury, would they have really allowed it to decline to the level where it is almost lifeless?

As Lord Steyn made clear in *R v Mirza; R v Connor*, ¹¹⁰ there is a positive responsibility on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right. To refuse to inquire into genuine and serious allegations of misconduct even if jury deliberations may be revealed is to undermine the moral integrity of the criminal justice process. ¹¹¹

Further, as the court made clear in *Dornan v Riordan*, ¹¹² the disclosure of fact-finders' reasoning process to the public and the parties, engenders confidence in the community that the fact-finder has gone about its task appropriately and fairly. In this sense, jurors need to provide reasons for their decisions, so that the public can have confidence in the system and know that the jurors have gone about their task in an appropriate manner. Consequently, the appropriate conclusion to draw in light of the above discussion, is that publication of jury verdicts will promote public confidence in that system.

¹⁰⁶ Ibid, at 88.

¹⁰⁷ ibid.

These were the results of a poll published in the *Melbourne Age*. See Phillips, J., "Jury Room Disclosures Erode the System" (1985) 59 *Law Institute Journal* 1330, at 1330.

¹⁰⁹ Pakes, F., *Comparative Criminal Justice*, William Publishing, Oregon, USA, 2004, at 100.

¹¹⁰ R v Mirza; R v Connor [2004] UKHL 2, at 16.

¹¹¹ Boniface, n 6 above, at 26.

¹¹² Dornan v Riordan (1990) 95 ALR 451, at 457.

2.3 Community of Jurors

Introduction

Apart from the four golden factors outlined above, various other arguments, to a lesser degree, have been put forward to justify the jury secrecy rule. In this section, an examination of one of those arguments, that is, that jurors are representative of the wider community, ¹¹³ is directly challenged here.

Scope of the jury

It has been noted on many occasions, that the huge strength of the jury system is in the random selection of members of the general public who together represent the views, attitudes and beliefs held more widely in the general community. However, as will be proposed below, if it can be demonstrated that jury decisions are not representative of the wider community, than greater scrutiny can be focused on the fact that jury verdicts are given without reasons. This is because the acceptability of jury decisions would be undermined, as the deliberations and decisions of the jury are not based upon the trust and combined wisdom of a group of random wide-ranging members of the community.

Statutory framework

In short, it is submitted that the current statutory framework throughout Australia in relation to jury trials appears to support the proposition that the selection of jurors is not representative of the community. For example, a consideration of Schedules 2 and 3 of the *Jury Act* 1977 (NSW) illustrates this point quite clearly:

Schedule 2 Persons ineligible to serve as jurors

- (1) The Governor.
- (2) A judicial officer (within the meaning of the Judicial Officers Act 1986).
- (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 either or both of the Houses of Parliament.
- (7) An Australian lawyer (whether or not an Australian legal practitioner).

¹¹³ Gleeson, M., "Juries and public confidence in the courts" (2007) 90 Reform 12, at 13.

¹¹⁴ Cunneen, M., "Getting it Right: Juries in Criminal Trials" (2007) 90 Reform 43, at 43.

- (8) A person employed or engaged (except on a 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 a Deputy Ombudsman.
- (10) A person who at any time has been a judicial officer (within the meaning of the Judicial Officers Act 1986) or a coroner, police officer, Crown Prosecutor, Public Defender, Director or Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions.
- (11) A person who is unable to read or understand English.
- (12)A person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror. 115

Schedule 3 Persons who have a right to claim exemption

- (1) Clergy.
- (2) Vowed members of any religious order.
- (3) Persons practising as dentists.
- (4) Persons practising as pharmacists.
- (5) Persons practising as medical practitioners.
- (6) Mining managers and under-managers of mines.
- (7) A person 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.
- (8) Persons who are at least 70 years old.
- (9) Pregnant women.
- (10) A person who has the care, custody and control of children under the age of 18 years (other than children who have ceased attending school), and who, if exempted, would be the only person exempt under this item in respect of those children.
- (11) A person who resides with, and has full-time care of, a person who is sick, infirm or disabled.
- (12) A person who resides more than 56 kilometres from the place at which the person is required to serve.
- (13) A person who:

- (a) 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
- (b) within the 12 months that end on the date of the person's claim for exemption, attended court in accordance with a summons and who was prepared to, but did not, serve as a juror.
- (14) A person who is entitled to be exempted under section 39 on account of previous lengthy jury service. 116

¹¹⁵ Section 6(b) of the *Jury Act* 1977 (NSW) provides that a person is not qualified or liable to serve as a juror if that person is, for the time being ineligible to serve as a juror, being a person referred to in Schedule

Similar statutory provisions on exemption or ineligibility for jury trials also exists in the other various states and territories throughout Australia. Further, the effect of Part 6 of the *Jury Act* 1977 (NSW) also allows the prosecution and defence parties in both criminal and civil jury trials to challenge selection of particular potential jurors to a trial. In all, therefore, the statutory framework that regulates juries, appears to promote a limitation in the jury being considered 'representative' of society. ¹¹⁸

Accordingly, the Australian jury does not represent or reflect the community as a whole, save in the broad sense of enabling "some citizens" to participate in the trial process. ¹¹⁹ As such, it can be seriously questioned whether a defendant in a criminal trial process really gets what they are entitled to, that is, a jury of his or her peers. ¹²⁰

2.4 Miscellaneous Arguments

Cost implications

The cost of Australian juries is a necessary and integral part of our system of justice. ¹²¹ It may be argued that by making it mandatory for the jury to provide written reasons for their decision, it could potentially increase the amount of money that the community will have to pay jurors, because they will be spending more time in the jury room, drafting up reasons for the decision.

Although there may be an element of truth to this argument, it does not necessarily follow that it should be used to support the proposition of the current jury secrecy rule. An increase in fees to juries for spending longer in the jury room, needs to be weighed against the necessity to ensure the accused or convicted individual in a criminal trial knows exactly why the jury made the particular verdict in question.

¹¹⁶ Section 7 of the *Jury Act* 1977 (NSW) makes clear that a person referred to in Schedule 3 is entitled as of right to be exempted from serving as a juror.

¹¹⁷ See generally *Juries Act* 1967 (ACT) ss 10,11, 13; *Juries Act* (NT) ss 10-11; *Jury Act* 1995 (Qld) s 4; *Juries Act* 1927 (SA) ss 11-14; *Juries Act* 2003 (Tas) ss 6, 11, 12; *Juries Act* 2000 (Vic) Schedule 2; *Juries Act* 1957 (WA).

¹¹⁸ Black, M., "The introduction of juries to the Federal Court of Australia" (2007) 90 Reform 14, at 14.

¹¹⁹ The Right Honourable Lord Justice Auld., "Chapter 5 Juries – Review of the Criminal Courts of England and Wales," September 2001: http://www.criminal-courts-review.org.uk/chpt5.pdf [Accessed 04/07/08].

Blake, B., "The Case for the Jury," in *The Jury Under Attack*, edited by Findlay, M & P. Duff, Sydney, Butterworths, 1988, at 147.

¹²¹ Black, n 118 above, at 16.

Therefore, although the result of making juries provide reasons for their decisions will inevitably increase the amount of funding needed to run jury trials, this should be seen as a positive move, in the sense it would ensure the public is not only made aware of how the jury is performing, but ensure that an accused or convicted person is given every chance to a fair trial in court.

Move away from history

Any change to the currency of the Australian jury system is seen by some as a move in the wrong direction. Effectively, it may be argued that given that jurors have participated in countless civil and criminal trials through the centuries of the common law, a suggestion that jurors should provide reasons for their decision would extend the role of a jury, which has not been present for over 600 years or more.

A number of points can be considered to deal with this argument. Before that, though, it is perhaps appropriate to remind ourselves of a comment made by Kirby J, who said:

".....the beginning of wisdom is the recognition of the need for change and of its causes." 122

First, therefore, it may be said that any suggested change to a jury should not necessarily be seen in a negative light. Indeed, as the current Australian jury appears to be on the decline in both civil and criminal trials, perhaps reform to the jury system is the only feature that may save it as representing a fundamental component of the Australian legal system. Without changing the structure of the jury system, serious doubt can be placed upon its ability to survive in the fullness of time.

Secondly, the unanimous verdict rule of English and Australian law, which has existed for over 600 years, has been modified so that in certain circumstances a jury can return a verdict despite there being one or two dissentient votes. Accordingly, the effect of

¹²² The Honourable Justice M.D. Kirby AC CMG., "Delivering Justice in a Democracy III – The Jury of the Future," see http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_dublin1.htm#FOOTNOTE_1 [Accessed 04/09/2009.

Maher, G., "The Verdict of the Jury," in *The Jury Under Attack*, edited by Findlay, M & P. Duff, Sydney, Butterworths, 1988, at 40. See, for example, the *Jury Amendment (Verdicts) Act* 2006 (NSW) which has become law. The effect of this legislation is to allow majority jury verdicts (for conviction or

changing the jury system that had remained by and large predominantly unchanged for centuries, did not appear to gain much weight as a factor going against allowing majority verdicts. It is suggested that this same argument would not bear well against the greater argument and need for jurors to provide reasons for their decisions!

Threat of Juror Journalism

In America, the disconcerting trend of jurors selling details of their experience in the trial process and their deliberations in the jury room to the press and the media in return for payment has gained much popularity. 124 However, the provision of jury reasons for a decision would not expand the role of the juror in allowing them to sell their experiences during the jury deliberation process to the public.

Appropriate legislation in Australian states and territories already curtails current or former jurors from gaining financially in exchange for their experiences during jury deliberation. For example, s 68B(2) of the Jury Act 1977 (NSW) outlines that a person (including a juror or former juror) must not, for a fee, gain or reward, disclose or offer to disclose to any person information about the deliberations of a jury.

Opening the Floodgates

Another point of contention regarding the veil on jury secrecy is whether, if a statutory provision were to affirm the rights of jurors and the media to publish accounts of jury deliberations, a 'spate of jury-room revelations' could potentially follow. 125 This, it is argued, could in part effectively promote litigation of convicted persons who may find grounds of appeal in light of new evidence in the nature of representations by jurors who found them guilty for perhaps illegal and/or improper reasons.

Two things can be said about this argument. First, if legislation were to be enacted providing for the mandatory provision of reasons for a jury verdict, the current author would suggest that it does not have retrospective application. This would directly prohibit

acquittal) in New South Wales criminal trials for offences against NSW law. Similar legislation also exists in other Australian states and territories.

¹²⁴ Tunna, n 70 above, at 90.

¹²⁵ Law Reform Commission of Australia, *Contempt*, Report 35, 1987, at 210.

jurors in civil and criminal trials disclosing any deliberations that they themselves made or experienced whilst being a member of a jury trial before such a law were passed.

Secondly, it is questionable whether the 'opening of floodgates' argument is satisfactory anyway. If X was innocently convicted of an offence because the jury did either not understand the evidence, acted for an improper purpose, or simply made a decision without any form of logical reasoning, than surely no justification including the floodgates argument could be used to go against quashing X's conviction. It is a fundamental right of the Australian legal system, and indeed a paramount human right internationally, that every person is not only given the right to a fair trial, but that they are heard by an unbiased and impartial adjudicator or jury.

Unpopular verdicts

Jury secrecy, it is said, enables juries to bring in verdicts even though they will be unpopular in the community.¹²⁶ The fear is that, if jurors know that their views and deliberations about the issues of a trial will be exposed to the community, social pressure will discourage unpopular verdicts.¹²⁷

Three points can be considered regarding the 'unpopular verdicts' argument. First, there is no solid empirical evidence or otherwise to suggest that the unpopular verdict argument is correct. Secondly, it is proposed that the publication of juror names in relation to a jury decision would be prohibited in all circumstances. Therefore, it is submitted that jurors will not be discouraged by social pressure, because in fact members of the public will not be able to place any direct pressure upon them anyway. Prohibition on the publication of juror names to the public acts as a 'shield' against social pressure being directed upon an Australian juror. Thirdly, it is doubted whether the provision of reasons for a verdict by a jury would inhibit unpopular verdicts. Members of the jury are given clear instructions and directions from a judicial officer that they should not be influenced by anything other than the evidence adduced during trial.

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¹²⁶ The Honourable Mr Justice McHugh, n 1 above, at 63-64.

¹²⁷ Ibid.

To suggest social pressure would influence jurors from delivering unpopular verdicts, is, to directly challenge the legitimacy of a jury from discharging their role in an effective and proper manner according to the law. Perhaps this point illustrates another important consideration about the Australian jury. That is, as the unpopular verdicts argument appears to at least implicitly infer, not a lot of confidence is placed in the jury to undertake their job in a manner consistent with their obligations.

Discouraging future jurors

The Law Reform Commission of Australia once noted that an inevitable by-product of allowing disclosure of deliberations is said to be that prospective jurors will be deterred from participating in the system, and instead be induced to avoid jury service. Similarly, the New South Wales Law Reform Commission outlined that, to many jurors, the fear that others may publicly discuss what might be said and done would be a disincentive to partake in jury service. 129

Despite the support by two differing Law Reform Commission's regarding the 'discouragement of future jurors' participating in jury service in circumstances where they would have to provide reasons for their decisions, the following points need to be considered. First, there is no viable empirical evidence to my mind that provides evidence of the fact future jurors would be deterred form becoming jury members if they had to provide reasons for their decision. Secondly, if a potential juror cannot find an exemption for jury service, then he or she is compelled to partake in jury service anyway. Therefore, it does not matter whether they would feel deterred, because the law would force them to attend for jury service. In the event that a potential juror did not attend for jury service, than it follows that the law would treat this as a contravention of the prospective juror's obligation as a citizen of the respective state or territory of Australia where they reside. 130

¹²⁸ Law Reform Commission of Australia, n 125 above, at 208.

¹²⁹ New South Wales Law Reform Commission, *Criminal Procedure –The Jury in a Criminal Trial*, Report 48, 1986, at para 11.23.

¹³⁰ There are offences in relation to the failure to attend for or avoiding jury service. See, for example, *Jury Act* 1977 (NSW) ss 63 (failure to attend), 62 (false representation to avoid service); *Juries Act* 1967 (ACT) s 41 (failure to attend, failure to remain), Schedule 2 (Part 2.1); *Juries Act* 1962 (NT) s 50 (failure to attend); *Jury Act* 1929 (Qld) s 28 (obligation to comply with jury summons); *Juries Act* 1927 (SA) s

Thirdly, there is in all likelihood already a range of members in the Australian community who feel deterred from becoming a juror in a civil or criminal trial. I doubt to these members, the mandatory provision of reasons for a verdict would make any difference in relation to their views in serving as a juror.

Closing words

There is quite an extensive range of reasons that have been put forward to justify the jury secrecy rule. Although undoubtedly there is merit to some of these arguments, it appears that when these justifications are balanced against the need to ensure an accused or convicted person knows not only why a particular verdict was reached, but to ensure justice is not only being seen to be done but is done, the provision of reasons far outweighs the veil on jury secrecy.

78(1)(a) (failure to attend); *Jury Act* 1899 (Tas) s 61 (False and misleading information); *Juries Act* 2000 (Vic) ss 71-72 (failure to attend); *Juries Act* 1957 (WA) s 55(1)(a) (failure to attend).

Chapter 3 – Verdicts Without Explanation, Why Jurors

Should Provide Reasons for their Decisions

"There is too much at stake to continue to allow juries' deliberations to continue to be lost in the black box of the jury room." ¹³¹

3.1 Introduction

In the previous chapter we considered those arguments used to justify the jury secrecy rule. Here, we will consider those arguments that have been put forward to lift the veil on jury secrecy, so that jurors have to provide reasons for their verdict. Interestingly, there are as many reasons put forward to justify the position that jurors should provide reasons for their decisions, as there are arguments supporting the jury secrecy rule in Australia.

3.2 Jury Nullification or Jury Equity

What is jury nullification or jury equity?

The term jury nullification or jury equity encompasses the idea that the jury has an official role to play over the civil or criminal justice system by effectively ignoring certain evidence when the legal outcome is repugnant to their sense of morality. For example, in *R v Blythe* (*The Independent*, UK, April 1998), where the judge ruled that there was no defence available to Blythe on a charge of cultivating cannabis with intent to supply to his wife, who was dying with multiple sclerosis, the jury found Blythe not guilty. ¹³³

Further, in *R v Ponting*, ¹³⁴ the defendant Ponting was charged under the *Official Secrets Act*, and notwithstanding clear directions that Ponting's behavior amounted to an offence, the jury acquitted him. Accordingly, a jury's right to arrive at a verdict of not guilty in such instances reflects a restriction placed on trial judges, namely, in no circumstances do they have the power to take a case from the jury and direct the jury to find the accused

¹³¹ Bagaric, n 45 above [Accessed 07/09/2008].

¹³² Hunter, n 90 above, at 974.

¹³³ The Independent, UK, April 1998.

¹³⁴ R v Ponting [1985] Crim LR 318.

guilty during or after trial. 135

Relationship between jury nullification and the jury secrecy rule

It is argued that by making the jury provide reasons for their decision, a well-recognised and often-praised feature of jury trials would be undermined if jury secrecy were not preserved. Supporters of this view argue that a jury would find it much harder to exercise the notion of jury nullification if they believed that any other one juror could spill the beans to the media or judicial system, and thereby, undermining the rationality and legality of the jury's decision. ¹³⁷

However, the jury nullification argument is perhaps one of the most important reasons why the jury should be made to provide reasons for their verdict. Consider the comments made on this topic by Auld LJ:

"..... the ability of a jury to defy the law and in effect cast judgment on its propriety was more than illogicality; it represented a blatant affront to the legal process." ¹³⁸

In this sense, by making jurors provide reasons for their decision, the jury would have to provide legally acceptable reasons based upon the evidence to reach a particular verdict. Without the provision of jurors providing reasons for a particular verdict, the current legal statutory framework in the prohibition of jury reasons, is directly protecting, and, at the least, indirectly allowing the jury nullification notion to flourish.

Accordingly, by providing a mandatory duty on an Australian jury to provide reasons for the verdict they reached, the effect of the jury nullification notion will become redundant, and rightly so! Indeed, by allowing jurors to provide verdicts that in effect nullify the law, those jurors are acting contrary to their oath or affirmation they must take before serving as a juror. Pursuant to s 72A(1) of the *Jury Act* 1977 (NSW), every person who is to serve as a juror must take an oath or affirmation that the person will give a true verdict according to the evidence. The publication of jury reasons for a particular verdict, in all,

¹³⁵ R v Wang [2005] UKHL 9.

¹³⁶ Chesterman, n 32 above, at 135.

¹³⁷ Ibid.

¹³⁸ The Right Honourable Lord Justice Auld, n 119 above [Accessed 07/09/2008].

would ensure that jurors are complying with the effect of section 72A(1) of the *Jury Act* 1977 (NSW). Without an obligation to provide reasons, jurors can continue to make decisions not in accordance with the evidence.

3.3 Increased Accountability of Jurors

Answerability of the Australian juror

If the protection of jury secrecy is removed and the publication of jury reasons for their decision is allowed, jurors will evidently be more accountable to the public, of whom they are representatives. Should this occur, it may be argued that jurors would be more likely to employ legitimate processes and decide matters on more rational basis. As McHugh J points correctly out:

".... although the public cannot elect or dictate to jurors, it is at least entitled to have the jury know that the public is watching its performance." 141

As a result, it may be said that accountability in an explanation of the reasons for decision is owed not only to the unsuccessful litigant, but also to everyone with an interest in the judicial process, including other institutions of government and ultimately the Australian public.¹⁴² Thus, without opportunities for disclosure and accountability the jury, and the justice which its symbolises, is not confirmed at any level other than that of ideology.¹⁴³

Accordingly, disclosure will make juries more accountable within the spotlight of the Australian community. This is important, because as the current jury system stands in Australia, the spotlight and indeed attractiveness of trial by jury appears to be withering away, surviving only by perhaps the narrow constitutional right to trial by jury in the Commonwealth Constitution of Australia.

¹⁴¹ The Honourable Mr Justice McHugh, n 1 above, at 65.

http://www.oxfordreference.com/views/ENTRY.html?entry=t241.e218 [Accessed 07/09/2008].

¹³⁹ Tunna, n 79 above, at 90.

¹⁴⁰ Ibid

¹⁴² Blackshield, T et al., "Judicial Reasoning," see

¹⁴³Bagaric, n 45 above [Accessed 07/09/2008].

Juror misconduct

Cases reveal that the modern juror appears unwilling to accept a passive role and act in accordance with their oath or affirmation, in reaching a verdict based upon only the evidence. He for example, in $R \ v \ K$, the trial judge directed the jury that they can only consider the evidence adduced in trial by the relevant parties, and reach a verdict in accordance with only that evidence. Further, in a more recent decision, $R \ v \ Skaf$, the jurors were told not to do their own research. Common to both these cases is the fact that jurors nevertheless took it upon themselves to investigate further evidence and facts not considered during trial.

Accordingly, because jurors do not have to provide reasons for their decision, those jurors who decide to "misbehave" and form their verdict on evidence not adduced at trial, the accused may never effectively know whether the decision made was not only correct, but the lawful one. Indeed, the provision of reasons for a decision by a jury will mean that a convicted person may have their conviction overturned in circumstances where the decision itself illustrates quite clearly the jury provided a verdict that is not legally acceptable. Without a judgment from the jury, setting aside a jury's verdict may remain difficult. However, there are some statutory provisions in New South Wales that may nevertheless allow jury misconduct to be dealt with by law.

For example, section 75C of the *Jury Act* 1977 (NSW) provides:

- (1) A juror who in the course of the trial or coronial inquest has reasonable grounds to suspect any irregularity in relation to another juror's membership of the jury, or in relation to the performance of the other juror's functions as a juror, may disclose the suspicion and the grounds on which it is held to the court or coroner.
- (2) A former juror who has reasonable grounds to suspect any irregularity in relation to another former juror's membership of the jury on which they served or in relation to the performance of the other former juror's functions as a juror on that jury, may disclose the suspicion and the grounds on which it is held to the sheriff.
- (4) In this section:

¹⁴⁴ Boniface, n 6 above, at 19.

¹⁴⁵ *R v K* (2003) 59 NSWLR 431.

¹⁴⁶ *R v Skaf* (2004) 60 NSWLR 86.

"irregularity", in relation to a juror's membership of a jury, or the performance of the juror's functions as a juror, means the following:

- (a) the commission by the juror of an offence under this Act or any other misconduct,
- (b) a juror becoming disqualified from serving, or ineligible to serve, as a juror,
- (c) the refusal of the juror to take part in the jury's deliberations,
- (d) the juror's lack of capacity to take part in the trial or coronial inquest (including an inability to speak or comprehend English),
- (e) the juror's inability to be impartial because of the juror's familiarity with the witnesses, parties or legal representatives in the trial or coronial inquest, any reasonable apprehension of bias or conflict of interest on the part of the juror, or any similar reason.

Notably, a number of important points can be made about the effect of s 75C of the *Jury Act* 1977 (NSW). First, given that the effect of this statutory provision allows a juror to disclose to the court alleged misconduct or irregularity of another juror, then what follows is that this section itself appears to provide express evidence that the jury secrecy rule already appears to be limited.

By allowing a juror to disclose to the court any form of deliberations made by another juror, on the basis of the latter's alleged misconduct or irregularity in conduct, the justifications put forward to support the jury secrecy rule have been outweighed by the need to ensure justice prevails. Evidently, by making it mandatory for the Australian jury to provide reasons for their decisions, the legislatures of the respective states and territories of Australia will truly be allowing justice to prevail above and beyond those arguments that support the jury secrecy rule.

Secondly, section 75C of the *Jury Act* 1977 (NSW) only applies to the law in New South Wales. Many of the other states and territories throughout Australia have taken a more restrictive approach, not allowing members of the jury to disclose misconduct of other jurors to the court. As Boniface points out:

"Juror misconduct is difficult to detect and even if misconduct is detected, the common law's veil of secrecy, in the form of the exclusionary rule, prevents

the court from considering evidence that might reveal that a guilty verdict has been influenced by jury misconduct." 147

As a result, the mandatory requirement that a jury provide reasons for their decision in all states and territories throughout Australia will extend the current scope of detecting and dealing with misconduct by jury members. By keeping the jury secrecy rule, apart from New South Wales, the scope of dealing with jury misconduct will remain inadequate.

Finally, in the event that a juror were to disclose to the court an apprehended suspicion that another juror was not effectively discharging their role properly, it is likely that the court in such circumstances would be considering evidence orally of what the first juror perceived in relation to the second juror. It is submitted that such evidence would need to be extremely persuasive and viable before a court of law would act upon such evidence and perhaps set aside a jury verdict of guilty. Conversely, a published decision setting out the jury's reasons for their verdict may be set aside a lot more easier. This is because a published decision is no more viable than the actual evidence and arguments presented in the decision.

If a jury decision was illogical, unreasonable and/or unlawful, then reading the jury decision itself will be decisive in the matter, However, a court's ability to set aside a jury's decision on the basis of what a juror or indeed several jurors disclosed to the court orally about the supposed misconduct by a particular juror, is subject to various problems. For example, such evidence may:

- 1. suffer from being considered hearsay evidence within the meaning of s 59 of the *Evidence Act* 1995 (NSW); or
- 2. be inadmissible because of a judicial discretion pursuant to sections 135-138 of the *Evidence Act* 1995 (NSW), where the maker of the representation (ie, the first juror) did not make the representation in circumstances that make it highly probable that it is reliable; or
- 3. unlike representations in a published jury decision which are made almost contemporaneous with the actual trial, representations made to a court pursuant to

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¹⁴⁷ Boniface, n 6 above, at 24.

section 75C of the *Jury Act* 1977 (NSW) may appear more likely to be a fabrication, and further from the truth, on the basis the representation was not made simultaneously with or soon after the asserted fact allegedly occurred.

3.4 What Room for Jury Secrecy on Appeal?

Concept and meaning of appeal

Basically, 'appeal' refers to the procedure of passing from one court to another to have the judgment, order or other determination of the former set aside or varied in favour of the party appealing.¹⁴⁸ In *Commonwealth v Limerick Steamship Co Ltd*,¹⁴⁹ Isaacs and Rich JJ outlined an appeal as the continuous process of passing from one tribunal to another to correct the error of the first.¹⁵⁰

Judgment and reasons for judgment

For the purpose of appeal, the judgment of a court and the reasons of the court for the judgment must be distinguished. An appeal may lie from the judgment but there is no appeal from the reasons. The only judgment given by a court is the order it makes. Reasons for judgment may explain the judgment and have value as a precedent but they are not the judgment.

An appellate court to which an appeal lies by way of rehearing will generally be more unwilling to review the decision of a jury than a finding of fact made by a judge. ¹⁵⁵ In *Swain v Waverley Municipal Council*, ¹⁵⁶ the court outlined one reason why courts are

¹⁴⁸ Musgrove v McDonald (1905) 3 CLR 132, at 148; Commonwealth v Bank of New South Wales (Bank Nationalisation Case) (1949) 79 CLR 497 at 625.

¹⁴⁹ Commonwealth v Limerick Steamship Co Ltd (1924) 35 CLR 69.

¹⁵⁰ Commonwealth v Limerick Steamship Co Ltd (1924) 35 CLR 69, at 92.

¹⁵¹ LexisNexis, *Halsbury's Laws of Australia*, (at 07 April 2008) 325 Practice and Procedure, 'Judgment and reasons for judgment' [325-11070].

¹⁵² Lake v Lake [1955] P 336, at 343-4; R v Ireland (1970) 126 CLR 321 at 330 (per Barwick CJ); Driclad Pty Ltd v Cmr of Taxation (1968) 121 CLR 45, at 64 (per Barwick CJ and Kitto J).

¹⁵³ Australian Telecommunications Commission v Colpitts (1986) 12 FCR 395.

¹⁵⁴ R v Ireland (1970) 126 CLR 321 at 330 (per Barwick CJ).

LexisNexis, *Halsbury's Laws of Australia*, (at 07 April 2008) 325 Practice and Procedure, 'Appellate review of fact finding by judge and by jury compared' [325-11370].

¹⁵⁶ Swain v Waverley Municipal Council (2005) 220 CLR 517.

reluctant to review a verdict of a jury is that in contrast to a judge, a jury does not give reasons for its decision. Similar sentiments on this point have been expressed in cases such as Warren v Coombes and Laybutt v Glover Gibbs Pty Ltd t/as Balfours NSW Pty Ltd. Ltd. 159

Accordingly, it is absolutely fundamental that the Australian jury is made to provide reasons for their decisions, so that an appellate court can correct and cure any injustices that the jury may have made whilst serving as part of the judicial process. Recent former Chief Justice of the High Court of Australia, Gleeson J, has noted:

"It is easier to appeal against a reasoned decision. It is easier to identify error. Miscarriages of justice have the capacity to shake confidence in the system, but the capacity of the system to correct itself might be expected to reinforce confidence. It may be that the spirit of our times attaches less importance to finality and more importance to the need to know, and be able to challenge, reasons." 160

Experience has shown that to err is human.¹⁶¹ In this sense, it is readily apparent that the Australian jury will sometimes make a decision that is wrong. Without the mandatory provision of reasons for a jury's decision, it will be much harder to first even identify that an error has occurred in a jury's verdict, and, second, even if an appeal takes place against a jury's decision, without a judgment, by what measure and assessment can an appellate court review a jury's verdict? In the context of a criminal trial, Hull writes:

"Juries.... make the criminal appeal process a joke. Courts of criminal appeal can look at whether evidence should or should not have been included or whether the trial judge gave proper directions but when they look at the role of the jury, all they can ask is whether a hypothetical jury could have reasonably come to this decision." ¹⁶²

¹⁶¹ McCusker, M., "Letter from Malcolm McCusker QC," see:

 $http://www.postnewspapers.com.au/special_coverage/extra_walsham_stories/2007_08_04_1.shtml \ [Accessed 08/09/2008].$

http://www.canberratimes.com.au/news/local/news/opinion/jury-system-asks-too-much-of-people-illequipped-for-the-job/713431.aspx [Accessed 08/09/2008].

¹⁵⁷ Swain v Waverley Municipal Council (2005) 220 CLR 517.

¹⁵⁸ Warren v Coombes (1979) 142 CLR 531, at 552 (per Gibbs ACJ, Jacobs and Murphy JJ).

¹⁵⁹ Laybutt v Glover Gibbs Pty Ltd t/as Balfours NSW Pty Ltd (2005) 221 ALR 310.

¹⁶⁰ Gleeson, n 113 above, at 13.

¹⁶² Hull, C., "Jury system asks too much of people ill-equipped for the job," see:

Pattison argues that the need for reasons of a decision in order to effectuate the provisions for appeal in legislation is so obvious that the legislature is to be treated as having anticipated that would be implied. On this basis, it may be argued that a jury in civil and especially criminal law trials has to provide reasons for their decision, because such an obligation is implicit in the legislation. Section 72A(1) of the *Jury Act* 1977 (NSW), for example, makes clear that members of the jury must give a true verdict according to the evidence. It is submitted that such an obligation placed upon jurors is only evident if the judicial process and indeed the community at large knows that the jury has reached a verdict on the basis of only the evidence adduced at trial. The upshot of all this is that the publication of a jury's reasons for their decision will ensure that the jurors are discharging their role effectively as members of a jury.

As Kirby J once noted, the giving of reasons facilitates appeal and judicial review that might not otherwise be possible.¹⁶⁴ As a result, given that the current system does not place an obligation upon the Australian jury to provide reasons for their verdict, then it follows that one reading of this may mean that the current jury system protects and facilitates unsound verdicts. This is because, as Kirby J makes clear, without giving reasons for a decision, an appeal might not otherwise be achievable.

Findlay notes that for systems of justice that rely on review through formal appeal procedures, the unaccountable and unexplained verdict of the jury may be an impediment to such checks on justice. As such, by making the jury explain why it reached the verdict it did, the jury may than perhaps not be seen as an impediment to checks on justice, but, rather, an accountable body like other fact-finders in the judicial system.

Accordingly, a survey of the academic arguments above in relation to jury verdicts and appeals, suggests that the jury should be made to provide reasons for their decisions. Without extending this obligation upon the jury, it will be extremely hard to protect the

¹⁶³ Pattison, S., "Costing: Assessors must give reasons" (1997) 35(8) Law Society Journal 26, at 26.

¹⁶⁴ Kirby, M., "Ex Tempore Judgments – Reasons on the Run" (1995) 25 *University of Western Australia Law Review* 213, at 218.

¹⁶⁵ Findlay, M & P. Duff., *Jury management in New South Wales*, Carlton South, Vic, Australian Institute of Judicial Administration, 1994, at 9.

rights of a convicted person, in circumstances where the guilty verdict was not made in accordance with the law.

Appeal of jury verdicts in criminal cases

A jury verdict of conviction can be overturned in limited circumstances provided variously by statute. ¹⁶⁶ For example, in New South Wales, the *Criminal Appeal Act* 1912 (NSW), pursuant to s 6(1), provides that a jury's verdict can be set aside if it is:

".... unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice."

In M v R, ¹⁶⁷ Mason CJ, Deane, Dawson and Toohey JJ applied the italicised portion of s 6(1), equating it with the notion that the jury verdict is 'unsafe or unsatisfactory.' The majority acknowledged the jury's advantages in seeing and hearing witnesses in the court room but said nevertheless where the evidence:

".... contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the Court of Criminal Appeal to conclude that if.... there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict." ¹⁶⁸

A number of courts have made comments about whether a verdict of the jury was generally unsafe or unsatisfactory. In *Whitehorn* v R, 169 Dawson J outlined that a verdict will be unsafe and unsatisfactory where the court concludes that the jury acting reasonably ought to have had a sufficient doubt to entitle the appellant to an acquittal. 170 Further, in the case of *Morris* v R, 171 the court made clear that a verdict may be unsafe even though there was legally sufficient evidence upon which the appellant could have been convicted. 172

¹⁶⁶ Hunter, n 90 above, at 974.

¹⁶⁷ M v R (1994) 181 CLR 487.

¹⁶⁸ M v R (1994) 181 CLR 487, at 494-5 (per Mason CJ, Deane, Dawson and Toohey JJ).

¹⁶⁹ Whitehorn v R (1983) 152 CLR 657.

¹⁷⁰ Whitehorn v R (1983) 152 CLR 657, at 687 (per Dawson J); Chamberlain v R (No 2) (1984) 153 CLR 521, at 534 per Gibbs CJ and Mason J, at 602-3, 606-7 per Brennan J.

¹⁷¹ *Morris v R* (1987) 163 CLR 454; *Rostron v R* (1991) 1 NTLR 191, at 205 (per Nader, Mildren JJ).

¹⁷² *Morris v R* (1987) 163 CLR 454, at 473 (per Deane, Toohey and Gaudron JJ).

In *Palmer v R*,¹⁷³ the High Court outlined that a court must undertake an independent examination of the evidence and make its own assessment of both the sufficiency and quality of the evidence.¹⁷⁴ As the case of *Chidiac v R* ¹⁷⁵ makes clear, the power of the court is derived from the words of the relevant sections empowering the court to set aside the verdict where it is 'unreasonable or cannot be supported' or 'there was a miscarriage of justice'.

An important consideration relevant to all those cases in which an appeal lies from a jury verdict, is the fact that such verdicts are not provided with reasons for the decision. In this sense, how can an appellate court regard a jury's decision as being *unreasonable* or *not supported by having regard to the evidence*, when indeed the appellate court has absolutely no idea on what basis the jury made their decision?

Interestingly, within the context of Administrative law, which will be examined further in Chapter 4, is the effect of the unreasonableness test to set aside an administrator's decision.¹⁷⁶ In Australia, an administrator's decision will be unreasonable and potentially set aside, in circumstances where the decision is devoid of any plausible justification.¹⁷⁷ It may be said that given the Australian jury does not provide reasons for their verdict, than their decision may very well be unreasonable because it is devoid of any plausible justification. Without the provision of reasons, the jury verdict provides no rationalisation as to how the decision was reached.

Administrative action has been held to be unreasonable because it is out of proportion to the power which is exercised.¹⁷⁸ It is simply illogical to provide for in statute that a jury has the power to reach a verdict according only to the evidence adduced at trial, but then provide no procedures to really ensure the jury's power was exercised correctly. The

¹⁷³ *Palmer v R* (1992) 106 ALR 1.

 $^{^{174}}$ See further *Morris v R* (1987) 163 CLR 454, at 463-4, 466 per Mason CJ, at 473 per Deane, Toohey and Gaudron JJ, at 477-9 per Dawson J.

¹⁷⁵ Chidiac v R (1991) 171 CLR 432, at 442 (per Mason CJ).

¹⁷⁶ See further Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5(2)(g), 6(2)(g); Cubillo v Commonwealth (2001) 112 FCR 455, at 521

¹⁷⁷ Commonwealth v Pharmacy Guild of Australia (1989) 91 ALR 65, at 87 (per Sheppard J).

¹⁷⁸ Chertsey Urban District Council v Mixnam's Properties Ltd [1965] AC 735; Edelsten v Wilcox (1988) 83 ALR 99; Allen & Hemsley v DCT (NSW) (1988) 81 ALR 617, at 629-31.

provision of reasons for a jury's decision will provide that procedure by which we can really determine whether a jury's verdict was unreasonable in the circumstances.

Further, it is submitted that for an appellate court to set aside a jury's verdict simply on the basis that the court comes to the conclusion that no hypothetical jury would have made such a decision, is to directly usurp the function of the jury. In circumstances where a jury's verdict is unreasonable having regard to the actual published decisions of the jury's verdict, the court would not be appropriating the jury's function as fact-finders. They would, rather, having regard to the decision made, be correcting and curing defects on the express basis of the judgment of the jury.

Cases such as *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* ¹⁷⁹ and *Commonwealth v Pharmacy Guild of Australia* ¹⁸⁰ make clear that unreasonableness as a ground of review may be established on account of a failure to give adequate weight to a relevant consideration of great importance, or undue weight to a relevant factor of no great importance. ¹⁸¹ Again, without the provision of reasons for a jury verdict, how can an appellate court establish whether a jury has given adequate weight to a relevant consideration of great importance, or undue weight to a relevant factor of no great importance? There appears to be more questions than answers with the verdict of the jury. It is only by the provision of clear, structured and cogent reasons for a jury's decision, will the convicted person and community know the jury is discharging their function effectively as a fact-finder in the judicial process.

3.5 Some further Arguments Against Jury Secrecy

Research Benefits

Remarkably, little effort has been expended in finding out how juries actually work, and whether they really do serve the functions or suffer from the failings which followers and opponents of the jury system allege. 182 Certainly, one of the strongest arguments

¹⁷⁹ Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 (per Mason J).

¹⁸⁰ Commonwealth v Pharmacy Guild of Australia (1989) 19 ALD 510 (per Sheppard J).

¹⁸¹ See further *Luu v Renevier* (1989) 19 ALD 521.

¹⁸² Young, W et al., "The effectiveness and efficiency of jury decision-making" (2000) 24(3) *Criminal Law Journal* 89, at 89.

favouring the lifting of the veil on jury secrecy is that it would enable the viability of the jury system to be more conclusively explored. 183

In the context of jury decisions and research, Chesterman notes:

"Restrictions on disclosure and publication of jury deliberations can severely inhibit research into the operations of juries. In this event, the restrictions, far from protecting the interests of the system of administration of justice, act to the detriment of those interests. Important information on such matters as the level of understanding of relevant issues by jurors, the degree to which matters of fact are successfully communicated to them and the problems arising from unfamiliarity with the law and legal problems may never be properly researched." ¹⁸⁴

Accordingly, the jury should disclose the reasons for their verdict so as to ascertain whether the system of trial by jury is working.¹⁸⁵ Indeed, the court in *Attorney General v New Statesman and Nation Publishing Co Limited* ¹⁸⁶ outlined that the publication of a juror's experience and deliberations may have an educational effect on the public.

More Trial Involvement

Young outlines that a significant number of jurors have made comments that in one way or another they felt marginalized during the trial and perceived themselves to be bystanders rather than central players in the judicial process of trials. As such, by allowing the jury to publish the reasons for their verdict, they will evidently be more actively participating in the judicial process. This is important, because if the random juror considers themselves as a mere bystander rather than a central player in the trial, the chances of them making a logically coherent and rational decision seems questionable.

Preventing conjecture of irrationality regarding a jury verdict

To determine how a jury was impressed by particular flights of advocacy, or what the

¹⁸³ Tunna, n 79 above, at 82. The New Zealand Law Reform Commission was allowed to conduct research into the deliberations of juries. See New Zealand Law Reform Commission, *Juries in Criminal Trials, Part Two: Volume 2 – A Summary of the Research Findings*, Preliminary Report Paper 37, 1999. ¹⁸⁴ Chesterman, n 32 above, at 136.

New South Wales Law Reform Commission., Criminal Procedure: The Jury in a Criminal Trial – A Discussion Paper for Community Consultation, Sydney, NSW, Law Reform Commission, 1985, at 192.

¹⁸⁶ Attorney General v New Statesman and Nation Publishing Co Limited [1981] 1 Qb 1, at 11.

¹⁸⁷ Young, n 182 above, at 94.

jurors made of judicial instruction in relation to their legal obligations, resort must usually be had to professional or media speculations which cannot be confirmed or denied. 188 Accordingly, with the mandatory provision of reasons for a jury verdict, one would need to go no further than the actual publication itself. This would help to eliminate conjecture in the media and elsewhere about exactly how the jury reached the decision that they did. Mere assumptions of the jury's decision may be evaporated quite quickly by looking at the reasons for the verdict itself.

The vigour with which absolute and indeed majority verdicts are protected might be explained by fear of judges, lawyers and politicians that if juries were made to account for their decision-making, the accuracy of their verdict, or the logic of the process through which it was obtained, might seriously be impugned. 189 To stop such speculation, the ability for a judicial officer or member of the community to pick up and read a jury's decision could in fact silence this suspicion immediately. In the event that a jury's verdict appears to be flawed, having regard to the reasons for the decision, then justice may be done by an appellate court correcting the illegality or erroneous decision of the jury.

As Byrne points correctly out, in the meantime, until juries are made to provide reasons for their decisions, the grounds on which jury verdicts are reached are not usually divulged, and therefore, there is no reliable way of knowing whether a verdict is based on a sound understanding of the case. 190

Findlay writes that in several Australian criminal jurisdictions it has been accepted that jurors are unduly confused by expert evidence, and as such may not carry out their factfinding functions as accurately as they should. 191 If this statement is to be accepted, then it is fundamentally important that the Australian jury is forced to provide reasons for their decision. This will allow persons convicted of offences to have their guilty verdict set aside, which, in the current state of affairs, seems unlikely given an appellate court will not be able to examine whether the jury understood the expert evidence in question.

¹⁸⁸ The Honourable Justice M.D. Kirby AC CMG, n 122 above [Accessed 08/09/2008].

¹⁸⁹ Findlay & Duff, n 165 above, at 9.

¹⁹⁰ Byrne, P., "Jury Reform and the Future," in *The Jury Under Attack*, edited by Findlay, M & P. Duff, Sydney, Butterworths, 1988, at 203.

Findlay, M., "Juries Reborn" (2007) 90 Reform 9, at 11.

Further, disclosure of jury reactions to evidence may lead to worthwhile reforms of the jury system within the broader component of the Australian legal system. ¹⁹²

Empirical Evidence?

As there has been quite a vast range of arguments mounted in relation to the question of jury secrecy, the author thought it would be useful to undertake a survey, for the purposes of gathering statistical data on the topic. Notably, 300 persons were surveyed in relation to 6 different questions, all related in some manner to the question of jury secrecy. ¹⁹³

Although the author acknowledges the limited number of people surveyed may mean that any data gathered from such an exercise could produce restricted and inadequate evidence, it is hoped that the data taken from the survey will provide some indication of what general members of the Australian community think about jury secrecy.

In relation to those participants who were surveyed, the following can be considered:

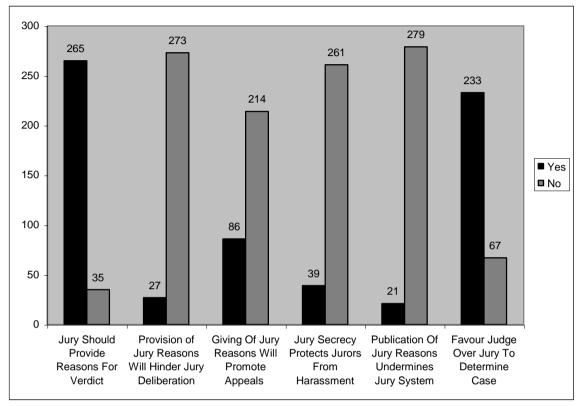
- Persons surveyed ranged in age group from 18-90.
- Participants varied greatly, but included members who were either blue-collar or
 white-collar workers. This included members of professional groups (i.e. such as
 medical practitioners, lawyers, optometrists, academics) to individuals such as
 tradespersons (i.e. carpenters, electricians, mechanics). Housewives and
 unemployed members of the community also formed part of the survey.
 University students and owners/workers of businesses were also surveyed.
- The survey was conducted across five states of Australia: New South Wales; Melbourne; Queensland; South Australia and Tasmania. 194
- Although not apparent on the survey, it is acknowledged that those members who
 undertook the survey came from vastly different cultural backgrounds, including,
 although not limited to, Indigenous persons, European persons, Asian persons,
 Middle Eastern persons and former residents of Africa.¹⁹⁵

¹⁹³ The actual survey drafted and administered to those persons who undertook this survey is annexed at the end of this manuscript.

¹⁹² The Honourable Mr Justice McHugh, n 1 above, at 66.

¹⁹⁴ All states and territories of Australia would have been surveyed but for the logistical nightmare in getting access to members of all those communities.





Perhaps the most striking piece of empirical data from the above graph is that 88% of persons surveyed were of the opinion that the Australian jury should provide reasons for their verdict. Such evidence may suggest that a large majority of members of the Australian community feel that jurors should provide reasons for their decisions. This is in striking contrast to the current set of laws in the various jurisdictions throughout Australia, which have enacted statutory provisions in direct contradiction to the clear majority view of that in the survey, that is, jurors should provide reasons for their verdict.

The next four questions administered for the survey, which represent the 'four golden factors' considered in chapter 2, also provides some interesting data that appears to undermine the arguments inherent in the four golden factors. For example, 91% of

¹⁹⁵ Although such persons may consider themselves Australians (and most of them may well be), it was important to undertake a survey that considered the opinions of persons representative of differing cultures and nationalities. This is because, after all, Australia itself is made up of members of the community whose own cultural background derives from countries other than that of Australia.

persons surveyed formed the view that the provision of jury reasons would not hinder jury deliberation. Further, 71% of people did not feel that the attachment of reasons for a particular jury verdict would promote appeals, in the sense of undermining the finality of verdicts principle. Supporters of jury secrecy would also not find comfort in the sense that 87% of persons surveyed felt that the publication of jury reasons for a verdict would not assist jury members in being harassed and pressured. Finally, 93% of individuals surveyed held the opinion that lifting the veil on jury secrecy would not undermine the jury system. In all, therefore, the data from the survey supports the view that those main arguments used to justify the current jury secrecy rule clearly do not represent the views of the majority of members of the community.

Accordingly, whether the empirical evidence outlined above makes those arguments supporting jury secrecy incorrect or erroneous may still remain unanswered. However, at least this much is clear, on the basis of those participants surveyed, they send a clear message that the Australian jury should provide reasons for any verdict that it reached.

Interestingly, 78% of persons surveyed outlined that they would prefer a judge to make a determination over a jury, in circumstances where they were charged with a criminal offence. Such evidence appears to support the view that members of the Australian community favour a criminal trial to be run by a judge alone without a jury. It is suggested that if the Australian jury were made to provide reasons for any verdicts that they reach, than perhaps members of the community might place more faith and confidence in the system of trial by jury.

Chapter 4 – Understanding Mandatory Provision of Jury Reasons in Light of Administrative Law

"The more significant the decision the clearer the duty may be, the clearer the reasons should be and the clearer the consequences will be for the breach. Some decisions cry out for a clear explanation. Especially is this so where..... the decision is very important for the person affected and for others close to that person." ¹⁹⁶

4.1 Connection Between Administrative Law Principles and Jury Secrecy

Administrative law is principally an area of public law that regulates the relationship between the citizen and the state. ¹⁹⁷Accordingly, this chapter seeks to examine how a study of some fundamentally important administrative law principles can help us to appreciate why the giving of reasons by decision-makers can also be used to extend the argument why the veil of jury secrecy should be lifted.

Indeed, a further opposition to the jury secrecy rule is that it runs counter to the principle, now entrenched to some extent by statute, that public agencies invested with powers to make decisions affecting individual's legal rights and liabilities should be obliged to furnish reasons for their decisions. To continue to allow Australian juries to deliberate in private without requiring them to account publicly for their decisions, is to accord them a privilege denied to most other public tribunals: a privilege inconsistent with existing notions of public accountability. 199

Bagaric notes, this silence inherent in jury secrecy flies in the face of trends in all other areas of law and government where there is a growing need for decision-makers to give reasons for decisions..... this is sound, modern policy.²⁰⁰ Further, as the recent former Chief Justice of the High Court of Australia has outlined, Gleeson J, a decision made by

¹⁹⁶ Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212, at 229-230 (per Kirby J).

¹⁹⁷ Head, M., Administrative Law: Context and Critique, Annandale, Federal Press, 2005, at 18.

¹⁹⁸ Campbell, E., "Jury Secrecy and Contempt of Court" (1985) 11(4) *Monash University Law Review* 169, at 194.

¹⁹⁹ Ibid.

²⁰⁰ Bagaric, n 45 above [Accessed 07/09/2008].

an independent tribunal that is obliged to hear both sides of an argument, to sit in public, and to give a reasoned decision is probably more likely to be right, and is almost certainly more likely to be acceptable to somebody adversely affected, than a decision made without those constraints.²⁰¹

Given that the Australian jury is said to be an independent body that is obliged to hear both the defence and the prosecutions submissions and sit in public, it follows that the jury should also be made to provide reasons for their decisions, so as to ensure, applying the reasoning of Gleeson J, former Chief Justice of the High Court of Australia, the decision made by the jury is not only more likely to be right, the verdict of the jury is 'almost certainly more likely to be acceptable to somebody' such as the accused in a criminal trial.

4.2 Access to Information

Absence of duty

At common law, courts have a key duty to give reasons where it is essential in order to allow a person to prosecute an appeal effectively. Nevertheless, administrators do not have any wide-ranging obligation at common law to give reasons for any decisions that they make. However, this principle, now so very well known in administrative law, may appear likely to be an exception to the general rule that administrators should provide reasons for any decisions that they make. 204

Indeed, Kirby P (as he was then known) in the case *Osmond v Public Service Board of New South Wales*, ²⁰⁵ a New South Wales Supreme Court of Appeal matter, formulated a general principle that administrators have a duty to provide reasons for their decisions,

2006.pdf [Accessed 18/09/2008].

²⁰¹ Gleeson, M., "Outcome, Process and the Rule of Law: Address Delivered to the Administrative Tribunals 30th Anniversary Dinner, Canberra, Canberra, 2 August, 2006", available from: http://www.aat.gov.au/SpeechesPapersAndResearch/30thAnniversary/pdf/OutcomeProcessRuleLawAugust

²⁰² Pettitt v Dunkley [1971] 1 NSWLR 376; Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378; King Ranch Australia Pty Ltd v Cardwell Shire Council [1985] 2 Qd R 182; Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.

²⁰³ Public Service Board of New South Wales v Osmond (1986) 159 CLR 656.

²⁰⁴ Bagaric, n 45 above [Accessed 07/09/2008].

²⁰⁵ Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447.

basing his judgment upon a line of taxation cases, a line of jurisprudence from English case law and *obiter dicta* in other common law jurisdictions.²⁰⁶

In the case of *Kioa v West*, ²⁰⁷ Brennan J outlined, in the context of administrative law cases, where adverse allegations are credible, relevant and important to a decision to be made, they should be disclosed to a person whose interests are likely to be affected by that decision, so that the person may have an opportunity to invalidate such allegations made against them. ²⁰⁸ Within the context of criminal law cases heard by a jury, a person who has been convicted of a criminal offence, will almost have no chance to invalidate a decision on the basis of those 'important' allegations considered by the jury, because, as has been illustrated throughout, the jury does not provide reasons for their decisions.

Deduction to be drawn from an absence of reasons

Even though an administrator does not act unlawfully in not giving reasons for a decision in the absence of any statutory obligation to do so, nonetheless the lack of reasons for a decision leaves open the prospect that a court upon judicial review may infer an error of law for taking into account irrelevant considerations, or failing to take into account relevant considerations, or acting unreasonably. For example, in the case of *Jackson v Director-General of Corrective Services*, the Director General was not required to provide reasons under relevant legislation when reviewing an application from a prisoner for day leave, where the Director General refused leave without giving reasons. Despite this, the court in *Jackson* inferred from all the facts and circumstances that the decision to decline leave was based on trepidation of the response by the community and this was an irrelevant consideration under the legislation and thus the decision was invalid.

It has been argued that the Australian jury verdict is apt to be based upon irrelevant

²⁰⁶ Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447.

²⁰⁷ Kioa v West (1985) 62 ALR 321.

²⁰⁸ Kioa v West (1985) 62 ALR 321, at 380.

²⁰⁹ Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, at 1049, 1053, 1061, applied in the Australian case of Pyrenees Shire Council v Day (1998) 192 CLR 330; Sordini v Wilcox (1982) 42 ALR 245; Public Service Board of New South Wales v Osmond (1986) 159 CLR 656, at 663-4 (per Gibbs CJ); Anderson, Dunn and Alister v Release on Licence Board [1984] 2 NSWLR 312, at 320.

²¹⁰ Jackson v Director-General of Corrective Services (1990) 21 ALD 261.

considerations such as sympathy for a plaintiff who has been injured, or for a widow and children of an employee who has been killed in the course of his employment, or sympathy for a plaintiff of moderate means as against a defendant who is insured or otherwise well able to pay any damages awarded.²¹¹ Because deliberations in the jury room are secret, it is hard to know what substance there is in the contention that the jury may be taking into account irrelevant considerations.²¹² Instead, if a matter is appealed, the appellate court will have to imagine what a reasonable jury would have done in the circumstances of the case, and, in this way, will usurp the function of the actual jury that was called upon to provide a determination of the case in question.

Statutory framework for administrators to provide reasons

Within the area of administrative law, there is a wealth of various pieces of legislation that place a direct duty upon administrators to provide reasons for their decisions. Section 13(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (*ADJR Act*) provides that a person who, under section 5 of the *ADJR Act*, is entitled to apply to the Federal Court or the Federal Magistrates Court for an order of review of a decision²¹³ that is reviewable under that Act, may make a written request to the decision-maker to provide a statement of the reasons for the decision made (a 'section 13 statement'). In conjunction with giving reasons for a decision made, an administrator, pursuant to a section 13 statement, must set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.²¹⁴

In Soldatow v Australia Council, 215 Davies J outlined that the purpose of a section 13 statement is to allow a person adversely affected by a decision reviewable under the

²¹¹ Bar Council, n 4 above, at 25.

²¹² Ibid.

²¹³ The entitlement to obtain reasons for a decision includes a right to obtain reasons for: (1) making, suspending, revoking or refusing to make an order, award or determination; (2) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; (3) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (4) imposing a condition or restriction; (5) making a declaration, demand or requirement; (6) retaining, or refusing to deliver up, an article; or (6) doing or refusing to do any other act or thing: *Administrative Decisions (Judicial Review) Act* (Cth) 1977 s 3(2). Compare this with s 25D of the *Acts Interpretation Act* 1901 (Cth), which provides that reasons may only be sought for a decision made and not for an action taken.

²¹⁴ Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13(1).

²¹⁵ Soldatow v Australia Council (1991) 28 FCR 1.

ADJR Act to obtain an explanation as to why that decision was reached.²¹⁶ Similarly, if the Australian jury was made to provide reasons for any verdict delivered, then, the persons aggrieved²¹⁷ in a particular case will be able to have an explanation as to why a verdict was reached.

Moreover, as the court made clear in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, ²¹⁸ the reasons outlined in a 'section 13 statement' are meant to inform, not to be scrutinized upon overzealous judicial review seeking to discern whether some inadequacy might be gleaned from the way in which the reasons are expressed. In this sense, if jurors had to provide reasons for their decisions, the written determination that they made should not be overtly criticised in order to invoke judicial review, unless the reasons themselves quite clearly demonstrate an error of law upon the jury's reasoning.

Pearce has stated that a 'section 13 statement' is intended to conquer the real sense of grievance experienced by a person who is not told why something affecting them has happened, and the information in the statement should help them in charting their future course of action. This comment by Pearce was later adopted by Ellicott J in *Burns v Australian National University*. In this sense, if a person was convicted of a criminal offence or indeed the prosecution wanted to appeal a matter in that case upon an aspect of law in relation to a decision made by the jury, how can they charter a future course of action without information in the nature of a statement setting out the reasons why a particular decision was made? It appears that in these circumstances, that convicted person or members of the prosecution will be seeking judicial review on mere speculation, unsupported by clear evidence, which, ironically, that evidence itself may be illegal, and, therefore, cannot be admitted, because it is protected by the jury secrecy rule.

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²¹⁶ Soldatow v Australia Council (1991) 28 FCR 1, at 2 (per Davies J); Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500, at 507; Brackenreg v Comcare Australia (1995) 56 FCR 335.

²¹⁷ A 'person aggrieved' for the purposes of this sentence refers to a plaintiff or defendant who has had adverse allegations made against them in a civil matter, or, alternatively, a defendant in a criminal case who is the subject of criminal charges.

²¹⁸ Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, at 272.

²¹⁹ Pearce, D.C., "Administrative Review Council, Statement of Reasons: An Explanatory Memorandum", *Administrative Law Service*, 1979, at 5003.

²²⁰ Burns v Australian National University (1982) 40 ALR 707, at 715. See further Minister for Immigration, Local Government and Ethnic Affairs v Taveli (1990) 94 ALR 177, at 192-3 (per French J).

In Ansett Transport Industries (Operations) Ptv Ltd v Taylor, 221 Lockhart J outlined that the statement of reasons to which section 13 of the ADJR Act refers, may satisfy the grievance or may disclose to the person a finding of fact or of law which he or she believes is worth challenging by bringing an action under the ADJR Act. 222 Accordingly, it may be argued that because the jury it prohibited from disclosing their reasons for a verdict to the accused or convicted person in a criminal law matter.²²³ this law in itself may have subverted the intention of the legislature in the passing of s 6(1) of the Criminal Appeal Act 1912 (NSW), which provides that a jury's verdict can be set aside if it is unreasonable, or cannot be supported having regard to the evidence. As the reasoning in the judgment of Lockhart J in Ansett Transport Industries makes clear, the statement of reasons for a decision may disclose to the person affected a 'finding of fact or of law'. which may allow them to seek judicial review under the ADJR Act. The prohibition of jury reasons for a decision flows in the opposite direction, suggesting that a person convicted of a criminal offence will find it difficult to reconcile a particular use for s 6(1) of the Criminal Appeal Act 1912 (NSW), when indeed they do not have a statement of reasons for why they were convicted of the criminal offence(s) in question.

Further, in *Minister for Immigration, Local Government and Ethnic Affairs v Taveli*, ²²⁴ French J (as he was than known), ²²⁵ outlined that a further policy of the legislative scheme to which section 13 belongs was to improve decision-making by requiring administrators to identify for themselves the reasons for their decisions. ²²⁶ As a result, the introduction of a legislative scheme that provided for the mandatory provision of reasons for decisions by the jury, would improve the common juror's decision-making ability by requiring jurors to identify for themselves the reasons for their decisions.

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²²¹ Ansett Transport Industries (Operations) Pty Ltd v Taylor (1987) 18 FCR 498.

²²² Ansett Transport Industries (Operations) Pty Ltd v Taylor (1987) 18 FCR 498, at 502; Australian Institute of Marine and Power Engineers v Secretary, Dept of Transport (1986) 13 FCR 124, at 130-1 (per Gummow J); Dalton v DCT (NSW) (1985) 7 FCR 382.

²²³ See section 68B of the *Jury Act* 1977 (NSW) and further *Chapter 2* above.

Minister for Immigration, Local Government and Ethnic Affairs v Taveli (1990) 94 ALR 177.

French J is now the current Chief Justice of the High Court of Australia, appointed to that position as of 1 September 2008: http://www.hcourt.gov.au/frenchcj.html [Accessed 20/09/2008].

²²⁶ Minister for Immigration, Local Government and Ethnic Affairs v Taveli (1990) 94 ALR 177, at 193. For further treatment on the *ADJR Act* and the provisions for exclusions of certain decisions from the requirement to provide a statement of reasons, see further *Australian Securities Commission v Somerville* (1994) 51 FCR 38.

It may be argued that although there are strong policy grounds upon which administrators should provide reasons for their decisions, these same justifications supporting the provision of reasons by administrators does not have the same weight in relation to justifying why the veil on jury secrecy rule should be lifted. It may be argued that members of the jury are not government appointed, and the area of criminal law is a completely different species to that of administrative law.

After considering these arguments, a number of important points can be raised for consideration. First, although it may be true that administrative law and criminal law evidently serve a different purpose in the community, as criminal law is dealing with regulating the criminality of citizens conduct in society, 227 whereas administrative law controls the legality of governmental decisions made by administrators, both areas of law have the clear potential to adversely affect the rights of citizens. Further, how can it be that administrators in many instances have to provide reasons for their decisions, and jury members do not, when in fact those persons affected by decisions of jury members may have far greater implications than a decision made by an administrator? Conviction of a criminal offence in Australia has the clear potential to take away from a person their own liberty for life, whereas as decisions of administrators, although important, do not generally bring about a conclusion where a person is to end up in jail. To repeat the quote extracted at the start of this chapter, for the sole purpose of emphasising its grave importance, Kirby J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* 228 said:

"The more significant the decision the clearer the duty may be, the clearer the reasons should be and the clearer the consequences will be for the breach. Some decisions cry out for a clear explanation. Especially is this so where..... the decision is very important for the person affected and for others close to that person." ²²⁹

Secondly, although it may also be true that technically the jury in a criminal or civil case

²²⁷ Clough, M & C. Mulhern., Criminal Law, Chatswood, NSW, LexisNexis, 2nd edition, 2004, at 3.

²²⁸ Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212

²²⁹ Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212, at 229-230.

are not appointed by the government in the same way a tribunal member or delegate of a particular Minister is, in fact it could be argued that jurors are indeed appointed by the government in a very limited sense, because it is the legislature through respective pieces of legislation on juries that have empowered the government to summon certain persons for jury service.²³⁰ In this way, jurors should be accountable for their actions, in the same way, if not more, than the accountability that attaches to decisions of administrators.

As noted above, the duty to provide reasons for a decision is imposed on tribunals and decision-makers under a wide variety of legislation.²³¹ Even the office of the Ombudsmen has a duty to give reasons for decisions that they make. For example, pursuant to s 12(1) of the *Ombudsman Act* 1976 (Cth), a decision not to investigate must be conveyed to the complainant and the department or authority with reasons.²³² In this sense, the importance in the provision of reasons for a decision made represents good governance. It does not allow decision-makers to make decisions that may be incorrect by law, and ensures that such decision-makers are discharging the function of their job in a satisfactory way. Without the provision of reasons for decisions made by jurors, we do not really know whether the Australian jury really is discharging their role as finders of fact in a civil or criminal law trial.

Freedom of Information Law

Another area in which we can learn about the importance in the provision of information, is that related to freedom of information laws. In short, access to documents in the possession of the Australian governments is regulated by freedom of information laws, which apply in every Australian jurisdiction and form an essential part of a broader

²³⁰ See, for example, Part 5 of the *Jury Act* 1977 (NSW), which deals with the summoning of jurors.

See, for example, Part 5 of the *Jury Act* 1977 (NSW), which deals with the summoning of jurors.

231 See, for example, the *Migration Act* 1958 (Cth) s 368(1)(b) (reasons for decision by member of the

Migration Review Tribunal), s 430(1)(b) (Refugee Review Tribunal); *Veterans' Entitlements Act* (Cth) s 34(1) (decisions by the Repatriation Commission when reviewing pensions); *Social Security (Administration) Act* 1999 (Cth) s 177(1)(a)(ii) (Social Security Appeals Tribunal to give reasons for decision); *Broadcasting Services Act* 1992 (Cth) s 205(a) (Australian Broadcasting Authority, when it makes a decision that is reviewable by the Commonwealth Administrative Appeals Tribunal, it must include in the document by which the decision is notified a statement setting out the reasons for the decision).

²³² See further, Ombudsman Act 1974 (NSW) s 15; Ombudsman Act 1989 (ACT) s 15(1); Ombudsman Act 1972 (SA) s 17(3); Ombudsman Act 1978 (Tas) s 22; Ombudsman Act 1973 (Vic) s 24; Parliamentary Commissioner Act 1971 (WA) s 18(2).

network of laws which augment the overall transparency of Australian governments. 233

In all jurisdictions throughout Australia, the key points for consideration regarding the Freedom of Information Acts have three vital elements:

- 1. Subject to a number of exceptions, it creates universal rights of access to documents in the control of government agencies and Ministers;²³⁴
- 2. It obliges government agencies to publish specific information about their actions and the documents held by them and to make accessible the internal laws which administer their decision-making as it affects members of the community;²³⁵ and
- 3. It includes a procedure whereby persons who have acquired access to their own individual records can apply for their amendment. ²³⁶

Significantly, the association which freedom of information laws have in common with the notion of jury secrecy is simple. That is, many of the rationales for the implementation of a policy of freedom of information can be extended to support the argument for lifting the veil of jury secrecy. We shall now consider several of these here.

First, freedom of information laws reflect a view that transparency is a fundamental prerequisite for political accountability and for discouraging corruption and other forms of misconduct.²³⁷ In this sense, without jurors having to provide reasons for their decisions, corruption in the deliberations of a jury matter may go unchecked. Indeed, in knowing that jurors do not have to provide reasons for the verdict that they reached, there is no real incentive to be discouraged from corruption whilst acting as a juror. Further, given that the system of trial by jury is itself a creature of statute, created by parliament,

²³³ See Freedom of Information Act 1982 (Cth); Freedom of Information Act 1989 (NSW); Freedom of Information Act 1992 (Qld); Freedom of Information Act 1991 (SA); Freedom of Information Act 1991 (Tas); Freedom of Information Act 1982 (Vic); Freedom of Information Act 1992 (WA); Information Act 2002 (NT); Freedom of Information Act 1989 (ACT).

²³⁴ See, for example, *Freedom of Information Act* 1982 (Cth) s 11; *Freedom of Information Act* 1989 (NSW) s 16.

²³⁵ See, for example, *Freedom of Information Act* 1982 (Cth) Pt II; *Freedom of Information Act* 1989 (NSW) Pt 2.

²³⁶ Freedom of Information Act 1982 (Cth) Pt V; Freedom of Information Act 1989 (NSW) Pt 4.

²³⁷ Commonwealth Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978*, Australian Government Publishing Service, Capherra, 1979; see

http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/pre1996/freedom/ [Accessed 19/09/2008].

without the jury having to provide reasons for a decision, we do not know in truth whether the system of trial by jury is indeed actively working in an effective manner. In that way, the political accountability of trial by jury goes unchecked without any real answerability to the very government who maintains the system of jury service.

Secondly, another rationale for the freedom of information laws is that open government improves the potential for the common everyday citizen in the community to actively participate in the formulation of governmental policy and in the procedure of the government itself.²³⁸ In the same way, the idea of partaking in a jury trial allows 'common everyday citizens' of the community to actively contribute and participate in the procedure of the Australian legal system. It might be argued that by making jurors provide reasons for their verdict, this may promote members of the community to play a more active part in the formulation of decisions made by courts, because, as it currently stands, the Australian jury makes a determination on findings of fact without having to provide not even a short judgment of a verdict with reasons. By making jurors provide reasons for a verdict, they will be more actively participating in the judicial process.

Participation is valuable to the functioning of a healthy democracy because it gives everyday citizens an investment in government affairs and provides them with a means for controlling their own affairs and those of the general public in which they live. ²³⁹ If jurors had to provide reasons for their decisions, they would certainty be controlling the affairs of the public more fully by undertaking a more active role in explaining why a person is to be found guilty or innocent. The provision of reasons for a verdict does not necessarily in an unreasonable way expand the function of the jury, but, rather, 'gives everyday citizens an investment in governmental affairs', especially within the context of criminal law matters, where the state seeks to protect members of the community.

A further purpose of freedom of information relates to its utility as a device for the exercise of certain aspects of privacy rights..... the ability of individuals to obtain access to their personal records, and to ask for their amendment, improves their level of control

²³⁸ Ibid.

²³⁹ ibid.

over their own individual records.²⁴⁰ It might be argued that the provision of reasons for a decision by jurors itself acts as a device so that persons convicted of a criminal offence can gain access to their personal records (i.e. reasons why they were convicted), and use this information for the possible basis of an appeal, in circumstances where that private information deliberated upon in the jury room was not used properly according to law.

Freedom of information laws certainly serve the purpose of possibly allowing a person to bring a matter to court to have their rights which have been affected fixed, as Head makes clear:

"..... the FOI laws may offer important opportunities for lawyers and their clients, and also the media, researches and community or political activists, to probe and challenge administrative actions and policies in a way not provided for by judicial or quasi-judicial review. This information may be critical in deciding whether there are grounds to seek review of an official decision." ²⁴¹

4.3 Natural Justice and Procedural Fairness

Main Principles

The rules of natural justice are principles which evolved at common law to ensure the fairness of the decision-making process of administrators and courts.²⁴² Currently, these principles also apply to arbitrators,²⁴³ referees²⁴⁴ and costs assessors.²⁴⁵ The term 'natural justice' is used interchangeably with the expression 'duty to act fairly', or, for the most part in Australia, 'procedural fairness'.²⁴⁶

The conception that an obligation to give reasons is a principle of procedural fairness, requiring an administrator to give reasons for a decision in appropriate circumstances,

²⁴⁰ New South Wale Department of Premier and Cabinet, "The NSW FOI Manual", August 2007, see: http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0019/685/FOIManual15Aug07.pdf [Accessed 15/09/2008.

²⁴¹ Head, n 197 above, at 55.

²⁴² Xuereb v Viola (1989) 18 NSWLR 453.

²⁴³ Gas & Fuel Corp of Victoria v Wood Hall Ltd [1978] VR 385.

²⁴⁴ Xuereb v Viola (1989) 18 NSWLR 453.

²⁴⁵ Attorney-General (NSW) v Kennedy Miller Television Pty Ltd (1998) 43 NSWLR 729.

²⁴⁶ These terms have been in use in the United Kingdom since the period of 1967: *Re HK (an infant)* [1967] 2 QB 617; *R v Birmingham City Justices; Ex parte Chris Foreign Foods (Wholesalers) Ltd* [1970] 3 All ER 945; *Furnell v Whangarei High Schools Board* [1973] AC 660.

was originally rejected in Australia.²⁴⁷ On this basis, it might be argued that given administrators do not have a mandatory obligation to provide reasons for their decisions, than there is no need for a jury to provide reasons for their verdict also.

Nonetheless, it has since been held in the United Kingdom that, in certain circumstances, an obligation to provide reasons for a decision may be part of the content of a fair hearing by an administrator.²⁴⁸ Since then, the courts in Australia have given limited recognition to the prospect of implication of an administrator's duty to give reasons when exercising a power that, as a matter of statutory interpretation, affects rights, property or legitimate expectations of a person.²⁴⁹

In *Public Service Board of New South Wales v Osmond*,²⁵⁰ Deane J noted in *obiter*, that in relation to a disciplinary hearing where a person's livelihood is in jeopardy, an administrator would have a duty to provide reasons for their decision.²⁵¹ On this basis, given that in many instances where a person is charged or convicted of a criminal offence could mean their own 'livelihood is in jeopardy', in the sense they could lose their freedom, it makes reasonable sense that jurors should also be made to provide reasons for the verdict that they reach. An extension of the comments made by Deane J in *Osmond* to criminal law matters would not be to subvert his intention in that principle, because, Deane J appears to recognise and appreciate the importance of reasons given by a fact-finder in circumstances when a person's livelihood is or could be threatened.²⁵²

Interestingly, the court in *Xuereb v Viola* ²⁵³ found that where a referee provided a report to the court pursuant to the Supreme Court Rules (NSW) Pt 72 r 11 (now repealed), that referee was required to provide reasons in order to justify the validity of the observations and overall outcome as illustrated in the report.²⁵⁴ In the same way, when a jury makes a

²⁴⁷ Public Service Board of New South Wales v Osmond (1986) 159 CLR 656.

²⁴⁸ R v Secretary of State for the Home Dept; Ex parte Doody [1994] 1 AC 531, at 560. See further Doody v Secretary of State for the Home Dept [1993] 3 All ER 92.

²⁴⁹ Coope v Iuliano (1996) 65 SASR 405, at 408.

²⁵⁰ Public Service Board of New South Wales v Osmond (1986) 159 CLR 656.

²⁵¹ Public Service Board of New South Wales v Osmond (1986) 159 CLR 656, at 676.

²⁵² See further Attorney-General (NSW) v Kennedy Miller Television Pty Ltd (1998) 43 NSWLR 729, at 734,735 (per Priestley JA).

²⁵³ Xuereb v Viola (1989) 18 NSWLR 453.

²⁵⁴ Xuereb v Viola (1989) 18 NSWLR 453, at 472, 473.

determination as to the innocence or guilt of a particular person on trial in a criminal matter, they should also be made to provide reasons for their verdict, in order to justify the validity of their findings of fact and overall outcome in a case. It is simply illogical that a referee is made to justify his findings, and a jury is not, when in fact, jurors in criminal law trials have far greater power to adversely affect the rights of a person than does a referee. The logic in this simply does not stand to reason.

As Davies J made clear in the case of *Yung v Adams*, ²⁵⁵ in the absence of an express clear statutory duty to give reasons a court may imply such a duty, particularly where the president of the tribunal must hold judicial office, or an appeal on questions of law lies to a court. ²⁵⁶ When the same case was appealed, Beaumont J in *Adams v Yung* ²⁵⁷ agreed with Davies J's reasons for implying in the relevant statute a duty on the part of the decision maker to state its reasons for reviewing a determination. ²⁵⁸ Further, Burchett and Hill JJ also agreed with Davies J that for a court to fulfil its responsibility to resolve an appeal on a question of law, the tribunal must give sufficient reasons so that the question of law in issue is made manifest. ²⁵⁹ Simply put, therefore, for an appellate court to fulfil its duty to hear appeal cases from matters determined by a jury, the courts of appeal must be given sufficient reasons by a jury so that the proposed error of law in question can be properly determined.

However, it is also true that there have been a number of judicial pronouncements rejecting the need for administrators in certain circumstances to give reasons for their decisions.²⁶⁰ For example, it has been doubted that a cost assessor has a duty to provide provide reasons for any decisions that they make.²⁶¹

²⁵⁵ Yung v Adams (1997) 80 FCR 453.

²⁵⁶ Yung v Adams (1997) 80 FCR 453. Davies J in Yung had followed the decision of R v Secretary of State for the Home Dept; Ex parte Doody [1994] 1 AC 531 sub nom Doody v Secretary of State for the Home Dept [1993] 3 All ER 92.

²⁵⁷ Adams v Yung (1998) 51 ALD 584.

²⁵⁸ Adams v Yung (1998) 51 ALD 584, at 620.

²⁵⁹ Adams v Yung (1998) 51 ALD 584, at 633.

²⁶⁰ Cypressvale Pty Ltd v Retail Shop Leases Tribunal (unreported, SC(QLD), Shepherdson J, 312/94, 25 July 1994, BC9404571).

²⁶¹ See, for example, *Smits v Buckworth* (unreported, SC(NSW), Young J, 3869/96, 22 September 1997, BC9704802). This case was varied on appeal, but not in regard to the duty to give reasons determination question observed in the original case: *Attorney-General for New South Wales v Smits* (1998) 45 NSWLR 521.

Despite the line of authority in cases such as *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* ²⁶² and *Smits v Buckworth* ²⁶³ that have rejected or questioned the need for administrators to provide reasons for their decisions, it is doubted that these cases can be reconciled with the need for jurors to provide reasons for their verdicts, on the basis that in criminal jury trials, the rights of a person can more extensively be affected in contrast to those persons subject to decisions of administrators.

The bias rule

The bias rule of procedural fairness is based upon the principle that justice should not only be done, but should also manifestly be seen to be done.²⁶⁴ The argument could be made that given jurors do not provide reasons for their decisions, although justice may have been done by the act of determining a verdict, the decision of the jury verdict is not manifestly being seen to be done, as the jurors are prohibited from disclosing their deliberations that took place during trial in the jury room.

As Gleeson CJ, McHugh, Gummow and Hayne JJ made clear in *Ebner v Official Trustee in Bankruptcy*, ²⁶⁵ the appearance of the bias rule operates to nullify a decision made by a decision-maker where a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring to the resolution of the question the decision-maker is required to decide. As noted above, apprehension of the bias rule is based upon the view that it is of primary significance that justice should not only be done, but should manifestly and unquestionably be seen to be done. ²⁶⁶ Within the context of a criminal law trial, it is submitted that the adducing of evidence before a jury and the verdict reached by merely saying 'guilty' or 'not guilty' is a prime example of where although justice might be done, it is not actually and manifestly being seen to be done. To come within the scope of justice actually being seen to be done, would require the jury in a case to actually

²⁶² Cypressvale Pty Ltd v Retail Shop Leases Tribunal (unreported, SC(QLD), Shepherdson J, 312/94, 25 July 1994, BC9404571).

²⁶³ Smits v Buckworth (unreported, SC(NSW), Young J, 3869/96, 22 September 1997, BC9704802).

²⁶⁴ R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256, at 259 (per Lord Hewart CJ).

²⁶⁵ Ebner v Official Trustee in Bankruptcy (2000) 176 ALR 644, at 647, 652, 663.

²⁶⁶ Webb v R (1994) 68 ALJR 582, at 585 (per Mason CJ and McHugh J); Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, at 345.

provide reasons and cogent justifications as to why particular evidence adduced at trial led the jury to a particular verdict.

The test of bias in relation to jurors is the same as the test for judges and members of a tribunal.²⁶⁷ That is, the test is whether a fair-minded lay observer might reasonably apprehend that the juror might not have brought an impartial mind to the resolution of the question the juror was required to decide.²⁶⁸ Such a test is problematic in circumstances where a person may be challenging that a juror was biased in determining their case, because, an appellate court applying the 'fair-minded lay observer' test will find it difficult to place themselves in the position of the juror who actually took part in the jury trial. If jurors were made to provide reasons for their decisions, it follows that the appellate court could use the lay observer judgment of the jury to actually determine whether any bias was evident in the determination of the decision by the jury. Without the provision of reasons, an appellate court may actually find bias existed by the jury without any evidence to support such a conclusion. In almost all circumstances, apart from extrinsic or internal evidence from persons who can provide clear and express evidence that a particular juror was biased, the actual reasons for a decision itself may lead a 'fair-minded observer' to determine whether a jury was actually biased or not.

Presently, in considering whether a reasonable apprehension of bias existed in the determination of a jury verdict, it is essential to consider the likely effect of the judge's directions (if any) as well as the irregularity in question. Accordingly, without the provision of reasons for a decision, an appellate court may be merely speculating in relation to the question of whether a jury verdict was tainted in part by bias.

Contravention of Procedural Fairness

A decision made in denial of procedural fairness is *void ab initio*²⁷⁰ when challenged successfully.²⁷¹ In this sense, if a jury were obliged to provide reasons for their decisions

²⁶⁷ Webb v R (1994) 68 ALJR 582, at 586 (per Mason CJ and McHugh J).

²⁶⁸ Webb v R (1994) 8 ALJR 582, at 583 (per Mason CJ and McHugh J).

²⁶⁹ Webb v R (1994) 68 ALJR 582, at 586 (per Mason CJ and McHugh J).

²⁷⁰ *Void ab initio* is taken to mean that the decision made has no legal effect from the beginning of when it was first made.

and they did not, a convicted person could challenge the decision of the jury verdict and gain a remedy that the decision is void, and, therefore, has no legal effect in law.²⁷²

There is overwhelming authority in support of the rule that procedural fairness stands on a higher plane and does not oblige an applicant to establish that the denial of procedural fairness is likely to have affected the result of the decision-making process.²⁷³ Consequently, in the event that jurors had a duty to provide reasons for their decision, a person convicted of a criminal offence on the basis of a verdict that lacks reasons, would not be enough to have the decision stand by the prosecution even if they could make the argument that the denial of procedural fairness is not likely to have affected the result of the jury's deliberation and final verdict before the court.

4.4 Abuse of Power and Broad Ultra Vires

Introduction

Within the context of administrative law, any decision made by an administrator that they were not empowered to make by statute is beyond power. That is, an administrator's decision in these circumstances is ultra vires, having no legal affect against the person to whom the decision is purported to apply.

There exist within administrative law various types of abuse of power statutory provisions that may render an administrative decision ultra vires. In truth, some of these statutory abuse of power provisions reveal a number of legal principles that could be utilized for the purposes of arguing that the nature of the current jury verdict structure is very much concerned with decisions that may be ultra vires.

Accordingly, the purposes of this section will therefore be to examine some of these provisions, and to see whether and to what extent administrative principles regarding

²⁷¹ Macksville & District Hospital v Mayze (1987) 10 NSWLR 708, at 720, 721, 716; Forbes v New South Wales Trotting Club Ltd (1979) 143 CLR 242, at 277 (per Aickin J).

Where a decision-maker who has a statutory duty to give reasons fails to give adequate reasons, an error of law is made: see *Dornan v Riordan* (1990) 24 FCR 564; *Commonwealth v Pharmacy Guild of Australia* (1989) 19 ALD 510; *Preston v Secretary, Dept of Family and Community Services* (2004) 39 AAR 177.

²⁷³ General Medical Council v Spackman [1943] AC 627, at 644, 645 (per Lord Wright); Hamblin v Duffy (No 2) (1981) 37 ALR 297; Village Roadshow Corp Ltd v Sheehan (1987) 17 FCR 324; Kioa v West (1985) 159 CLR 550, at 633; Macrae v A-G (NSW) (1987) 9 NSWLR 268, at 283.

abuse of power can be used to appreciate why lifting the veil on jury secrecy may assist to support an argument that jury decisions reflect a strong commonality with ultra vires.

Irrelevant and Relevant Considerations

Administrators, in exercising discretionary power, must not take into consideration irrelevant considerations, and, when making a decision, must take into consideration relevant considerations. Accordingly, when the jury is discharged in a criminal trial after they have provided the court with a verdict, without the provision of reasons, in most instances it will be difficult to determine whether jurors have taken into consideration irrelevant considerations or relevant considerations.

Indeed, within the context of administrative law, the court in *Allen Allen & Hemsley v Australian Securities Commission*²⁷⁷ has held that a failure to indicate in a statement of reasons how itemised relevant considerations were taken into account may provide the basis for an inference that the decision-maker did not take relevant considerations into account. There is no reason to suspect that jurors should be exempt from this principle, especially in light of the fact that administrators may have more knowledge and appreciation for applying the law correctly as opposed to the lay person of the community who may not properly understand the nature of evidence and trial process itself.

Within the context of criminal jury trials, the main considerations the jury should both take into consideration and apply in reaching a verdict is the actual legitimate evidence adduced during the trial. Further, the jury is also obliged to take into consideration and follow any directions of the judge on points of law. Conversely, the jury should not take into consideration irrelevant considerations, such as convicting a person in a criminal trial on the basis of what a spirit had told the jury during a séance.²⁷⁹

²⁷⁴ Sections 5(2)(a) and 6(2)(a) of the Administrative Decisions (Judicial Review) Act 1977 (Cth).

²⁷⁵ Sections 5(2)(b) and 6(2)(b) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) provide for review of decisions and conduct engaged in for the purpose of making decisions in cases of 'failing to take a relevant consideration into account in the exercise of a power'.

²⁷⁶ Jury Act 1977 (NSW) s 55E.

²⁷⁷ Allen Allen & Hemsley v Australian Securities Commission (1992) 27 ALD 296.

²⁷⁸ Allen Allen & Hemsley v Australian Securities Commission (1992) 27 ALD 296, at 304, 305.

²⁷⁹ R v Young [1955] QB 324. Consider whether it would be legal to adduce evidence during trial that required the defence to conjure up spirits of the dead? See R v Duncan [1944] 1 KB 713.

Improper Purpose

When an administrator makes a decision, they must not act for an improper purpose.²⁸⁰ That is, a statutory power that gives an administrator the power to make a decision must be exercised in accordance with purposes that are expressed to be the purposes of the empowering statute in an objects clause.²⁸¹

When the purposes of the statute are not expressly stated the court must construe the statute in order to determine which purposes are proper.²⁸² This is not a big problem for the courts when construing the purposes for which a jury must act, because, in general, it is well known that jurors are finders of fact, and their duty does not extend beyond the provision of a verdict decided on the basis of the lawful evidence admitted in court.

However, it is also true that the lack of reasons for a decision by jurors could tend to suggest that the jury verdict handed down was made for an improper purpose. If no reasons are put forward to justify why a particular decision of the jury was made, it follows there is no evidence to confirm whether the jurors in question have actually discharged their statutory purpose to decide a verdict on the facts in issue²⁸³ and admissible evidence put before the court.

Further, as Gaudron J outlined in *Industrial Equity Ltd v DCT*,²⁸⁴ a person challenging the exercise of a power on the basis of improper purpose bears the onus of establishing that issue.²⁸⁵ Without the provision of reasons for why a particular verdict was reached, the onus of a convicted person challenging the verdict of the jury on the basis that it was made for an improper purpose will be much harder to make out.

²⁸⁰ Sections 5(2)(c) and 6(2)(c) of the Administrative Decisions (Judicial Review) Act 1977 (Cth).

Municipal Council of Sydney v Campbell [1925] AC 338; Bromley v Dawes (1983) 34 SASR 73.

²⁸² R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170; Schlieske v Minister for Immigration and Ethnic Affairs (1987) 79 ALR 554.

²⁸³ Section 57A of the *Jury Act* 1977 (NSW) makes clear that the jury is to determine the facts in issue during a criminal and civil law trial.

²⁸⁴ Industrial Equity Ltd v DCT (1990) 170 CLR 649, at 671.

²⁸⁵ See also Municipal Council of Sydney v Campbell [1925] AC 338, at 343.

Bad faith

Bad faith²⁸⁶ occurs where a power is exercised for corrupt or dishonest motives which amount to male fides or a deliberately malicious or fraudulent purpose.²⁸⁷ The Federal Court cases of *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs*²⁸⁸ and *Engler v Cmr of Taxation*²⁸⁹ outline a set of principles for establishing lack of good faith: ²⁹⁰

- 1. An allegation of bad faith is a serious matter involving personal fault on the part of the decision maker.
- 2. The allegation is not to be lightly made and must be clearly alleged and proved.
- 3. The presence or absence of honesty will often be crucial.
- 4. The circumstances in which the court will find an administrative decision-maker had not acted in good faith are rare and extreme. This is especially so where all that the applicant relies upon is the written reasons for the decision under review.
- 5. The Court must make a decision as to whether or not bad faith is shown by inference from what the decision-maker has done or failed to do and from the extent to which the reasons disclose how the decision-maker approached its task.

Accordingly, if a convicted person or indeed the prosecution were to allege the jury had made a decision in bad faith, it would undoubtedly be an allegation that must be clearly proved. The reasoning in the Federal Court of Australia cases such as *SBBS* and *Engler* appear to suggest that a finding that an administrator had acted in bad faith is rare and extreme, and, further, this is especially so where all the applicant relies upon is the written reasons for the decision under review. Such a reading tends to suggest that if an applicant wished to challenge a decision that was made without reasons, than it follows it would be

²⁸⁶ Sections 5(2)(d) and 6(2)(d) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) provide for review of decisions and conduct engaged in for the purpose of making decisions in cases of an exercise of a discretionary power in bad faith.

²⁸⁷ Roncarelli v Duplessis (1959) 16 DLR (2d) 689.

²⁸⁸ SBBS v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 749 (per the Court).

²⁸⁹ Engler v Cmr of Taxation (No 2) (2003) 52 ATR 642.

²⁹⁰ It should be noted that not all of the set of principles for establishing lack of good faith are extracted in this section. Only those principles that are relevant for the purposes of providing a critique of jury secrecy are given some treatment in this section.

even harder to make out a ground that an administrator had acted in bad faith. In turn, therefore, with jurors not being made to provide reasons for their decisions, it would be even more difficult for an applicant to demonstrate the jury acted in bad faith in reaching the particular verdict that they did.

Further, again as *SBBS* and *Engler* make clear, the court must make a decision as to whether or not bad faith is shown by inference from what the decision-maker had done or failed to do by having regard to the reasons that may disclose how the decision-maker approached its task. Without the provision of reasons, an appellate court will have a difficult job in drawing any inferences that the jury may have acted in good faith or otherwise, because, such a court cannot have regard to the reasons for the jury's verdict.

<u>Unreasonableness?</u>

In circumstances where an exercise of statutory power is so unreasonable that no reasonable person could have so exercised the power, there occurs an abuse of power or improper exercise of power.²⁹¹ This ground of review is directly based upon the test devised by Lord Greene MR in review at general law in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.²⁹²

Within the context of administrative decisions, some Federal Court of Australia judges have favoured a formula of unreasonableness based upon a decision that is devoid of any plausible justification.²⁹³ The High Court of Australia has desisted from identifying any one principle as being of more help than another, although there is support for the view that an unreasonable decision is one for which no logical basis can be discerned.²⁹⁴

Accordingly, it might be argued that without jurors providing reasons for their decisions, such a verdict reached in a trial is more likely to be unreasonable than a decision made

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223.

²⁹¹ Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 5(2)(g), 6(2)(g).

²⁹³ Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 (per Wilcox J); Dornan v Riordan (1989) 19 ALD 185, at 188 (per Wilcox J); Secretary, Department of Social Security v Willee (1990) 96 ALR 211, at 222 (per Foster J); Wouters, Wright and Holmes v DCT (NSW) 84 ALR 577, at 584 (per Bowen CJ, Wilcox and Lee JJ).

²⁹⁴ Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379; Minister for Immigration and Multicultural Affairs v Eshetu (1999) 54 ALD 289, at 311 (per Gaudron and Kirby JJ).

with the provisions of reasons. This is simply because as jurors do not provide reasons for their verdict, this tends to suggest that the decision made by the jury is not only devoid of any plausible justification, but is also one for which no logical basis can be discerned. How can a jury verdict delivered to the court have a logical basis and be made with plausible justification when in fact there are no reasons for a decision? Are we to conclude that the deliberations of jury members in the jury room are enough to make any decision reached justified and correct by law? Surely not. The provision of reasons is the fundamental basis upon which any decision-makers can justify the decision that they have made. To suggest otherwise is to support a policy of decision-making that is not only illogically incoherent, but that fails to demonstrate that justice is being seen to be done in the eyes of all those persons whose rights are affected at law.

Concluding Remarks

In this age of "transparency", in which decision-makers must give reasons for their decision, surely anyone charged with a criminal offence has a right to expect that reasons will be given for a conviction.²⁹⁵ In the same way, the prosecution should also have a right to access reasons from the jury as to why a particular person was acquitted of particular charges.²⁹⁶ The "inscrutability" of a jury decision is a euphemism for "no reasons given."297 Such a policy of decision-making is out of step with modern, enlightened thinking.²⁹⁸ It is hoped that the legislature will both acknowledge and recognise that decision-makers such as jurors should 'join the party' and 'get on board' with a whole other host of decision-makers who provide reasons for their decisions.

 $^{^{295}}$ McCusker, n 161 above. 296 Ibid.

²⁹⁷ ibid.

²⁹⁸ ibid.

Chapter 5 – Reasons for Judgment, World Jury Systems and the Rule of Law

"How can the jury invest the trial with the appearance of adhering to the rule of law when that process in fact tends to obfuscate and impede the realisation of that ideology." ²⁹⁹

5.1 Importance of Reasons for Judgment

It is in our basic human nature to make rational and measured decisions when the need arises – a capacity that subordinates our instructive and sensate faculties. However, despite this inimitable capacity, and the awesome power of human intellect, we can and do fall into error from time to time. For, while we are uniquely human, we are also *only* human. Following this logic, it can be said with some discomfort that there would have been decisions reached in a trial by jury that may not only be morally wrong, but are also erroneous by law. Accordingly, the provision of reasons provides a safeguard upon which the fallible nature of the twelve jurors can be kept in check.

Aristotle says that deliberation is a particular kind of inquiry, which entails reasoning, and not just gathering information.³⁰³ Correct and sound judgment includes the correct process that leads to determining and pronouncing the truth.³⁰⁴ Without the provision of reasons for a decision, in truth, we do not really know whether correct and sound judgment has occurred in the overriding outcome of a trial by jury. Indeed, we do not even know whether any logical reasoning has taken place between the jurors during deliberation time in the jury room. At best, we are left to speculate indefinitely.³⁰⁵

Every decision reflects the perspectives and perceptions of the decision-maker at the time

²⁹⁹ Findlay, M., "The Role of the Jury in a Fair Trial", in *The Jury Under Attack*, edited by Findlay, M & P. Duff, Sydney, Butterworths, 1988, at 172.

³⁰⁰ Byron, G., "Making Decisions: We all do it" (2007) 18 *Alternative Dispute Resolution Journal* 162, at 162.

³⁰¹ Ibid.

³⁰² ibid.

³⁰³ Aristotle., *Nicomachean Ethics Book VI*, 1142b30, in Barnes, J, *The Complete Works*, Princeton University Press, 1984, at 1804.

³⁰⁴ Byron, n 300 above, at 164.

³⁰⁵ Richardson, H.S., *Practical Reasoning About Final Ends*, Cambridge University Press, 1997, at 22.

he or she makes the decision.³⁰⁶ Although without jurors being made to provide reasons for their decisions a convicted person can appeal against a jury verdict, an appellate court will indefinitely be at a disadvantage in many instances, because, unlike the juror who has experienced personally the trial process before their very eyes, appellate courts cannot be able to tell whether particular 'flights of advocacy' so important within the context of an adversarial trial indeed have had an impact on the case. At least with the provision of reasons for a jury verdict, an appellate court may be able to obtain some idea from a reading of the jury verdict how the case proceeded at trial.

If a decision reached is both clear and properly constructed, this will be evident upon a scrutiny of a written decision.³⁰⁷ Without a written decision, what necessarily follows is that in many instances we will not be able to determine whether a decision reached was both clear and proper. It is as simple as that! Speculation about how the jury reached the verdict it did is extremely dangerous, because, not only might it assume that jurors think how we do when in fact we are not the decision-maker in that case, but, further, we may be providing justification for a jury's verdict of "guilty", when, in truth, we have no idea what evidence the jury actually considered. This is a sobering thought.

Fine argues that most people in society do not use their gift of reason much at all, or if they do, "they are content to employ the sloppiest of reasoning." If lay persons who became members of the jury were made to provide reasons for their decisions, it would be interesting to see whether Fines' opinion that people are content to employ the sloppiest of reasoning has any merit within the system of trial by jury.

Quite apart from the necessities of the law, it is plain that significant decisions affecting the lives and rights of others ought to be made for good and sufficient reasons.³⁰⁹ Obviously, those reasons must be stated clearly.³¹⁰ It is unfortunate that the current system of decision-making by jurors does not cater for good and sufficient reasons.

³⁰⁶ Byron, n 300 above, at 165.

³⁰⁷ Ibid

³⁰⁸ Fine, C., A Mind of Its Own, Allen and Unwin, Sydney, 2005, at 20.

³⁰⁹ Byron, n 300 above, at 170.

³¹⁰ Ibid.

However, within the spectrum of the legal system, the need to provide reasons is exceedingly important. The rationale of the obligation to provide reasons for a decision is that they amount to a "salutary discipline for those who have to decide anything that adversely affects others". Without jurors having an obligation to provide reasons for a decision, the system of trial by jury within the Australian legal system certainly does not come within the scope of a salutary discipline.

Reasons for a decision encourage a careful examination of the relevant issues, the elimination of extraneous considerations, and provide consistency in decision-making.³¹² As we saw in chapter 4, without the need to provide reasons for a jury verdict, jurors are in a more comfortable position to fail to take into account relevant considerations.

As Woolf LJ noted in *R v Secretary of State for the Home Department; Ex parte Singh*,³¹³ reasons for decisions in many cases promote the acceptance of decisions once made.³¹⁴ Given that the jury verdict is provided to a court without clear reasons for the decision, it follows that it is hard to say that the jury verdict in itself promotes the acceptability of the decision made by a jury.

Craig notes that the mandatory provision of reasons for a decision facilitates the work of the courts in performing their supervisory functions where they have jurisdiction to do so.³¹⁵ In this sense, it can be said that without the need for jurors to provide reasons for their decisions, this may tend to undermine and usurp the role of an appellate court in discharging their supervisory job of overturning jury verdicts if they are wrong at law.

Provision of reasons for a decision has the capacity to demonstrate and encourage good management generally by ensuring that a decision is properly considered by the repository of the power.³¹⁶ Can we be so sure that jurors are only determining whether a

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³¹¹ Stanley, A et al., *Judicial Review of Administrative Action*, 5th ed, London, Sweet & Maxwell, 1995, at 459; cited in *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870, at 872. ³¹² Ibid.

³¹³ R v Secretary of State for the Home Department; Ex parte Singh (The Times, 8 June 1987).

³¹⁴ R v Secretary of State for the Home Department; Ex parte Singh (The Times, 8 June 1987).

³¹⁵ Craig, P., "The Common Law, Reasons and Administrative Justice" (1994) 53(2) Cambridge Law Journal 282, at 283.

³¹⁶ Stanley, n 311 above, at 472.

person is guilty or not guilty by considering the admissible evidence in the case? Without the provision of reasons for a verdict, we may never know the answer to this question.

Justification for a decision in the nature of written reasons not only promotes real consideration of the issues in a case, but they discourage the decision-maker from merely going through the motions.³¹⁷ As it currently stands, deliberations in the jury room may go no further at times than a juror deciding to acquit a person, not because they are not guilty, but because they want to return home to take care of their young baby. Serious questions need to be asked about what motions the jury actually goes through during their deliberations, yet, ironically, it is the jury secrecy rule itself that hides the motions of the jury room from revelation within the face of justice.

Where the decision effects the redefinition of the status of a person by the agencies of the State, the provision of reasons for a decision guard against the arbitrariness that would be involved in such a redefinition without proper reasons.³¹⁸ As it is quite clear that a decision made by the jury has the potential to refine the status of a person, it follows that the provision of reasons for a jury verdict would guard against the arbitrariness of the system of trial by jury, a procedure maintained by the government in all states and territories throughout Australia to this very day.

The provision of reasons is a safeguard of sound administration.³¹⁹ The more important for the parties the order made by the judicial officer, the more vital it is that the order be supported by reasons.³²⁰ Given that it is close to unquestionable that the decisions made by the jury in a criminal law matter are very important, in the sense that verdicts of the jury may adversely affect the rights of a person, it follows that it is vitally important that a jury verdict be supported by reasons. Without the provision of reasons for a decision, this fact in itself tends to undermine the permissibility of the jury decision.

³¹⁷ Ibid.

Rabin, M., "Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement" (1976) 44 *University of Chicago Law Review* 60, at 77-78.

³¹⁹ Katzen, H., "Inadequacy of Reasons as a Ground of Appeal" (1993) 1 Australian Journal of Administrative Law 33, at 33.

³²⁰ Kirby, M., "Reasons for Judgment: Always Permissible, Usually Desirable" (1994) 12 Australian Bar Review 121, at 135.

In most encounters with authority in liberal democracies, people are permitted to have reasons for decisions made about them.³²¹ If a bureaucrat refuses a fishing licence or a permit to extend a garage, one is entitled to reasons and an opportunity to challenge the decision.³²² But, as Hull correctly points out, if you are going to be banged up for life for murder, you "don't get any reasons".³²³

Finally, to conclude this section, in reference to Australian juries, Bagaric has noted:

"Logicially, the more important the right at stake is, the higher is the imperative to give reasons. But not in our legal systen. We can know why our application to build a fence has been refused, but not why we might be locked up for 10 years or why an accused has been acquitted." ³²⁴

5.2 Rule of Law and Jury Secrecy

Introduction

Bottomley and Parker suggest that the rule of law is valued in society because it is thought to curb the power of government, protect the rights and liberties of citizens and promote personal autonomy, in that individuals can predict the circumstances in which governments will interfere with their lives. 325

Accordingly, it may be asked what does jury secrecy have to do with the notion of the rule of law in Australia? The short answer to that question is a lot. It might be argued that decisions made by the jury, a body consisting of lay persons, has nothing to do with government interference. However, if one considers that in truth the system of trial by jury is currently a creature of statute, although decisions may be made by normal persons of the community, it follows that the jury verdict itself is connected directly to the government. A systematic overview of some of the vital principles inherent in the notion of the rule of law will show, by application, how the jury secrecy rule tends to openly undermine that principle.

³²¹ Hull, n 162 above.

³²² Ibid.

³²³ ibid.

³²⁴ Bagaric, 45 above.

Bottomley, S & S. Parker., *Law in Context*, Federation Press, Sydney, 2nd edition, 1997, at 46.

Principles of the Rule of Law

The rule of law entails that laws are administered fairly, rationally, predictably, consistently and impartially.³²⁶ Fairness requires a reasonable and observable, indeed manifest, process of consideration of the rights and duties asserted.³²⁷ Rationality requires a reasoned relationship between the rights and duties of the participants and the ultimate outcome.³²⁸ Predictability requires a process by which the result is, and is clearly seen to be, related to the original rights and duties.³²⁹ Consistently requires that similar cases lead to similar results.³³⁰ Impartiality requires that the decision-maker be indifferent to the ultimate outcome.³³¹ Notably, the publication of formal reasons for a decision made plays "a critical role in the achievement of the objectives of the rule of law".³³²

Unfortunately, at least three of the objectives of the rule of law as set out above appear unlikely to be present within the overall decision-making process of jurors. In broad terms, given that the jury does not provide a publication of formal reasons for their verdict, it follows that the system of trial by jury does not play a critical role in the achievement of the objectives of the rule of law.

As the jury verdict does not come with the provision of reasons, one may seriously question how *fair* the system of trial by jury really is within the context of the legal system. Without jury reasons, there is no reasonable, observable and indeed manifest evidence for the process of considering the rights and obligations of the parties. It is hard to say that the decision of the jury verdict comes with an inherency of *rationality*, when indeed there is no evidence in the nature of clear reasons to support the proposition of a reasoned relationship between the rights and duties of the participants and the ultimate outcome in the final jury verdict. And, perhaps most worrying of all, without the provision of reasons, we do not know whether the jury has been entirely *impartial* in reaching the decision that they did. Although a formal written decision may not overtly

³²⁶ Spigelman, n 40 above.

³²⁷ Ibid.

³²⁸ ibid.

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³³⁰ Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89.

³³¹ R v Watson; Ex parte Armstrong (1976) 136 CLR 248; Webb v R (1994) 181 CLR 41.

³³² Spigelman, n 40 above.

make clear the bias evident by some jury members, it at least allows the appellate courts to imply such a lack of impartiality existed, in circumstances where the evidence could not lead to the conclusion reached by the jury.

The giving of reasons emphasises the essential role of the judiciary in a society adhering to the rule of law. Why should the jury be exempt from promoting the rule of law? As Kirby J has argued, unaccountable power is a tyranny. If the exercise of power is accounted for, and is thought illegal or unjust, it may be remedied. If it is hidden in silence (i.e. such as the jury secrecy rule), the chances of a brooding sense of injustice exists, which will contribute to undermining the integrity and legitimacy of the polity that permits it. Reasoned justice is an attribute of freedom.

At its most basic level, the rule of law is the principle that every person should be subject to the same law.³⁴⁰ It abhors arbitrary governmental rule or action, and seeks to supply citizens with some fundamental protections by requiring the government to act according to the law.³⁴¹Although jurors may not be the government, they should certainly act in accordance with the law, and, in this way, should also be made to provide reasons for their decisions to promote the rule of law in Australian society.

Without the provision of reasons for a decision, it is submitted that not all people tried for a criminal offence are dealt with in the same way equally before the law. That is to say, there is one law applied when judicial officers are made to provide reasons for their decisions, and another law in application where jurors provide a verdict. Whereas the latter law is void of the rule of law given the limitation in the jury verdict which does not provide reasons for its decision, decisions made by judicial officers with reasons, ensure accountability and integrity of the reasoning process of judgment. It is interesting

³³³ Kirby, n 164 above, at 218.

³³⁴ Kirby, n 320 above, at 133.

³³³ Ibid.

The example of the jury secrecy rule in this sentence is given by the author and not Kirby J.

³³⁷ Kirby, n 320 above, at 133.

³³⁸ Ibid.

³³⁹ ibid.

³⁴⁰ Spears, D., "The Criminal Justice System and the Rule of Law" (2008) 84 *Precedent* 18, at 19.

³⁴¹ Spigelman, J.J., "The Rule of Law and Challenges To It" (1982) 46(2) Law Society Journal 57, at 57.

that a judicial officer of Australia agrees with this point. As District Court Judge French notes:

> "I know what system I would choose if I were charged with a serious offence that put my liberty at risk. Simply put, if I were guilty I would take my chances with a jury as I would have nothing to lose. If I were innocent, I would not put my fate in the hands of a committee of 12 people who do not have to give any reasons for their decision or be in any way accountable for what has happened in the jury room." 342

It must be asked why the features thought necessary to defend the rule of law in respect of judicial decision-making are lacking in respect of decisions by the jury. 343 The basis of the problem here is that jury verdicts are treated not as legal decisions based on legally defined criteria but as pure questions of fact. 344 But the logic of general verdicts that juries typically deliver belies this assumption as a possible validation of the current rules.³⁴⁵ Significantly, for a general verdict must be a finding of law and not of fact or to be more precise a general verdict is an application of law to a set of facts. 346 Yet, applying law to facts is a matter of law, and not a question of fact.³⁴⁷

Adherence to the rule of law is not only something to be strived for, but is an indispensable element of an equitable justice system.³⁴⁸ In this way, by promoting the rule of law, the government should respect the rights of the individual under the rule of law and provide effective means for their enforcement.³⁴⁹ Within the context of the system of trial by jury, it is suggested that by the legislature enacting provisions for the mandatory provisions of reasons for a jury verdict, the government will be providing an effective means for the regulation of the rule of law. In this way, if the jury is to remain the centrepiece of the criminal trial system, the symbol of its democratic accountability, the

³⁴² French, V., "Juries: A Central Pillar Or An Obstacle to a Fair and Timely Criminal Justice System? A Very Personal View" (2007) 90 Reform 40, at 40.

³⁴³ Maher, n 123 above, at 44-45.

³⁴⁴ Ibid.

³⁴⁵ ibid.

³⁴⁶ ibid.

³⁴⁷ See Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 150 CLR 355, at 376; Edwards v Bairstow [1956] AC 14, at 30, 36.

³⁴⁸ Vlot, M., "Staying the Head of Vengeance: The Rule of Law and International Human Rights" (2008) 84 *Precedent* 46, at 46. ³⁴⁹ Ibid.

protector against autocracy and the assurance of its ultimate understandability, this will be by the tradition of the legislature in ensuring the trial by jury prevails, and not by mere constitutional right.³⁵⁰

A crucial feature of the rule of law is that the reasons for action which law provides in terms of pre-accounced legal standards are actually applied in the legal process and that individuals in society affected by them are able to ensure that the legal system does implement the law, most evidently by the practice of justifying reasons that show a concordance between official action and previously declared rules.³⁵¹ If jurors were made to provide reasons for their decisions, albeit even in a limited form, at least one will be able to effectively determine whether the jury has actually implemented and applied the law to a set of facts in the correct way.

5.3 Presumption of Innocence and Beyond Reasonable Doubt

Within the criminal law, the rule of law is in part generally associated with the presumption of innocence. ³⁵² In *Woolmington v DPP*, ³⁵³ Lord Sankey said:

"..... where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental.... it is the duty of the prosecutor to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecutor has not made out the case and the prisoner is entitled to an acquittal". 354

Perhaps one of the most problematic areas in a jury trial, is the ability of individual jurors to comprehend and understand what it means when the law stipulates a person is not to be found guilty in a criminal case unless the prosecution has proved the alleged charges beyond reasonable doubt. This old and famous common law rule is also enacted in the

³⁵⁰ Fricke, G., "Trial by Jury", available from

http://www.aph.gov.au/library/pubs/rp/1996-97/97rp11.htm#HISTORY [Accessed 25/07/2008].

Dicey, A.V., Introduction to the Study of the Law of the Constitution, 10th ed, Oxford, 1960, at 202.

³⁵² Spears, n 340 above, at 20.

³⁵³ *Woolmington v DPP* [1935] AC 462.

³⁵⁴ See also *Jayasena v R* (1970) AC 618.

form of statutory provisions in various jurisdictions around Australia. For example, section 141(1) of the *Evidence Act* 1995 (NSW) provides that in a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

Interestingly, what the term 'beyond reasonable doubt' means within the context of a criminal law trial has been the subject of ambiguous and complex discussion. In this respect, the High Court of Australia has strongly cautioned trial judges in criminal matters against attempting to explain the term to the jury, and has rejected any explanation which states or implies that a reasonable doubt means a rational doubt.³⁵⁵

In $R \ v \ Reeves$, ³⁵⁶ Hunt CJ was critical of a trial judge who invited the jury to ponder what exactly was meant by 'reasonable', and who suggested to them that the answer was not found in their own individual understanding of the word 'reasonable'. In $R \ v \ Blanch$ ³⁵⁷ and $R \ v \ Solomon$, ³⁵⁸ the New South Wales Court of Criminal Appeal overturned convictions where the trial judge contrasted proof beyond reasonable doubt with a state of 'absolute certainty'.

There is judicial authority to support the proposition that care should also be taken in warning a jury against 'entertaining a fanciful doubt' not to invite the jury to subject any doubt they have to comparative analysis to determine whether it is reasonable or far fetched or fanciful. So Consequently, it has been said that it is generally wise to give no direction at all.

Similarly, the courts in England have also suffered problems in attempting to explain to the jury what the term beyond reasonable doubt entails. In *Miller v Minister of Pensions*, ³⁶¹ Lord Denning explained that the criminal standard requires the prosecution

³⁵⁵ Green v R (1971) 126 CLR 28.

³⁵⁶ R v Reeves (1992) 29 NSWLR 109, at 116-117.

³⁵⁷ R v Blanch (17 August 1988, CCA NSW, unreported, BC8801599).

³⁵⁸ R v Solomon (15 November 1989, CCA NSW, unreported, BC8901451).

³⁵⁹ Graham v R [2000] TASSC 153.

³⁶⁰ R v Southammavong [2003] NSWCCA 312; Barr v R [2004] NTCCA 1; Boonudnoon v R [2002] WASCA 313; Krasniqui v R (1993) 61 SASR 366.

³⁶¹ Miller v Minister of Pensions [1947] 2 All ER 373.

evidence to have a degree of cogency that need not reach certainty, but must carry a high

degree of probability. Lord Denning felt that proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt, but, if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of cause, it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

English judges since *Miller* have approved various explanations of the term 'beyond reasonable doubt', and have even suggested replacing the expression with other phraseology, employing the language of 'comfortable satisfaction', and likening the jury's task to that of deciding any of the more important questions which confront them in their 'ordinary lives'. 362

Evidently, a survey of some of the case law in relation to the ambiguity of the meaning 'beyond reasonable doubt' serves as a good example of the complexity of legal principles in criminal law. Yet, the legislature continues to allow the jury to sit in criminal cases and determine the rights and liabilities of individuals brought before the court, without the need to justify their reasons for taking a particular course of action. As the above case law demonstrates, judicial officers of various courts in both Australia and England have struggled to compromise and reach a proper explanation as to the term 'beyond reasonable doubt'. However, despite such a doubt as to the word, judges in criminal law cases provide reasons to justify their verdicts, which, in part, can allow an appellate court to remedy an unsafe verdict in circumstances where a judicial officer has clearly given a construction to the term 'beyond reasonable doubt' that is unacceptable by other judicial officers who sit on higher courts in the court hierarchy structure. Yet, quite ironically, we allow ordinary everyday citizens to determine the guilt of a particular individual, having regard to applying the term 'beyond reasonable doubt', who, for the most part, have no or little legal training, and expect them to provide a verdict that is just. The idea itself might appear close to insane for some, especially when one considers that how can we expect normal lay persons who sit as jurors to understand the word beyond reasonable doubt,

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³⁶² Hunter, n 90 above, at 1010.

when in fact judges throughout various jurisdictions find trouble in understanding what the term means.

In Velevski v R, ³⁶³ the High Court held that where there is conflicting expert evidence this does not inevitably mean that the Crown case cannot have been proved beyond reasonable doubt. However, it is clear their Honours reached this conclusion on different grounds. Gleeson CJ and Hayne J held that because the conflicting aspects of the expert opinions were based on matters within the jury's knowledge, the jury could legitimately decide which opinions to believe and which to reject. Gaudron J held that the matters of conflict were beyond the knowledge of ordinary jurors and that, therefore, they could not find the case proven beyond reasonable doubt. Callinan and Gummow JJ rejected the proposition that jurors might lack the capacity to appropriately evaluate conflicting expert evidence and come to a decision. Accordingly, if jurors were forced to provide reasons for any decisions that they made, than perhaps one would be able to expressly tell to what extent, if any, the jury could both understand and rule on conflicting evidence submitted before a court. With respect to their Honours in Velevski, it appears that all of their judgments go no further than to merely speculate about whether an ordinary person, being a member of the jury, can or cannot understand conflicting expert evidence. If a jury were to provide reasons for their decisions, their Honours in Velevski could have determined the question of whether it was within the knowledge of the respective jurors to rule on the conflicting expert evidence, by having regard to a construction of the reasons given by the jury in their determination of the expert evidence.

To conclude this section, in the words of McLachlin CJ:

"Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their right, a right which only illegitimate institutions and laws venture to infringe. The prevalence of

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 $^{^{363}}$ Velevski v R (2002) 187 ALR 233.

such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law". (Emphasis in original) 364

5.4 World Jury Systems and Jury Silence

Introduction

Significantly, to appreciate any kind of suggestion that jurors in Australia should be made to provide reasons for any verdicts that they deliver, regard should be had to what the laws in various jurisdictions throughout the world have to say about the issue of jury secrecy. Although it is readily apparent from an examination of the case law and statutory provisions as outlined below, that there are many countries worldwide that prohibit jurors from disclosing their deliberations of a jury verdict, it is also true that there is some support for the proposition that jurors should provide reasons for their decisions.

One of the benefits of the comparative study of legal institutions is that it exposes the degree to which they are shaped by contingency as well as by logic or principle.³⁶⁵ What is regarded in one jurisdiction as the only likely or acceptable way of doing something is often revealed to be pure preconception.³⁶⁶ In other words, the comparative study of law can act as a equilibrium to the unconscious ethnocentrism often displayed in legal and political ideology.³⁶⁷

New Zealand

Acceptability of jury secrecy in New Zealand appears to be a little more liberal than the restrictive approach taken in Australia on the topic. For example, in New Zealand, evidence of juror deliberations in the jury room may be revealed in 'particular discretionary circumstances', a provision that has no application in Australia. In $R \ v \ Tuia$, ³⁶⁸ the New Zealand Court of Appeal took the view that if, in a particular case, a compelling reason were shown, a court, balancing competing public interests, might

³⁶⁴ McLachlin, J., "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 Canadian Journal of Administrative Law and Practice 171, at 174.

³⁶⁵ Duff, P., "The Scottish Criminal Jury: A Very Peculiar Institution", in *World Jury Systems*, edited by Vidmar, N, New York, Oxford University Press, 2000, at 249.

³⁶⁶ Ibid.

³⁶⁷ ibid.

³⁶⁸ R v Tuia [1994] 3 NZLR 553 (per Mckay, Tipping JJ and Sir Gordon Bisson).

depart from the normal rule on non-disclosure of jury deliberations and employ a flexible case-by-case approach.

Presently, as section 76(1) of the *Evidence Act* 2006 (NZ) makes clear, evidence of jury deliberations by a person must not give evidence about the deliberations of a jury. This provision almost mirrors the New South Wales equivalent, where, pursuant to section 68B(1)(a) of the *Jury Act* 1977, a juror must not, without consent of the judge or coroner, disclose any information regarding the deliberations of the jury. Accordingly, although there is some variation between the laws of Australia and New Zealand on jury secrecy, both jurisdictions as a general rule prohibit the disclosure of jury deliberations.

<u>Fiji</u>

The criminal justice system in Fiji does not permit ordinary citizens to act as jurors in delivering a final verdict in a criminal trial, as jurors do in Australia, but restricts them to a mere consultative role, preserving the final decision to the trial judge. In this respect, Tedeschi believes as a reasonable possibility that the reason Fiji does not have a full jury system is because they do not trust their own citizens to deliver a true verdict according to the evidence and in accordance with the law, and further they fear that jurors would deliver verdicts based upon completely extraneous considerations such as race. The such as such as race.

Whether the suspicion Tedeschi has highlighted about the jury system in Fiji is correct or not, we will really only ever be able to appreciate whether an Australian jury has based their verdict on extraneous considerations, if, as argued above, jurors were made to provide reasons for their decisions. Although Fijian jurors do not provide verdicts in a trial, their advisory role at least gives them a chance to speak out about the issues in a case. Australian jurors should follow in this regard!

Japan

Before May 2009, a new criminal law will allow Japanese citizens to deliberate on a

³⁷⁰ Ibid.

³⁶⁹ Tedeschi, M., "Criminal Law and Social Change in Fiji Lessons from Two Criminal Trials" (2007) 81(8) *Australian Law Journal* 661, at 678.

criminal verdict and sentence in mixed decision-making groups with a professional judge or judges.³⁷¹ Only the empanelled judges are to interpret the law and make decisions on litigation procedure, though lay assessors may comment on such issues.³⁷² However, it is notable that lay assessors may provide reasons for their decisions, question witnesses, victims and the defendant.³⁷³

Accordingly, it is clear that the proposed new Japanese system of juror participation in legal trials is substantially more tolerant to the idea of jurors providing reasons for their decisions than is the Australian legal system. However, given that the new system has not come into place yet in Japan, we will not be able to determine the effectiveness of the Japanese system of hybrid juror and judge trials until the system has had a chance to operate. Notwithstanding this, it is clear that Japanese lay assessors play a more active role in the trial process than would a juror in Australia, where jurors do not provide reasons for their decisions and have no right to question witnesses and the defendant.

Canada

In criminal cases, the benefit of trial by jury is enshrined and protected in s 11(f) of the *Canadian Charter of Rights and Freedoms*. Persons charged with an offence where the maximum penalty is five years imprisonment have a constitutional right to have their case heard by a jury.³⁷⁴ Like Australia, jurors in Canada are as a general rule prohibited from disclosing their deliberations in the jury room.

Clause 649 of the Canadian Code governs the issue of jury secrecy in Canada. The effect of this provision in essence makes it an offence for a juror, or anybody providing support services to a juror, to disclose any information relating to deliberations. There are two exceptions to this prohibition: such information may be disclosed for the purposes of an investigation into an alleged offence in relation to a juror, or in order to give

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³⁷¹ Kent, A & M. Nolan., "Reintroducing A Criminal Jury in Japan: Reform Lessons For Us All?" (2007) 90 *Reform* 47, at 48.

³⁷² Ibid, at 50.

³⁷³ See Article 6(2) of the *Lay Assessors Act* (JAP).

³⁷⁴ Stuesser, L., "The Jury in Canada" (2007) 90 *Reform* 51, at 51.

³⁷⁵ Tunna, n 79 above, at 95.

³⁷⁶ Ibid.

evidence in subsequent proceedings.³⁷⁷

Accordingly, the law on jury secrecy and deliberations of jurors in Canada and Australia is very similar. However, there does appear to be one distinctive difference between the two jurisdictions. Clause 649 of the Canadian Criminal Code does not mention the possibility of publication by the media, so seemingly, if the media published information that it had been provided with by a juror in breach of the provision, it follows that the media in Canada or elsewhere would not have committed any offence under this Clause. Accordingly, with respect to the media and jury secrecy in Canada, Clause 649 can only be reconciled with the law on jury secrecy in New South Wales to the extent that a person discloses information about jury deliberations, that has not been done for a fee, gain or reward. Otherwise, disclosure of jury deliberations by the media is prohibited in New South Wales under section 68B(2) of the *Jury Act* 1977.

England, Northern Ireland & Wales

Like Australia, it is an offence in England, Northern Ireland and Wales to obtain, disclose or solicit information of jury deliberations.³⁸⁰ Section 8 of the *Contempt of Court Act* 1981 makes it an offence:

"To obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any proceedings."

In this way, perhaps one of the strongest arguments for maintaining the veil on jury secrecy is that a range of other countries around the world support the position Australia has taken with respect to the disclosure of jury deliberations outside of the jury room. However, as has been illustrated above, and, as will be expanded upon below, it is also true the some countries internationally find the illegality of jurors explaining the reasons for their decisions as an undesirable practice that is not to be accepted.

³⁷⁷ ibid.

³⁷⁸ ibid.

³⁷⁹ See section 68B of the *Jury Act* 1977 (NSW).

³⁸⁰ Jackson, J.D., "The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past", in *World Jury Systems*, edited by N. Vidmar, New York, Oxford University Press, 2000, at 311.

United States

In a similar way to Australia, jurors in the United States (US) are not obliged to justify or explain their decision in a criminal trial.³⁸¹ In fact, jurors in the US are prohibited, subject to exceptions, from disclosing what has occurred during jury deliberations whilst the trial is still on foot.³⁸² Like Australia, US courts have offered similar justifications for the jury secrecy rule, as the Supreme Court case of *United States v Proctor & Gamble* stated the commonly cited reasons for the rule of jury secrecy is:³⁸³

- 1. to prevent the escape of those whose indictment may be contemplated;
- 2. to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jury;
- 3. to prevent subordination of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- 4. to encourage free untrammeled disclosure by persons who have information with respect to the commission of crimes;
- 5. to protect the innocent accused who is exonerated from disclosure of the fact that he [or she] has been under investigation, and from the expense of standing trial where there was no probability of guilt.

However, unlike Australia (subject to exceptions),³⁸⁴ the US takes a more liberal approach in allowing jurors to talk freely and openly about jury deliberations after the criminal trial has finished.³⁸⁵ In the US jurors are free to discuss their deliberations after the trial and even sell their story to a tabloid, book publisher, or television station.³⁸⁶

Interestingly, by reason of the First Amendment to the US Constitution a law or rule of court denying the media the right to interview jurors without consent of the court is

³⁸³ United Stated v Proctor & Gamble 356 US 677, 681 n.6 (1958) (quoting United States v Rose, 215 F.2d 617, 628-29 (3rd Cir.1954).

³⁸¹ Campbell, n 198 above, at 186.

³⁸² Ibid.

³⁸⁴ See further *Chapter 2* above, especially that headed "The Law on Jury Secrecy in Australia".

³⁸⁵ Campbell, n 198 above, at 186.

³⁸⁶ Vidmar, N., "A Historical and Comparative Perspective on the Common Law Jury", in *World Jury Systems*, New York, Oxford University Press, 2000, at 38.

unconstitutional.³⁸⁷ In this way, while it is an offence in Australia for members of the media to procure and disclose information about juror deliberations for any monetary fee, ³⁸⁸ members of the media in the US have the right to disclose juror deliberations ³⁸⁹ after a trial has finished, a right entrenched and protected constitutionally.³⁹⁰

Spain

Undoubtedly, the structure of the Spanish jury system provides the most compelling support for the proposition that jurors should not only provide reasons for their decisions, but that juror deliberations are to be exposed as a fundamental right. In Spain, the jury must give a succinct rationale for their verdicts, ³⁹¹ indicating the evidence upon which the verdict was based and the reasons for finding a particular proposition proved or not proved. ³⁹² Accordingly, whilst proponents of the 'four golden factors' in Australia would consider jury secrecy as paramount to justice, the Spanish ironically view lifting the veil on jury secrecy as a right that should and has been accorded constitutional significance.

The mandatory obligation upon jurors to provide reasons for their decisions in Spain was deemed necessary to comply with Articles 24(2) and 120(3) of the Spanish Constitution of 1978 (SC). Article 24(2) of the SC deals with the presumption of innocence, which provides the following:

"...all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent."

³⁸⁷ Re The Express-News Corporation v Clift 695 F.2d, 807 at 808, 809 (1982) (5th Circ).

³⁸⁸ See section 68B(2) of the *Jury Act* 1977 (NSW).

³⁸⁹ In *US v Harrelson* 713 F 2d 1114 (1983), Rubin CJ of the Court of Appeals in the Fifth Circuit said that the federal courts have generally disfavoured post verdict interviewing if it is done for the purpose of obtaining evidence of jury misconduct unless there is some ground, backed by evidence, which suggests misconduct. See further *Haeberle v Texas International Airlines* 739 F2d 1019 at 1021 (1984).

³⁹⁰ News gathering in the US is part of the freedom guaranteed by the First Amendment of the US Constitution: see *Branzemburg v Hayes* 408 US 665 (1972).

³⁹¹ See Article 61(1) of Ley Orgánica del Tribunal del Jurado (LOTJ).

³⁹² Thaman, S.C., "Europe's New Jury Systems: The Cases of Spain and Russia", in *World Jury Systems*, edited by N. Vidmar, New York, Oxford University Press, 2000, at 344-345.

Further, Article 120(3) of the SC, dealing with judgments of the court, provides:

"Judgments shall always specify the grounds therefore, and they shall be delivered in a public hearing."

To avoid deficiencies with the verdict, the Spanish jury may request the secretary of the court to help them in drafting their verdicts. In this way, if Australian jurors were made to provide reasons for their verdicts, it is suggested that they should also be permitted to seek out the assistance of a judicial officer or special court officer for the purposes of assisting them draft their jury determination with reasons.

<u>France</u>

In France, the jury sits on an equal footing with at least three professional judges.³⁹⁴ The French jury and judges first determine questions of guilt.³⁹⁵ After this, if applicable, they consider the penalty to be applied to the offender in question, and provide sufficient reasons to justify any decisions that they have made.³⁹⁶ Consequently, the contemporary French jury is actually a mixed tribunal of lay persons and judges.³⁹⁷

Denmark and Norway

In both Denmark and Norway, jurors do not provide reasons for any verdict that they reach.³⁹⁸ In this way, the Australian system is akin to that in Denmark and Norway to the extent all three jurisdictions prohibit jurors and persons from disclosing the content of jury deliberations.

Brazil

The Constitution of Brazil permits jurors to decide cases where persons have been charged with crimes such as first-degree murder, abortion, infanticide and suicide

³⁹³ See Article 61(2) of Ley Orgánica del Tribunal del Jurado (LOTJ).

Bonnieu, M., *The Presumption of Innocence and the French Cour d'Assises: Is France Ready for Adversary Procedure?* Paper presented at the International Conference on Law Participation in the Criminal Trial in the 21st Century, Siricusa, Sicily, Italy, May 26-29, 1999.

³⁹⁵ Youngs, R., English, French and German Comparative Law, London, Cavendish, 1998, at 51.

³⁹⁶ Ibid, at 51-52.

³⁹⁷ Brooks, T., "The Right to Trial by Jury" (2004) 21(2) Journal of Applied Philosophy 197, at 211-212.

³⁹⁸ Vidmar, n 386 above, at 445-446.

instigation.³⁹⁹ Jurors are not permitted to provide reasons for their verdicts, and indeed cases determined by a jury in Brazil are done by a process of secret ballot, where jurors do not reveal how they reached their verdict and which way they voted.⁴⁰⁰

Concluding Remarks

Although only a limited survey has been given regarding jury secrecy in various countries around the world, such a survey provides an illustration of how the issue of jury secrecy and disclosure of juror deliberations remains different, depending upon which jurisdiction we are dealing with. For example, countries such as England, Northern Ireland, Wales and Australia are by far the most restrictive countries, prohibiting disclosure of jury deliberations in most circumstances. Nonetheless, there are countries such as New Zealand, Canada and the United States, where, although generally there is a prohibition on disclosure of jury deliberations, a more broad range of exceptions subsists that allow the veil on jury secrecy to be lifted. Finally, in the most developed form, countries such as Japan, Spain, France and states from civil law jurisdictions permit jurors or lay persons who partake in a trial process to disclose the reasons for their verdict.

Accordingly, if the system of trial by jury were to be reformed, in the sense jurors were made to provide reasons for their decisions, it follows that Australia would not be out of touch with all the countries around the world. Indeed, Australia would be following what is considered a constitutional right in Spain, and, which in civil law jurisdictions such as France, lay persons play a more active role in the trial process.

³⁹⁹ See *Brazil Constitution* 1988, Article 5, XXXIX (Rules on Jury).

⁴⁰⁰ See *Brazil Constitution* 1988, Article 5, XXXIX(b).

Chapter 6 – An International Law Perspective on the Concealment of Jury Deliberations

".... opinions that seek to cut off contemporary Australian law.... from the persuasive force of international law are doomed to fail." ⁴⁰¹

6.1 Introduction to International Law

Until moderately recent times, international law was regarded as a system of legally binding rules and principles which regulated relations exclusively among sovereign States. However, since the First World War, the notion of international law has expanded to include among its subjects public international organisations and the rights of individuals. It is this latter development within the framework of international law that allows this chapter to be written.

There is an argument to be made, as will be demonstrated below, that certain fundamental principles inherent within international law may seriously question the validity of law in Australia regarding jury secrecy and prohibition on disclosure of jury deliberations. The arguments which will be suggested could be so strong, that effectively the Federal Government in Australia, by allowing the various states and territories to enact statutory provisions prohibiting the disclosure of juror deliberations and maintaining the veil on jury secrecy, could amount to a violation of various rules of international law.

6.2 Civil Rights in International Law

Liberty and Security of Person

The legal notion of liberty and security of person is founded upon protection which the common law extends, chiefly through laws that regulate the criminal law process in Australia. Within international law, Article 9(2) of the *International Covenant on Civil and Political Rights* provides that every person who is arrested on a criminal charge must

⁴⁰¹ Al-Kateb v Godwin and Others (2004) 208 ALR 124, at 173 (per Kirby J).

⁴⁰² Hall, S., *International Law*, Sydney, LexisNexis, Butterworths, 2006, at 1.

⁴⁰³ Dixon, M., *Textbook on International Law*, 5th edition, Oxford University Press, Oxford, 2004, at 3.

⁴⁰⁴ *Hatzinikolaou v Snape* (1989) 97 FLR 86, at 90, 91 (Kirby P).

be notified swiftly of the charges against him or her. 405

Australia seeks to comply with their international obligations with respect to Article 9(2) of the *International Covenant on Civil and Political Rights* (ICCPR) by ensuring that where a warrant or summons is issued, the reasons for the arrest or order to appear must be stated in the warrant or summons, or, the person be orally told of the reasons for their arrest. Where the arrest is without warrant, the common law rule is that unless a person is given reasons for the arrest, the arrest itself is not legitimate and an action for false imprisonment in tort law can be brought. Interestingly, the Australian Capital Territory and Victoria have incorporated Article 9(2) of the ICCPR into their human rights statutes.

In simple terms, the argument could be made that given police officers are placed under a statutory obligation to notify an alleged offender of a criminal offence their reasons for arresting them, either in written or oral form, than it follows that jurors should also be made to provide reasons for their decisions. This is especially in light of the fact that jurors, unlike police officers, may ultimately determine the guilt or innocence of a person.

It might be argued that given Article 9(2) of the ICCRP provides that every person arrested on a criminal charge must be notified swiftly of the charges against him or her, it follows implicitly that every person convicted of a criminal offence must be notified promptly the reasons for their conviction or otherwise. Such an argument certainly makes rational sense, especially given the fact that the criminal conviction of a person will undoubtedly more adversely affect the rights of such a person over merely arresting them.

⁴⁰⁵ International Covenant on Civil and Political Rights (New York, 19 December 1966; Aust TS 1980 No 23; 999 UNTS 171).

⁴⁰⁶ New South Wales v Riley (2003) 57 NSWLR 496. See further section 201 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), which provides that the police must inform arrestees of the reason for the arrest before, at the time of or as soon as reasonably practicable after the arrest: s 201(1) and 201(3)(a). See also s 3ZD(1)-(2) of the Crimes Act 1914 (Cth).

⁴⁰⁷ Nicholas v Parsonage [1987] RTR 199, Div Ct; Christie v Leachinsky [1947] AC 573. See also section 201(1)(c) of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), which provides that an arresting police officer must state the reasons to the alleged offender in question the purposes for which they are being arrested.

⁴⁰⁸ Human Rights Act 2004 (ACT) s 18(3); Charter of Human Rights and Responsibilities Act 2006 (Vic) s 21(4).

Right to a Fair Trial

Perhaps the most compelling argument to be made in support of the proposition that Australia should enact statutory provisions which have the effect that jurors have a mandatory obligation to provide reasons for their decisions, is, so that Australia can legislate consistently with the provisions of Article 14 of the ICCPR, and, not to enact laws, such as the protection of jury secrecy, which fly in direct contradiction to the international principles outlined expressly in Article 14 of the ICCPR.

In short, Article 14 of the ICCPR sets out what the international community believes is the main attributes of a fair trial and a fair determination of rights and obligations attached to a particular person. ⁴¹⁰ In particular, Article 14(1) of the ICCPR provides:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children".

Given that the system of trial by jury in Australia within the context of criminal cases does not permit jurors to give reasons for their decisions and disclose juror deliberations, a number of direct inconsistencies between the laws on jury secrecy in Australia and the international law principles outlined in Article 14(1) of the ICCPR are evident.

First, it is doubtful whether a trial by jury is equally fair as a trial conducted in full by a judicial officer of the court. This is because the former system fails to explain to a person charged with a criminal offence why they have been found guilty or otherwise, whereas in the latter system, judges are obliged to provide reasons for their decisions. In this way,

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⁴⁰⁹ Australia ratified the ICCPR on the 13th August 1980 and the ICCPR came into force in Australia 13 November 1980.

⁴¹⁰ Dietrich v R (1992) 177 CLR 292.

the current system of trial by jury with the maintenance of the jury secrecy rule seriously questions the extent to whether persons who have their case determined in this way receive the same kind of safeguards and fairness as evident in a trial by judge alone.

Secondly, the current prohibition in Australia with respect to jurors and persons from disclosing juror deliberations means we do not know whether a person charged with a criminal offence has had their case determined by a fair, competent, independent and impartial jury, as required under Article 14(1) of the ICCPR

Thirdly, Article 14(1) of the ICCPR outlines that any judgment rendered in a criminal case should be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. On this basis, it is submitted that for Australia to comply with this provision in the ICCPR, Australian jury verdicts rendered in a criminal case should be made public, which, importantly, includes reasons for the judgment.

The word 'judgment' in Article 14(1) of the ICCPR should not be given a narrow construction, which would mean judgment is limited to a determination simply of whether a person is guilty or not guilty. Rather, the word 'judgment' should be construed in more broad terms, to mean the inclusion of a determination by the tribunal of fact with clear reasons for a particular verdict. The broad approach is consistent with illustrating that justice is not only done in a particular case, but is seen to be done. Provision of reasons for a decision adds to that portrayal of justice.

Article 14(2) of the ICCPR provides:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

It is submitted that a person charged with a criminal offence is only to be found guilty of a criminal offence if the matter is proved by a court of law. The word 'proved guilty' should be given a construction that would mean a tribunal of fact, such as a jury, invested with the power to convict a person, can only find a person guilty if they prove such a person is guilty by not merely providing a verdict of guilty or not guilty, but by providing

reasons to justify why their verdict was made. It is doubtful whether a mere verdict of guilty or not guilty by a jury, without more, can be given a construction entirely consistent with the meaning of "proved guilty according to law".

Support for this argument that the current author has outlined with respect to Article 14(2) of the ICCPR and the jury can be found with respect to the Spanish legal system. Indeed, a primary reason why jurors in Spain have to provide reasons for their decisions, is to ensure that such fact-finders are in compliance with the presumption of innocence provision of the Spanish Constitution.⁴¹¹

In *Touron v Uruguay*, 412 the Human Rights Committee (HRC), commenting on Article 14(2) of the ICCPR, had the following to say:

"The State party has not responded to the Committee's request that it should be furnished with copies of any court orders or decisions relevant to the matter. The Committee is gravely concerned by this omission. Although similar requests have been made in a number of other cases, the Committee has never yet been furnished with the texts of any court decisions. This tends to suggest that judgments, even of extreme gravity, as in the present case, are not handed down in writing. In such circumstances, the Committee feels unable, on the basis of the information before it, to accept either that the proceedings against Luis Touron amounted to a fair trial...." ⁴¹³

Moreover, in *Estrella v Uruguay*, ⁴¹⁴ the HRC expressed the view that where reasons were not given for a decision, it follows that member states who are bound by Article 14(2) of the ICCPR will have violated that provision. ⁴¹⁵ It follows that given jurors do not provide reasons for their decisions in Australia, there is merit in the argument that Australia continues to violate Article 14(2) of the ICCPR.

Unfortunately for Australia, there are further provisions in Article 14 of the ICCPR that cause problems for the jury secrecy rule in Australia. Article 14(5) of the ICCPR provides:

⁴¹² Touron v Uruguay, Communication No. 32/1978.

⁴¹¹ Thaman, n 392 above, at 344.

⁴¹³ *Touron v Uruguay*, Communication No. 32/1978, at para 11.

⁴¹⁴ Estrella v Uruguay, Communication No. 74/1980, at para 10.

⁴¹⁵ The view expressed in *Estrella* has also been shown support in the case of *Byron Young v Jamaica*, Communication No. 615/1997.

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

Without jurors having to provide reasons for their decisions, as argued more fully in chapter 3, persons convicted of criminal offences will indeed have a difficult time in having their case reviewed by a higher tribunal. This is because the role of an appellate court becomes seriously limited when it does not have the opportunity to review the actual decision made by the jury. In general, when an appellate court reviews a decision from a lower court, one of the first things it may consider is the reasons for the decision, as outlined in the judgment. To consider how this argument runs, the HRC case of *Henry v Jamaica* 416 provides a good illustration.

In *Henry v Jamaica*,⁴¹⁷ the accused claimed that, because of the non-availability of a written judgment of the Jamaican Court of Appeal, he was denied the possibility of effectively appealing to the Judicial Committee of the Privy Council, which allegedly routinely dismisses petitions which are not accompanied by the written decisions with reasons of the lower court. The HRC examined Article 14(5) of the ICCPR, and outlined that the convicted person was entitled to a written decision of the guilty verdict, within a reasonable time, "duly reasoned", for all instances of appeal. The HRC consequently found that the accused's right under Article 14(5) was violated by the failure of the Court of Appeal to issue a written judgment.⁴¹⁸

By way of further support, in the case of *Currie v Jamaica*, ⁴¹⁹ the HRC reaffirmed that under Article 14(5) of the ICCPR, a convicted person is entitled to have, within a reasonable time, access to written judgments, properly reasoned, for all instances of appeal in order to enjoy the effective exercise of their right to have their conviction and sentence reviewed according to law. ⁴²⁰

⁴¹⁶ Henry v Jamaica, Communication No. 230/1987.

Henry v Jamaica, Communication No. 230/1987.

⁴¹⁸ The view expressed and held in *Henry* was supported in the case of *Little v Jamaica*, Communication No. 283/1988. See further Weissbrodt, D.S., *Right to a fair trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: Background, Development, and <i>Interpretations*, Cambridge, Martinus Nijhoff Publishers, 2001, at 149.

⁴¹⁹ *Currie v Jamaica*, Communication No. 377/1989.

⁴²⁰ See also *Reid v Jamaica*, Communication No. 250/1987.

It may be argued that the main principle held in cases such as *Henry v Jamaica* and *Currie v Jamaica* have no application in placing a positive duty upon jurors in countries who are bound by Article 14(5) of the ICCPR from providing reasons for their decisions, because, those cases were specifically dealing with the lack of written reasons for a decision by "courts". Although this may be perfectly true, it is submitted that the principles outlined in cases such as *Henry v Jamaica* and *Currie v Jamaica* should also extend to jurors for the following reasons:

- 1. Like the judges in those cases, jurors have the same role in determining the guilt or innocence of an individual;
- 2. Given that jurors suffer from far greater lack of inexperience in determining issues of fact and understanding the law, it follows that jurors should have a higher obligation to provide reasons for their decisions than judges. This is because there is a far greater chance that jurors may not understand the law, and, therefore, not decide a case lawfully; and
- 3. If jurors are to continue not to have an obligation to provide reasons for their verdicts, the very reasoning underlying the judgments in *Henry v Jamaica* and *Currie v Jamaica* would be simply void. That is, a person convicted of a criminal offence via a trial by jury would not be able to effectively appeal their decision to a higher court, because jurors do not provide reasons for their decisions. There is no difference between a jury or judge determining a criminal case, because, in truth, both jurors and judges, when acting independently of each other, ultimately determine the same issue, whether a person charged with a criminal offence is guilty or not guilty of those charges before the court. If there is any difference, it is that jurors are far more likely to not understand what a particular element of law means, or, better still, appreciate and comprehend countless directions by a trial judge. All the more reason why jurors should provide reasons for their decisions!

The common practice in Australia is for judgments (relevant findings as to law and facts, decisions and any orders, sentences or other matters) to be published, ⁴²¹ but it is unfortunate that this principle does not extend to the jury trial system. The practice of

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⁴²¹ Brittingham v Williams [1932] VLR 237.

publication has been explained as being partially to inform the parties⁴²² and in part to ensure that, if there is an appeal from the judicial officer (magistrate, district or county court or supreme court judge), the appellate court is in a position to deal effectively with the appeal.⁴²³ As illustrated above, there is absolutely no reason why the rationale of this principle should also not apply to the jury system.

Failure in a lower court to provide reasons for a decision is an error of law, and it is not essential to demonstrate also an error in relation to the finding itself. How can jurors provide a verdict in a criminal law trial without reasons, and this does not constitute an error of law? Even if some of the proceedings of a case are *in camera*, the reasons and orders should still be published. Accordingly, it does not matter that juror deliberations are made *in camera*, and as such, jurors should publish the reasons for their verdict.

6.3 Political Rights

Freedom of Expression

Article 19 of the ICCPR in part (relevance to jury secrecy rule) provides:

- (2) everyone shall have the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice; and
- (3) the exercise of the rights provided for in (2) above carries with it special duties and responsibilities, and it may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- (a) for respect of the rights and reputations of others, or
- (b) for the protection of national security, public health or morals.

Accordingly, it might be argued that given the jury secrecy rule in Australia expressly prohibits jurors from disclosing juror deliberations, it follows that this prohibition is

⁴²² Pettitt v Dunkley [1971] 1 NSWLR 376.

⁴²³ Donovan v Edwards [1922] VLR 87.

⁴²⁴ Pettitt v Dunkley [1971] 1 NSWLR 376.

⁴²⁵ Latin term for close proceedings, not open for public viewing of a case.

⁴²⁶ David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294.

⁴²⁷ The Human Rights Committee has indicated that this rule continues to apply even during declared states of emergency: see General Comment 29: States of Emergency (article 4), UN Doc CCPR/C/21/Rev 1/Add 11 (2001) at para 6.

entirely incompatible with Article 19(2) of the ICCPR. This is because a juror is restricted from imparting information they may have obtained during jury deliberations. Unless an exception to the jury secrecy laws in Australia can apply within the meaning of Article 19(3) of the ICCPR, the prohibition of jurors disclosing their deliberations made in the jury room is in conflict with the principles of Article 19.

Protection from not allowing jurors or other persons to disclose juror deliberations cannot be said to be necessary to respect the rights and reputations of others. Indeed, if jurors were made to provide reasons for their decisions, and, therefore, disclose jury deliberations, it is submitted that the reasoning of the jury, found in the juror deliberations, may reveal particular points that may allow an appellate court to overturn a jury decision, and, consequently, cure the reputation of a wrongly convicted person.

It is also highly doubtful whether the current laws on jury secrecy are necessary for the protection of national security in a majority of cases. Criminal law cases generally, even the more serious ones, deal with matters not of national security, or a threat to it, but rather violation of serious domestic criminal laws that do not directly challenge the sovereignty of the Australian state. It is also difficult to provide justifications for why the laws on jury secrecy are a necessity to protect public health or morals. Indeed, it may be that juror deliberations themselves may tend to undermine protection of public health or morals in society. If juror deliberations were made public, we could cure injustices related to public health or morals if the jury verdict has gone astray. How can we achieve this end when juror deliberations cannot be disclosed? In this way, no reasonable argument can be made to suggest that the jury secrecy rule is necessary to comply with the exceptions to freedom of expression as outlined in Article 19(3) of the ICCPR.

Regrettably, the law in Australia with respect to freedom of expression is that it is a negative right or freedom in that it exists only where there is no legal restraint of the right. As there are various pieces of legislation around Australia in the states and territories that expressly limit the right of jurors to impart to the public juror deliberations,

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⁴²⁸ James v Commonwealth (1936) 55 CLR 1 (per Lord Wright); Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479, at 479 (per Latham CJ).

the freedom of expression rule in Article 19 of the ICCPR has little application with respect to jurors imparting information of jury deliberations.

It is also unfortunate that there is no constitutionally recognised right to freedom of expression in Australia. 429 If such a right were found, perhaps there might be an argument mounted that the laws with respect to jury secrecy are unconstitutional, by expressly prohibiting persons from imparting information related to jury deliberations.

6.4 European Court of Human Rights

In short, there is a line of reasoning in some of the cases determined before the European Court of Human Rights (ECHR), which tends to suggest jurors should be made to provide reasons for their decisions. Some of these cases outline that to suggest otherwise, would mean there is the clear potential that member countries of the European Convention of Human Rights will have violated several provisions of the Convention.

As the ECHR is part of a regional system for protecting human rights, it does not exactly represent international law. However, jurisprudence from the ECHR provides authority that can in many instances be applied by international law bodies such as the HRC, a body created under the auspices of international law machinery, such as the ICCPR. In fact, many of the human right provisions in the European Convention of Human Rights mirror those outlined in the ICCPR. Therefore, judicial authority determined by the ECHR is persuasive for committee members of the HRC.

In the ECHR case of *Gregory v United Kingdom*, ⁴³⁰ it was stressed that a tribunal, including a jury, must be impartial from a subjective as well as objective point of view. Although Australia is not bound by the European Convention of Human Rights, it is seriously questionable whether the jury secrecy rule would be enough to demonstrate the impartiality of a jury from a subjective and objective point of view. Provision of juror reasons for their decisions allow a court to construe the jury judgment, and indeed

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⁴²⁹ Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, (at 133 per Mason CJ, at 149 per Brennan J, at 182, 183 per Dawson J); applied in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, at 127, 128 (per Mason CJ, Toohey and Gaudron JJ).

⁴³⁰ *Gregory v United Kingdom* (1998) 25 EHRR 577, at para 43.

determine whether the reasons for verdict made may reveal a lack of impartiality and bias on the part of the jury.

Not surprisingly, the ECHR has had something to say about the provision of reasons as an important benchmark to permit an appeal to occur in a case. In Hadjianastassiou v Greece, 431 the court identified as an important requirement a sufficiency of reasoning to enable a decision to be reviewed by a higher court. In this way, the Australian jury should have a duty to provide sufficient reasons for any verdict that they make, so the convicted person or prosecution can have the jury verdict reviewed properly by a higher court.

Transparency would be better facilitated if the jury gave reasoned judgments. 432 Significantly, this position has been reinforced by the ECHR decision of Van De Herk v Netherlands, 433 where it was held that courts of member countries are obliged to provide reasons for their decisions. There is no reason why this rule should not also apply to the jury, who also make decisions that have the same outcome when made by a judge alone.

There is some encouragement for the view that jurors should provide reasons for their decisions, albeit indirectly, in the ECHR decision of Murray v UK. 434 In that case. it was held that inferences from silence in a Diplock court complied with Article 6⁴³⁵ of the European Convention of Human Rights because the judge fully and openly reasoned his decision. 436 Some have inferred, with which the current author agrees, that the absence of the opportunity for such reasoning by a jury would lead to a different result.⁴³⁷ We await further judicial authority directly on such a point before the ECHR or elsewhere.

In Remli v France 438 and Sander v UK, 439 the ECHR has commented that member states who are bound by Article 6 of the European Convention of Human Rights, are highly

⁴³¹ Hadjianastassiou v Greece (1992) 16 EHRR 219.

⁴³² Carson, L & R. Lubensky., "Citizens Juries Pave the Way to the Law Courts (2008) 33(1) Alternative Law Journal 10, at 10.

⁴³³ Van De Herk v Netherlands (1994) 18 EHRR 481, para 61.

⁴³⁴ Murray v UK (1996) 22 EHRR 29.

⁴³⁵ See Section 1 Article 6 of the *European Convention of Human Rights*.

⁴³⁶ See further Section IV Article 51(1) of the European Convention of Human Rights, which outlines reasons should be given for the judgment of the Court.

⁴³⁷ See further The Right Honourable Lord Justice Auld, n 119 above, at 171.

⁴³⁸ Remli v France (1996) 22 EHRR 253.

vulnerable to breaching that Article by means of the jury secrecy rule, where jurors do not provide a reasoned judgment for their verdict. Although Australia is not bound by Article 6 of the European Convention of Human Rights, that Article in effect mirrors Article 14 of the ICCPR, to which, notably, Australia is bound by.

Concluding Remarks

Despite fourteen findings made by the HRC (including four in 2006) that Australia has breached the rights set out in the ICCPR, the Australian government has failed to effectively comply with the conclusions reached by the HRC. This is a regrettable result. Unfortunately, as demonstrated above, it is highly doubtful whether the jury secrecy rule inherent within the system of trial by trial is compatible with a range of international law principles. Until Australia ensures jurors provide reasons for their decisions, it is seriously questionable whether Australia takes several of the Articles outlined in the ICCPR seriously. 441

⁴³⁹ Sander v UK [2000] Crim LR 767.

⁴⁴⁰ Williams, G., A Charter of Rights for Australia, Sydney: University of New South Wales Press, 2007, at 50.

⁴⁴¹ See further Donnelly, J.D., "Human Rights, Individuals and the Land Down Under – Why Australia Needs a Statutory Federal Bill of Rights", paper presented to the *Australian Lawyers Alliance*, December 10, 2007.

Chapter 7 – Jury Reform and Evolution of the Australian Turu

"The participation of citizens in a democratic process is both a right and a duty. The concept of a written statement of reasons created by each juror is designed to enhance the expression of that right and improve the conditions under which the duty is carried out." ⁴⁴²

7.1 Mandatory Provision of Reasons for Jury Verdict

Introduction

As most of the series of essays throughout have been tailored to demonstrate why the Australian jury should be made to provide reasons for their decisions, this chapter is entirely dedicated to providing a draft outline of the nature of reform that should be enacted to ensure jurors have a positive duty to provide reasons for their decisions.

Accordingly, it is perhaps firstly appropriate to address the question that if jurors were made to provide reasons for their decisions, what would be the nature of such a duty? An examination of the case law with respect to the nature of the duty administrators have to provide a statement of reasons for their decisions within the context of administrative law, is a good starting point for considering the nature of a mandatory obligation upon jurors to provide reasons for their verdicts.

What reasons should be required for a jury verdict?

When a person has a right to a review a decision made with respect to them under s 5 of the *ADJR Act*, the decision-maker who made the decision may be required to provide a statement of reasons setting out how the decision was made (section 13 statement). Notably, the Federal Court of Australia has construed the duty of a decision-maker to provide a section 13 statement in a common sense manner that does not require a legalistic document. Such an approach is practical and should also be considered relevant to jurors when they are required to provide reasons for their verdicts. As such,

⁴⁴² Cassidy, n 3 above, at 12.

⁴⁴³ Smith v Minister for Immigration (1984) 53 ALR 551, at 554.

because jurors are mainly lay persons, the nature of any judgment they give should also not be construed as having to meet a standard of a legalistic document.

With respect to the content of a section 13 statement drafted by administrators, courts such as ARM Constructions Pty Ltd v Cmr of Taxation, 444 Bowring v Minister for Immigration⁴⁴⁵ and Ansett Transport Industries (Operations) Ptv Ltd v Taylor⁴⁴⁶ have outlined that a section 13 statement should not be examined as an Act of Parliament or a contract drawn by solicitors with time for review and evaluation, but should be studied carefully and sensibly by the court, not zealously in pursuit of error. It is submitted these principles should also be applied with respect to judgments made by the jury.

In *Powell v Evreniades*, 447 it was held that the court will not subject a section 13 statement to fine analysis with a view to finding through a microscopic analysis of it some error of law. 448 Accordingly, an appellate court should also not subject a judgment made by a jury to a fine analysis with a view to finding through a microscopic analysis some particular error of law. Such an approach could flood appellate courts with decisions made originally by the jury in a case.

In general terms, with respect to a section 13 statement of reasons, the court in Soldatow v Australia Council 449 has made clear that such a statement must contain proper and adequate reasons which are intelligible, deal with substantial issues raised for determination and expose the reasoning process adopted by the decision-maker. 450 These same kind of considerations should also be given treatment by jurors when they provide a statement of reasons justifying any particular verdict that they have reached.

The same court in Soldatow v Australia Council 451 also made clear that a section 13

⁴⁴⁴ ARM Constructions Pty Ltd v Cmr of Taxation (1986) 65 ALR 343, at 349.

⁴⁴⁵ Bowring v Minister for Immigration (1987) 13 ALD 677, at 679.

⁴⁴⁶ Ansett Transport Industries (Operations) Pty Ltd v Taylor (1987) 73 ALR 193, at 197.

⁴⁴⁷ Powell v Evreniades (1989) 87 ALR 117.

⁴⁴⁸ Powell v Evreniades (1989) 87 ALR 117, at 122.

⁴⁴⁹ Soldatow v Australia Council (1991) 28 FCR 1.

⁴⁵⁰ Soldatow v Australia Council (1991) 28 FCR 1. See also Aghedo v Minister for Immigration and Ethnic Affairs (1986) 9 ALN N279.

Soldatow v Australia Council (1991) 28 FCR 1.

statement of reasons need not be lengthy unless the subject matter requires it but should be sufficient to enable a determination as to whether the decision involved an error of law. ⁴⁵² In this way, the decision of the jury also need not be lengthy unless the nature of the case determined by the jury requires that it should be, however, the reasons given by a jury decision should be sufficient to enable an appellate court to determine whether there may have been an error of law in the jury verdict.

Further, a decision-maker required to provide a section 13 statement must include in the statement the true reasons for the decision. 453 Consequently, the jury must provide in their judgment the true reasons for the why they reached a particular verdict. This principle almost goes without saying, however, it should be stated for the purposes of ensuring jurors know exactly what they are required to do when writing a judgment.

A decision-maker who has to provide a section 13 statement must set out in that statement an understanding of how the law applied in the decision. This obligation need not be taken so far that all applicable law is specified or a detailed legal opinion be given. Accordingly, any decision issued by the jury for any verdict that they have reached, must, as a matter of law, set out in their judgment an understanding of how they applied the facts and evidence to the relevant law. Such a mandatory obligation is important, because, many jurors are far more likely to misunderstand the meaning of certain elements of a crime, than, say, for example, factual evidence adduced at trial. The complexity of legal jargon, in conjunction with case law that has interpreted certain words in a criminal offence, are not always so easy to understand for a lawyer, let alone a lay person sitting as a juror in a criminal trial.

In a section 13 statement of reasons, the findings of fact and the decision-maker's reasoning processes must be set out in clear and unambiguous language. 456 Notably, only the findings on *material questions* of fact need to be set out so that some evidence may

⁴⁵² Soldatow v Australia Council (1991) 28 FCR 1.

⁴⁵³ Minister for Immigration, Local Government and Ethnic Affairs v Taveli (1990) 94 ALR 177, at 194 (per French J).

⁴⁵⁴ Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500, at 507.

⁴⁵⁵ Ansett Transport Industries (Operations) Pty Ltd v Taylor (1987) 18 FCR 498, at 503.

⁴⁵⁶ Ansett Transport Industries (Operations) Pty Ltd v Wraith (1983) 48 ALR 500.

basically be referred to in the section 13 statement.⁴⁵⁷ Surely placing this same obligation upon a jury when they are drafting up their own judgment would not be too difficult to comply with.

As the court made clear in *Our Town FM Pty Ltd v Australian Broadcasting Tribunal*, ⁴⁵⁸ a section 13 statement of reasons is deficient if it states conclusions without particulars or explanations for those conclusions. ⁴⁵⁹ In this way, if a jury were to provide a judgment which merely stated conclusions of fact without reasons to explain those conclusions, than this itself would be enough for an appellate court to set aside the jury verdict.

Significantly, as the court outlined in Commissioner of Taxation v Osborne: 460

"There can be no blueprint or universal pro forma for statement of reasons. The characteristics of an individual decision will largely determine the material to be set out in a statement of reasons. Adequacy is a question of degree."

Accordingly, in determining whether a jury has provided an adequate statement of reasons for any decision that they have made, this is a question of degree depending upon the characteristics of the individual issues of fact and evidence in question in a particular case heard before a jury.

The sufficiency of juror reasons for their decisions would not be a difficult task. In *Vasili v Australian Telecommunications Corporation*, ⁴⁶¹ Von Doussa J stated that even where a decision-maker had merely said that it preferred one body of medical opinion to the other it would not have failed to state its reasons because by stating its preference for a particular expert opinion it would have disclosed its reasoning process leading to the findings of fact based upon accepted opinion. In this way, if jurors outlined in their judgment that they favoured a particular witness over another, this would be sufficient enough in itself to illustrate that the jury had provided an adequate reasoning process.

⁴⁵⁷ Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13(1).

⁴⁵⁸ Our Town FM Pty Ltd v Australian Broadcasting Tribunal (1987) 16 FCR 465.

⁴⁵⁹ Our Town FM Pty Ltd v Australian Broadcasting Tribunal (1987) 16 FCR 465, at 482-4.

⁴⁶⁰ Commissioner of Taxation v Osborne (1990) 26 FCR 63. See further Katzen, n 319 above, at 38.

⁴⁶¹ Vasili v Australian Telecommunications Corporation (Unreported, Federal Court, No 818/91, 12 December 1991, Von Doussa J).

In *Federal Commissioner of Taxation v Cainero*, 462 Foster J outlined that it could not be suggested that a decision-maker was under an obligation to isolate in its reasons for judgment every issue of fact and record a specific finding in respect of each of them. 463 His Honour felt that it was obviously sufficient as a matter of common sense, that a sufficient compliance with the requirement of considering all issues of fact and giving adequate reasons occurs when the reasons themselves provide a sufficient indication that the ultimate facts to be decided have been fully kept in mind and that no significant area of primary fact has been ignored. In this sense, it would not be necessary for every jury decision issued to explicitly give treatment to every piece of evidence adduced at trial. However, the jury judgment should be read as a whole, sufficiently indicating that the ultimate questions of fact to be decided have been made on the basis of the available evidence or lack of it.

7.2 Draft Legislation

Having considered the nature of reasons that should be given by a jury when outlining a particular verdict, it is now necessary to provide a draft piece of legislation that encompasses these principles. It is suggested the following draft statutory provisions could be enacted in the various state and territory Acts that regulate the law with respect to the jury.

Section 68BB of the *Jury Act* 1977 (NSW)

Mandatory Obligation Upon Jurors to Provide Reasons for Jury Verdict Reached

- (1) Upon issuing a verdict to the court, the jury must also provide a written judgment outlining the reasons for why the verdict issued was given.
- (2) Although not limited to, the reasons for the jury verdict should:
 - (a) Provide a summary of the relevant law that is under consideration in the particular case;
 - (b) Outline a statement of reasons that shows an understanding of how the law applied to the final verdict made. This need not be taken so far that all

⁴⁶² Federal Commissioner of Taxation v Cainero (1988) 15 ALD 368.

⁴⁶³ Federal Commissioner of Taxation v Cainero (1988) 15 ALD 368, at 370.

- applicable law is specified or a detailed legal opinion be given.
- (c) Outline the findings of fact determined and the jury's reasoning processes, which must be set out in clear and unambiguous language;
- (d) Set out the reasons for why the verdict was reached, having regard to evidence admitted during trial and any directions of law made by the trial judge.
- (3) In order that a jury shall comply with subsections (1) and (2) of this section, a jury officer should be appointed, who is to assist the jury in reaching their verdict in the jury room by undertaking the following duties:
 - (a) Acting as a mediator during juror deliberations, so that all of the jurors are able to actively participate in the deliberation process in reaching a verdict;
 - (b) Assist the jury in drafting the actual written judgment; and
 - (c) Not offer any opinion or make any representations of a personal nature about any of the facts, law or evidence in question related to the case.
- (4) In determining whether a verdict given by the jury should be set aside on the basis that the jury has not sufficiently complied with subsections (1) and (2) of this section, without limiting what matters the court may consider, the court may take into account:
 - (a) The complexity of the factual and legal issues for consideration in the case;
 - (b) Whether the jury has failed to adequately address a fact in issue;
 - (c) Whether the reasons given tend to suggest that the jury:
 - (i) Failed to take into consideration relevant considerations,
 - (ii) Took into consideration irrelevant considerations,
 - (iii) Acted for an improper purpose, by making a decision not on the basis of the admissible evidence.
 - (d) Whether a reading of the jury verdict shows a lack of impartiality by the jury.

Commentary on Draft Provisions

Evidently, the draft statutory provisions outlined above achieve a number of purposes:

1. The statutory provisions provide a positive duty upon jurors to provide written reasons for any verdict that they deliver to the court: s 68BB(1) of the *Jury Act* 1977 (NSW);

- 2. Provide guidance upon the types of elements that need to be addressed in a written jury decision, such as a summary of the relevant law, a statement of reasons outlining an understanding of how the relevant law in a case has been applied to the decision made, outline the conclusions made on questions of fact with an explanation as to how this determination was reached, and provide ancillary commentary with respect to the evidence admitted during trial and directions given by the trial judge: s 68BB(2) of the *Jury Act* 1977 (NSW);
- 3. Set up a system whereby a jury officer is invested with certain powers to assist jurors to discharge their duty to provide a written reasoned decision: s 68BB(3) of the *Jury Act* 1977 (NSW); and
- 4. Outline some of the grounds a court may consider in determining whether a written decision by the jury was duly reasoned according to law: s 68BB(4) of the *Jury Act* 1977 (NSW).

7.3 Series of Questions for Jury Judgments

An alternative approach to jurors providing reasons for their decisions in the form of a written judgment, is to provide jurors with a series of questions to structure their decision-making. The publication of the jurors' views, as responses to a court-administered questionnaire, could be controlled by making them as part of the presentation of the verdict. The publication of the decisions are provided by making them as part of the presentation of the verdict.

Cassidy points out that such an approach is by no means impossible, when in fact Australians are required to fill in a relatively large number of often complex forms during the course of their lives and samples of jury deliberation questionnaires could be included in schools' legal studies courses to facilitate awareness of them. 466

Indeed, Lord Justice Auld thought administering a series of questions for the jury to answer was a good idea, where he stated that:

⁴⁶⁴ Darbyshire, P., "What Can We Learn from Published Jury Research? Findings for the Criminal Courts Review 2001" (2001) *Criminal Law Review* 970, at 974.

⁴⁶⁵ Cassidy, n 3 above, at 11.

⁴⁶⁶ Ibid, at 12.

"..... the time has come for the trial judge in each case to give the jury a series of written factual questions, tailored to the law as he [or she] knows it to be and to the issues and evidence in the case. The answers to these questions logically lead only to a verdict of guilty of not guilty." ⁴⁶⁷

To enable the jury to have the best chance of coming to grips with the essential elements of the charges against a person, the court could insist that the parties exchange sufficient hard information to reveal the facts in issue between them, and notify the jury what they are. This would certainly help those jurors who struggle to understand countless hours of submissions by counsel for the defence team or the prosecution. Written material can be digested, on average, four times more quickly than the same material presented orally. Notably, this is not to suggest that written material should replace oral testimony in a trial, but, together, written and oral information can be used to ensure jurors make the best available determination on the evidence admitted at trial.

7.4 Concluding Remarks

We have no idea whether juries behave well.⁴⁷⁰ Instead, we have endless, unsubstantiated assertions about juries being diligent, bulwarks of liberty, rational and bringing commonsense to the task and so on.⁴⁷¹ Public exposure of the process of reasoning for jury decisions provides a guarantee to the public of probity, neutrality and high judicial performance that marks the success of the judicial system in Australia.⁴⁷²

It becomes difficult to maintain the expectation that the jury is the "bulwark of liberty" and the "lamp of freedom" to borrow the words of Lord Devlin, unless it can be shown that representative and impartial juries practise independent and democratic decision making. 473 Why should confidence at this level have to rely on faith in an ideology rather than knowledge of actual decision-making practice?

⁴⁶⁷ The Right Honourable Lord Justice Auld, n 119 above, at 172.

⁴⁶⁸ McFarlane, G., "Jury Trial – Evolution or Extinction" (2001) 151 New Law Journal 414, at 414.

⁴⁶⁹ Kirby, n 164 above, at 231.

⁴⁷⁰ Hull, n 162 above.

⁴⁷¹ Ibid.

⁴⁷² Prescott, K., "Judgments – Why the Detail?", see:

 $http://www.courts.sa.gov.au/schools/resources/fact_sheets/Judgments_why_the_detail_17.pdf \\ [Accessed 08/09/20081.$

⁴⁷³ Findlay, n 46 above, at 371.

According to Sir Louis Blom-Cooper, OC, with whom the current author agrees, a publicly unaccountable jury is a 'curiosity' in today's democratic society. 474 By allowing juries to speak, through the disclosure of jury deliberations, this participation could perhaps be seen as an attempt to allow the community's voice to be truly given expression, in a way which articulates the needs of justice with increased public awareness of its processes. 475

Courts are content not to know the nature of jury deliberations, for the practical reason what they might discover – biases, irrationality, confusion and so on – may constitute serious troubles for the administration of justice. 476 Accordingly, there is an understandable concern that knowledge of what actually occurs in the jury room may do more harm than good.⁴⁷⁷

Mandatory provision of reasons for jury verdicts will promote principles inherent in the rule of law, bring jurors in line with many other decision-makers in Australia who provide reasons for their decisions, allow Australia to enact more consistent statutory provisions with respect to the jury that match principles enunciated in international instruments such as the ICCPR, and, most importantly of all, show that justice is not only done, but seen to be done.

 $^{^{474}}$ See The Right Honourable Lord Justice Auld, n 119 above, at 172. 475 Cassidy, n 3 above, at 13.

⁴⁷⁶ Ibid, at 10.

⁴⁷⁷ ibid.

8. Annexure

8.1 Australian Criminal Law Jury Survey

Questions

The author of this survey is currently undertaking a research project on whether the jury should provide reasons for a verdict in Australian criminal law trials. Please answer the questions below.

1) Should jurors provide reasons for their	decisions? Yes	No □
1) Should Jurors provide reasons for then	decisions:	110
2) Do you think the giving of jury reasons for a verdict will hinder the ability of jurors to		
make a proper decision?	Yes □	No \square
3) It has been asserted on occasions that i	f the jury were made to provide reaso	ns for their
decisions, this would promote appeals to	3 3	No
4) Do you think that the current system	in Australia whereby the jury does n	ot disclose
what goes on in the jury room protects jur	• • •	No \square
5) Publication of jury reasons for a verdi	ct undermines the system in Australia	of trial by
jury. Do you agree with this statement?	Yes	No \square
	1 66	
6) If you were charged with a criminal determined by a judge over a jury?	offence, would you prefer to have $\mathbf{Yes} \ \Box$	your case No
determined by a judge over a jury.	163	110 🗆
* Australian jurors sitting in criminal l verdicts that they reach. Outline any comm		ons for the
, , , , , , , , , , , , , , , , , , ,		
Occupation:	Gender: Male □	Female □
Age: 18-30 □ 31-45 □	46-60 □	Over 60 □
Thank you for completing this survey		

8.2 Commentary of Participants Regarding Australian Criminal Law Jury Survey

Outlined below are a number of responses participants provided in relation to the last question, which required participants of the survey to outline how they felt about the issue that jurors did not provide reasons for their decisions:

- * "If a jury were to provide reasons for its decisions, it would essentially open the criminal justice system and make are jury accountable for its decisions".
- * "Well the person should know what they did wrong and he or she deserves an explanation about it".
- * "Without a reason, a person cannot be convicted of a crime. Decisions should be precise with a straightforward reason".
- * "A number of verdicts may be based on prejudice".
- * "One argument against this would be that the 'guilty' party as a result of the verdict would want to know reasons and perspectives as to how the jurors came about with the final decision".
- * "Jurors should provide reasons because I feel the accused has a right to know why a verdict is given".
- * "The jury should not have to provide reasons for their verdict, because this would take too much time and prolong the trial".
- * "We should get rid of juries altogether in Australia, so we do not need to worry about biased judgments being made by certain jurors".

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