IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 51 of 2013

B E T W E E N:

**MARK SHARNE SMITH**
Appellant

and

**THE STATE OF WESTERN AUSTRALIA**
Respondent



## APPELLANT'S SUBMISSIONS

### PART I CERTIFICATION INTERNET

1. These submissions are in a form suitable for publication on the internet.

### PART II ISSUES

2. Does the common law rule making evidence of jurors' deliberations inadmissible ('**Exclusionary Rule**') operate to exclude evidence of alleged physical coercion of a juror by a fellow juror to manipulate a verdict?
3. If so, is there (or should there be) an exception to the Exclusionary Rule to admit such evidence - so that the Exclusionary Rule cannot be used to protect or condone such conduct by a juror?
4. If the Exclusionary Rule operates to exclude evidence of such alleged physical coercion and there are no exceptions to the rule, is it now time for a curial re-examination of the rule in the face of contemporary jury misconduct, and especially allegations of physical coercion?

### PART III CERTIFICATION JUDICIARY ACT

5. The Appellant considers that notices under s 78B are not required.

### PART IV CITATION COURT OF APPEAL

6. ***Smith v The State of Western Australia*** **[2013] WASCA 7** (no authorised report), on appeal from ***The State of Western Australia v Smith***, District Court of Western Australia Indictment 124 of 2011 (unreported).

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## PART V FACTS

7. The Appellant was tried on indictment in the District Court of Western Australia.

8. The indictment alleged two counts of indecent dealing with a girl under 13 years.

9. The trial commenced on 16 January 2012.

10. The jury retired to consider its verdict on 17 January 2012, and the Appellant was, ultimately, unanimously convicted by the jury as charged.

11. After retirement by the jury at 3.20 pm, no questions or requests for clarification were made by the jury which returned, at 6.53 pm, to deliver its verdicts.

10 12. The foreman of the jury then pronounced verdicts of guilty on each of the two counts in the presence and hearing of all members of the jury.

13. After that pronouncement, members of the jury were asked whether the verdict was the verdict of them all, to which the foreman replied in the affirmative.

14. The trial judge then recorded verdicts of guilty, the jury was discharged, and the matter was adjourned for sentencing to a later date.

15. Between the entry of the jury's verdict on 17 January 2012 and the Court reconvening on the following day an envelope addressed to the trial Judge was found in the jury room.

16. On 18 January 2012 when the Court reconvened the trial judge advised counsel
20 that a note in an envelope addressed to him had been discovered on the jury table in the jury room. There was no indication on the note as to the identity of its author, either by name or by juror number.

17. The note read as follows:

> 'I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote. This has made my ability to perform my duty as a juror on this panel.'

18. The trial judge expressed the view (in the trial transcript) that a juror was somewhat upset after delivery of the verdict and observed that it was probably obvious to counsel which juror that was.

30 19. The trial judge also noted (in the trial transcript) that the departure of the jury following the verdict was *'unusually noisy'*, and the foreperson was somewhat slow to affirm that the verdict was the verdict of all members of the jury.

20. No inquiry was made, or ordered, by the trial judge.

21. The case was adjourned until 2 March 2012 when the Appellant was sentenced to concurrent terms of 12 months imprisonment with parole eligibility. The Appellant was denied parole and ultimately released on 1 March 2013.

22. As a consequence of his convictions the Appellant is a '*reportable offender*' under the ***Community Protection (Offender Reporting) Act* 2004 (WA)** and subject to the restrictions imposed pursuant to ss 28, 29, 29A and 30.

23. The Appellant by an interlocutory application in the appeal below sought an inquiry into the circumstances of the Juror's Note.

24. The interlocutory application in the Court of Appeal ('**CoA**') for an inquiry into the Juror's Note was considered by Mazza JA on 24 August 2012 and referred to the hearing of the appeal.

25. Ultimately the Court of Appeal, the Chief Justice (McLure P and Mazza JA agreeing) refused the Appellant's application for an inquiry (CoA [48]).

## PART VI APPELLANT'S ARGUMENT

### VI-1 ERRORS BELOW

26. The Court of Appeal erred in law, Martin CJ (McLure P and Mazza JA concurring), when it:

26.1 Found that the Exclusionary Rule applied to exclude evidence of the Juror's Note (at [30]–[48] CoA), because:

26.1.1 The rule cannot apply to exclude evidence of *criminal* conduct by a juror toward a fellow juror [coercion of a juror is a crime, s 123 of the ***Criminal Code* (WA), ('Code')**], and

26.1.2 The CoA's finding failed to consider that the rule works '*supported to an extent by statute*' as described by Gleeson CJ in ***R v Minarowska* (1995) 83 A Crim R 78** at 86. In particular no consideration was given to Part IXA of the ***Juries Act* 1957 (WA)** ('**Juries Act**') which permits access to '*protected information*' (defined at s 56A, (see [45] below) by: (i) a court, **s 56B(2)(a)**; (ii) a prosecutor or a police officer for the purpose of an investigation concerning an alleged offence relating to jury deliberations, **s 56B(2)(e)**], or (iii) as part of a fair and accurate report of such an investigation **s 56B(2)(f)**.

26.2 Found that the rule meant that any investigation into the Juror's Note was futile because it *must* involve '*receiving evidence with respect to the deliberations of the jury and, in particular, the reasons why a juror voted in a particular way*', (CoA [38]).

26.3 Relied on ambiguity in the Juror's Note to dismiss the appeal (CoA [34]–[37]), and refuse an inquiry (CoA [48]). Any ambiguity arose from failure by the trial judge to inquire into the Juror's Note. The ambiguity identified by the CoA would have been clarified by an inquiry that: (i) identified the juror; (ii) identified the fellow juror; (iii) determined whether the juror resiled from the Juror's Note; and if the juror did not resile from the note, (iv) generally describe the alleged conduct. Otherwise an inquiry would have be made by the WA Police, see section 56B(2)(e) of the *Juries Act*.

## VI–2 THE EXCLUSIONARY RULE

27. The Exclusionary Rule is a common law rule. It is recognised in: (i) Australia (see [30] below); (ii) New Zealand in ***R v Papadopoulos* [1979] 1 NZLR 621**, ***R v Taka* [1992] 2 NZLR 129**, and ***Tuia v The Queen* [1994] 3 NZLR 553**; (iii) Canada, ***R v Pan; R v Sawyer* [2001] 2 SCR 344**; (iv) the UK: references begin in the eighteenth century, see ***R v Woodfall* (1770) 98 ER 398; (1770) 5 Burr 2661** (Lord Mansfield); ***Vaise v Delaval* (1785) 99 ER 944; (1785) 1 TR 11**, and ***Jackson v Williamson* (1788) 100 ER 153; (1788) 2 TR 281,** and the UK cases are collected in ***R v Mirza* [2004] 1 AC 1118** per Lord Steyn at [11], and (v) the European Court of Human Rights: *Mirza* per Lord Hope at 1159, [108].

28. The Exclusionary Rule has developed slightly differently in the various common law jurisdictions; see Lord Steyn's observations in *Mirza* at [11] of the differences as to the '*scope of the exception*' in Australia and NZ. There are also variations in the legislation relating to juries in the various Australian States and Territories that '*support*' the operation of the rule in each jurisdiction (see [44] and [51] below).

29. For example, Gleeson CJ in *Minarowska* (at 88) left open the question whether there exists a residuary discretion to allow the admission of evidence that would otherwise be excluded by the Exclusionary Rule as contemplated by Lord Steyn in his dissenting judgment in *Mirza* (see [14]-[17]) and the NZ case of *Tuia*.

30. The contemporary Australian version of the Exclusionary Rule has its first expression in the citation of the English authority ***Ellis v Deheer*** **[1922] 2 KB 113** in ***Prothonotary v Jackson*** **[1976] 2 NSWLR 457**, (see also ***R v Zampaglione*** **(1981) 6 A Crim R 287** per Young CJ and Murray J at 298). This is acknowledged by Kirby J's account of the rule in ***John Fairfax Publications Pty Ltd v Rivkin*** **(2003) 201 ALR 77** (114 at [164] fn 139).

31. Certainly, *Ellis* appears to be the starting point for Australasian expositions of the rule: Martin CJ (CoA [10]), and the **New Zealand Law Commission '*Juries In Criminal Trials*' Report No 69 2001** at Chapter 14.

10 32. In *Ellis* the foreman of a jury in a case for damages for personal injury in a motor vehicle accident delivered the verdict within the hearing of only *some* of the jurors because the court was crowded with jurors for the next case.

33. In *Ellis* the Court of Appeal Bankes LJ (Warrington LJ agreeing) (at 117), described the rule in the following terms:

> '... the Court will never admit evidence from jurymen of the discussion which they may have had between themselves when considering their verdict or of the reasons for their decision, whether the discussion took place in the jury room after retirement or in the jury box itself. It has for
20 many years been a well accepted rule that when once a verdict has been given it ought not be open to an individual juryman to challenge it, or to attempt to support it if challenged'.

34. Bankes LJ noted that a new trial was sought (*Ellis* at 118) not because of what took place in the jury room but in open court. Unanimity cannot be inferred where a verdict is not delivered in the sight and hearing of all of the jury. It is contended that if a juror's vote had been coerced by a fellow juror then mute acceptance of a verdict stated by the foreman in the presence of all jurors cannot found a proper inference of unanimity in the absence of inquiry (see [12]-[13] above).

30 35. Bankes LJ in *Ellis* (118-119) noted two situations dealing with evidence of what occurred in open court where the rule does not operate: (i) where some jurors do not hear a verdict delivered (***R v Wooller*** **(1817) 171 ER 589; 2 Stark 111**, or (ii) where jurors give evidence of a verdict when a verdict is wrongly entered by a judicial officer (***Roberts v Hughes*** **(1841) 151 ER 821; 7 M&W 399**).

36. Martin CJ (CoA [10]) preferred Atkin LJ's statement of the rule, (*Ellis* at 121):

> '... the court does not admit evidence of a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect to be.'

37. The rationale of the rule was described by the NSW Court of Criminal Appeal in ***Rinaldi v R* (1993) 30 NSWLR 605**, (Carruthers, Sully, and Abadee JJ) at 612–613 (underlining added, cited with approval in ***Shrivastava v The State of Western Australia* [No 2] [2011] WASCA 8** per Pullin JA at [25]):

> 'What has to be made clear, and which we here seek to emphasise, is the necessity for not only ensuring the finality of jury verdicts, but also the need to ensure that jurors or former jurors are not subjected to pressure, harassment or otherwise, either in relation to their deliberations in reaching a verdict, or, in relation to the verdict itself. The need to ensure that a juror or former juror's privacy and anonymity are respected, is self evident. Further, a juror's performance of the civic duty of service ought not to be accompanied by fear, apprehension, or concern for actual or potential embarrassment'.

38. In Australia the critical role of a trial judge to ensure a fair trial is described in ***Dietrich v R* (1992) 177 CLR 292**: Mason CJ and McHugh at 299-300, 311; Brennan J 325; Deane J 328-329; Toohey J 353-357, and Gaudron 362-365.

39. Gaudron J in *Dietrich* at (365), citing ***Jago v District* Court (NSW) (1989) 168 CLR 23**, observes that:

> A trial is not necessarily unfair because it is less than perfect but it is unfair it if involves a risk of the accused being improperly convicted. If the only trial that can be had is one that involves a risk of that kind, there can be no trial at all.

40. The court's obligation described in *Rinaldi* to, '*ensure that jurors or former jurors are not subjected to pressure, harassment or otherwise, either in relation to their deliberations in reaching a verdict, or, in relation to the verdict itself*' is an emanation of the obligation to ensure a fair trial.

41. The operation of the Exclusionary Rule is complicated by the manner in which trial by jury was introduced to the Australian Colonies.

42. It was introduced into each of the colonies by legislation and the legislation differed: ***Brownlee v R* (2001) 207 CLR 278** per Gleeson CJ and McHugh J at [12], also **Evatt, 'The Jury System in Australia' (1936) 10 *Australian Law Journal* (Sup.) 49**.

43. The Exclusionary Rule works '*supported to an extent by*', State and Territory legislation. Gleeson CJ after discussing section 68A of the ***Jury Act* 1977 (NSW)** in *Minarowska* (at 86-87), described that relationship as, (emphases added):

> 'The result of all this is that the common law principles designed to maintain the secrecy of jury deliberations, **supported to an extent by statute**, limit the scope for challenging a verdict on the basis of a complaint as to the way in which the jury went about performing their task. This limitation relates both to the facts that may or may not be proved, and to the evidence that may or may not be adduced. Because the underlying policy aims to preserve the secrecy of jury deliberations, and to maintain the integrity and finality of a formally expressed verdict, the distinction between what may and what may not be proved, and what may or may not be challenged is not drawn by reference to the degree of seriousness or potential injustice of what might have occurred. It is primarily drawn by reference to the outer limits of the veil of secrecy which is drawn over the jurors' deliberations.'

44. Thus the operation of the Exclusionary Rule in each State and Territory will be affected by the local legislation. The passage from *Minarowska* set out above has been cited with approval and applied by the Court of Appeal in WA: see *Shrivastava* per McLure P at [3] and Pullin JA at [31]-[32].

45. In WA the relevant legislation is at part IXA of the *Juries Act* that makes unauthorised access to '*protected information*' a crime, a term defined at s 56A(1) to mean: '*(a) statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court; or (b) information that identifies, or is likely to identify, a person as, or as having been, a juror in particular proceedings*'.

46. Authorised access includes those persons nominated at s 56B(2)(a) (a court) and s 56B(2)(e) (police and prosecutors) of the *Juries Act*, (see [26.1.2] above).

47. In *Shrivastava*, (admissibility of email sent to a juror), Pullin JA considered how the WA legislation works with the Exclusionary Rule at [31]-[32].

48. His Honour observed that '... *The provisions of the Juries Act are a partial reflection of the policy referred to in Rinaldi. There are provisions entirely or partially reflecting the policy in all Australian States and Territories except for South Australia .... The common law rule prohibiting the admission of evidence about jury deliberation is one manifestation of the policy referred to in Rinaldi, the provisions of the Juries Act 1957 are another ...*'.

49. It is thus that the Exclusionary Rule and local legislation work together to reflect the rationale of the rule. It is contended that the access given to police and prosecutors by s 56B(2)(e) of the *Juries Act* is declaratory of matters extrinsic to the rule rather than a statutory exception to the rule's operation. A statutory declaration that became necessary with the introduction of the offence at s 56B(1) of the *Juries Act* making it a statutory offence to disclose '*protected information*'.

50. Part IXA (ss 56A-56E) of the *Juries Act* was inserted by s 10 of the ***Juries Amendment Act* 2000 (WA)** (**'JA Act'**). The Second Reading Speech of the JA Act refers to measures to '*protect the confidentiality of jury deliberations*', (WA *Hansard* Legislative Council 22 October 1998 then Attorney General Hon Peter Foss MLA at 2525). It is noted by the then Attorney that the amendments were an initiative of the Standing Committee of Attorneys General and similar provisions had been enacted in NSW, Queensland, the ACT and the Northern Territory.

51. Cognate but not identical provisions can be found in:

51.1 **NSW**: at ss 68 and 68A of the ***Jury Act* 1977 (NSW)**, the equivalent provision to s 56B of the *Juries Act* is s 68A and the power to access jury deliberations by police and prosecutors to investigate inter alia '*an offence relating to a juror*' is at s 68A(4);

51.2 **Queensland**: at s 70(7) of the ***Jury Act* 1995 (Qld)** the court before which a trial was conducted has the power to authorise an investigation where 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;

51.3 **ACT**: s 42C of the ***Juries Act* 1967 (ACT)** adopts a similar approach to the WA *Juries Act* in that it defines '*protected information*' at s 42C(11). Section 42C(5) is very similar to s 56B(2) of the *Juries Act*, and s 42C(5)(c) to s 56B(2)(e);

51.4 **NT**: Like the WA and the ACT the ***Juries Act* (NT)** adopts a definition of '*protected information*' at s 49A. The scheme mirrors that in the ACT. Section 49A(5) is very similar to s 56B(2) of the *Juries Act*, and s 49A(5)(c) to s 56B(2)(e);

51.5 **Vic**: makes similar provision but in different terms at s 78 of the ***Juries Act* 2000 (Vic)**. Section 78(3)(b) allows for the investigation and prosecution 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*'. Section 78(3)(c) provides for an investigation by a person authorised by the Court of Appeal '*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*', and

51.6 **Tas**: Tasmania has also now adopted a similar provision based on a definition of '*prohibited matter*' at s 3 of the ***Juries Act* 2003 (Tas)**, and at s 58(6) that Act allows the disclosure of such matter for the purpose of investigating and prosecuting '*a complaint about the deliberations of a jury or the disclosure of information about those deliberations by a juror or former juror*'.

## VI–3 ANALYSIS OF THE EXCLUSIONARY RULE

### 3.1 Physical Coercion – Neither 'Jury Deliberation', nor an 'Irregularity'

52. It is the Appellant's contention that the Exclusionary Rule does not, and was never intended, to operate in respect of *criminal* conduct. It is extrinsic to the rule.

53. This appeal is about alleged criminal conduct. It is not about *non*-criminal juror *misconduct* whether: (i) of the kind occasioned by the use of a ouija board (***R v Young* [1995] 1 QB 324**) or a coin toss (*Vaise v Delaval* at [27] above) to reach a verdict, (ii) a juror's state of mind: e.g. where a juror indicated at the start of a trial that his mind was made up and he would acquit, and thereafter refused to participate in jury deliberations, ***R v Brown* (1907) 7 SR NSW 290; 24 WN (NSW) 93**, or (iii) or a jury's failure to recognise the need for unanimity in a verdict: ***Nanan v The State* [1986] AC 860**, and ***Biggs v Director of Public Prosecutions* (1997) 17 WAR 534**.

54. Nor is it a case in which an unsuccessful attempt to bribe a juror was brought to the court's attention by a statement from a juror to the court *after* the verdict was delivered in circumstances where the juror did not accept the bribe and made no mention of the attempt to members of the jury: ***R v Woolcott Forbes* (1944) 44 SR (NSW) 333; 61 WN (NSW) 219.**

55. Of course the importance of *Woolcott Forbes* (per Jordan CJ at 342) was that *the court allowed the juror to make the statement and explain what had occurred* (in open court) and the CoA refused a new trial by relying on the juror's statement.

56. Were the analysis in this case in the CoA below applied such a statement would be precluded as intrinsic to the operation of the Exclusionary Rule.

57. Modern Australian authority, such as *Minarowska*, focuses on the substantive nature of the alleged conduct by (or affecting) the jury and whether the conduct can be said to be extrinsic to the deliberations of the jury, rather than upon the source of the evidence or where the conduct occurred.

10 58. One has to be careful not to discount the significance of the alleged conduct in this appeal by describing it merely in terms of a jury '*irregularity*' rather than as *criminal* conduct, (compare Martin CJ CoA [15]).

59. Alleged physical coercion of a juror by any person, including a fellow juror, can never properly be understood as jury deliberations, and no doubt that is why:

59.1 Coercion of a juror is a crime under s 123 of the Code, and

59.2 Section 56B(2)(e) of the *Juries Act* allows police and prosecutors to access jury deliberations when investigating criminal conduct by jurors.

60. If that were not so prosecution of an offence under s 123 of the Code, where the alleged criminal conduct was by a juror against a fellow juror, could never be
20 investigated or brought to trial. Indeed in WA, as in the legislative provisions in every State and Territory (absent SA) at [51] above, the definition of '*protected information*' (or its equivalent) specifically does not capture criminal conduct.

**3.2 Conduct That Is Extrinsic To The Rule – Is There An Exception To The Rule?**

61. The Appellant contends that physical coercion of a juror by a fellow juror to manipulate a verdict is extrinsic to the operation of the Exclusionary Rule.

62. However, there may be circumstances in which, despite inquiry, alleged criminal conduct cannot be categorically established but there remains the '*reasonable apprehension or suspicion on the part of a fair minded and informed member of*
30 *the public that the juror or jury has not discharged their task with impartiality*' (***Webb v The Queen*** **(1994) 182 CLR 41** per Mason and McHugh at 47 [3], 50 [9] and 52 [13]), i.e. that criminal conduct of some type *has*, or *may* have, occurred.

63. In the former situation the rule does not apply because the criminal conduct is extrinsic.

64. However, in the latter case a court in its *discretion* may need to consider whether such conduct as can be established should be admitted as an exception to the rule to protect the integrity of the verdict, the fairness of the trial and to ensure that the rule is not used to protect criminal conduct. Arguably, in those circumstances and any other situation in which the reasonable apprehension in *Webb* is established, there must (should) be a residuary discretion to admit evidence of such conduct as an exception to the rule. Otherwise an irregularity that would have occasioned the discharge of a juror or jury prior to the verdict will be entrenched if discovered after the verdict.

10 65. It cannot be correct that the trial judge's duties extend no further than the verdict because then the court would have no power to inquire (see Section 3.3 below).

66. Indeed were the common law rule to seek to maintain a blanket prohibition on adducing evidence gathered in such an inquiry, because that evidence touches on jury deliberations, such a prohibition could not negate the statutory right of a court or police and prosecutors, to have access to '*protected information*' for the purposes of such an investigation under ss 56B(2)(a) and (e) of the *Juries Act*. However, that course imagines the possibility of investigations by the police unsanctioned or supervised by a court.

20 **3.3 Inquiry**

67. The trial judge had the power to order an inquiry – ***R v Woolcott Forbes*** ([54] above); ***R v Emmett* (1988) 14 NSWLR 327** per Lee J at 335 and *Minarowska* per Gleeson CJ at 86, Pincus JA in ***R v Myles* (1997) 1 Qd R 199** at 208 lines 5-15, and see the CoA below at [16]). A complaint to police by the Appellant would be moot without being able to identify jurors, details available only to a trial judge.

68. So it is that if a juror cannot give evidence of criminal conduct toward him or her by a fellow juror in a jury room then for all practical purposes no one can reveal such conduct, conduct that goes to the heart of the integrity of a verdict.

69. Justice Lee in *Emmett* (at 335) in setting out the facts in that case touches on the
30 primary elements of the Appellant's argument in this appeal (underlining added):

> 'The affidavits of the two jurors do not present evidence going to the deliberations of the jury in the jury room in retirement, but present evidence establishing that a sheriff's officer wrongly intruded into the jury's deliberations, took part therein and put pressure on the jury to come to a verdict and even expressed an opinion the accused were guilty. <u>None of the policies which support the rule that a juryman cannot</u>

> impugn a verdict in which he has participated can possibly be urged to support a proposition that the verdict be allowed to stand if those allegations are true. For the court not to inquire into the matter would be for the court to condone the exposure of the jury to influence in arriving at its verdict by the very persons entrusted to ensure that the jury shall conduct its deliberations only with all jurors present, in secrecy, in private and free from opinions or pressure from anyone whether connected with the trial or not. To say that jurors could not reveal misconduct by sheriff's officers in the jury room would for all practical purposes be to say that no one can reveal misconduct by sheriff's officers in the jury room.'

70. Consistently with the role of the trial judge (as explained in *Dietrich*) such an inquiry is warranted when fairness demands it, and the form of an inquiry will be dictated by what fairness requires (determined by the trial judge). In this case fairness required an inquiry to determine whether criminal conduct by one juror toward another juror, for the purpose of coercing his or her vote, had occurred so as to taint the jury's verdicts.

71. Ultimately any inquiry supervised by the trial judge must, if relied upon to establish a miscarriage of justice, lead to a report to an appellate court.

72. Such an inquiry must, in the first instance, be the responsibility of the trial judge who bears the obligation to ensure the fairness of the trial and the protection of the jury. This allows for the direction of a sheriff's officer by the court in respect of that inquiry. Section 156 of the ***Supreme Court Act* 1935 (WA)** provides for the office of Sheriff. The Sheriff is an officer of the District court of WA by s 156(2).

73. Were the Appellant to lose this appeal he would be convicted in circumstances where the verdict was coloured by an un-investigated allegation of physical coercion of a juror. This would put him in the situation described by Gaudron J in *Dietrich* ([39] above) because there remains a risk he was improperly convicted. Such a situation echoes Lee J's concerns in *Emmett* that a court might rely on the Exclusionary Rule to unwittingly condone such conduct ([69] above).

74. Depending on the product of an inquiry by the trial judge the court could refer the matter to the WA Police for investigation and, if warranted, prosecution. Indeed if the allegations concerned the Sheriff's Office a trial judge may have little choice.

75. If, (i) substantial time has elapsed without an inquiry, (ii) there has been no investigation authorised by the courts, despite an appellant's best attempts, and (iii) an inquiry is no longer practicable, then the verdicts should not be allowed to stand because of the risk identified by Gaudron J ([39] above).

76. In this case the practicality of an inquiry requires answers to the following questions, being matters within the knowledge of the State:

76.1 Does the Sheriff's Office retain the necessary information regarding the make up of the jury in January 2012 to *now* allow that office to:

76.1.1 Identify each of the 12 jurors, and

76.1.2 Contact each of the 12 jurors?

76.2 Does the Sheriff's Office have the capacity (in terms of staff) to conduct an inquiry concerning criminal conduct by a juror against a fellow juror:

76.2.1 If the inquiry is ordered by the trial judge, say, within a week of a verdict being delivered, or

76.2.2 After 21-22 months have elapsed, as in the present case?

76.3 What is the maximum time after a verdict has been delivered where such an inquiry by the Sheriff's office becomes impracticable, and why?

### 3.4 Common Law Rules Regarding Confidence and Privilege

77. Just like other common law rules relating to privileged communications, such as legal professional privilege, the Exclusionary Rule does not protect criminality.

78. Otherwise the rationale of the rule would be defeated (at [37] above).

79. The principle that legal professional privilege does not apply to communications which are criminal in themselves, or intended to further a criminal purpose, was established in ***R v Cox and Railton* (1884) 14 QBD 153** at 167 per Stephen J.

80. In ***Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543**, the majority at [24] approved *Cox and Railton* and rejected the notion that privilege attaches to communications made between client and lawyer for the purpose of engaging in contraventions of the *Trade Practices Act*. A communication the purpose of which is to '*seek help to evade the law by illegal conduct*' it is not privileged.

81. Criminality is not an exception to legal professional privilege it is extraneous or extrinsic to that rule, see ***Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 188 ALR 515** per North J at [29]-[31]:

> 'The description ... [of the 'crime/fraud exception'] ... *is inaccurate, first, because such communications do not fall within a protected category at all and, hence, are not excluded by way of an exception. Second, the communications are not limited to those in pursuit of a crime or fraud, but extend to communications in pursuit of an illegal or improper object*'.

82. There are useful passages regarding the rationale of legal professional privilege that echo the point at [81]:

82.1 ***Grant v Downs* (1976) 135 CLR 674** at 685 per Stephen, Mason and Murphy JJ, and

82.2 ***R v Bell; Ex parte Lees* (1980) 146 CLR 141** per Stephen J at 151-152.

83. Similarly, the rationale of the Exclusionary Rule would be debased were it used to encourage jurors so that, as Stephen J put it in *Bell,* they '*may the better undertake or continue criminal or fraudulent conduct*'.

## VI–4 HOW THE EXCLUSIONARY RULE HAS BEEN APPLIED

### 4.1 Australia

84. The Appellant has been unable to find any case in which the Exclusionary Rule has been applied in Australia to: (i) make evidence of a criminal offence committed by a juror against a fellow juror inadmissible, or (ii) refuse an inquiry into alleged criminal conduct by a juror against a fellow juror.

85. The case closest to the facts in this appeal is *Emmett*, albeit the coercion was by sheriff's officers not fellow jurors. *Emmett* supports the Appellant's position ([69] above). *Emmett* was not challenged below and was applied (CoA [16]).

**Victoria**

86. In ***R v Medici* (1995) 79 A Crim R 582** the Victorian Court Of Criminal Appeal (Southwell, Vincent and McDonald JJ) considered how the Exclusionary Rule worked in tandem with s 69A(5) of the *Juries Act* 1967. The Court (at 590) observed, in respect of the rule that courts have distinguished between matters relating to what passes between jurors and matters that may have *influenced* the jury *extrinsic* to those matters.

87. The Court noted at (592), citing ***Re Matthews & Ford* [1973] VR 199** at 211, that courts '... *in proper cases received evidence tendered to show misconduct or partiality or bias on the part of jurors ... or that a juror has accepted bribes ...*'.

88. The Court accepted (at 596) the test in *Webb* (see [62] above) may be used to determine whether a juror '*had not discharged their task with impartiality*', and at (594) that where an '*irregularity appears after the jury has been discharged following verdict, regard should be had to the first four policy considerations referred to in Matthews & Ford*'. The first four policy considerations referred to

in *Matthews & Ford* include: (i) (at 209 line 30) unanimity of the verdict can only be achieved as a result of *free* (but confidential) interchange of views; (ii) (at 210 line 15) the verdict of the jury stated in open court is treated as an outward, formal and exclusive expression and repository of their agreement which holds each of them thereafter to verdict (see [34] above); (iii) (at 210 line 45) the need to ensure finality in litigation, and (iv) (at 210 line 45) the need to protect jurors from the importuning of defeated litigants.

89. The Court in *Medici* referred to s 69A(5) of the *Juries Act* 1967. The Court found that it was not necessary to explore and determine the parameters of that subsection, but observed at (596) that, '... [b]*y its terms, it would enable investigations to be had and disclosure to be had relevant to the commission of a criminal offence perpetrated during the course of the deliberations of a jury'*. The Appellant makes the same observation in regard to s 56B(2)(e) of the *Juries Act*.

90. The Court did not read the provisions of s 69A(5) as evincing an intention of Parliament to change the *general* proposition that a Court will not enquire into what has taken place or passed between jurors or the reason for their decision.

**Queensland**

91. In *R v Myles* (see [67] above), case decided before the *Jury Act* 1995 (Qld) was assented to, Fitzgerald P (at 203) applied the test in *Webb* (refer to [62] above) to determine whether evidence which he described as '*peripheral*' should be received, i.e. *inter alia* that the jury foreman had informed the jury room that (i) he had a military background and had assisted the Australian Federal Police ('**AFP**') in circumstances where the AFP and the Queensland police had conducted surveillance in that case; (ii) comments about the evidence regarding freight, and (iii) comments about the evidence regarding the price of meat.

92. Fitzgerald P (at 203) observed that '*The jury's access to such peripheral information would raise neither a serious question as to the fairness of the appellant's trial, a significant possibility that an innocent person ... might have been convicted, nor any other prospect of a substantial miscarriage of justice*'.

93. Further, referring to the more liberal approach evident in NZ (see *Tuia v R*) adherence to the jury system, which is considered essential to the fair trial of serious offences, involves acceptance of its inherent frailties. Imperfections in the deliberative process of juries that lack any exceptional quality or significance are not seen as depriving an accused person of a fair trial.

94. In *Myles*, in addition to the three matters at [91] above, the jury foreman and two or three other jurors had visited a relevant site for an unauthorised view.

95. Fitzgerald P treated this as more significant (from 204). At (205) his Honour suggested that the test for receiving evidence regarding the unauthorised view would at least require the court to be satisfied that '*... if the information was found to be correct, the verdict would be set aside despite the proviso ...* [and] *... that seems to me to require the prosecution to establish that there is no significant possibility that an innocent person or persons, have been convicted; if that possibility exists, the verdict is unsafe and could not be saved by the proviso*'. That is a more stringent test than that applied in *Webb*.

96. Fitzgerald P (at 205) describes how the stringent application of the Exclusionary Rule must now be rejected, '*Further, the traditional objection to any reception of evidence from a jury member concerning jury deliberations, that it would 'force the jury door wide open' (Young at 434) cannot be sustained; it is logically possible to keep the door firmly shut in all but exceptional circumstances and to open it only to the extent necessary. If that were not otherwise obvious, it has been demonstrated by legislation, e.g. the English statute referred to in Young and, in Queensland, the Jury Act 1995*'.

97. Pincus JA in *Myles* (at 208) noted that the rule is a general one and it cannot be absolute, '*If one of the jurors were credibly alleged to have conveyed to the others, in the jury room, threats of physical retaliation if they acquitted an accused, it is inconceivable that that could not be gone into by way of inquiry ... if the inquiry disclosed that the verdict had been arrived at as a result of such intimidation the court would have the right to upset it*'.

**Western Australia**

98. In *Shrivastava* ([37] above) McLure P held at [5] that the clear weight of current authority in Australia is that there is no residuary discretion to allow evidence of jury deliberations even if there are sufficiently compelling reasons to do so. Further, that even if that were subsequently held not to be the common law of Australia, the residuary discretion would not be enlivened in that case.

99. The approach taken by Pullin JA in *Shrivastava* is referred to above at [47]-[48].

100. Buss JA (at [98]) concluded that no material prejudice was caused to Mr Shrivastava even if the court, balancing competing public interests, is empowered to depart from the normal rule of confidentiality if a sufficiently compelling reason

is shown [being the view of the Court of Appeal of NZ in *Tuia* (556–557) which was left open by Gleeson CJ in *Minarowska* (87)].

**South Australia**

101. In ***R v Wilton* (2013) 116 SASR 392** (Blue J; Sully and Kelly JJ concurring) (at [29]) held that the admissibility of evidence involving jury communications depends on whether the communication is an intrinsic part of a jury deliberation or an improper extraneous external influence. Affidavits of three jurors regarding an allegation that a juror had been told about the accused's previous convictions by his wife and told the jury were obtained. Blue J found (at [42]-[44]) the affidavits were admissible despite the fact that they deposed to conversations amongst jurors because the conversations were not properly part of the jury's deliberations.

102. Blue J observed (at [26]) that:

> '... the admissibility of evidence relating to jury communications does not turn on whether the evidence is adduced from a juror or from a non-juror. That proposition is now clearly established by authority. For example, matters properly characterised as being intrinsic jury deliberations cannot be proved by hearsay or evidence from a sheriff's officer or other non-jury member who heard or saw the jury deliberation in question. Similarly, evidence of what is properly characterised as improper extraneous influence upon the jury can be adduced directly from a jury member as much as from an outsider'.

103. Blue J noted ([32]-[33]) that the prosecution's position (which was rejected) would mean a distinction drawn between the admissibility of evidence relating to: (i) a third party entering the jury room and threatening to shoot jury members unless they delivered a guilty verdict (which would be admissible), and (ii) evidence of one of the jurors doing the same thing (which would not be admissible).

## 4.2 New Zealand

104. In *R v Papadopoulos* the NZ CoA referred to the rule that courts will decline to receive affidavits from jurors purporting to disclose what took place during deliberations, noted that this rule did not apply to matters extrinsic to those deliberations, and referred (at 626-627), without rejecting it, to counsel's argument that this rule may be subject to an exception (counsel employed the same example as was referred to by Blue J in *Wilton* at [32]-[33]).

105. In *R v Taka* the NZ CoA referred (at 131) to an extreme category where the rule of confidentiality of jury deliberations may be subject to an exception. In the Respondent's Summary of Argument in the special leave application at [3.16], reliance is placed on the holding of Martin CJ at [42] in the CoA (which is in turn an acceptance of an argument advanced by the Respondent below), that the purported existence of a NZ exception to the rule '*has developed incrementally from an insecure foundation*'. That '*foundation*' being the suggestion that a submission by counsel in *Papadopoulos* was mistaken in *Taka* as a statement of established principle. The obvious flaw in that argument is that the same Judge, now Lord Cooke of Thorndon, first gave the judgment of the Court in *Papadopoulos* (as a Justice of the NZ CoA) and then, as President, delivered the reasons of the NZ CoA in *Taka.* Cooke P, as he then was, in *Taka*, specifically accepted the existence of the exception (at 131 line 50) and states, '... *where there is reasonable ground for contending that, despite the general rule, a disclosure of jury deliberations is admissible the proper course is an agreed memorandum ...*'.

106. In *Tuia v R* Tipping J, giving the judgment of the Court, indicated (at 556) that there could be circumstances raising a sufficiently compelling reason to depart from the general rule and that in deciding whether to do so it is necessary to balance competing public interests. Certainly Gleeson CJ proceeded on that understanding of the NZ cases in *Minarowska*.

### 4.3 United Kingdom

107. In *Mirza* the House of Lords (Lord Steyn dissenting) explained the rationale for the Exclusionary Rule (Lord Slynn at [47]-[55], Lord Hope at [113]-[123], Lord Hobhouse at [142]-[146] and Lord Rodger at [163]-[172]). The court canvassed some exceptions to the rule (i) a complete repudiation of the oath taken by the jurors to try the case according to the evidence (Lord Hope at [123]), and (ii) when extraneous material is introduced into jury deliberations (Lord Steyn at [11]).

108. In ***R v Adams* [2007] 1 Cr App R 449** Gage LJ (at 457) referred to the fact that the Criminal Cases Review Commission ('**CCRC**') produced a questionnaire for jurors (instructed not to reveal jury deliberations). The CRC interviewed 11 surviving members of a jury (from a trial 13 years earlier). The CoA (at 458) gave directions about hearing evidence from those jurors. Four jurors subsequently gave evidence in the absence of the others.

109. Once a conflict between emerged as to the credit of a juror in *Adams*, it became inevitable that the court would need to hear evidence from the jurors (459). Gage LJ noted (at 461) the Court's experience of hearing this evidence showed how difficult it is to distinguish between jury deliberations and extrinsic matters.

110. In ***R v Thompson and others***, [2010] 2 Cr. App. R. 27 the Court of Appeal, Judge LCJ, Hughes LJ and Bean J, considered 6 cases each of alleged jury irregularity. The court proceeded to dismiss 5, and allow 1, of the 6 appeals. Where there are serious grounds for believing there has been a complete repudiation of the oath taken to try the case on the evidence a court will enquire, and may hear, *de bene esse,* evidence, including the evidence of jurors. If that has occurred, the verdict will be unsafe, and any conviction will be quashed (Judge LCJ 263-264).

111. On 19 November 2012 the then president of the Queen's Bench Division (Sir John Thomas) issued a ***Protocol On Jury Irregularities In The Crown Court*** ([2013] 1 Cr. App. R. 22), defining a jury irregularity at (1) and (3); requiring that any irregularity relating to the jury be drawn to the attention of the trial judge as soon as it is known (2); stipulating that a trial judge has no jurisdiction in relation to enquiries about jury irregularities discovered after the end of the trial (16); and stating that in those circumstances the trial judge should inform the Registrar of Criminal Appeals about the information (17). The Registrar may refer the case to the full Court to consider whether it wishes to direct a CCRC investigation (22) and, if so, directions will be given as to the scope of the investigation (24).

112. Such a protocol suggests the increasing prevalence of jury misconduct in the UK.

**4.4 Canada**

113. The Supreme Court of Canada considered the rule in ***R v Pan; R v Sawyer*** [2001] 2 SCR 344. Arbour J delivered the unanimous decision of the Court. Following conviction counsel for one of the appellants was approached by a juror who stated that undue pressure had been placed on her to convict. The trial judge declined to conduct an inquiry. Her Honour held that evidence that the jury has been exposed to some influence from outside the jury is admissible.

114. The distinction between intrinsic and extrinsic matters is not always self-evident and it is not possible to articulate with complete precision what is a matter extrinsic to a jury's deliberations. Her Honour's exposition of the modern rule at [77] was cited with approval in ***R v Skaf*** **(2004) 60 NSWLR 86** at [212].

## PART VII APPLICABLE STATUTES

115. A list (and copies) of the applicable legislation is set out at Annexure A to these submissions.

## PART VIII PRECISE ORDERS SOUGHT

116. The orders made by the Court of Appeal of the Supreme Court of Western Australia on 17 January 2013 be set aside.

117. A declaration that the Juror's Note is admissible despite the common law rule precluding the admission of evidence of a jury's deliberations.

**If an inquiry into the Juror's Note is no longer practicable:**

118. The verdicts entered by the District Court of Western Australia on 17 January 2012 be quashed.

**If an inquiry into the Juror's Note remains practicable:**

119. An order that the matter be remitted to the Court of Appeal and the Juror's Note be received into evidence.

120. An order that an inquiry supervised by the Court of Appeal be held into the circumstances of the Juror's Note, and a written report be made to the Court of Appeal upon the completion of that investigation.

121. A copy of the written report to the Court of Appeal be served on the parties.

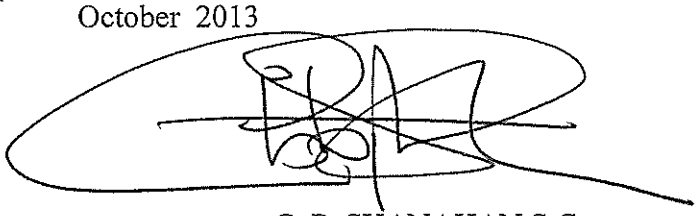
122. An order that the parties be heard by the Court of Appeal upon the completion of the investigation into the circumstances of the Juror's Note as to the ultimate disposition of the appeal.

123. There be liberty to apply in the Court of Appeal.

## PART IX ESTIMATE OF TIME REQUIRED

124. It is estimated that the Appellant's oral argument will take 2 hours.

Dated: 16th October 2013



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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 51 of 2013

B E T W E E N:

**MARK SHARNE SMITH**
Appellant

and

10

**THE STATE OF WESTERN AUSTRALIA**
Respondent

**ANNEXURE 'A'**
**APPLICABLE STATUTES**

| No. | Legislation | Section/s | In Force | Reprint | Page |
|---|---|---|---|---|---|
| 1. | *Community Protection (Offender Reporting) Act 2004* (WA) | ss. 28, 29, 29A 30 | Yes. | 14.11.08 | 2 |
| 2. | *Criminal Appeals Act 2004* (WA) | s.30 | Yes. | 12.04.13 | 5 |
| 3. | *The Criminal Code* (WA) | s.123 | Yes. | 1.03.13 | 6 |
| 4. | *Juries Act 1957* (WA) | Part IXA ss. 56A-56E | Yes. | 23.09.11 | 7 |
| 5. | *Juries Amendment Act 2000* (WA) | s.10 | Yes. | No. | 11 |
| 6. | *Supreme Court Act 1935* (WA) | s.156 | Yes. | 6.01.12 | 14 |
| 7. | *Juries Act 1967* (ACT) | s.42C | Yes. | 1.07.11 | 15 |
| 8. | *Jury Act 1977* (NSW) | ss. 68, 68A | Yes. | 15.07.08 | 17 |
| 9. | *Juries Act* (NT) | s.49A | Yes. | 15.02.12 | 19 |
| 10. | *Jury Act 1995* (Qld) | s.70 | Yes. | 14.10.10 | 21 |
| 11. | *Juries Act 2003* (Tas) | s.58 | Yes. | 17.9.08 | 23 |
| 12. | *Juries Act 1967* (Vic) | 69A | No, repealed 01.08.01 s.92 *Juries Act 2000* (Vic) | Repealed | 25 |
| 13. | *Juries Act 2000* (Vic) | s.78 | Yes. | 1.07.13 | 27 |

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**1. *Community Protection (Offender Reporting) Act* 2004 (WA), ss. 28, 29, 29A 30**

**28. Reportable offender to report annually and as required by Commissioner**

(1) A reportable offender must report his or her personal details to the Commissioner each year.

(2) The reportable offender must make the report in each year during the calendar month in which he or she first reported in accordance with this Act or a corresponding Act.

(3) The Commissioner may, at any time, cause written notice to be given to a reportable offender requiring the reportable offender to report his or her personal details to the Commissioner at the time or times stated in the notice.

(4) A reportable offender must report his or her personal details to the Commissioner in accordance with a notice under subsection (3).

(5) If the reportable offender has been in government custody for any period since he or she last reported his or her personal details under this section, the details he or she must report include details of when and where that custody occurred.

(6) If a reportable offender's reporting period expires but he or she is then required to report again under section 25, the reference in subsection (2) to the month during which he or she first reported is to be read as a reference to the month during which he or she first reported in respect of the current reporting period.

**29. Reportable offender to report changes to relevant personal details**

(1) A reportable offender must report to the Commissioner any change in his or her personal details —

(a) if subsection (2)(a) or (b) applies to the change, within 24 hours after that change occurs; or

(b) otherwise, within 7 days after that change occurs.

(2) For the purposes of subsection (1), a change occurs —

(a) in the place where the reportable offender or a child generally resides; or

(b) as to when the reportable offender has unsupervised contact with a child; or

(ca) as to when the reportable offender is present at a place; or

(c) in the place where the reportable offender is generally employed; or

(d) in the motor vehicle that the reportable offender generally drives,

only on the expiry of the relevant 7 day period referred to in section 26(2)(a), (da), (d) or (e) or the relevant 3 day period referred to in section 26(2)(b), (c) or (db).

(3) If the personal details of a reportable offender (other than one to whom Division 10 applies) change while he or she is not in Western Australia, he or she must report the change to the Commissioner within 7 days after entering Western Australia.

(4) A person does not commit an offence against section 63 because of a failure to comply with the reporting obligation imposed by subsection (3) if he or she does not remain in Western Australia for 14 or more consecutive days, not counting any days spent in government custody.

(5) A reportable offender who is in government custody for 14 or more consecutive days must report his or her personal details to the Commissioner -

(a) within 7 days after ceasing to be in government custody; or

(b) before leaving Western Australia, if he or she leaves within that 7 day period.

[Section 29 amended by No. 54 of 2012 s. 14.]

**29A. Intended absence from place of residence to be reported**

(1) In this section, a reference to the place where a reportable offender generally resides is a reference to —

(a) the premises, or each of the premises, where he or she generally resides, as determined in accordance with section 26(2)(a); or

(b) if he or she does not generally reside at any particular premises, the localities in which he or she can generally be found.

(2) This section applies to a reportable offender who -

(a) intends to leave the place where he or she generally resides for 7 or more consecutive days; and

(b) does not intend to leave Western Australia.

(3) At least 7 days before leaving the place where he or she generally resides, the reportable offender must report the intended absence to the Commissioner and must provide details of -

(a) the dates, or approximate dates, of the period during which he or she intends to be absent from the place where he or she generally resides; and

(b) each address or location within Western Australia at which he or she intends to reside (to the extent that they are known) and the dates, or approximate dates, of the periods during which he or she intends to reside at those addresses or locations.

(4) If circumstances arise making it impracticable for a reportable offender to make the report at least 7 days before he or she leaves, it is sufficient compliance with subsection (3) if the reportable offender reports the required information to the Commissioner no later than 24 hours after leaving the place where he or she generally resides.

(5) If the reportable offender decides not to leave the place where he or she generally resides, he or she must report his or her change of intention to the Commissioner within 7 days after deciding not to leave.

(6) This section does not limit any requirement under this Act for a reportable offender to report a change in the place where he or she generally resides.

[Section29A inserted by No. 27 of 2008 s. 5.]

**30. Intended absence from Western Australia to be reported**

(1) This section applies to a reportable offender who intends to leave Western Australia, whether to travel elsewhere in Australia or to travel out of Australia.

(2) At least 7 days before leaving Western Australia, the reportable offender must report the intended travel to the Commissioner and must provide details of —

(a) each State, Territory or country to which he or she intends to go while out of Western Australia;

(b) the approximate dates of the periods during which he or she intends to be in each of those States, Territories or countries;

(c) each address or location within each State, Territory or country at which he or she intends to reside (to the extent that they are known) and the approximate dates of the periods during which he or she intends to reside at those addresses or locations;

(d) if he or she intends to return to Western Australia, the approximate date on which he or she intends to return; and

(e) if he or she does not intend to return to Western Australia, a statement of that intention.

(3) If circumstances arise making it impracticable for a reportable offender to make the report at least 7 days before he or she leaves, it is sufficient compliance with subsection (2) if the reportable offender reports the required information to the Commissioner no later than 24 hours after leaving Western Australia.

(4) A reportable offender who reports under subsection (3) after leaving Western Australia must make the report -

(a) by facsimile or email sent to the Commissioner or to any other address permitted by the regulations; or

(b) in any other manner permitted by the regulations.

[Section 30 amended by No. 27 of 2008 s. 6.]

**2. *Criminal Appeals Act* 2004 (WA), s.30**

**30. Appeal against conviction, decision on**

(1) This section applies in the case of an appeal against a conviction by an offender.

(2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.

(3) The Court of Appeal must allow the appeal if in its opinion —

(a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or

(b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or

(c) there was a miscarriage of justice.

(4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(5) If the Court of Appeal allows the appeal, it must set aside the conviction of the offence (offence A) and must -

(a) order a trial or a new trial; or

(b) enter a judgment of acquittal of offence A; or

(c) if -

(i) the offender could have been found guilty of some other offence (offence B) instead of offence A; and

(ii) the court is satisfied that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender was guilty of offence B,

enter a judgment of conviction for offence B and impose a sentence for offence B that is no more severe than the sentence that was imposed for offence A; or

(d) if the court is satisfied that the offender should have been found not guilty of offence A on account of unsoundness of mind - enter a judgment of acquittal of offence A on account of unsoundness of mind and deal with the offender under the Criminal Law (Mentally Impaired Accused) Act 1996; or

(e) if the offender could have been found guilty of some other offence (offence B) instead of offence A and the court is satisfied -

(i) that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender did the acts or made the omissions that constitute offence B; and

(ii) that the offender should have been found not guilty of offence B on account of unsoundness of mind,

enter a judgment of acquittal of offence B on account of unsoundness of mind and deal with the offender under the Criminal Law (Mentally Impaired Accused) Act 1996.

(6) If the Court of Appeal enters a judgment of acquittal of offence A or enters a judgment of conviction of offence B, it may vary any sentence —

(a) that was imposed for an offence other than offence A at or after the time when the offender was sentenced for offence A; and

(b) that took into account the sentence for offence A.

| 3. | *Criminal Code 1913* (WA), s.123 |
|---|---|

**123. Corrupting or threatening juror**

Any person who -

(1) Attempts by threats or intimidation of any kind, or by benefits or promises of benefit of any kind, or by other corrupt means, to influence any person, whether a particular person or not, in his conduct as a juror in any judicial proceeding, whether he has been sworn as a juror or not; or

(2) Threatens to do any injury or cause any detriment of any kind to any person on account of anything done by him as a juror in any judicial proceeding; or

(3) Accepts any benefit or promise of benefit on account of anything to be done by him as a juror in any judicial proceeding, whether he has been sworn as a juror or not, or on account of anything already done by him as a juror in any judicial proceeding;

is guilty of a crime, and is liable to imprisonment for 5 years.

[Section 123 amended by No. 101 of 1990 s. 9; No. 51 of 1992 s. 16(2); No. 70 of 2004 s. 34(1).]

**4. *Juries Act* 1957 (WA)**

Part IXA ss. 56A-56E
Part IXA - Jury confidentiality
[Heading inserted by No. 12 of 2000 s. 10.]

**56A. Terms used**

(1) In this Part —

prosecuting officer means —

(a) the Director of Public Prosecutions or the Deputy Director of Public Prosecutions appointed under the Director of Public Prosecutions Act 1991; or

(b) a member of the staff referred to in section 30 of the Director of Public Prosecutions Act 1991 who is an Australian legal practitioner within the meaning of that term in the Legal Profession Act 2008 section 3; or

(c) the Director of Public Prosecutions or the Associate Director of Public Prosecutions appointed under the Director of Public Prosecutions Act 1983, as amended from time to time, of the Parliament of the Commonwealth; or

(d) a member of the staff referred to in section 27(1) of the Director of Public Prosecutions Act 1983, as amended from time to time, of the Parliament of the Commonwealth who is a legal practitioner as defined in that Act; or

(e) a person employed under section 27(3) of the Director of Public Prosecutions Act 1983, as amended from time to time, of the Parliament of the Commonwealth who is a legal practitioner as defined in that Act;

protected information means -

(a) statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court; or

(b) information that identifies, or is likely to identify, a person as, or as having been, a juror in particular proceedings;

publish, in relation to protected information, means communicate or disseminate the information in such a way or to such an extent that it is available to, or likely to come to the notice of, the public or a section of the public.

(2) This Part applies in relation to juries in trials or coronial proceedings in a court of the State or another State, the Commonwealth or a territory of the Commonwealth whether begun before or after the commencement of the Juries Amendment Act 2000 1 and to juries in inquests held under the Coroners Act 1920 before its repeal by section 60 of the Coroners Act 1996.

[Section 56A inserted by No. 12 of 2000 s. 10; amended by No. 65 of 2003 s. 42(2); No. 21 of 2008 s. 669(2).]

**56B. Protected information not to be disclosed**

(1) A person who discloses protected information commits an offence if the person is aware that, in consequence of the disclosure, the information will, or is likely to, be published.
Penalty: $5 000.

(2) Subsection (1) does not prohibit disclosing protected information -

(a) to a court; or

(b) to a board or commission appointed by the Governor; or

(ba) to the Corruption and Crime Commission established under the Corruption and Crime Commission Act 2003; or

(bb) to the Parliamentary Inspector of the Corruption and Crime Commission appointed under the Corruption and Crime Commission Act 2003; or

[(c) deleted]

(d) to the Parliamentary Commissioner for Administrative Investigations or the Deputy Parliamentary Commissioner for Administrative Investigations appointed under section 5 of the Parliamentary Commissioner Act 1971; or

(e) to a prosecuting officer or a police officer for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity; or

(f) as part of a fair and accurate report of an investigation referred to in paragraph (e); or

(g) to a person in accordance with an authorisation granted by the Minister to conduct research into matters relating to juries or jury service; or

(h) to an Australian legal practitioner (within the meaning of that term in the Legal Profession Act 2008 section 3) for the purpose of obtaining advice in relation to a matter referred to in paragraph (a), (b), (c), (d) or (e).

[Section 56B inserted by No. 12 of 2000 s. 10; amended by No. 48 of 2003 s. 62; No. 50 of 2003 s. 73(2); No. 65 of 2003 s. 42(2); No. 78 of 2003 s. 74(2); No. 21 of 2008 s. 669(3).]

**56C. Protected information not to be solicited or obtained**

(1) A person who solicits or obtains protected information with the intention of publishing or facilitating the publication of that information commits an offence.
Penalty: $5 000.

(2) Subsection (1) does not prohibit soliciting or obtaining protected information —

(a) in the course of proceedings in a court; or

(b) by a board or commission appointed by the Governor; or

(ba) to the Corruption and Crime Commission established under the Corruption and Crime Commission Act 2003; or

(bb) to the Parliamentary Inspector of the Corruption and Crime Commission appointed under the Corruption and Crime Commission Act 2003; or

[(c) deleted]

(d) by the Parliamentary Commissioner for Administrative Investigations or the Deputy Parliamentary Commissioner for Administrative Investigations appointed under section 5 of the Parliamentary Commissioner Act 1971; or

(e) by a prosecuting officer or a police officer for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity; or

(f) by a person in accordance with an authorisation granted by the Minister to conduct research into matters relating to juries or jury service; or

(g) by an Australian legal practitioner (within the meaning of that term in the Legal Profession Act 2008 section 3) for the purpose of giving advice in relation to a matter referred to in paragraph (a), (b), (c), (d) or (e).

[Section 56C inserted by No. 12 of 2000 s. 10; amended by No. 48 of 2003 s. 62; No. 50 of 2003 s. 73(2); No. 65 of 2003 s. 42(2); No. 78 of 2003 s. 74(2); No. 21 of 2008 s. 669(4).]

**56D. Protected information not to be published**

(1) A person who publishes protected information commits an offence.
Penalty: $5 000.

(2) Subsection (1) does not prohibit publishing protected information -

(a) in accordance with an authorisation granted by the Minister to conduct research into matters relating to juries or jury service; or

(b) as a part of a fair and accurate report of —

(i) proceedings in respect of an alleged contempt of court, an alleged offence against this Part or an alleged offence otherwise relating to jury deliberations or a juror's identity; or

(ii) proceedings by way of appeal from proceedings referred to in subparagraph (i); or

(iii) if the protected information relates to jury deliberations, proceedings by way of appeal from the trial in the course of which the deliberations took place if the nature or circumstances of the deliberations is an issue relevant to the appeal; or

(c) about a prosecution for an alleged offence against section 56B, 56C or this section if, before the prosecution was instituted, that information had been published generally to the public.

[Section 56D inserted by No. 12 of 2000 s. 10; amended by No. 50 of 2003 s. 73(2).]

**56E. Lawful disclosure of protected information**

Sections 56B, 56C and 56D do not prohibit a person —

(a) during the course of a trial, disclosing, soliciting or obtaining, or publishing, with the leave of the court or otherwise with lawful excuse, information that identifies, or is likely to identify, the person or another person as, or as having been, a juror in the trial; or

(b) after the trial has been completed, disclosing, soliciting or obtaining, or publishing —

(i) information that identifies, or is likely to identify, the person as having been a juror in the trial; or

(ii) information that identifies, or is likely to identify, another person as having been a juror in the trial if the other person has consented to the publication or disclosure of that information.

[Section 56E inserted by No. 12 of 2000 s. 10.]

**5. *Juries Amendment Act* 2000 (WA), s.10**

**10. Sections 56A to 56E inserted**

Before section 57 of the principal Act, the following heading and sections are inserted —

"

Part IXA — Jury confidentiality

56A. Interpretation and application

(1) In this Part —

"prosecuting officer" means —

(a) the Director of Public Prosecutions or the Deputy Director of Public Prosecutions appointed under the Director of Public Prosecutions Act 1991;

(b) a member of the staff referred to in section 30 of the Director of Public Prosecutions Act 1991 who is a practitioner as defined by the Legal Practitioners Act 1893;

(c) the Director of Public Prosecutions or the Associate Director of Public Prosecutions appointed under the Director of Public Prosecutions Act 1983, as amended from time to time, of the Parliament of the Commonwealth;

(d) a member of the staff referred to in section 27(1) of the Director of Public Prosecutions Act 1983, as amended from time to time, of the Parliament of the Commonwealth who is a legal practitioner as defined in that Act; or

(e) a person employed under section 27(3) of the Director of Public Prosecutions Act 1983, as amended from time to time, of the Parliament of the Commonwealth who is a legal practitioner as defined in that Act;

"protected information" means —

(a) statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court; or

(b) information that identifies, or is likely to identify, a person as, or as having been, a juror in particular proceedings;

"publish", in relation to protected information, means communicate or disseminate the information in such a way or to such an extent that it is available to, or likely to come to the notice of, the public or a section of the public.

(2) This Part applies in relation to juries in trials or coronial proceedings in a court of the State or another State, the Commonwealth or a territory of the Commonwealth whether begun before or after the commencement of the Juries Amendment Act 2000 and to juries in inquests held under the Coroners Act 1920 before its repeal by section 60 of the Coroners Act 1996.

56B. Protected information not to be disclosed

(1) A person who discloses protected information commits an offence if the person is aware that, in consequence of the disclosure, the information will, or is likely to, be published.
Penalty: $5 000 or imprisonment for 6 months, or both.

(2) Subsection (1) does not prohibit disclosing protected information —

(a) to a court;

(b) to a board or commission appointed by the Governor;

(c) to the Anti-Corruption Commission established under section 5 of the Anti-Corruption Commission Act 1988;

(d) to the Parliamentary Commissioner for Administrative Investigations or the Deputy Parliamentary Commissioner for Administrative Investigations appointed under section 5 of the Parliamentary Commissioner Act 1971;

(e) to a prosecuting officer or a police officer for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity;

(f) as part of a fair and accurate report of an investigation referred to in paragraph (e);

(g) to a person in accordance with an authorization granted by the Minister to conduct research into matters relating to juries or jury service; or

(h) to a practitioner as defined by the Legal Practitioners Act 1893 for the purpose of obtaining advice in relation to a matter referred to in paragraph (a), (b), (c), (d) or (e).

56C. Protected information not to be solicited or obtained

(1) A person who solicits or obtains protected information with the intention of publishing or facilitating the publication of that information commits an offence.
Penalty: $5 000 or imprisonment for 6 months, or both.

(2) Subsection (1) does not prohibit soliciting or obtaining protected information —

(a) in the course of proceedings in a court;

(b) by a board or commission appointed by the Governor;

(c) by the Anti-Corruption Commission established under section 5 of the Anti-Corruption Commission Act 1988;

(d) by the Parliamentary Commissioner for Administrative Investigations or the Deputy Parliamentary Commissioner for Administrative Investigations appointed under section 5 of the Parliamentary Commissioner Act 1971;

(e) by a prosecuting officer or a police officer for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity;

(f) by a person in accordance with an authorization granted by the Minister to conduct research into matters relating to juries or jury service; or

(g) by a practitioner as defined by the Legal Practitioners Act 1893 for the purpose of giving advice in relation to a matter referred to in paragraph (a), (b), (c), (d) or (e).

56D. Protected information not to be published

(1) A person who publishes protected information commits an offence.

Penalty: $5 000 or imprisonment for 6 months, or both.

(2) Subsection (1) does not prohibit publishing protected information -

(a) in accordance with an authorization granted by the Minister to conduct research into matters relating to juries or jury service;

(b) as a part of a fair and accurate report of -

(i) proceedings in respect of an alleged contempt of court, an alleged offence against this Part or an alleged offence otherwise relating to jury deliberations or a juror's identity;

(ii) proceedings by way of appeal from proceedings referred to in subparagraph (i); or

(iii) if the protected information relates to jury deliberations, proceedings by way of appeal from the trial in the course of which the deliberations took place if the nature or circumstances of the deliberations is an issue relevant to the appeal;

or

(c) about a prosecution for an alleged offence against section 56B, 56C or this section if, before the prosecution was instituted, that information had been published generally to the public.

56E. Lawful disclosure of protected information

Sections 56B, 56C and 56D do not prohibit a person —

(a) during the course of a trial, disclosing, soliciting or obtaining, or publishing, with the leave of the court or otherwise with lawful excuse, information that identifies, or is likely to identify, the person or another person as, or as having been, a juror in the trial; or

(b) after the trial has been completed, disclosing, soliciting or obtaining, or publishing —

(i) information that identifies, or is likely to identify, the person as having been a juror in the trial; or

(ii) information that identifies, or is likely to identify, another person as having been a juror in the trial if the other person has consented to the publication or disclosure of that information.

**6. *Supreme Court Act* 1932 (WA), s.156**

**156. Sheriff**

(1) The sheriff shall be an officer of the Supreme Court, and shall be charged with the service and execution of all writs, applications, summonses, rules, orders, warrants, precepts, process and commands of the Court which are directed to him, and shall make such return of the same to the Court together with the manner of the execution thereof as he is thereby required, and shall take, receive, and detain all persons who are committed to his custody by the Court, and shall discharge all such persons when thereunto directed by the Court or the law.

(2) The sheriff is also an officer of the District Court and the Magistrates Court and has the same functions in respect of those courts as in respect of the Supreme Court, including those under subsection (1).

(3) The sheriff may delegate to a bailiff appointed under the Civil Judgments Enforcement Act 2004, on any terms the sheriff thinks fit, the performance of any function under subsection (1).

(4) If a delegation is made under subsection (3), the Civil Judgments Enforcement Act 2004 section 109(2) and (4) to (8) apply with any necessary changes.

[Section 156 amended by No. 59 of 2004 s. 128; No. 5 of 2008 s.,120.]

| 7. | *Juries Act* 1967 (ACT) , s.42C |
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**42C. Confidentiality of jury deliberations and identities**

(1) This section applies in relation to juries in criminal, civil or coronial proceedings in a court of the Territory, the Commonwealth, a State or another Territory whether instituted before or after the commencement of this section.

(2) A person must not disclose protected information if the person is aware that, in consequence of the disclosure, the information will, or is likely to, be published.
Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(3) A person must not solicit or obtain protected information with the intention of publishing or facilitating the publication of that information.
Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(4) A person must not publish protected information.
Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(5) Subsection (2) does not prohibit disclosing protected information—

(a) to a court; or

(b) to a royal commission or a board of inquiry; or

(c) to the director of public prosecutions, a member of the staff of the director's office or a police officer for the purpose of an investigation about an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity; or

(d) as part of a fair and accurate report of an investigation referred to in paragraph (c); or

(e) to a person in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or

(f) to a legal practitioner to obtain legal advice in relation to a disclosure mentioned in paragraph (a), (b), (c), (d) or (e).

(6) Subsection (3) does not prohibit soliciting or obtaining protected information—

(a) in the course of proceedings in a court; or

(b) by a royal commission or a board of inquiry; or

(c) by the director of public prosecutions, a member of the staff of the director's office or a police officer for the purpose of an investigation about an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity; or

(d) by a person in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or

(e) by a legal practitioner from his or her client for the purpose of giving legal advice to the client in relation to a disclosure mentioned in paragraph (a), (b), (c) or (d).

(7) Subsection (4) does not prohibit publishing protected information—

(a) in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or

(b) as part of a fair and accurate report of—

(i) proceedings in relation to an alleged contempt of court, an alleged offence against this section or an alleged offence otherwise relating to jury deliberations or a juror's identity; or

(ii) proceedings by way of appeal from proceedings referred to in subparagraph (i); or

(iii) if the protected information relates to jury deliberations—proceedings by way of appeal from the proceedings in the course of which the deliberations took place if the nature or circumstances of the deliberations is an issue relevant to the appeal; or

(iv) a statement made or information provided by the director of public prosecutions about a decision, or the reason for a decision, not to institute or conduct a prosecution or proceedings for an alleged contempt of court or alleged offence relating to jury deliberations or a juror's identity.

(8) This section does not prohibit a person—

(a) during the course of proceedings, publishing or otherwise disclosing, with the leave of the Supreme Court or otherwise with lawful excuse, information that identifies, or is likely to identify, the person or another person as, or as having been, a juror in the proceedings; or

(b) after proceedings have been completed, publishing or otherwise disclosing—

(i) information that identifies, or is likely to identify, the person as having been a juror in the proceedings; or

(ii) information that identifies, or is likely to identify, another person as, or as having been, a juror in the proceedings if the other person has consented to the publication or disclosure of that information.

(9) This section does not apply in relation to information about a prosecution for an alleged offence against this section if, before the prosecution was instituted, that information had been published generally to the public.

(10) A prosecution for an alleged offence against this section is not to be instituted except with the written consent of the director of public prosecutions or a person authorised by the director for that purpose.

(11) In this section:

"protected information" means—

(a) particulars of statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court; or

(b) information that identifies, or is likely to identify, a person as, or as having been, a juror in particular proceedings.

"publish", in relation to protected information, means communicate or disseminate the information in such a way or to such an extent that it is available to, or likely to come to the notice of, the public or a section of the public.

| 8. | **Jury Act 1977 (NSW), ss. 68, 68A** |
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**Disclosure etc of identity or address of juror**

68 Disclosure etc of identity or address of juror

(1) A person shall not, except in accordance with this Act, wilfully publish any material, broadcast any matter or otherwise disclose any information which is likely to lead to the identification of a juror or former juror in a particular trial or inquest.

Penalty: In the case of a corporation, $250,000; in any other case, 2 years imprisonment or 50 penalty units (or both).

(2) Subsection (1) does not apply to the identification of a former juror with the consent of the former juror.

(3) A reference in this section to the identification of a juror or former juror includes a reference to the disclosure of the address of the juror or former juror.

(4) Subsection (1) does not apply to the disclosure of information by the sheriff to any of the following bodies or persons for the purposes of an investigation or prosecution of a contempt of court or an offence relating to a juror or a jury:

(a) a court,

(b) the New South Wales Crime Commission,

(c) the Independent Commission Against Corruption,

(d) the Police Integrity Commission,

(e) the Australian Crime Commission,

(f) the Director of Public Prosecutions,

(g) the NSW Police Force,

(h) the Australian Federal Police.

(5) Subsection (1) does not apply to the disclosure of information by the sheriff to a person in accordance with an authority granted by the Attorney General for the conduct of a research project into matters relating to juries or jurors.

(6) In this section:

"court" includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

**Soliciting information from or harassing jurors or former jurors**

68A Soliciting information from or harassing jurors or former jurors

(1) A person must not solicit information from, or harass, a juror or former juror for the purpose of obtaining information about:

(a) the deliberations of a jury, or

(b) how a juror, or the jury, formed any opinion or conclusion in relation to an issue arising in a trial or coronial inquest.

Maximum penalty on indictment: imprisonment for 7 years.

(2) The deliberations of a jury include statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.

(3) Subsection (1) 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.

(4) Subsection (1) does not prohibit any of the following bodies or persons from soliciting information from a juror or former juror for the purposes of an investigation or prosecution of a contempt of court or an offence relating to a juror or a jury:

(a) a court,

(b) the New South Wales Crime Commission,

(c) he Independent Commission Against Corruption,

(d) the Police Integrity Commission,

(e) the Australian Crime Commission,

(f) the Director of Public Prosecutions,

(g) the NSW Police Force,

(h) the Australian Federal Police.

(4A) Subsection (1) does not prohibit a juror from soliciting information from another member of the jury during a trial or coronial inquest.

(5) In this section:
"court" includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

**9. *Juries Act* (NT), s.49A**

**49A. Confidentiality of jury deliberations**

(1) This section applies in relation to juries in criminal, civil or coronial proceedings in a court of the Territory, the Commonwealth or a State or another Territory of the Commonwealth, whether instituted before or after the commencement of this section.

(2) A person must not disclose protected information if the person is aware that, in consequence of the disclosure, the information will, or is likely to, be published.
Maximum penalty:
(a) in the case of a natural person – 85 penalty units or imprisonment for 2 years;
(b) in the case of a body corporate – 440 penalty units.

(3) A person must not solicit or obtain protected information with the intention of publishing or facilitating the publication of that information.
Maximum penalty:
(a) in the case of a natural person – 85 penalty units or imprisonment for 2 years;
(b) in the case of a body corporate – 440 penalty units.

(4) A person must not publish protected information.
Maximum penalty:
(a) in the case of a natural person – 85 penalty units or imprisonment for 2 years;
(b) in the case of a body corporate – 440 penalty units.

(5) Subsection (2) does not prohibit disclosing protected information:
(a) to a court; or
(b) to a Royal Commission, Commission of Inquiry or Board of Inquiry; or
(c) to the Director of Public Prosecutions, a member of the staff of the Director's Office or a member of the Police Force for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations; or
(d) as part of a fair and accurate report of an investigation referred to in paragraph (c); or

(e) to a person in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or

(f) to a health practitioner in the course of the treatment of a person in relation to issues arising out of the person's prior service as a juror.

(5A) A health practitioner to whom protected information is disclosed must not disclose the information to anyone else unless it is necessary for the health or welfare of the former juror.

Maximum penalty: 85 penalty units or imprisonment for 2 years.

(6) Subsection (3) does not prohibit soliciting or obtaining protected information:

(a) in the course of proceedings in a court;

(b) by a Royal Commission, Commission of Inquiry or Board of Inquiry;

(c) by the Director of Public Prosecutions, a member of the staff of the Director's Office or a member of the Police Force for the purpose of an investigation concerning an alleged contempt of court or alleged offence relating to jury deliberations;

(d) by a person in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or

(e) by a legal practitioner for the purpose of giving advice in relation to a matter referred to in paragraph (a), (b), (c) or (d).

(7) Subsection (4) does not prohibit publishing protected information:

(a) in accordance with an authorisation granted by the Attorney-General to conduct research into matters relating to juries or jury service; or

(b) as part of a fair and accurate report of:

(i) proceedings in respect of an alleged contempt of court, an alleged offence against this section or an alleged offence otherwise relating to jury deliberations;

(ii) proceedings by way of appeal from proceedings referred to in subparagraph (i); or

(iii) proceedings by way of appeal from proceedings in the course of which jury deliberations took place if the nature or circumstances of the deliberations is an issue relevant to the appeal.

(8) This section does not apply in relation to information about a prosecution for an alleged offence against this section if, before the prosecution was instituted, that information had been published generally to the public.

(9) A prosecution for an alleged offence against this section is not to be instituted except with the written consent of the Director of Public Prosecutions or a person authorised by the Director for that purpose.

(10) In this section:

"health practitioner "means a medical practitioner or person registered under the Health Practitioner Regulation National Law to practise in the psychology profession (other than as a student).

"protected information" means particulars of statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court.

"publish", in relation to protected information, means communicate or disseminate the information in a way or to an extent that it is available to, or likely to come to the notice of, the public or a member of the public.

**10.** ***Jury Act*** **1995 (Qld) , s.70**

**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 authorize -

(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 authorize -

(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.

**11. *Juries Act* 2003 (Tas), s.58**

**58. Disclosure of certain matters**

(1) A person must not –

(a) publish, or cause to be published, any prohibited matter; or

(b) solicit or obtain the disclosure by a juror or former juror of any prohibited matter.

Penalty:

In the case of –

(a) a body corporate, a fine not exceeding 3 000 penalty units; or

(b) a natural person, a fine not exceeding 600 penalty units or imprisonment for a term not exceeding 2 years.

(2) A juror must not disclose any prohibited matter during the course of a trial except in the course of deliberations with another juror in that trial.

Penalty:

Fine not exceeding 600 penalty units or imprisonment for a term not exceeding 2 years.

(3) A former juror must not disclose any prohibited matter if the person has reason to believe that the disclosure may result in the prohibited matter being published to the public.

Penalty:

Fine not exceeding 600 penalty units or imprisonment for a term not exceeding 2 years.

(4) The provisions of subsection (1) or subsection (3) do not prevent a former juror from disclosing, in relation to issues arising out of the person's service as a juror, any prohibited matter to –

(a) a medical practitioner or a psychologist in the course of treatment; or

(b) an Australian legal practitioner in the course of seeking professional legal advice.

(5) A medical practitioner or psychologist must not disclose any information referred to in subsection (4) to any other person.

Penalty:

Fine not exceeding 600 penalty units or imprisonment for a term not exceeding 2 years.

(6) The provisions of this section do not prevent –

(a) a juror or former juror disclosing any information about the deliberations of a jury to –

(i) a judge, the court or the Magistrates Court; or

(ii) a board or commission appointed by the Governor; or

(iii) the Attorney-General; or

(iv) the Director of Public Prosecutions for Tasmania for the purpose of an investigation and prosecution relating to a criminal offence involving a juror or former juror; or

(v) the Director of Public Prosecutions for the Commonwealth for the purpose of an investigation and prosecution relating to a criminal offence involving a juror or former juror; or

(b) the investigation by a police officer at the request of the Director of Public Prosecutions for Tasmania or the Director of Public Prosecutions for the Commonwealth of a complaint about the deliberations of a jury or the disclosure of information about those deliberations by a juror or former juror to the police in the course of the investigation; or

(c) the investigation by a person authorised by the court sitting as 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 juror or former juror to the authorised person in the course of that investigation; or

(d) 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; or

(e) 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.

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

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

(9) An offence under this section is an indictable offence.

**12. *Juries Act* 1967 (Vic), 69A**

**69A. Confidentiality of jury's deliberations.**

(1) A person must not publish to the public any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of a jury.
Penalty: 100 penalty units or imprisonment for three months or both.

(2) A person who solicits or obtains the disclosure by a person who is or has been a member of a jury of statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of that jury is guilty of an offence.
Penalty: 100 penalty units or imprisonment for three months or both.

(3) A person who is or has been a member of a jury must not disclose any statements made, opinions expressed, arguments advanced or votes cast in the course of the deliberations of that jury if that person has reason to believe that any of that information is likely to be or will be published to the public.
Penalty: 100 penalty units or imprisonment for three months or both.

(4) Nothing in this section prevents the publication or disclosure by any person of any information about the deliberations of a jury if that publication or disclosure does not identify a juror or the relevant legal proceedings.

(5) Nothing in this section prevents a person who is or has been a member of a jury disclosing to a judge, a court, a board or commission appointed by the Governor in Council, the Attorney-General or the Director of Public Prosecutions any information about the deliberations of a jury, or the investigation by the police at the request of the Director of Public Prosecutions of any complaint about the deliberations of the jury or the disclosure of information about such deliberations by a person who is or has been a member of the jury to the police in the course of such an investigation.

(6) If in proceedings for an offence against this section it is necessary to establish the intention or awareness of a body corporate, it is sufficient to show that a servant or agent of the body corporate had that intention or awareness.

(7) If an offence against this section committed by a body corporate is proved to have been committed with the consent or connivance of a person who is a director, manager, secretary or other officer of the body corporate, that person is deemed to have committed the offence also, and is liable to be proceeded against and punished accordingly.

(8) Proceedings for an offence against this section shall be prosecuted summarily.

(9) No prosecution for an offence against this section shall be brought without the consent in writing of the Director of Public Prosecutions or of a person authorized by the Director of Public Prosecutions to give consent for the purposes of this sub-section.

(10) This section does not apply to the disclosure of information about the proceedings for an offence against this section if, before the proceedings were instituted, the information had been published generally to the public.

(11) This section applies to coronial juries, and juries in criminal and civil trials.

**13. *Juries Act* 2000 (Vic), s.78 and 92**

**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 -

(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 member of the police force 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 the 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.

**92. Repeal of Juries Act 1967**

The Juries Act 1967 is repealed.