Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the world wide web?

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The growing availability of information is challenging the right to a fair trial in the 21st century. For decades courts have maintained the integrity and impartiality of the jury by shielding jurors from pre-trial publicity. However, as the traditional forms of media have expanded into the world wide web, it has become increasingly difficult to control both the dissemination of information and the conduct of jurors. This article explores the level of prejudicial impact of publicity on high profile trials. Remedies to alleviate such an impact are discussed.

INTRODUCTION

In 2010, an order was made to suppress the identity of an 18-year-old South Australian man being investigated for the murder of three of his family members. However, a Facebook site dedicated to the memory of the victims had been used to identify and abuse the alleged murderer. Not only did this publication hinder the police investigation but there is a risk that the right of the defendant to a fair trial will be compromised. There is nothing preventing jurors from downloading Facebook pages, online news, blogs, and videos on YouTube, using their mobile internet service. In an era of digital communication, the question must be asked: can, and if so how, should the right to a fair trial be maintained in high profile criminal matters?

This article argues that the increasing proliferation of prejudicial publicity justifies a shift away from the Australian strategy of prevention and towards reforming the jury trial. The first part introduces the principles of open justice and the right to a fair trial and outlines the traditional Australian approach to prejudicial publicity. The article then focuses on the growing use of suppression orders in Victoria and concludes that such orders cannot adequately prevent the publication of prejudicial information. The next part critically analyses the judiciary’s faith in the jury and suggests that in the light of recent research, it is unreasonable to expect jurors to remain impartial when serving on trials that are subject to extreme publicity. Finally, the article raises some strategies that might go towards easing the impact of prejudicial publicity on high profile criminal trials.

FAIR TRIAL V OPEN JUSTICE – THE GROWING TENSION BETWEEN THE TWO PRINCIPLES

Fair trial

Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The principle that an accused be given a fair trial is an essential element of the Australian legal
system, and also a recognised human right. At an international level, the right to a fair trial is enshrined in Art 14 of the *International Covenant of Civil and Political Rights* (ICCPR) (above) and in Art 6 of the *European Convention for the Protection of Human Rights*. In Victoria, the right to a “fair and public hearing” is protected by the *Victorian Charter of Human Rights*.

Although the fairness of a trial is based on numerous elements, this article will focus on the impartiality of the jury. At its core, the right to a fair trial requires that the jury decide the case solely on the evidence presented in court. The rules of evidence facilitate the right to a fair trial by shielding jurors from evidence which is more prejudicial than probative.

**Open justice**

Justice should not only be done, but should manifestly and undoubtedly be seen to be done. The principle of open justice sits alongside the right to a fair trial as a central tenet of Australian criminal justice and a recognised human right. Like the right to a fair trial, open justice is also enshrined in the ICCPR, *European Convention* and *Victorian Charter of Human Rights*. Open justice requires that the doors of the courts are open to members of the public to observe proceedings. It maintains the honesty of witnesses, has a deterrent effect on criminal activity, and provides a means of scrutiny on judicial decision-making. The integrity of the justice system is protected by this process. Furthermore, the community at large has an interest in knowing that those who are charged for offences are subsequently tried. While anyone can observe the administration of justice from the public gallery of the courtroom, the seats are often empty. In the 21st century, the community relies on the media to inform it about matters in the public interest.

Justice demands that the media be free and able to report court proceedings. The starting point in all cases is that the court will be open, and that the media will be able to report fairly and accurately on proceedings. However, there are a few “strictly defined” situations in which it is justified to

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3 *Dietrich v The Queen* (1992) 177 CLR 292 at 326; 64 A Crim R 176. Spigelman CJ referred to the “principle of a fair trial” because there is no enshrined right to a fair trial in Australia. Notwithstanding, he noted that it is not inaccurate to refer to the right to a fair trial: Spigelman J, “The Truth Can Cost Too Much: The Principle of a Fair Trial” (2004) 78 ALJ 29 at 30.


6 For example, the right to legal representation and the right to cross-examine witnesses; see further Sir Anthony Mason, “Fair Trial” (1995) 19 Crim LJ 7 at 7.


8 *R v Sussex Justices* [1924] 1 KB 256 at 259 (Lord Hewart). However, note that this quote has been attributed to Lord Sankey: see Spigelman J, “The Principle of Open Justice: A Comparative Perspective” (2006) 29 *University of New South Wales Law Journal* 147 at 150.

9 ICCPR, Art 14 provides that “everyone shall be entitled to a fair and public hearing”; European Convention, Art 6 provides that “everyone is entitled to a fair and public hearing”; and the *Victorian Charter of Human Rights*, s 24 provides that “a person charged with a criminal offence … has the right to have the charge … decided by a competent, independent and impartial court or tribunal after a fair and public hearing”.


12 *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 at [99]; 148 A Crim R 522. See also Kirby P in *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 for an overview of the history of open justice.

13 The term “public interest” is used here to refer to matters which the media deem to be *interesting to the public* and therefore worth reporting. A critical view of media reporting practices would equate the public interest with sensationalism and the media’s private and commercial interest in printing stories that sell.


restrict court access or reporting. One situation is to maintain the right to a fair trial. While the media facilitates open justice, it is well accepted that publicity concerning an accused or the circumstances of an offence can hinder the fairness of a trial.\footnote{Throughout this article the term “publicity” will be used to refer to information published by the media, in addition to independent online material such as blogs and videos posted on the internet.}

The growing tension between the two principles

Since the inception of the impartial jury as we know it today, there have always been cases where the defendant is so infamous that he or she has claimed that a fair trial is not possible.\footnote{Bell V, “How to Preserve the Integrity of Jury Trials in a Mass Media Age” (2005) 7 Judicial Review 311 at 311.} This has usually been where the trial is to be heard in a country town where the locals are often highly knowledgeable about the prior convictions of other townsfolk. A cure for this circumstance was to move the trial to another venue where the defendant is not known. As the media has become more pervasive throughout Australia, the infamy of a defendant can no longer be contained within a town or even a region. A change of venue will not guarantee that the new jurors do not know about the infamous defendant from media coverage.

The extent of contemporary publicity of high profile cases is exacerbated by the nature of that publicity. Media outlets also have an interest in publishing stories that sell. Stories are sometimes sensationalised, and at times facts are described out of context which could mislead the reader or listener. Defence counsel often argue that media reports are biased against their clients,\footnote{R v Thomas [1815] 4 M & S 442; 105 ER 897; R v Patterson (1867) 4 W W & A'B 43.} and frequently only canvass the first day of a trial – being the Crown Opening.\footnote{Moloney A, “Fed to the Lions by the Media Circus” (2008) (401) Lawyers Weekly 16.} The challenges caused by pre-trial publicity are not new but they have been exacerbated by the rise and the immediacy of the internet.

Over the past two decades, the internet has upgraded and revolutionised the way in which we communicate and disseminate information. Newspapers are read online,\footnote{See the opinion of defence counsel quoted in Chesterman M et al, Managing Prejudicial Publicity – An Empirical Study of Criminal Jury Trials in New South Wales (Law and Justice Foundation of New South Wales, 2001) p 148.} televised broadcasts are stored and watched on YouTube, radio segments are available via podcast, Facebookers, bloggers and tweeters can share ideas, opinions and images with the world at large. Criminal matters have been, and continue to be, the subject of talkback radio debate,\footnote{Kermand C, “Readership Decline Continues for Papers”, The Age online (14 May 2010), http://www.theage.com.au/business/media-and-marketing/readership-decline-continues-for-papers-20100513-x1tk.html viewed 6 February 2012.} as well as television series, movies, Facebook, tweets, blogs and YouTube videos.\footnote{Hinch v Attorney-General (Vic) (1987) 164 CLR 15; 30A Crim R 466; R v Glennon (1992) 173 CLR 592; 60 A Crim R 18.} Significantly, everything posted on the internet can be archived and accessed instantly at the click of a mouse. There is very little limit on who can contribute to this sphere of ideas and what can be published, stored and later retrieved. Essentially anyone can be a publisher on the internet. This has impacted upon the legal profession, Judgments and legal articles are available online and can be downloaded from within the courtroom.\footnote{Cauchi S, “Ipad Invasion Proves Bitter-Sweet”, The Age online (19 September 2010), http://www.theage.com.au/business/ipad-invasion-proves-bittersweet-20100918-1sh17a.html viewed 6 February 2012.}

While the internet has created many new possibilities and has many obvious benefits, it is challenging the traditional methods used to ensure the impartiality of the jury. The hurdles it poses to the right to a fair trial have been recognised by the legal community and are the source of much

\footnotesize{\url{Protecting the right to a fair trial – has trial by jury been caught in the world wide web? (2012) 36 Crim LJ 103}}
debate. However, little has been done to deal with the difficulties created by digital communication. It was always possible for a juror to search through newspaper archives in libraries for information about an accused but it rarely happened. The availability of online information, in an easily searchable and accessible form, has made a wealth of unrestricted and unreliable material available to jurors. Prejudicial publicity is now just a click away for the “Googling juror”.

As Mason CJ and Toohey J stated in R v Glennon, “the possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial”. Unfairness caused by pre-trial publicity will not of itself lead to a stay of proceedings. The test is whether there is an unacceptable risk to a fair trial. It is accepted that a juror who encounters prejudicial material will not be automatically tainted and unable to deliver an impartial verdict. Notwithstanding, Glennon was determined at the dawn of the internet and prior to the “Google revolution.” The extended reach of the media, and the rise of the internet, have shifted the possibility of a juror encountering prejudicial information to a probability.

Following Glennon, several “high-profile” defendants have applied for a stay of proceedings. The only successful application was in the 2010 South Australian case of R v Liddy. The evidentiary prejudice suffered by the defendant due to the four-year delay between the alleged acts of sexual assault and the trial, the extreme factual similarity between the two trials and the sustained media publicity between the two trials were of import to the decision to stay the proceedings. However, the judge in that case did emphasise that “if pre-trial publicity had been the only basis relied on by the applicant, it is unlikely that I would have granted a stay of proceedings”.

No other infamous defendants have had their trials permanently stayed on the basis of prejudicial publicity. Most recently in the trial of the well-known murderer Peter Dupas, the jury were instructed by the trial judge to ignore any publicity about the case and to not conduct any research including internet searches. The High Court held that the directions given by the trial judge were sufficient to cure the unfair consequences of seven years of negative media attention spread across seven websites, approximately 120 newspaper articles, four books and several television programs. Despite increasing access to prejudicial publicity, the High Court readily defended the ability of the jury to resist the influence of such information. Further below, the article will further explore how realistic it is for the High Court to continue to rely on jury directions as the panacea for jury prejudice caused by the availability of prejudicial information on the internet.

The proliferation of negative publicity prompted Weinberg J in the Dupas appeal to question whether Charles Manson, Ronald Biggs, or Osama Bin Laden could ever receive a fair trial. Whilst rampant publicity might impact upon the right to a fair trial, it is of greater public interest that mass
murderers cannot rely on their infamy to escape punishment. Courts take into account the particular context of the trial before them and the importance of the public interest considerations relevant to the trial in question. Public interest considerations include the need to dispose of serious charges efficiently, the need to maintain public confidence in the administration of justice\(^{37}\) and “the community’s right to expect that a person charged with a criminal offence [will] be brought to trial”.\(^{38}\)

Both free speech and the community needed to prosecute those suspected of crimes have a role to play in the balancing exercise. Ultimately, however, the courts have an obligation to protect the integrity of criminal trials by ensuring that other interests do not overshadow the defendant’s right to be tried by an impartial jury. However, the line between open justice and fair trial has been blurred by the advent of the internet. The result has created dissent within court judgments\(^{39}\) and academic discourse as to whether the correct balance has been struck between the competing tensions.\(^{40}\)

In Attorney General for New South Wales v X, Mason P said:

> A verdict of guilt and ensuing punishment must be the product of a fair trial. The rule of law can settle for nothing less. Trial by media cannot be tolerated in a civilised society.\(^{41}\)

This statement can be contrasted to the dicta of Ashley JA in \(R v Dupas\):

> it is conceivable … that the time will come when it is possible to afford the applicant a sufficiently fair trial, either because of a change in evidence or other circumstance or because of a reduction in acceptable standards of fairness.\(^{42}\)

A corollary of this reasoning is that in a continually evolving digital and media age, a tainted trial may be better than no trial at all.\(^{43}\) Given that the most serious offences are heard before a jury, and that a guilty verdict may deprive the accused of his or her liberty, technology should not be permitted to erode the principle of a fair trial. However, what is defined as acceptable standards of fairness in one century may not translate into the next. The new conditions encountered in the 21st century dictate a need to revise the traditional approach to maintaining a fair trial.

### The Traditional Australian Approach to Prejudicial Publicity

The traditional Australian approach to managing prejudicial publicity is founded on prevention and deterrence. In some circumstances publications will be restricted to protect the defendant’s right to a fair trial. The Australian strategy has three tiers.\(^{44}\) At the forefront lies contempt law, particularly sub judice contempt. If it is not sufficient, suppression orders can be issued to restrain specific publications. Finally, remedial measures can be implemented to cure the effect of prejudicial publicity. Remedial measures range from delaying or moving a trial, giving jury directions and in extreme

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\(^{38}\) \(R v Glennon\) (1992) 173 CLR 592 at 598 (Mason CJ and Toohey J), 617 (Brennan J); 60 A Crim R 18.

See, for example, the three judgments in \(R v Dupas (No 3)\) (2009) 198 A Crim R 454.


\(^{41}\) Attorney-General (NSW) v X (2000) 49 NSWLR 653 at [184]. While this case concerned a publisher’s liability for sub judice contempt, Mason P’s comments concerned the primacy of the right to a fair trial generally.

\(^{42}\) \(R v Dupas (No 3)\) (2009) 198 A Crim R 454 at [191] (emphasis added).

\(^{43}\) Bagaric argued that “the majority in Dupas is probably wrong that a tainted trial is better than no trial at all”: Bagaric, n 40 at 9.

circumstances ordering a permanent stay of proceedings. Given Australia’s contemporary emphasis on prevention, the remedial mechanisms are seldom used and, with the exception of jury directions, are underdeveloped.

Australia’s focus on prevention has been compared to the remedial approach of the United States. A significant difference between the two jurisdictions lies in the freedom given to the press. In Australia, free speech has been recognised as a fundamental social value, and in a more limited sense, as an implied right in the Constitution. In contrast, the right to free speech is enshrined in the First Amendment to the American Constitution. Consequently the media have an almost unfettered ability to report court proceedings. For example, in the OJ Simpson trial, the Los Angeles Times ran 398 front page stories about the matter, and more than 1,500 articles during the course of the 16-month trial, and CNN transformed into the “all OJ network”. The current restrictions on the Australian media prevent Australian criminal matters from turning into such a media circus. Nevertheless, in the 21st century, the publicity arising from high profile Australian trials is challenging the traditional preventative approach.

Sub judice contempt

Sub judice contempt is a branch of contempt law that seeks to deter the publication of information which has a real and definite tendency to prejudice or embarrass pending proceedings. Fair, accurate and contemporaneous reports will not be contemptuous. Essentially, the doctrine seeks to strike a balance between the right to a fair trial and open justice. However, some of the assumptions underlying the principles of sub judice contempt have been challenged by technological and social change. First, the law assumes that jurors who are exposed to prejudicial material will be rendered partial and unreliable. This assumption directly challenges the judicial assumption that jurors are robust and can ignore prejudicial publicity. Secondly, the law is aimed towards the press and therefore presumes that the public only obtains its information from the mass media. More and more, the public are turning to Wikipedia or Twitter to learn the latest news. Thirdly, since much of the law was created prior to television, it was simply not designed to deal with the breadth of information available and the speed at which information can be accessed today. In practice, the law of sub judice contempt is powerless to prevent a majority of prejudicial online publications.

45 Other remedial measures are: allow a challenge for cause by counsel; sever the trials or two or more co-accused; hear the matter by a judge sitting alone (in some jurisdictions); question jurors to ascertain bias; or set aside a guilty verdict and order a retrial.
46 Chesterman et al, n 20, p122.
47 Chesterman et al, n 20, p 116.
50 Hinch v Attorney-General (Vic) (No 2) (1987) 164 CLR 15 at 34 (Wilson J); 30 A Crim R 466. Different formulations of the test were expounded by the court. Deane and Toohey JJ adopted similar formulations to Wilson J (at 47 and 70), Mason CJ preferred the terms of a “substantial risk of serious interference with a fair trial” (at 27) and Gaudron J suggested of test of whether a publication “poses a real risk to the administration of justice” (at 87).
51 Lawbook Co, Media and Internet Law and Practice (looseleaf service, update 71) at [4.590].
Suppression orders
In addition to the law of contempt, the judiciary is empowered to grant suppression orders\(^55\) to prevent the publication of information that may prejudice a trial. This power is sourced in common law\(^56\) and statute.\(^57\) It is important to note that suppression orders cannot bind the world at large, but apply only to the party or parties named in the order.\(^58\) This does not mean that those who are not formally bound can ignore the terms of a suppression order. It has been held that the media are put on notice when an order is made, and the deliberate frustration of its terms is punishable for contempt.\(^59\) The following part of this article will consider the effectiveness of suppression orders to prevent prejudicial publicity in an internet age. Some recent Victorian cases serve to highlight how suppression orders are inadequate in contemporary circumstances.

CAN THE COURT CONTROL THE INFORMATION?

Victoria’s growing suppression order culture
The Victorian courts have been accused of fostering a suppression order culture.\(^60\) The State Attorney-General is considering introducing legislation that will force courts to favour open justice.\(^61\) In 2005 the County Court made 66 orders. In 2009 this more than doubled to 156.\(^62\) There are several reasons for this increase, some of which are beyond the control of the judiciary. First, new legislation has been introduced that automatically suppresses information in particular matters such as sex offence cases.\(^63\) However, in some circumstances, judges are making overlapping orders where legislation already prevents court reporting.\(^64\) This has prompted practitioners to describe the current situation as a “minefield of suppression orders”.\(^65\) Secondly, numerous orders were made during the series of related gangland and terrorism proceedings.

Thirdly, and of most significance, is the observation that “in Australia suppression orders are issued on occasions when they cannot be justified”.\(^66\) The making of superfluous orders is problematic because it unnecessarily impinges on the media’s freedom to publish and curtails open justice. Furthermore, it undermines the validity of sub judice contempt to effectively deter the publication of prejudicial material. It also questions the ability of jurors to ignore external information and discharge their duty according to their oath. Finally, it is argued to isolate the community from the legal system and matters of public interest. For example, gangland murderer Carl Williams’ first murder conviction

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55 Suppression orders are also referred to as “non publication” orders.
57 There are two types of statutory provisions: those which give the court the power to make orders, and those that automatically impose a suppression order in particular circumstances. For a general overview of Australian statutory provisions see Lawbook Co, n 51 at [15.130]-[15.1690].
61 Munro P, “Victorian Bid to End Court Secrecy”, The Sunday Age (22 May 2011) p 5.
63 For example, ss 182-186 of the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) prohibits the publication of evidence led and documents produced during a trial heard under the Act: Cummins, n 62.
64 Kenyon, n 56 at 288.
– arguably a matter of community concern – was suppressed for over 18 months until he had pleaded guilty to other charges. Given the defendant’s notoriety, the orders were said to be necessary to maintain the integrity of pending matters but there was a community and media outcry surrounding the secrecy when the information finally became public. Suppression orders have a role to play in criminal procedure but in an age of digital communication, they must be adapted to technological change.

**Suppression of online publicity**

**The Mokbel orders**

Controlling information in an internet age has become more difficult for the courts and has complicated the role of the court reporter and media outlets. As well as knowing what can be published and when, the media must also monitor their web-based material.

For two years blanket suppression orders prevented the reporting of information about the infamous underworld figure Tony Mokbel, including the fact that in September 2009 he was acquitted of the murder of Lewis Moran. A Google search of his name returned over half a million hits. The trial judge refused to permanently stay the proceedings but made a number of blanket suppression orders preventing the reporting of all aspects of Mokbel’s trial, his previous convictions and allegations of his involvement in criminal activities.

The trial judge also ordered the removal of 1,500 articles from media websites (the internet order). Information published on the internet is permanent. It can be cached, copied or mirrored onto other internet sites and stored by search engines such as Google. While the media complied with the court order, tens of thousands of articles on other sites remained available to inquisitive jurors. For this reason, the internet order was set aside by the Court of Appeal. The appellate court relied on the judicial assumption that the jurors are robust and heed judicial directions.

Mokbel’s acquittal prima facie suggests that this jury resisted Mokbel’s bad press and decided the case only on the facts presented to them. Due to jury room secrecy, there is no way of knowing whether or not the Mokbel jury consisted of Googling jurors and the effect, if any, that prejudicial publicity had in the jury room. The potential for prejudicial publicity to change a jury’s verdict also depends on other factors such as the strength of the prosecution’s case. The average Victorian juror is well educated. Common sense would dictate that a jury is therefore unlikely to convict a defendant purely on reputation where the prosecution’s case is not strong. It is the close cases where there is a real risk of prejudicial publicity impacting upon the verdict. Whilst the Mokbel trial is one instance of a jury whose verdict appears to have resisted the bad reputation of the defendant, there has been a growing number of trials where the work of the Googling juror has been made public, which brings into question the Court of Appeal’s confidence in the jury following judicial “don’t search” instructions. Before discussing the Googling juror trials, there is a further chapter in the Melbourne underworld saga that has equally challenged the courts in terms of controlling prejudicial publicity.

**The Underbelly litigation**

Channel Nine was to broadcast *Underbelly*, a docudrama based on the infamous gangland wars in Melbourne in 2008. Jurors in two trials could potentially have watched or be watching Channel Nine’s version of events while contemporaneously hearing evidence in court. The judges in those trials granted orders preventing and limiting the broadcast of the series on television and over the internet in Victoria. Despite the orders, Victorians could download the first episode within half an hour of it being aired in other jurisdictions. A week before the Court of Appeal delivered its decision, all 13

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67 Innes et al, n 60, p 87.
68 The first order was made on 15 April 2009. Further orders were made throughout 2009 and were only lifted on 20 April 2011.
69 News Digital Media Pty Ltd v Mokbel [2010] VSCA 51 at [79].
episodes were available online. Numerous Underbelly books remained on sale across Victoria. This discrepancy may be attributed to the pervasive power of television, and the fact that it is free and easily accessible in most households.\(^{71}\)

Despite acknowledging that Victorians had easy internet access to the series,\(^{72}\) the Court of Appeal did nothing to address the internet issue. In reality, the publicity surrounding the suppression of the series only increased community interest and created demand for pirated copies. The fact that many potential jurors watched highly prejudicial material in the lead up to the murder trials sits uncomfortably with the defendant’s right to a fair trial. If jurors approached their decision-making task with a pre-existing bias, or sought out the series after being empanelled and were influenced by its thrilling content, the fairness of the trial can be brought into question.

**TRIAL BY JURY**

The making of the Underbelly suppression orders and the general plethora of suppression orders in Victoria is at odds with the judicial assertions that juries are robust and will follow judicial instructions to ignore prejudicial publicity. On the one hand, judges suppress information because it is thought that jurors will be influenced by prejudicial publicity; on the other, courts are constantly reiterating that the jury can remain impartial in highly publicised cases. Judicial reliance in a robust jury is now explained.

**The jury and pre-trial publicity**

A basic tenet of jury trials is that the jury must reach its decision impartially, by reference only to the evidence admitted at trial and not by reference to facts or alleged facts gathered from the media or some outside source.\(^{73}\) For this reason, jurors are given guidance – through the form of judicial directions – to put any external information, such as pre-trial publicity, out of their minds. Case law highlights that Australian judges proceed on the basis that jurors can be trusted to follow directions and discharge their duty in accordance with their oath.\(^{74}\) The legitimacy of Australian criminal justice rests upon this judicial assumption. Put simply, unless the courts and the community trust the jury to follow judicial directions, there is no point in having criminal trials.\(^{75}\)

The current position in Australia is that jurors can no longer be considered “exceptionally fragile and prone to prejudice”.\(^{76}\) Jurors discharge their role conscientiously and can remain impartial in the face of prejudicial information.\(^{77}\) Given the shortcomings of sub judice contempt, suppression orders and even judicial directions in a digital age, the jury’s ability to remain impartial is of critical importance.

However, the internet has created a new realm of “outside sources” through which jurors can access prejudicial material about the accused or confusing information about the law. In highly publicised matters, it is very likely that diligent jurors will access information about the case being heard before them. This is problematic because the world wide web contains a wealth of information

\(^{71}\)Vickery J said that “no other source of information, including newspapers, books, radio and the internet, comes close to the pervasive power of television”: *X v General Television Corporation* (2008) 187 A Crim R 533 at [16].

\(^{72}\)*General Television Corporation v DPP* (2008) 19 VR 68 at [7]; 182 A Crim R 496.


\(^{74}\)*R v Glennon* (1992) 173 CLR 592 at 603 (Mason CJ and Toohey J), 614 (Brennan J); 60 A Crim R 18; *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 at 366 (Spigelman CJ, Handley JA and Campbell AJA agreeing); 148 A Crim R 522; *Dupas v The Queen* (2010) 241 CLR 237 at 248-249; 203 A Crim R 186.

\(^{75}\)*Gilbert v The Queen* (2000) 201 CLR 414 at 425 (McHugh J); 109 A Crim R 580.


which would be inadmissible in court. A growing number of cases around the world have had to deal with jurors performing online research. As a result, the Googling juror has emerged, and is recognised by academics and judges alike.

The article will now consider whether there is a sound factual basis for the judiciary’s assumptions that contemporary jurors:
(1) follow judicial directions; and
(2) can remain impartial in the face of extreme prejudicial publicity.

This will be followed by consideration of the pervasive nature of the internet and its known and potential impact on jury deliberations.

Assumptions underpinning the integrity of the jury

Do jurors follow judicial directions?

As Spigelman J stated: “Trial judges of considerable experience have asserted, again and again, that jurors approach their task in accordance with the oath they take … [and] … they listen to the direction that they are to determine guilt only on the evidence before them.” In highly publicised matters it is common practice for judges to give two directions at the commencement of a trial – and often multiple times thereafter. First, jurors are to ignore publicity about the case and secondly they are instructed not to go and do their own research. Despite judicial faith in juries following directions, there are a growing number of reported cases where judicial instructions have been flouted.

These instances have usually involved an earnest juror’s curiosity for the truth to prompt him or her to conduct external investigations, contact witnesses and other persons and refer to unauthorised materials.

In the Melbourne terrorism trial of R v Benbrika, the trial judge repeatedly and unambiguously told the jury that the case was to be decided on the evidence given in the court room. The trial judge rejected two applications to discharge the jury on the basis of the jury having clearly defied these directions. Despite being warned five times (three of these directions explicitly referred to obtaining information from the internet), “Wikipedia” type internet printouts were found in the jury room wastebasket.

The trial judge held that there was nothing overtly noxious in the printouts and then addressed the jury in a non-specific manner to confirm that they could still determine the case impartially. The jury were given another stern reminder not to conduct independent investigations, contact witnesses and other persons and refer to unauthorised materials.


During the Melbourne terrorism trial Benbrika, the trial judge reassured defence counsel that “there is no suggestion that any of the accused were Googled, or anything of that nature.”: Kissane K, “Trial and Error”, The Age online (18 September 2008), http://www.theage.com.au/national/trial-and-error-20080917-4imf.html viewed 6 February 2012. In New Zealand, District Court Judge Harvey issued a partial suppression order specifically tailored to deal with the Googling juror in Police v PIK [2008] DCR 853.

John Fairfax Publications Pty Ltd v District Court (NSW) (2004) 61 NSWLR 344 at 366 (Spigelman CJ, Handley JA and Campbell AJA agreeing); 148 A Crim R 522.


R v Benbrika [2009] VSC 142 at [54].
During deliberations, a new law came into force in Victoria and the trial judge specifically warned the jury that it was now a criminal offence to conduct an enquiry for the purposes of obtaining information about any matter relevant to the trial.\(^{87}\) Despite the threat of imprisonment, a dictionary was retrieved from the jury room. The foreperson confessed that it had been there for a couple of weeks and had been used to look up the meaning of a key word used in the charge.\(^{88}\) His Honour held that while the use of the dictionary may have been inappropriate – as he directed the jury to interpret the term according to its plain English meaning – it had not compromised the trial and therefore did not warrant the discharge of the jury.\(^{89}\) The Court of Appeal reaffirmed that because, in the circumstances, the fairness of the trial had not been compromised, the flagrant juror disobedience did not warrant a new trial. To this date, those jurors have not been charged for breaching the Juries Act 2000 (Vic), and, as discussed below, nor should they be subject to such a sanction.

This case highlights the extent to which jurors will go to fulfil their duty to bring down a correct verdict. There is logic to support the juror’s behaviour of defying clear judicial directions if they feel it is necessary in order to fulfil their higher duty of determining the right verdict, even if this exposes them to criminal sanction.\(^{90}\) It should not be assumed that jurors will follow judicial directions.

Critics have labelled the judiciary’s reliance on jury instructions as “one of the great legal fictions.”\(^{91}\) Studies confirm that despite directions to the contrary, jurors will conduct their own research if they feel it will assist them in coming to the right verdict.\(^{92}\) Some judges of the High Court have acknowledged that directions are not a foolproof remedy to counter the effect of prejudicial publicity.\(^{93}\) The increasing use of suppression orders can also be suggestive of the judiciary not believing their own assertions. Since information about a defendant can be easily accessed online, the increasing temptation for jurors to Google the accused in turn undermines the power of judicial instructions.

**Can jurors remain impartial in the face of extreme prejudicial publicity?**

As media attention is often temporary, it is argued that prejudicial publicity will be subject to the “fade factor” and diminish over time.\(^{94}\) To be influenced by prejudicial publicity, a (potential) juror must first encounter information, remember it and then apply it when reaching a verdict.\(^{95}\)

A secondary argument is that the breadth of information available today may detract a juror’s attention away from prejudicial publicity. Potential jurors are unlikely to take detailed notice of a specific article amidst the “tide of information”.\(^{96}\) A recent juror study conducted in the United Kingdom concluded that while the fade factor is generally a legitimate assumption, it may not apply in

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\(^{87}\) Section 78A of the *Juries Act 2000 (Vic)* provides a penalty of up to 120 penalty units if a juror makes “an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror”. Enquiry is defined in s 78A(5) and includes conducting research by any means, such as using the internet.

\(^{88}\) *R v Benbrika* [2009] VSC 142 at [106]-[110].

\(^{89}\) *R v Benbrika* [2009] VSC 142 at [113]-[118].

\(^{90}\) It is also suggestive of a trial system which is not accommodating the needs of the contemporary jury; see also Horan J, “Communicating with Jurors in the Twenty-first Century” (2007) 29(1) *Australian Bar Review* 75.

\(^{91}\) Ardill, n 40 at 5; see also Bagaric, n 40 at 8.


\(^{95}\) Chesterman et al, n 20, p 74. NSW juror surveys were conducted between 1997 and 2000.

\(^{96}\) Chesterman, n 44 at 143. This point was made by Whealy J in *R v Baladjam* [2008] NSWSC 714 at [48].
high profile cases.\textsuperscript{97} It found that 35\% of jurors in high profile cases recalled pre-trial publicity, of which 20\% said that they found it difficult to put the publicity out of their minds while serving as jurors. Furthermore, while most jurors could not recall any particular emphasis in the pre-trial publicity, 89\% of those who did remembered that it suggested that the defendant was guilty.\textsuperscript{98}

In an internet age, information is no longer transitory.\textsuperscript{99} In cyberspace the news cycle has almost vanished. Media websites, YouTube and search engines provide quick access to current and historic news 24 hours a day, seven days a week.\textsuperscript{100} It is only human to forget details over time; however, within seconds a simple online search can reveal a wealth of prejudicial information, and refresh a juror’s memory.

The second memory argument, that the impact of prejudicial publicity is being diluted by the current tide of information, is likely to have been moderated by the ability of an individual to filter the information received from the internet to a select number of trusted sites that the individual chooses to rely upon.\textsuperscript{101} However, to counter this point, some academics argue that the filtering process will negatively impact on the foundations of a democracy because individuals will only read websites that align with their pre-conceived ideas. For example, potential jurors who hold a prosecution bias will only access websites that confirm their belief that all those charged with criminal offences must be guilty. The internet will therefore feed on the prejudices of the individual, narrow their exposure to different viewpoints and heighten the individual’s prejudices.\textsuperscript{102}

\textit{Are jurors unduly influenced by prejudicial publicity?}

A 1990 New South Wales jury study concluded that jurors are less likely to be influenced by prejudicial publicity than had been feared at that time.\textsuperscript{103} This study and a 1999 New Zealand jury study\textsuperscript{104} provide general support for the judiciary’s faith in the jury’s ability to resist prejudicial publicity. However, the New South Wales study did note that 8\% of verdicts were likely to have been publicity driven, and a further 10\% were possibly influenced by publicity.\textsuperscript{105} These two findings are significant because they identify that publicity does sway verdicts. As the two studies were conducted more than a decade ago (during Google’s infancy and prior to the birth of the Googling juror), the scope for inappropriate juror influence is likely to have grown since then.

A simulation terrorism trial was presented by real lawyers, forensic experts and a judge at the Supreme Court of New South Wales in 2008.\textsuperscript{106} A cross-section of jury eligible citizens were tested as to their levels of pre-trial prejudice and the impact of this prejudice on their verdict. The mock jurors’ “fear of terrorism” was measured as part of the surveying process.

\textsuperscript{97} Thomas, n 92, p 41.
\textsuperscript{98} Thomas, n 92, p 42.
\textsuperscript{99} Spigelman, n 3 at 44.
\textsuperscript{100} Mastromauro M, “Pre-Trial Prejudice 2.0: How YouTube Generated News Coverage is Set to Complicate Concepts of Pre-Trial Prejudice Doctrine and Endanger Sixth Amendment Fair Trial Rights” (2010) 10 Journal of High Technology Law 289 at 327. Spigelman J, \textit{Open Justice and the Internet}, Speech delivered at the Law Via the Internet Conference (Sydney, 28 November 2003); See also Price S, “Harvey’s Online Gag”, \textit{Media Law Journal} (26 August 2008), \url{http://www.medialawjournal.co.nz/?p=150} viewed 6 February 2012.
\textsuperscript{103} Chesterman et al, n 20, p xx.
\textsuperscript{105} Chesterman et al, n 20, p xx.
\textsuperscript{106} Tait D et al, \textit{Juries and Interactive Evidence}, Linkage Project (2008) funded by the Australian Research Council and the Australian Federal Police, the Australian Capital Territory Director of Public Prosecutions and the Australian Institute of Judicial Administration as industry partners.
Jurors with a higher fear of terrorism were certain that the defendant was responsible for the crime (pre-deliberation) compared to jurors with a lower fear of terrorism (this correlation was statistically significant). Additionally, jurors rated as having a higher fear of terrorism were more likely to convict the defendant both prior to and following deliberations, compared to the jurors classified as having a lower fear of terrorism. However, this difference was not statistically significant. Jurors who expressed a higher fear of terrorism in the pre-deliberation survey were four times more likely to return a verdict of guilty than jurors who expressed a lower fear of terrorism.

Whilst this study identifies that jury prejudice is likely to be impacting upon our jury system, the process of deliberation was identified as reducing these biases. Following their mini-deliberations, there was a significant decline in guilty verdicts among both groups and the impact of fear of terrorism on verdicts was also reduced. A follow-up laboratory study was conducted and confirmed the findings of the main study. A fear of terrorism was significantly related to guilty verdicts.

Whilst the results of these two studies are prima facie disturbing for those facing terrorist charges, the fact that these findings are a result of simulations means that in a real case other factors will be working towards ameliorating the jurors’ prima facie fear of terrorism. For example, a full deliberation is likely to redress the negative impact that a fear of terrorism might have on an individual juror even further.

Local research results are also supported by emerging overseas research, confirming that jurors are influenced by prejudicial publicity. United States mock jurors exposed to negative pre-trial publicity were more likely to convict an accused than those exposed to limited prejudicial or neutral publicity. In a simulated study conducted in the United Kingdom it was concluded that evidence of a defendant’s previous conviction(s) can have a significant prejudicial effect on jurors.

The rise of the Googling juror

The Googling juror is challenging the administration of criminal justice around the world. Trials have been aborted in several jurisdictions as a result of jurors conducting online research. Since January 2009, in the United States alone, 21 trials have been overturned or ordered for re-trial as a result of jurors conducting online research. Unless jurors are sequestered, there is nothing restraining them from going home at night and researching aspects of the trial in the privacy of their homes. As such behaviour is difficult to monitor and detect, the true incidence of the Googling juror is unknown. However, as evidenced by the Benbrika jury’s Wikipedia searches (discussed in the previous section), the Googling juror is not an isolated incident.

In R v K, a guilty verdict was quashed and a retrial ordered because defence counsel found out that some jurors had conducted online research. The jurors discovered that the accused – who was being tried for the murder of his first wife – had previously been charged with the murder of his second wife. The online search warranted a retrial. Recently the Victorian Court of Appeal dealt with the issue of jurors who looked up the definition of “beyond reasonable doubt” on the internet. On appeal, the court held that despite the flagrant breach of the judicial direction, the internet definitions

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110 Sharpe and Calman, n 78; Myers C, “Can the Jury Trial Survive Google?” (2011) 25 Criminal Justice 4; Schwartz, n 78.


did not make the standard of proof to be established by the Crown less burdensome and therefore could not have negatively affected the jury’s verdict.\textsuperscript{113} Once again, juror defiance has been forgiven by the courts.

Media law academic, Steven Price has argued that “Googling is almost instinctive and it would be counterproductive to make it a criminal offence or sequester the juries so they don’t have internet access”.\textsuperscript{114} Since most of the risk of prejudicing a trial comes from top Google hits and widely used social networking sites, Price has suggested that “an official should be tasked with sitting down before each trial (and periodically during it) and Googling the defendant’s name. If there’s prejudicial material out there, steps should be quickly taken to have it temporarily taken down”.\textsuperscript{115}

Easy access to the internet together with increasing evidence of the Googling juror suggests that we need to acknowledge, accept and work from the starting point that once empanelled, some jurors will conduct online research.\textsuperscript{116} In many cases independent research by jurors is not conducted to harm the defendant, but rather to obtain as much information as possible to make the most informed decision. Notwithstanding good intentions, jurors risk being exposed to material that is more prejudicial than probative, and may consequently undermine their ability to remain impartial. While some judges and academics have acknowledged the threat of the Googling juror, in practice little has been done to deal with the problem. The main response has come from governments who have made it an offence for jurors to conduct external research.

**The legislative response to the Googling juror**

Three States have responded to the problem of the investigative juror.\textsuperscript{117} In 2008 the *Juries Act 2000* (Vic) was amended to prohibit jurors from making external enquiries and ensure that verdicts are determined solely on the evidence led in court.\textsuperscript{118} Under s 78A of the Act, a juror who makes an enquiry “for the purpose of ascertaining information about a party to the trial or any matter relevant to the trial” may be liable for fine of 120 penalty units. Making an enquiry is not strictly defined but includes using the internet to search for information. In addition, under s 78B, a trial judge may question a juror suspected of breaching the provision to ascertain whether or not enquiries were in fact made.

Bongiorno J, in forgiving the *Benbrika* jury for disobeying his “don’t search” instructions, explained that the jury behaviour was not contemptuous:

There is something faintly ridiculous about criticising lay people who go to a standard reference source for assistance on a question of fact such as the meaning of an ordinary English word when that is exactly what any reasonable person would expect them to do – perhaps especially after the Judge has told them they would need no assistance from him.\textsuperscript{119}

Furthermore, uncovering the “enquiring juror” directly challenges the fundamental principal of jury secrecy. This ill-advised legislation has the potential to encourage defence counsel to play detective and hunt out juror behaviour which might heighten their chances on appeal.\textsuperscript{120} Furthermore, a juror is likely to be discouraged from reporting that a fellow juror has been doing their own research if it means the well-meaning fellow juror could go to jail. Such legislation also impinges upon the rights of the juror – jurors should be free from the threat of sanction if they are to act impartially and

\textsuperscript{113} *Martin v The Queen* (2010) 202 A Crim R 97 at [79], [89].


\textsuperscript{115} Price, n 114.

\textsuperscript{116} *R v K* (2003) 59 NSWLR 431 at [81]; 144 A Crim R 468.

\textsuperscript{117} Section 69A of the *Jury Act 1995* (Qld) prohibits jurors from making enquiries; *Jury Act 1977* (NSW), s 68C makes it an offence for jurors to conduct their own investigations; *Juries Act 2000* (Vic), s 78A also prohibits the making of enquiries.


\textsuperscript{119} *R v Benbrika* [2009] VSC 142 at [114].

\textsuperscript{120} *R v K* (2003) 59 NSWLR 431 at [83]-[84]; 144 A Crim R 468.
without fear of retribution. Community confidence in the justice system is interfered with when citizens are exposed to criminal sanctions by undertaking their civic duty of jury service.

Despite several instances of juror breaches, only one juror has been publically punished. In the jury deadlocked murder trial of Anthony Sherna in 2009, a juror looked up a legal term online. That juror was sentenced to an adjourned undertaking without conviction for 12 months and was fined $1,200. Furthermore, the continued juror defiance suggests that legislative prohibitions on juror investigations are unlikely to eradicate the earnest Googling juror. Juror misbehaviour in recent trials makes judicial faith in the jury following their “don’t search” directions seems like mere rhetoric.

SOLUTIONS TO PROTECT HIGH PROFILE TRIALS IN AN INTERNET AGE

Given that it has become very difficult to control not only information but also jurors, the time is ripe to consider alternatives to maintain the right to a fair trial in Australian criminal justice. The final part of this article considers a range of strategies to better protect high profile criminal trials, and ultimately concludes that the most effective solution lies in reforming the traditional notion of trial by jury.

A national suppression order scheme

The Standing Committee of Attorneys-General recently released the Court Suppression and Non Publication Orders Bill 2010 (Cth) in response to concerns about suppression orders. Clause 3 of the model Bill provides an underlying presumption in favour of the public interest in open justice and recognises publication by means of the internet. Clause 11(2) also provides courts with the extended power to make an order that applies anywhere in the Commonwealth. The ability to make a national suppression order could have potentially avoided the Underbelly saga. However, from a commercial point of view, interstate suppression will further complicate broadcasting and the distribution of national newspapers and magazines. Media outlets would need to run different stories more frequently to avoid breaching such orders.

The Bill also extends the grounds for the making of orders, and provides a catch-all provision that orders can be made where it is “necessary in the public interest”. Concerns have been raised that this broad power will result in more suppression orders. In many cases increasing the number of suppression orders cannot completely prevent the dissemination of prejudicial information. There is a real need to look at other strategies if the right to a fair trial is to be maintained.

Remedial procedures

There are a number of remedial tactics that can be employed at various stages of a trial to maintain the impartiality of the jury. As judicial directions have been considered above, they will not be discussed here, but they are one of the most relied upon judicial remedies for maintaining jury impartiality. The experience of the American courts provides a good starting point to analyse the effectiveness of a remedial approach.

123 “Publish” is defined as “providing access to the public or a section of the public by any means, including by … (d) broadcast or publication by means of the internet”.
124 Court Suppression and Non-publication Orders Bill 2010 (Cth), cl 8(1)(e) provides that an order may be made where “it is otherwise necessary in the public interest for the order to be made and that the public interest significantly outweighs the public interest in open justice”.
Voir dire

In the United States, jurors are subject to extensive voir dire examinations or “interrogations” before being empanelled. While providing a means of identifying and excluding a juror on the basis of bias, a comprehensive voir dire increases the costs and duration of criminal trials and relies on jurors admitting their prejudices to the court. For example, in the OJ Simpson trial, jury selection took two months and involved jurors completing a 79-page questionnaire before being empanelled.

The extensive investigation of jurors, and the employment of jury consultants to assist in the process, raises a number of ethical issues. Ultimately, the empanelled jury in the United States may not reflect impartiality but rather the most tactical decisions by the party with the deepest pockets. As criminal trials are already lengthy and costly, it seems unwise to adopt a mechanism that will further heighten Australia’s access to justice problem.

Sequestration of jurors

Locking up jurors during deliberations was common practice in Australia a few decades ago but less common today. In theory, sequestration may stop a juror from conducting research outside court hours and thereby assist with the problem of the Googling juror. In practice, however, the popularity of smart phones and similar gadgets means that people are able to connect to the internet anywhere and everywhere, including the jury room. The sequestration of jurors will further increase the costs of jury trials and the burden of serving as a juror. This remedy is unlikely to make a return to Australian criminal justice.

Change the trial venue/delay the commencement of the trial

Australian judges have the power to relocate a trial venue or delay the commencement of a trial. These remedies may still be effective in remote locations and/or where a matter has received little publicity. However, they also rely on the “fade factor”, which as discussed above, has been diminished by the availability of online information. It is difficult to contend that a change of venue or temporary adjournment can effectively protect the widely reported trial of an infamous defendant.

Permanent stay of proceedings

The permanent stay of proceedings lies at the extreme end of the remedial spectrum. The granting of this remedy presents an obvious conundrum – the more notorious the accused, the less likely that he or she will be brought to justice. Moreover, defendants may be encouraged to seek out media attention or engage in particularly heinous crimes to lay the foundations for an upcoming stay application. Whilst possible, the High Court has made it abundantly clear that it is very unlikely that a permanent stay on the basis of prejudicial publicity will be granted.

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126 Chesterman, n 44 at 131.
127 In 1984 the average amount of time spent empanelling a jury in California was six weeks, compared to under 30 minutes in New South Wales; Weems P, “A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California” (1984) 10 Sydney Law Review 330 at 343-347.
130 Jury consultants for OJ Simpson obtained data from the lengthy jury questionnaire, jurors’ body language and responses during the voir dire and other external sources. This data was put into a computer program which then ranked the potential jurors according to their likely sympathy to the defence. Linder, n 129.
132 The United States is the only country where sequestration still commonly occurs; Spigelman, n 8 at 162.
133 Spigelman, n 26 at 164.
Increase media sanctions

Some judges believe that the problems surrounding prejudicial media publicity are caused by the “deplorable conduct of the mass media, individual journalists and commentators”. Ashley J in the Dupas appeal suggested that the media was doing unacceptable damage to the fundamental tenet of the criminal justice system. He further suggested that the courts must face up to and address the source of the problem: media misbehaviour. His Honour did not elaborate as to how this should be done but given that anyone can be a publisher on the internet, media sanctions would not be an effective way to manage the problem that now goes well beyond the behaviour of journalists and media outlets.

Australian judges have a number of remedial mechanisms available to cure the effect of prejudicial publicity. However, in practice they are not foolproof, and in some circumstances increase the costs and delays associated with the administration of criminal justice. Where prejudicial publicity can be neither prevented nor remedied, reforming the traditional system of trial by jury may provide a more effective strategy to maintain the right to a fair trial.

Alternatives to trial by jury

Mixed jury

Mixed juries may provide a novel and effective solution to the challenges created by widespread prejudicial publicity. This form of jury involves lay assessors sitting alongside professional arbitrators and reaching a verdict together. The professional arbitrators may be trained jurors, assessors, facilitators or judges. The mixed jury has a number of recognised benefits which will not be addressed here. Rather, the remainder of this section will focus on the use of the mixed jury to deal with the effect of prejudicial publicity in highly publicised trials. The notion of the mixed jury is not new and can, in its early form, be traced back to 12th century England. In the 16th century the mixed jury was used to address potential racial prejudice where a party to the proceedings was from a minority race. In such cases, the empanelled jury consisted of half natives (being Englishmen) and half members of the minority’s community.

The modern day mixed jury has its roots in civil law countries such as Germany and France, and is becoming more common around the world. After extensive study, Japan rejected the common law jury in favour of the mixed jury. The Japanese jury in contested cases is composed of six randomly selected members of the community and three judges. In simple terms, a bare majority can convict the defendant, so long as one of the judges sitting on the jury supports the verdict. A recognised potential disadvantage of the mixed jury is that lay jurors may be influenced by their professional counterparts. This criticism has been contentious in Japan where a strong societal hierarchy exists; however, because the mixed jury is so new, there is no available evidence to determine its impact.

139 Ramirez, n 138 at 781.
140 Park, n 136 at 532.
141 Katsuta, n 136 at 513.
143 Fukurai, n 142 at 324.
144 Park, n 136 at 540.
Two other disadvantages exist for the introduction of the mixed jury. First, community confidence in the legal system might be undermined by the inclusion of professional arbitrators in the jury room. This argument also applies to trial by judge alone because both remove, to some extent, the random inclusion of community members in the justice system. A further disadvantage, in comparison to trial by judge alone, is that the mixed jury is a more expensive model.

The concept of the mixed tribunal is not foreign to Australia. In the Victorian Civil and Administrative Tribunal (VCAT), matters concerning medical practitioners — such as serious disciplinary breaches — will be determined by a tribunal of two medical practitioners and a tribunal member who is legally trained. The potential for a judge to unduly influence professional jurors, like those used in VCAT is less likely compared to the potential influence a judge may have over randomly chosen jurors. If the mixed jury was introduced in Australia, regulatory safeguards and training could assist professional arbitrators sitting on the jury to discharge their role as ordinary jurors and to refrain from dominating deliberations.

Throughout this article it has become clear that no mechanism provides a perfect solution to the challenges created in the 21st century. However, it seems that in alleviating the effects of prejudicial publicity, the benefits of the mixed jury outweigh the disadvantages. There are two significant advantages of using the mixed jury in highly publicised criminal trials. First, having professional arbitrators within the jury room is likely to prevent lay jurors from sharing their own research or exposure to publicity about the case with other jurors. Professional arbitrators sitting on a jury can be expected to put an immediate end to any conversation about information gleaned through external enquiries. In addition, lay jurors are likely to be hesitant about effectively admitting that they have breached their oath and performed independent research before a professional arbitrator. Either way, the effect is that inadmissible and prejudicial material is isolated and prevented from directly factoring into deliberations. While individual jurors cannot be stopped from conducting their own research, the inclusion of a professional arbitrator within the jury can go a long way towards maintaining its integrity and impartiality.

A second benefit of the mixed jury is that professional arbitrators can provide additional guidance in the jury room. Research has shown that jurors conduct their own enquiries to clarify evidence, verify expert testimony or fill in unexplained gaps. In criminal trials jurors may address handwritten questions to the judge. Nevertheless, there is research to suggest that jurors would like to be able to ask more questions during proceedings. Professional arbitrators, as members of the jury, may be able to explain procedural uncertainties to other jurors away from the intimidating court room environment. The theory underlying this benefit is that jurors who have a greater sense of understanding during the trial, will be less tempted to seek out additional information on the internet.

Judicial systems around the world are reforming the administration of justice and adopting variations of the mixed jury. The mixed jury model retains some of the historical and social importance of trial by jury and offers an additional layer of protection in trials which are subject to extreme publicity. Like trial by judge alone, the mixed jury could be available at the election of the defendant. Constitutional implications for the introduction of the mixed jury would need to be considered. For example, s 80 of the Australian Constitution provides that federal indictable offences must be determined by a jury trial. The High Court held in Brown v The Queen that a defendant charged with such an offence could not elect to be tried by judge alone. It may be that the chosen form of the mixed jury would not comply with the constitutional definition of trial by jury for federal indictable offences.

While empirical research would be desirable in order to determine its viability in Australia, a form of the mixed jury may be a successful strategy to strengthen the right to a fair trial in an internet world and beyond.

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146 Victorian Civil and Administrative Tribunal Act 1998 (Vic), Sch 1, Pt 5A, s 11A; Health Practitioner Regulation National Law (Victoria) Act 2009 (Vic).
147 Horan, n 90 at 91.
**Trial by judge alone**

Trial by judge alone may provide an alternative where, as a result of extensive publicity, it is believed that it is impossible to empanel 12 impartial jurors. A criminal defendant can elect to be tried by judge alone in five Australian jurisdictions.\(^{149}\) The Queensland Criminal Code was amended in 2008 to provide for judge alone trials, and is the only Act to provide this option specifically where “there has been significant pre-trial publicity that may affect jury deliberations”.\(^{150}\)

In 2009, Dennis Ferguson was tried by judge alone in Queensland. Ferguson was found guilty of sex offences against children between 1998 and 2003, and as result was subject to widespread and extremely prejudicial publicity. In 2005 he was charged with another offence of the same nature. At first instance, Ferguson successfully obtained a permanent stay of proceedings on the basis of prejudicial pre-trial publicity. The stay was overturned by the Queensland Court of Appeal, and leave to the High Court was subsequently refused. Consequently, Ferguson elected to be tried by judge alone, and was ultimately acquitted of the 2005 charge.\(^{151}\)

The availability of judge alone trials for serious criminal matters has been criticised. In 1986 the Supreme Court of South Australia conducted its first judge alone murder trial.\(^{152}\) At the conclusion of his judgment, White J condemned judge alone trials for murder and treason charges and suggested that the Juries Act be amended to remove that option.\(^{153}\) His Honour was of the opinion that such serious charges were matters of fundamental community importance and should be determined according to social values, by ordinary members of the community.

Trial by judge alone was introduced in the Australian Capital Territory (ACT) in 1993 with the intention that it be limited for use in matters where pre-trial publicity could prejudice a fair trial or those involving complex and lengthy legal issues. The original intention is not being heeded with over half of all ACT defendants electing a trial by judge alone. The ACT will introduce legislation this year to remove the right to trial by judge alone in serious cases such as murder, manslaughter and sexual offences. The purpose of the change is to ensure that community standards are better reflected in the criminal justice system by the use of jury trial for serious charges.\(^{154}\)

Removing the jury in highly publicised matters assumes that “obviously judges are more capable than jurors of putting aside prejudicial matter, including public prejudice”.\(^{155}\) This is far from proven. Despite the judiciary’s training and most concerted efforts, a judge sitting alone may still be influenced by prejudicial information.\(^{156}\) Judges, like jurors, are only human and may be unaware of subconscious bias. As the jury room provides a forum for discussion, a group of 12 individuals may be more successful at managing and dealing with bias than a single judge.\(^{157}\) Until research comparing judge and jury decision-making is conducted, the extent of bias is subject to guess-work.

In *R v Fardon*, a 2010 Queensland case similar to *Ferguson*, Muir JA noted in dicta that trial by judge alone provides “a useful mechanism by which the court can avoid the possibility of an unfair

\(^{149}\) Criminal Procedure Act 1986 (NSW), s 132; Criminal Procedure Act 2004 (WA), s 118; Supreme Court Act 1933 (ACT), s 68B; Juries Act 1927 (SA), s 7; Criminal Code Act 1899 (Qld), ss 614-615. Note that the option of electing to be tried by judge alone is not absolute, and subject to conditions.

\(^{150}\) Criminal Code Act 1899 (Qld), s 614(4)(c).

\(^{151}\) *R v Ferguson* (unreported, District Court of Queensland, Wolfe CJ, 4 March 2009).


\(^{154}\) Australian Capital Territory Department of Justice and Community Safety, Reform to Judge Alone Trials, Media Release (12 February 2011).

\(^{155}\) *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25 at 102 (Mason J).


\(^{157}\) Horan, n 90 at 78.
The most attractive aspect of this option is the fact that it would be available only on the request of the defendant and the sanction of the trial judge. In this way, it does not take away the right of every defendant to a trial by one’s peers. Moreover, the Queensland experience illustrates that very few “no jury orders” have been made since the legislation was introduced in 2008. This is the most cost effective alternative and for this reason it is asserted that giving Australian defendants in high profile trials this option is the most attractive option for reform.

Trial by judge alone effectively removes the threat of the Googling juror; however, it may not guarantee the impartiality of the decision-maker. Moreover, it eliminates an historic element of the legal system and denies the community the right to participate in the administration of criminal justice. Jurisdictions without juries suffer from a lack of community confidence in their legal systems. Any move away from trial by jury should be only enacted following thorough investigation and a proven need for reform.

CONCLUSION

Trial by jury has been caught in the world wide web. The traditional approach of preventing prejudicial publicity is not coping with the amount and ease of availability of information in the 21st century. With the press of a button on a juror’s telephone, a Google search of a high profile defendant can return tens of thousands of results. While sub judice contempt and suppression orders have a role to play in criminal procedure, they are not foolproof mechanisms for ensuring a fair trial for infamous defendants because anyone can publish on the internet.

Current research and recent incidence of juror misbehaviour combine to undermine the judicial assumption that jurors follow judicial directions and are capable of resisting the undue influence of prejudicial publicity in high profile cases. Judicial directions as to prejudicial publicity, even if they were followed, are an insufficient remedy. The research suggests that there is a real likelihood that jurors will bring their prejudices to a trial involving an infamous defendant. Such prejudices are likely to have been heightened by pre-trial publicity. Whilst processes such as the group decision-making nature of deliberation have been identified as providing a means to alleviate such prejudices, the extent of this alleviation remains unknown.

Legislative responses to the rise of the Googling juror have already been shown to be ineffective in stopping a juror’s desire for more information. Such legislation is also repugnant to the fundamentals of Australia’s jury system.

It is imperative that a criminal trial is fair, and consequently determined by an impartial decision maker. New technological conditions are challenging the courts’ ability to deliver on this imperative. There is a real need to look beyond traditional sanctions and prevention if the right to a fair trial is to be maintained. Remedial mechanisms have their place in trial management, but in cases that are the subject of extreme publicity, a more interventionist approach towards the jury trial may be required. Giving the infamous defendant the option of a trial by judge alone or a trial by a mixed jury are potential solutions to the problem. Technology is likely to encroach further upon the fairness of jury trials and these alternatives to trial by jury should be seriously considered as a way to protect the right to a fair trial in the future.

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158 R v Fardon [2010] QCA 317 at [45].  
159 Queensland Law Society, Submission No 15 to the Standing Committee of Law and Justice, Parliament of New South Wales, Inquiry into Judge Alone Trials under s 132 of the Criminal Procedure Act 1986 (7 July 2010).  