IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B18 of 2015

ON APPEAL FROM THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

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BETWEEN:

LESLIE GLYN SMITH

Appellant

and

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THE QUEEN

Respondent

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APPELLANT'S SUBMISSIONS

Filed on behalf of the Appellant
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Part 1: Certification

1. This submission is in a form suitable for publication on the Internet.

Part II: Issue

2. This appeal raises for the Court's consideration the issue of whether the requirements of procedural fairness oblige a trial judge who has received a note from the jury which discloses its voting pattern to disclose the precise contents of the note to counsel. In particular, should a trial judge do so before determining whether to continue to permit the jury to further deliberate and return a unanimous verdict, permit the jury to return a majority verdict or discharge them.

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Part III: Section 78B of the *Judiciary Act 1903*

3. The appellant has considered the matter and no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Citations

4. Primary judgment: *R v Smith,* trial before Shanahan DCJ, 18-24 February 2014, District Court, Townsville (unreported); and in the Queensland Court of Appeal (**QCA**) judgment: *R v Smith* [2014] QCA 277 (**the decision below** or ***Smith***).

20 **Part V: Facts**

5. On 24 February 2014, the appellant was convicted after a trial on a rape charge by a jury's majority verdict (11:1).[1] He was sentenced to five years' imprisonment with a suspension after half that time.[2]

6. On 7 November 2014, the QCA[3] dismissed the appellant's conviction appeal.[4]

7. The evidence at trial is summarised by Holmes JA in her Honour's reasons for the decision below (paragraphs [3] to [23]). The issues for determination by the jury in reaching a verdict were consent and whether the appellant had an honest and
30 reasonable mistaken belief as to consent.[5]

8. The course of jury deliberations leading to the verdict being taken was:
   (a) The jurors were sworn on 18 February 2014. There is no transcript record of the oaths taken.[6]
   (b) The jury retired to consider its verdict at 11.14am on Friday 21 February 2014.[7]

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[1] 24.02.14 Transcript verdict T2. As permitted by s 59A *Jury Act 1995* (Qld).
[2] 24.02.14 Sentencing Remarks T3.
[3] Per Holmes JA with whom Philippides and Dalton JJ both agreed, Philippides J also giving separate reasons.
[4] *R v Smith* [2014] QCA 277 ('*Smith*').
[5] Section 24 *Criminal Code* (Qld).
[6] Presumably what is set out in s 22 *Oaths Act 1867* (Qld) occurred.
[7] 21.02.14 Transcript redirections T22 L15.

(c) At 3.07pm that afternoon, the jury was permitted to disperse and return on the following Monday to resume deliberations. In doing so, the trial judge warned: "You shouldn't talk to anyone at all about the case or any of the decisions you've got to make or any thoughts you've got about the case, and that also includes any one of your number at this stage."[8]

(d) At 9.00am on Monday 24 February the jury resumed deliberations.[9]

(e) At 12.31pm, the jury sought and received further directions, including as to the meaning of 'reasonable doubt'.[10]

(f) At 2:30pm, the jury sent a note to the trial judge, which indicated that it could not reach consensus and asked for his Honour to "please advise" it.[11] The jury was given a '*Black* direction'[12] and asked to resume deliberations.[13]

(g) At 4.20pm, the jury sent a further note to the trial judge. The trial judge advised the parties in open court that the information in the note indicated that "the jury is still not in total agreement" and that the note "disclosed their voting pattern which I don't intend to publish any further".[14] His Honour stated that as at 4:10pm, eight hours of deliberation had elapsed since the jury retired to consider its verdict. Neither party disagreed with that calculation, nor questioned his Honour's declaration that he did not intend to disclose the voting pattern.[15]

(h) No application for the discharge of the jury was made by either counsel.

(i) At 4.25pm, the trial judge advised the jury that because of the time that had passed, the law allowed a majority verdict of 11:1, and asked the jury whether a majority verdict might "resolve the situation" and whether they would like further time to consider. The jury speaker responded that "you could probably give us about half an hour and we can [indistinct]."[16]

(j) At 4.44pm, the jury announced their decision to convict the appellant by a majority of '11:1'.[17]

9. No direction was given to the jury concerning any prohibition or restriction upon the disclosure of jury information *to the court*. Instead, they were only told:

> "If you need any further directions on the law, again, all you need to do is ask. I ask if you have any requests that you reduce them to writing so that they can be considered before you are brought back in the court room."[18]

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[8] 21.02.14 Transcript redirections T24.
[9] 21.02.14 Transcript redirections T25.
[10] 24.02.14 Transcript redirections T5-6.
[11] 24.02.14 Transcript redirections T6. Jury note marked #F for Identification.
[12] *Black v The Queen* (1993) 179 CLR 44.
[13] 24.02.14 Transcript redirections T7.
[14] *Smith* at [57]; 24.02.14 Transcript redirections T8 L5-11.
[15] *Smith* at [57]; 24.02.14 Transcript redirections T8-9.
[16] 24.02.14 Transcript redirections T10 L5-30.
[17] 24.02.14 Transcript verdict T2.
[18] 21.02.14 Transcript redirections T22 L5-11.

Part VI: Argument

Introduction

10. In the decision below, the QCA found the course of proceedings concerning the jury's return of a majority verdict, following the jury's note containing its voting pattern, unexceptionable. In doing so the court declined to follow the approach taken to the issue raised in this appeal by the Victorian Court of Appeal (**VCA**) in *LLW v R* (***LLW***)[19] and a majority of that court in *HM v R* (***HM***).[20]

11. The appellant submits that the QCA erred in so doing because:

(a) There is no prohibition, including in the *Jury Act 1995* (Qld), for the disclosure by a jury to a trial judge of its voting pattern, nor thereafter by a judge to counsel.

(b) The practice followed in Queensland – and indeed in other States – forbidding disclosure by a trial judge to counsel of jury information (including the votes cast), which information has been disclosed by the jury to the judge, erroneously placed reliance upon the British common law.

(c) The statutory framework in Queensland was not different, in any practical sense, from that in place in Victoria.

(d) The "voting pattern" was relevant to, at least in the sense that it was capable of influencing, the discretions still required to be exercised by the trial judge at the appellant's trial.

(e) The QCA decision did not give sufficient weight to the appellant's right to procedural fairness, and therefore, to a fair trial.

(f) A miscarriage of justice occurred in the appellant's trial.

Disclosure of jury information under the Jury Act 1995

12. In Queensland, the *Jury Act 1995* (**the Act**) governs the workings of juries. The Annexure to this outline contains the relevant provisions.

13. Section 70 is of most significance in considering the restrictions imposed by the Act on the disclosure of jury information. It concerns the 'confidentiality of jury deliberations'. It regulates the disclosure of "jury information", which is defined to include "information about statements made, opinions expressed, arguments advanced, or votes cast, in the course of a jury's deliberations."[21]

14. It essentially contains three offences intended to protect jury deliberations. Two are aimed at preventing the publication of jury information *to the public*: ss 70(2) and (4) and the other is aimed at protecting individual jurors from being harassed for jury information: s 70(3).

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[19] (2012) 35 VR 372. The VCA comprised Maxwell P, Weinberg JA and Williams AHA.

[20] (2013) 231 A Crim R 349; [2013] VSCA 100. The majority comprised Redlich JA and Kaye AJA. Whelan JA dissented.

[21] Subsect. 70(17) *Jury Act 1995.*

15. The phrase "to the public" as used in ss 70(2) and (4) is not defined, but its ordinary meaning within the context of this statute does not include a written note to the trial judge. The secondary materials to the Act show that the provision was intended to prevent the exposure of jury deliberations in the media.[22]

16. Thus, none of the prohibitions touch upon a jury's disclosure to a court, particularly privately to a judge. To the contrary, disclosure to, and solicitation by, the court is facilitated by s 70(6). The focus of that provision is to enable the "proper performance of the jury's functions," with disclosure and solicitation of such information permitted as necessary to achieve that function. The words "to the extent necessary" are facilitative of the "proper performance of the jury's functions".

17. Additional protections are contained in the Act. Of most relevance for present purposes is s 50 of the Act, which requires jury members to be sworn, *inter alia,* "not to disclose anything about the jury's deliberations except as allowed or required by law." Section 70(6) is such a law. The jury at the appellant's trial was 'allowed', indeed encouraged, to write any questions or further directions needed down and was not warned about disclosing its voting patterns.

18. Finally, s 54 prohibits a person (other than a juror or the officer of the court who has charge of the jury) from communicating with any juror whilst the jury is kept together, without the judge's leave.[23]

19. The Act does not prohibit a juror or the jury from disclosing jury information (particularly when made in a note) to a judge. Whilst it may have been irregular (in the sense that it may not be common or ordinarily done or sought), what the jury did in the appellant's case by including details of its voting pattern in its note to the judge, did not breach the Act, nor did it offend any rule of practice.[24] In fact, the jury did what the trial judge specifically asked it to do, 'reduce (any request they may have for directions) to writing'.

20. Neither does the Act place any limitation upon a judge who has received jury information. Revealing jury information in open court does not easily fall to be considered as a publication "to the public" (s 70(2)), but disclosure by a trial judge to counsel in chambers, or in a closed court, or by passing the note to counsel in court, certainly does not. Neither s 70 nor any other provision in the Act prevents "the disclosure (by a trial judge) of votes cast by the jury"[25] to trial counsel.

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[22] Second reading speech, the Hon. MJ Foley – member for Yeronga, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts, 14 September 1995, Hansard, p210-211.

[23] Subsect. 54(1).

[24] NB. Since the decision in this case in the Court below, the Queensland Supreme Court Benchbook has added such a recommendation for trial judges.

[25] Respondent's submission in opposing special leave in this Court, at [16] and re-iterated in oral argument *Smith v The Queen* [2015] HCATrans 84.

Common law: non-disclosure of jury information – Queensland and other States

21. In the decision below, Holmes JA stated that "generally speaking, the view has been that jury numbers should not be revealed to trial judges, and that where they are, the judge should not communicate them to counsel."[26] Her Honour referred to the Queensland decision of *R v Kashani-Malaki*[27] along with the New South Wales decision of *R v Yuill*[28] and the Victorian decision of *R v Black, Watts and Black.*[29]

22. In *Kashani-Malaki,* McMurdo P said the following, in obiter remarks, citing *R v Black,*[30] *R v Gorman*[31] and s 70 of the Act:[32]

> "If (the jury's note) concerned information confidential to the jury room such as voting figures, that part of the note should not have been disclosed in open court."

23. Both *Yuill* and *Black* dealt with a failure on the part of a trial judge to properly or accurately disclose a note provided by the jury, in circumstances that led to a miscarriage of justice. Whilst neither decision dealt with the disclosure of voting figures, both applied the following principle, which in *Yuill* was described as follows:[33]

> "It has always been the basic rule that the contents of any communication between the jury and the trial judge must be disclosed to the parties in open court and recorded in the transcript ... There are two exceptions to the basic rule. The first is where the communication concerns some subject which is unconnected with the issues which the jury have to determine ... The second is where the communication concerns some subject about which it was inappropriate for the jury to have communicated with the judge – the most obvious example being a disclosure of the voting figures when quite properly informing the judge of the existence of a disagreement."

24. In the New South Wales decision of *R v Burrell,*[34] following *Yuill,* a juror had sent a note to the trial judge stating that he/she did not feel the deliberations were genuine, felt intimidated and the subject of unpleasant behaviour. Parts of the note were not disclosed to counsel because the trial judge considered that they impermissibly referred to the manner in which the jury was undertaking its deliberations.[35] The issue to be determined was whether the trial judge erred by thereafter giving a *Black* direction, which may have increased the pressure upon the juror who sent the note, rather than discharging the jury because of the disclosures

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[26] *Smith* at [81].
[27] [2010] QCA 222.
[28] (1994) 34 NSWLR 179.
[29] (2007) 15 VR 551.
[30] Ibid.
[31] [1987] 2 All ER 435.
[32] *Kashani-Malaki v R* [2010] QCA 222 at [43] per McMurdo P.
[33] *R v Yuill* (1994) 34 NSWLR 179 at 190; *R v Black* (2007) 15 VR 551 at 554-555.
[34] (2007) 190 A Crim R 148.
[35] *Ibid* at 206-207.

contained in the note.[36] The trial judge was not found to have erred in giving a *Black* direction and then taking a verdict, McClellan CJ at CL said:[37]

> "... in most cases any communication between the jury and the judge should be disclosed in full to counsel for both parties. The exceptions are confined ... This rationale flows logically from the "fundamental requirement of the administration of the criminal law that the trial and every aspect of the trial must take place in open court.... However, there are occasions when disclosure is not appropriate. It has never applied to material which discloses the actual deliberations of the jury. As was noted in [*R v Smith* [1982] 2 NSWLR 697 at 612], when the subject matter of a jury note does not "inhere in or relate to the resolution of the issues joined between the Crown and the accused" it is a matter for the discretion of the trial judge as to whether or not to disclose the note to counsel. It is neither appropriate nor advisable for a judge to disclose a note that relates solely to the deliberative processes of jurors inter se. The deliberations of the jury are not a matter upon which the Crown and the accused can join issue, because it is not a subject in respect of which evidence will be admitted by the court.
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> ... It has always been the case that it is inappropriate for the jury to disclose their deliberative process to the judge. It would be equally inappropriate if a judge was to further the error by disclosing the jury's deliberative process to counsel. Unless a jury note reveals some irregularity upon which submissions would be of assistance, the only purpose served by the disclosure of the note would be to dispel any impression of secrecy. Since for sound policy reasons a jury's deliberations are required to be secret, disclosure must be confined."

25. His Honour had earlier in his decision noted the policy reasons behind the secrecy requirements. They included the protection of the jury's legitimacy, of which an important element is that the jury's verdict is final and, that juries be shielded from inappropriate external influences and protected from external oversight and challenge.[38]

26. In doing so, his Honour referred to *R v Potier*,[39] which in turn cited *R v SKAF*.[40] These two cases were, however, dealing with a different aspect of the secrecy attaching to jury deliberations: the taking of evidence from former jurors as to their deliberations, in the course of subsequent inquiry into the propriety of those deliberations (referred to as "the exclusionary rule"). In that context, the need for secrecy attaching to jury communications was described in *SKAF*, following review of authorities dealing with that aspect, as being "based on the need to promote full and frank discussion amongst jurors, to ensure the finality of the verdict, to protect jurors from harassment, pressure, censure and reprisals, and (to a degree) to maintain public confidence in juries."[41] None of these considerations looms large in

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[36] *Burrell* at 210, [252], 219 [297].
[37] At 212 [263], [265].
[38] At 210-211 [256].
[39] [2005] NSWCCA 336 at [12], [457]-[460].
[40] (2004) 60 NSWLR 86 at 92-93.
[41] *R v SKAF* (2004) 60 NSWLR 86 at 92.

the context of a note from the jury to the trial judge seeking assistance containing its voting pattern at that point in its deliberations.

27. In *R v Millar (No. 2),*[42] the QCA rejected a ground of appeal challenging the taking of a majority verdict after it was revealed in a note to the judge – which note was read out to counsel in open court – that the numbers were 10/2. Gotterson JA cited the South Australian decision of *Deemal-Hall v DPP (Cth),*[43] which considered the giving of a *Black* direction and taking of a verdict after the same disclosure, for the following proposition:[44]

> "It is a well-established exception to the general rule that communications from the jury should be disclosed in open court but that trial judges ought to keep jury voting figures to themselves in the unfortunate circumstance that they are made aware of them."

28. *Kashani-Malaki*, *Yuill, Burrell, Black* and *Deemal-Hall* all relied upon the British case of *R v Gorman*[45] (***Gorman***) for those propositions, with *Yuill* and *Deemal-Hall* also noting *R v Townsend*[46] (***Townsend***).

29. In *Gorman,* the issue was whether a trial judge had to disclose to counsel the voting numbers contained in a note from the jury, which indicated it was incapable of reaching a verdict. In that case, a majority verdict had already been allowed and the only additional order that could be made was to discharge the jury. Lord Lane CJ upheld the approach taken by the trial judge, which was in line with the approach recommended by Waller LJ in *Townsend,* stating "it would be clearly undesirable for information as to voting figures to be made public." His Honour then went on to set out three propositions regarding a trial judge's obligations with respect to communications from the jury:[47]

> "First of all, if the communication raises something unconnected with the trial, for example a request that some message be sent to a relative of one of the jurors, it can simply be dealt with without any reference to counsel ...
>
> ... Secondly, in almost every other case a judge should state in open court the nature and content of the communication which he has received from the jury and, if he considers it helpful to do so, seek the assistance of counsel. This assistance will normally be sought before the jury is asked to return to court, and then, when the jury returns, the judge will deal with their communication. *Exceptionally if, as in the present case, the communication from the jury contains information which the jury need not, and indeed should not, have imparted, such as details of voting figures, as we have called them, then, so far as possible the communication should be dealt with in the normal way, save*

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[42] (2013) 227 A Crim R 556.
[43] (1995) 65 SASR 495 at 506.
[44] *R v Millar (No.2)* (2013) 227 A Crim R 556 at 562 [27] per Gotterson JA.
[45] [1987] 2 All ER 435 per Lord Lane CJ, who delivered the judgement of the Court of Appeal, which also comprised Kennedy and Roch JJ.
[46] (1982) 74 Cr. App. R. 218. Lord Justice Waller delivered the judgment of the Court of Appeal, which also comprised of Jupp and Waterhouse JJ.
[47] [1987] 2 All ER 435 at 439-440.

> *that the judge should not disclose the detailed information which the jury ought not to have revealed.*
> We may add, before parting with the case, that the objects of these procedures, which should never be lost sight of, is this: first of all, to ensure that there is no suspicion of any private or secret communication between the court and jury, and secondly, to enable the judge to give proper and accurate assistance to the jury on any matter of law or fact which is troubling them. If those principles are borne in mind, the judge will, one imagines be able to avoid the danger of committing any material irregularity." (emphasis added)

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30. In *Townsend*, the challenge was to an earlier trial in respect of the same charge where the jury had been discharged after it could not reach a unanimous verdict. The jury had given the bailiff a note that indicated a disagreement and disclosed the voting numbers. The trial judge instructed the bailiff to tell the jury to continue their deliberations until a unanimous verdict could be reached (it not being possible at that stage for a majority verdict to be entered). Counsel for the accused was not informed of the note until after the jury had returned a verdict of guilty. Waller LJ held that this was a material irregularity in the trial, applying *R v Lamb*[48] where a similar situation was considered. Waller LJ set out the appropriate procedure for the
20 circumstances under consideration and stated:

> "On receipt of the note from the jury indicating that there was a division of opinion the judge should have called the jury into court in the presence of the defendant and his counsel and indicated to them without disclosing in public the precise contents of the note (this would be clearly undesirable) that he had received a note showing that there was a division of opinion within the jury and telling them it was not possible at that stage to accept a majority verdict and asking them to retire again and to endeavour to reach a unanimous verdict."

30 **31.** No authority was cited in *Townsend* and *Gorman* for the propositions for which they now stand. Neither did the judgments refer to s 8 of the *Contempt of Court Act 1981* (UK), which applied by the time of the *Townsend* decision on appeal. Its text is set out in the Annexure to this outline. Section 8 was enacted following the case of *Attorney General v New Statesman & Nation Publishing Co. Ltd,*[49] which held that the publication of an article disclosing the content of jury deliberations during a high profile trial of a politician was not a contempt of court.[50] In its original form,[51] s 8 prohibited publication of jury deliberations, disclosure of jury deliberations with a view to them being published or with knowledge that they would be published, and solicitation of disclosure of jury deliberations with the intention to publish the
40 information. During the parliamentary process, the provision was substantially changed and extended to prohibit *any* disclosure or solicitation of disclosure of jury

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[48] (1974) 59 Cr. App. R 196.
[49] [1981] QB 11.
[50] Such breaches being of "rules of conduct" prior to the enactment of s 8: see p.169-170 E. Campbell *Jury Secrecy and Contempt of Court* Vol. 11 Monash University Law Review 169 December 1985.
[51] *Contempt of Court Bill 1980* (UK).

deliberations, regardless of whether the information would be published or was intended to be published.[52]

Conclusions on disclosure of jury information

32. This history shows that the reliance upon *Townsend* and *Gorman* to extend notions of jury secrecy to disclosures made during the trial by a jury to the trial judge in seeking assistance to reach a verdict (in Australia and particularly in Queensland) is misplaced for the following reasons.

33. Firstly, there is a particular legislative history behind s 8 of the *Contempt of Court Act 1981* which reveals a distinction between disclosures "to the public" and those made to a court during the course of a jury fulfilling its function in ongoing proceedings. There is a broader prohibition in s 8(1) than that contained in the *Jury Act* 1995. It was in the context of that prohibition that Waller LJ wrote that "it would be clearly undesirable" to disclose.

34. Secondly, the rationales behind the secrecy of jury deliberations have been developed in the context of post-verdict examinations of jury conduct in the jury room. They do not easily apply to the circumstances under consideration here.

35. Thirdly, as explained in *HM,*[53] the statements in *Townsend* and *Gorman* are *obiter dicta,* which failed to consider the issue of procedural fairness for an accused and say nothing about the disclosure of voting numbers to a judge, which numbers are relevant to a pending determination regarding a majority verdict.

Victorian Act relevantly similar to Queensland Act

36. The Annexure to these submissions also contains the relevant provisions of the *Juries Act 2000* (Vic) (**the Vic Act**). There is no relevant difference between it and the Qld Act.

Prohibitions on disclosure

37. The prohibitions on disclosure are relevantly similar, particularly when regard is had to the definition of "publish" (as used in s 78(1) and (2) of the Vic Act), which includes "disseminate, broadcast and transmit" (s 3 of the Vic Act). Section 78(3) contains an exception to the general prohibitions for disclosure to a judge or court.

38. Whilst the QCA noted that disclosure under s 70(6) was only "to the extent necessary", as noted above, that is merely facilitative of "the proper performance of the jury's functions". It would be read as broadly or as widely as necessary to permit the jury's functions to be performed.

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[52] *Attorney General v Scotcher* [2005] 1 WLR 1867 at [21].
[53] (2013) 231 A Crim R 349 at 355 [16]; [2013] VSCA 100 [16].

39. Both Acts therefore do not prohibit the disclosures made here, but rather permit them.

Majority verdicts / discharge

40. As noted in the decision below, the discretions to be exercised under the Vic Act (either to take a majority verdict or to order discharge) are expressed within the same provision (s 46) as alternatives to each other.

41. Sections 59A and 60 of the Qld Act are to the same effect as s 46 of the Vic Act..

42. Under s 59A, the discretion to permit a majority verdict arises only once the prescribed period has lapsed – being at least eight hours or such further period as determined by the trial judge to be "reasonable, having regard to the complexity of the trial" – and the trial judge is satisfied that "the jury is unlikely to reach a unanimous verdict after further deliberation". It is only if these two conditions are met that the trial judge "*may* ask the jury to reach a majority verdict."

43. In the context in which these words and this provision appear in the Act, the use of the word 'may' should be read as indicating, consistent with s 32CA(1) of the *Acts Interpretation Act 1954* (Qld), that the power may be exercised or not exercised, at the trial judge's discretion.[54] The provision cannot be said to confer a power to be exercised upon the fulfilment of the conditions precedent.[55] It sits as a discretion permitting either action or omission, in addition to the discretion to discharge.

44. Such an interpretation is also consistent with the statements of legislative intent.[56]

45. There are a number of provisions in the Act that permit a trial judge to exercise the discretion to discharge a jury before a verdict has been returned.[57] Of most relevance is s 60(1), which provides the power to discharge a jury "if a jury cannot agree on a verdict, or the judge considers there are other proper reasons for discharging the jury without giving a verdict."

46. This discretion to discharge can therefore be exercised at any time, if the jury cannot agree on a verdict (thereby including the time when the s 59A discretion could also be exercised). It also provides a trial judge with ample power to discharge a jury if any irregularity of communication involving the jury occurs. The discretion to discharge a jury without returning a verdict is necessarily wide and is not susceptible to an exhaustive statement of what circumstances might give rise to it.

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[54] See *Muto & Eastey* (1995) 83 A Crim R 67 at 70.
[55] Cf. *Leach v The Commonwealth* (2007) 230 CLR 1 at 17-18 [36] to [39].
[56] Explanatory Memorandum to the *Criminal Code and Jury and Another Act Amendment Bill 2008*, p3; Second reading speech, the Hon. KG Shine – member for Toowoomba North, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, 26 August 2008, Hansard, p2244.
[57] Sections 46, 48, 56, 60, 61 of the Act.

47. Section 59A requires consideration of whether the jury is unlikely to reach a unanimous verdict; and s 60 requires consideration, *inter alia,* of whether the jury cannot agree on a verdict. The significant factual matters for judicial assessment under both provisions are very similar and the s 60 discretion arises in the same factual context as that contained in s 59A. To that extent, it operates as an alternative to it. The decision below, indicating that the discretion under s 60 only follows the exercise of discretion under s 59A, has no statutory basis and should not be accepted.[58]

48. Whilst the contrary has been suggested by the respondent, the following is in fact the case in both jurisdictions:

(a) There is no prohibition upon a jury not to (privately) disclose its voting pattern to a trial judge when seeking assistance concerning its deliberations, including in a written note.

(b) There is a no prohibition upon a trial judge disclosing such information to counsel during a trial.

(c) A trial judge has a wide discretion to discharge a jury.

(d) There is a discretion as to whether to permit a majority verdict.

(e) There is no exclusion of procedural fairness considerations. An accused has a right not to be convicted other than after the conduct of a fair trial.

Relevance of votes cast

49. The decision of the QCA below is premised on the finding that s 70 of the Act does not contemplate revelation of the jury's voting pattern, and accordingly, the statutory intent is that such information "is not among the matters properly to be taken into account in the exercise of the discretion" under s 59A(2).[59]

50. Firstly, this is too narrow a construction. As already explained, the discretion under s 59A(2) was not the only discretion still to be exercised by the trial judge.

51. Secondly, even if that should be the case, it does not follow, as held below, that "the information cannot acquire relevance purely by reason of its inadvertent disclosure."[60] Just because jury information is not usually, nor envisaged by the Act as being, disclosed to a court, does not deprive it of relevance – in the sense that there is an actual or perceived capacity for the information to influence the exercise of discretion – when it is disclosed. This was the sense in which relevance was considered in *HM;*[61] the difference sought to be drawn in the decision below between those aspects of *HM* which discussed "relevant" information and information which might influence the decision of the trial judge[62] is incorrect.

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[58] *Smith* at [62].
[59] *Smith* at [83]-[84], [86].
[60] *Smith* at [84].
[61] (2013) 231 A Crim R 349 at 358; [2013] VSCA 100 [28] and [30].
[62] *Smith* at [80].

52. If it is accepted that the statutory intent behind s 70 is that jury voting numbers is not the sort of information that would be received by a court under s 70(6) for the purposes of exercising discretions under ss 59A and 60, the underlying assumption is that such information would not be available to the court. However, that assumption must be disturbed when that information in fact becomes available. Section 70 can hardly be thought to imply (and does not express in its terms) that situation. The statutory intent behind the provision is rendered nugatory when its underlying assumptions are not borne out. Relevance must be considered afresh. It is in those circumstances that the principles of procedural fairness adopted by the Victorian court of appeal in *HM v R* are applicable.

53. The nature of the discretion to be exercised under s 59A involves an assessment of:
(a) The complexity of the trial – going to timeframe before it is exercised;
(b) The likelihood of the jury reaching a unanimous verdict;
(c) Whether instead, further time to reach a unanimous verdict might be given;
(d) Whether instead, the jury should be discharged.

54. The jury voting pattern, at any particular stage, could be relevant to these features.

55. The Court of Appeal accepted that "knowing the jury numbers might well assist a judge in reaching a state of satisfaction as to the likelihood of the jury's reaching a unanimous verdict after further deliberation".[63] Such a proposition must be correct. *A fortiori* it might be relevant to and capable of influencing the decision of whether or not to permit a majority verdict in any particular trial.

56. The approach taken in the majority judgment in *HM*, in particular at 356-360 [22]-[36], should be preferred by this Court, viz. if a further discretion is to be exercised, "*any* information received [by the judge]... whether or not it was irregular for the jury to have provided it, and which is relevant to an issue yet unresolved in the trial, must be disclosed to the parties".[64] That principle sidelines, for good reason, any notion that only a particular composition of the jury would be of relevance and should be disclosed to the parties. The concept of a majority verdict is concerned entirely with the extent to which a jury disagrees. The disclosure of the voting numbers tells the trial judge far more than the mere fact of disagreement; it confirms the precise balance of that disagreement at a point in time. That detail is fundamentally relevant both to the discretion to discharge and to the discretion to direct a majority verdict.

Procedural fairness

57. In the factual scenario that existed at the time the jury note was given in the appellant's trial eight hours had just elapsed since the jury commenced their deliberations. There were therefore a number of countervailing imperatives.

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[63] *Smith* at [82].
[64] *HM v R* (2013) 231 A Crim R 349 at 358; [2013] VSCA 100 [30].

58. Firstly, the need for jury deliberations to remain, as far as possible, confidential.

59. Secondly, the need 'for all communications between the jury and the judge to be disclosed to counsel for the accused'.

60. Thirdly the existence of matters that gave rise to a discretion for a trial judge to discharge the jury without returning any verdict.

61. Finally, the court had not yet determined whether to permit the jury to return a majority verdict.[65]

62. These imperatives required due consideration of fundamental protections within the criminal justice system including an accused's entitlement to a fair trial, which must include an entitlement to procedural fairness and the need for transparent justice.[66]

63. The reasons set out in the QCA decision suggest that the court did not pay adequate attention to the residual discretion in s 59A(2), the discretion in s 60(1) and had not appreciated the need to afford procedural fairness to an accused as a primary obligation. The approach taken by the VCA – in promoting procedural fairness to an accused as a primary objective – in the context of similar prohibitions on disclosure of jury information contained in the *Juries Act 2000* (Vic), is unexceptionable and accords with first principle notions and common sense. It should be preferred.

64. The *ratio decidendi* in *HM* is expressed in the following passage:[67]

> "The right to procedural fairness — to a fair trial — is a fundamental right of each accused. Therefore, as a matter of principle, we consider that the tension between the dictates of procedural fairness, on the one hand, and the protection of the confidentiality of jury communications, on the other hand, must be resolved in favour of the former, *in a case where the information revealed by the jury to the judge, may be relevant to a decision to be made by the judge in relation to the trial.*
>
> ...
>
> We are not here concerned with information received which is irrelevant to any issue in the trial and which the trial judge may elect to deal with without informing counsel. *But any information received during this process, whether or not it was irregular for the jury to have provided it, and which is relevant to an issue yet unresolved in the trial, must be disclosed to the parties.* It enables counsel to make informed submissions on the issue. It is, we consider, inconsistent with the principle of procedural fairness, for a judge to be apprised of the information concerning the state of deliberation of the jury — such as the

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[65] Cf. *HM* (2013) 231 A Crim R 349 at 357; [2013] VSCA 100 [25]; *LLW v The Queen* (2012) 35 VR 372.

[66] In *HM*, the majority referred to this as 'self-evident'.

[67] (2013) 231 A Crim R 349 at 358 [28]-[30].

precise numbers which constitute a majority and a minority — without the judge conveying that information to counsel, where argument of counsel and the decision of the trial judge may be influenced by such information." (emphasis added)

65. No qualification was made in *HM* and *LLW* of the kind that might be seen in the earlier VCA decision of *MJR v R* (***MJR***),[68] namely, that disclosure was necessary because the numbers revealed a statutory majority and the decision then to be made was whether to permit a majority verdict.

66. The QCA sought to apply *MJR* in preference to *HM* and then distinguished the appellant's case from *MJR* because there 'the 11/1 split in favour of conviction had the capacity to raise a reasonable perception that the judge could not bring a dispassionate mind to his exercise of discretion'.[69] However, this distinction has a flawed internal logic. The influence is a matter of degree. A reasonable rhetorical question is: 'Would not a 10:2 split have raised a similar, albeit marginally lesser, perception?'

67. Once the 'genie is out of the bottle' it is artificial to, as the QCA appears to have done,[70] expect judicial indifference in all cases bar where there is a communication of a statutory majority for conviction. Firstly, by s 620 of the *Criminal Code* (Qld) a trial judge is expected to form a view of the facts in order to make comments to the jury on those facts as considered appropriate. It seems likely that if a jury's voting pattern is significantly in favour of or decidedly contrary to a judge's own view of the facts, this would undoubtedly influence the exercise of any s 59A or s 60 discretion, even if only subconsciously. Secondly, if the numbers were locked at 6-6 or close to that, it is difficult to envisage a trial judge would see any utility in extending more time to the jury for a majority verdict. Thirdly, even if it is conceivable that such a disclosure has no prejudicial effect on the course of justice, the same cannot be said of the perception of justice.

68. Likewise, the effectiveness of submissions that could be made by counsel would be increased by knowledge of the numbers. As discussed in *HM*,[71] knowledge of the numbers disclosed to the judge might affect the force with which an objection to a majority verdict or a request to discharge the jury is made, or submissions as to the content or emphasis to be made in future directions.

Miscarriage of justice

69. If something as germane to the conduct of a criminal trial as the voting pattern of the jury is prematurely revealed, then the mere fact of its disclosure necessarily raises the question of causality in any discretionary decision that follows. That will be the case whatever the jury numbers may be.

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[68] (2011) 33 VR 306. The VCA comprised Ashley, Weinberg and Harper JJA.
[69] *Smith at* [85].
[70] *Smith* at [85], [87].
[71] (2013) 231 A Crim R 349 at 359 [33].

70. In this respect, the assertion of Ashley JA in *MJR* is apposite:

> The authorities show that the question is not whether it is likely that the impugned decision would have been the same. Procedural fairness must be upheld for its own sake. Relief will only be refused where, put shortly, the court can say that, had procedural fairness been accorded, the result could not have been different.[72]

It could not be said that the result could not have been different here; there were other discretions to exercise, viz. whether or not to discharge the jury and whether in fact to permit a majority verdict.

71. In the present case, there was no disclosure to the parties of the voting pattern revealed to the trial judge in order to permit submissions by their counsel on the exercise of discretions available to the trial judge, and limited discussion or explanation as to why the residual discretion was to be exercised in favour of permitting a majority verdict and not discharging the jury under s 60(1). This represented an erroneous appreciation of the discretion to be exercised. In *Muto v Eastey* the Victorian court of appeal wrote that:[73]

> "Because there is a residual discretion to be exercised, counsel should be invited to make submissions as to the appropriateness of a majority verdict at that stage. After hearing any submissions that are made the court should consider whether to exercise its discretion in favour of taking a majority verdict..."

This course was not taken. There is no basis to assess whether and how the residual discretion was exercised, notwithstanding that the statute abridged what was hitherto "a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt."[74]

72. Once the jury disclosed to the trial judge that they could not return a unanimous verdict and disclosed the votes cast in its deadlock, the trial judge should have considered whether to discharge the jury at that point.[75] The information disclosed could not be regarded as immaterial to the further discretions yet to be determined. Accordingly, the trial judge should have either discharged the jury without further disclosure or disclosed the entirety of the jury information, including the votes cast, to both counsel. His Honour did neither.[76]

73. The failure to afford procedural fairness at that point rendered the trial relevantly unfair, causing a substantial miscarriage of justice.[77]

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[72] *MJR v R* (2011) 33 VR 306 at 318.
[73] (1995) 83 A Crim R 67 at 74.
[74] See *Reg. v. Thatcher* (1987) 1 SCR 652 at p 698.
[75] Section 60(1) *Jury Act 1995* (Qld).
[76] 'The absence of a request from counsel that he be provided with the information did not relieve the judge of the obligation to disclose the voting details'; *HM* (2013) 231 A Crim R 349 at 358 [31].
[77] *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 541-542 per Isaacs J; *Barton v The Queen* (1980) 147 CLR 75 at 95-96 per Gibbs ACJ and Mason J, 103 per Stephen J, 107 per

74. Additionally, the appellant's trial was short and indications of an inability to reach unanimous agreement were given before and after a *Black* direction. The change from an entrenched position, in the space of less than 19 minutes, following upon a majority verdict being allowed, particularly if the QCA is correct in how it inferred the voting numbers from the trial judge's comments,[78] of itself gives rise to a substantial miscarriage of justice.[79]

Part VII: Applicable statutes[80]

10 **75.** *Acts Interpretation Act 1954* (Qld), s 32CA(1)
76. *Criminal Code* (Qld), s 620
77. *Jury Act 1995* (Qld); ss 50, 54, 59A, 60, 70
78. *Juries Act 2000* (Vic); ss 3, 46, 78
79. *Contempt of Court Act 1981* (UK); s 8

Part VIII: Orders sought

80. Appeal allowed.
81. Conviction set aside.
82. Retrial ordered.

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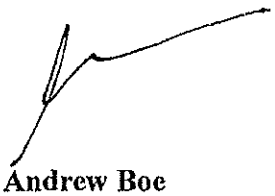
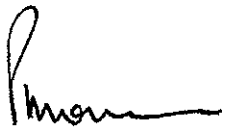
Part IX

83. Presentation of the appellant's oral argument is estimated to take 1½ hours.

Dated: 15 May 2015





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Murphy J, 109 per Aickin J, 109 per Wilson J; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25-31 per Mason CJ, 47-49 per Brennan J, 56-57 per Deane J, 71-72 per Toohey J, 75-76 per Gaudron J; *Dietrich v The Queen* (1992) 177 CLR 292 at 298-300 per Mason CJ and McHugh J, 324 per Brennan J, 326-328 per Deane J, 353-357 per Toohey J.

[78] *Smith* at [88].

[79] As was the case in *HM* (2013) 231 A Crim R 349 at 359 [34].

[80] The provisions are set out in the Annexure to these submissions.

ANNEXURE

Jury Act 1995 (Qld)[1]

50 Jury to be sworn

The members of the jury must be sworn to give a true verdict, according to the evidence, on the issues to be tried, and not to disclose anything about the jury's deliberations except as allowed or required by law.

Editor's note— For the form of the oath, see the *Oaths Act 1867*, sections 21 (Swearing of jurors in civil trials) and 22 (Swearing of jurors in criminal trials). Under the *Oaths Act 1867*, section 17, a juror may make an affirmation instead of an oath in certain cases (see also section 5 of that Act).

54 Restriction on communication

(1) While a jury is kept together, a person (other than a member of the jury or a reserve juror) must not communicate with any of the jurors without the judge's leave.

(2) Despite subsection (1)—

(a) the officer of the court who has charge of the jury may communicate with jurors with the judge's leave; and

(b) if a juror is ill—communication with the juror for arranging or administering medical treatment does not require the judge's leave.

(3) A person who contravenes subsection (1) may be punished summarily for a contempt of the court.

(4) The validity of proceedings is not affected by contravention of this section but, if the contravention is discovered before the verdict is given, the judge may discharge the jury if the judge considers that the contravention appears likely to prejudice a fair trial.

59A Verdict in criminal cases for other offences

(1) This section applies to a criminal trial on indictment other than the following trials—

(a) a trial for an offence mentioned in section 59(1)(a); or

(b) a trial before a jury as mentioned in section 59(1)(b).

(2) If, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict.

(3) If the jury can reach a majority verdict, the verdict of the jury is the majority verdict.

(4) For the definition in subsection (6), *prescribed period*, paragraph (a), the periods mentioned in subparagraphs (i), (ii) and (iii) are the periods reasonably calculated by the judge.

(5) A decision of the judge under subsection (4) is not subject to appeal.

(6) In this section—

majority verdict means—

(a) if the jury consists of 12 jurors—a verdict on which at least 11 jurors agree; or

(b) if the jury consists of 11 jurors—a verdict on which at least 10 jurors agree.

prescribed period means—

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[1] These provisions are still in force, in this form, as at the date of these submissions.

(a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods—

(i) a period allowed for meals or refreshments;

(ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;

(iii) a period provided for the purpose of the jury being accommodated overnight; or

(b) the further period the judge considers reasonable having regard to the complexity of the trial.

60 Jury may be discharged from giving verdict

(1) If a jury can not agree on a verdict, or the judge considers there are other proper reasons for discharging the jury without giving a verdict, the judge may discharge the jury without giving a verdict.

(2) If proceedings before a jury are to be discontinued because the trial is adjourned, the judge may discharge the jury.

(3) A decision of a judge under this section is not subject to appeal.

70 Confidentiality of jury deliberations

(2) A person must not publish to the public jury information.

Maximum penalty—2 years imprisonment.

(3) A person must not seek from a member or former member of a jury the disclosure of jury information.

Maximum penalty—2 years imprisonment.

(4) A person who is a member or former member of a jury must not disclose jury information, if the person has reason to believe any of the information is likely to be, or will be, published to the public.

Maximum penalty—2 years imprisonment.

(5) Subsections (2) to (4) are subject to the following subsections.

(6) Information may be sought by, and disclosed to, the court to the extent necessary for the proper performance of the jury's functions.

(7) If there are grounds to suspect that a person may have been guilty of bias, fraud or an offence related to the person's membership of a jury or the performance of functions as a member of a jury, the court before which the trial was conducted may authorise—

(a) an investigation of the suspected bias, fraud, or offence; and

(b) the seeking and disclosure of jury information for the purposes of the investigation.

(8) If a member of the jury suspects another member (the ***suspect)*** of bias, fraud or an offence related to the suspect's membership of the jury or the performance of the suspect's functions as a member of the jury, the member may disclose the suspicion and the grounds on which it is held to the Attorney-General or the director of public prosecutions.

(9) On application by the Attorney-General, the Supreme Court may authorise—

(a) the conduct of research projects involving the questioning of members or former members of juries; and

(b) the publication of the results of the research.

(10) The Supreme Court may give an authorisation under subsection (9) on conditions the court considers appropriate.

(11) Information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding may be disclosed—

(a) in the course of the proceeding—by any person with the court's permission or with lawful excuse; or

(b) after the proceeding has ended—by the juror or someone else with the juror's consent.

(12) A former member of a jury may disclose jury information to a health professional who is treating the former member in relation to issues arising out of the former member's service on the jury.

(13) The health professional may ask the former member to disclose jury information for the purpose of treating the former member in relation to issues arising out of the former member's service on the jury.

(14) The health professional must not disclose jury information to anyone else unless the health professional considers it necessary for the health or welfare of the former member.

Maximum penalty—2 years imprisonment.

(15) Subsection (14) does not apply in as far as the health professional discloses information that identifies the health professional's patient to the sheriff for the purpose of the sheriff advising whether the patient was a former member of a jury.

(16) The sheriff may disclose to the health professional information advising whether the patient was a former member of a jury.

(17) In this section—

health professional means a person who practises a profession prescribed under a regulation for the definition, and includes a doctor and a psychologist.

jury information means—

(a) information about statements made, opinions expressed, arguments advanced, or votes cast, in the course of a jury's deliberations; or

(b) information identifying or likely to identify a person as, or as having been, a juror in a particular proceeding.

psychologist means a person registered under the Health Practitioner Regulation National Law to practise in the psychology profession, other than as a student.

treat, in relation to a patient of a health professional, means provide a service to the patient in the course of the patient's seeking or receiving advice or treatment.

Acts Interpretation Act 1954 (Qld)

32CA Meaning of may and must etc.

(1) In an Act, the word may, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.

(2) In an Act, the word must, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.

(3) To remove any doubt, it is declared that this section applies to an Act passed after 1 January 1992 despite any presumption or rule of interpretation.

Criminal Code (Qld)

620 Summing up

(1) After the evidence is concluded and the counsel or the accused person or persons, as the case may be, have addressed the jury, it is the duty of the court to instruct the

Juries Act 2000 (Vic)[2]

3 Definitions - ***publish*** includes disseminate, broadcast and transmit;

46 Failure to reach unanimous verdict in criminal trials

(1) In this section, ***majority verdict*** means—

(a) if, at the time of returning its verdict, the jury consists of 12 jurors—a verdict on which 11 of them agree;

(b) if, at the time of returning its verdict, the jury consists of 11 jurors—a verdict on which 10 of them agree;

(c) if, at the time of returning its verdict, the jury consists of 10 jurors—a verdict on which 9 of them agree.

(2) If, after deliberating for at least 6 hours a jury in a criminal trial—

(a) is unable to agree on its verdict; or

(b) has not reached a unanimous verdict—

the court may discharge the jury or, subject to subsections (3) and (4), take a majority verdict as the verdict of the jury.

(3) A court must refuse to take a majority verdict if it considers that the jury has not had a period of time for deliberation that the court thinks reasonable, having regard to the nature and complexity of the trial.

(4) A verdict that the accused is guilty or not guilty of murder or treason or an offence against section 71 or 72 of the **Drugs, Poisons and Controlled Substances Act 1981** or an offence against a law of the Commonwealth must be unanimous.

(5) If in a criminal trial—

(a) it is possible for a jury to return a verdict of not guilty of the offence charged but guilty of another offence with which the accused has not been charged; and

(b) the jury reaches a verdict (unanimously or by majority verdict) that the accused is not guilty of the offence charged; and

(c) the jury is unable to agree on its verdict on the alternative offence after a cumulative total of at least 6 hours deliberation on both offences—

a majority verdict on the alternative offence may be taken as the verdict of the jury.

78 Confidentiality of jury's deliberations

(1) A person must not—

(a) publish, or cause to be published, any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of a jury; or

(b) solicit or obtain the disclosure by a person who is or has been a juror of statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of that jury.

Penalty: In the case of a body corporate, 3000 penalty units;
In any other case, 600 penalty units or imprisonment for 5 years.

(2) A person who is or has been a juror must not disclose any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of that jury if the person has reason to believe that any of that information is likely to be or will be published to the public.

Penalty: 600 penalty units or imprisonment for 5 years.

(3) Nothing in this section prevents—

(a) a person who is or has been a juror disclosing to—

[2] These provisions are still in force, in this form, as at the date of these submissions.

(i) a judge or court; or
(ia) the Juries Commissioner; or
(ii) a board or commission appointed by the Governor in Council; or
(iii) the Attorney-General; or
(iv) the Director of Public Prosecutions for Victoria or the Director of Public Prosecutions for the Commonwealth—
any information about the deliberations of a jury; or
(b) the investigation by a police officer at the request of the Director of Public Prosecutions for Victoria, the Director of Public Prosecutions for the Commonwealth or the Juries Commissioner, of a complaint about the deliberations of a jury or the disclosure of information about those deliberations by a person who is or has been a member of a jury to Victoria Police in the course of the investigation; or
(c) the investigation by a person authorised by the Court of Appeal, in relation to an appeal to that Court, of an allegation about the deliberations of a jury or the disclosure of information about those deliberations by a person who is or has been a member of a jury to the authorised person in the course of that investigation.

(4) The Director of Public Prosecutions for Victoria or the Juries Commissioner may request the Chief Commissioner of Police to investigate a complaint about the deliberations of a jury or the disclosure of information about those deliberations by a person who is or has been a member of a jury.

(4A) If a complaint referred to in subsection (4) is made to the Juries Commissioner during the course of a trial, the Juries Commissioner must refer the complaint to the trial judge.

(5) Nothing in subsection (1)(b) or (2) prevents a person who has been a juror from disclosing any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of that jury to a registered medical practitioner or a registered psychologist in the course of treatment in relation to issues arising out of the person's service as a juror.

(6) A registered medical practitioner or registered psychologist must not disclose information referred to in subsection (5) to any other person.

Penalty: 600 penalty units or imprisonment for 5 years.

(7) Nothing in this section prevents the publication or disclosure by a person of any information about the deliberations of a jury if that publication or disclosure is not capable of identifying a juror or the relevant legal proceeding.

(8) This section does not apply to the disclosure of information about a proceeding for an offence against this section if, before the proceeding was commenced, the information had been published generally to the public.

(9) This section does not prohibit a person from soliciting information from a juror or former juror in accordance with an authority granted by the Attorney-General for the conduct of a research project into matters relating to juries or jury service.

(10) An offence against this section is an indictable offence.

(11) A prosecution for an offence against this section may only be brought with the consent in writing of the Director of Public Prosecutions for Victoria or of a person authorised by the Director of Public Prosecutions for Victoria to give consent for the purposes of this subsection.

(12) In this section—

court includes the Magistrates' Court;

deliberations includes any discussions between two or more jurors at any time during a trial of matters relevant to that trial.

Contempt of Court Act 1981 (UK)[3]

8 Confidentiality of jury's deliberations.

(1) Subject to subsection (2) below, it is a contempt of court 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 legal proceedings.

(2) This section does not apply to any disclosure of any particulars—

(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or

(b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,

or to the publication of any particulars so disclosed.

(3) Proceedings for a contempt of court under this section (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it.

[3] This provision is still in force, in this form, as at the date of these submissions.