DON'T ASK DON'T TELL – THE LAW SURROUNDING MEDIA PUBLICATIONS OF JURY DELIBERATIONS

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Introduction

Trial by jury has been a major part of justice systems around the world for centuries. With this, there has also been the idea that jury deliberations should be kept secret. Historically this view stems from the belief that jurors were led to their verdict by the presence of God in the jury room.[1] Allowing investigation into the deliberative process would therefore involve questioning God, a highly blasphemous deed. In modern New Zealand, the idea that deliberations should remain unpublished is based more upon ideas of privacy and fair trial rights and is protected via the law of contempt of court.

In April 2013 the New Zealand Law Commission launched a review of this law.[2] The review includes consideration of "juror contempt (for example … disclosing jury deliberations)".[3] In accordance with this review, the aim of this paper is to examine the law surrounding disclosure of jury deliberations. In particular it will consider disclosure to the media by jurors and disclosure to the public by the media. First, this paper examines the broader law of contempt in New Zealand. Secondly, the law regarding disclosure as stated in the leading case of *Solicitor-General v Radio New Zealand Ltd (Radio NZ)* and subsequent law will be examined.[4] Next, the rationale behind the current state of the

[1] Dorne Boniface "Juror misconduct, secret jury business and the exclusionary rule" (2008) 32 Crim LJ 18 at 24.

[2] Law Commission "Review of Contempt of Court" (11 April 2013) <www.lawcom.govt.nz/our-work>.

[3] At Terms of Reference.

[4] *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) [*Radio NZ*].

law will be assessed for validity resulting in the conclusion that the law as it stands in New Zealand is not an ideal state of affairs. Finally, alternatives to the current law will be examined.

II.

Contempt Law Prior to Radio NZ

Contrary to the law in the United Kingdom and some states in Australia,[5] contempt of court in New Zealand remains largely common law.[6] However, some statutes cover specific aspects of contempt. This legislation bears consideration as it provides a framework for the common law and indicates the difficulty involved in striking an appropriate balance between freedom of expression and jury secrecy.

The broad power of the courts to punish contempt is contained in the Judicature Act 1908.[7] This Act prescribes certain categories of conduct that will always be contemptuous, while noting adds that the list is non-exclusive and does not limit the power of the courts to punish for any other acts.[8] Because the underlying rationale of these categories is said to be "the preservation of confidence in the courts" an action must undermine this preservation in order to be deemed contempt.[9] The courts therefore have the power to decide that disclosures regarding jury deliberations are likely to undermine confidence in the system and are therefore contemptuous.

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[5] See for example, Contempt of Court Act 1981 (UK), s 8; and Jury Act 1977 (NSW), ss 68A–68B.

[6] John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at [9.1].

[7] Section 56C.

[8] Section 56C(3).

[9] Burrows and Cheer, above n 6, at [9.1].

Although there is no direct, statutory ban on publishing deliberations there is still a bias towards preventing disclosure. The main legislation concerning juries, the Juries Act 1981, does not directly prohibit jurors from discussing their deliberations nor does it ban the media from soliciting such information. It does, however, contain a requirement that jury lists be kept confidential.[10] The reasoning behind this requirement appears to be that if the number of people able to access the list of jurors' names and addresses is small, the media should not be able to gain their details and therefore should be prevented from seeking out jurors. This provision therefore indirectly protects both jurors and any information concerning their deliberations. It is worth noting this protection of the jury list does not prevent jurors from seeking out the media and disclosing information that way. The legislation alone does not prevent publication of information a juror reveals through approaching the media by their own initiative. It therefore does not entirely ensure deliberations will remain secret.

This legislation provided the background for the 1994 *Radio NZ* decision. The Judicature Act empowered the courts to declare any conduct contemptuous and the Juries Act supported the view that juror identities and deliberations should be protected. Until the *Radio NZ* case it was assumed that these laws and the general public opinion that notion that secrecy was beneficial would be sufficient enough to prevent media publication of juror comments.[11]

III.

The "Radio New Zealand" Decision

In the *Radio NZ* case the High Court was forced to directly confront the issue of whether media publication of juror comments was

[10] Juries Act 1981, s 12.
[11] *Radio NZ*, above n 4, at 58.

contempt of court. Public opinion had clearly proved insufficient to restrain such acts of publication and in this case the court was forced to choose between "condemning the practice, or being taken as condoning it".[12] The Court decided in favour of condemnation. As this case remains the leading authority on the issue of publication via the media and requires close consideration. .

A. Facts

The judgment succinctly outlines the facts of the case..[13] In order to give a fuller understanding of the issues involved they will be summarised here.

In 1990 David Tamihere was accused of murdering two Swedish tourists who had gone missing. In a highly publicised trial, the jury found Tamihere guilty on two counts of murder and he was subsequently sentenced to life imprisonment. This was despite the fact that neither tourist's body had been found at the time of the trial. The following year, one of the bodies was discovered some 70km away from the area where the police alleged Tamihere killed them. As a result of this new information, Tamihere lodged an appeal and Radio New Zealand attempted to contact the jurors that had given the guilty verdict via telephone. They succeeded in contacting nine out of twelve jurors with one of those nine providing lengthy statements. The other eight were reportedly annoyed that they had been contacted and refused to discuss the trial. Radio New Zealand subsequently broadcast a report on this new information including comments from this juror stating that he had second thoughts about the decision and wondered if the jury had done the right thing or not. Further broadcasts included comments from the other jurors claiming that they were happy with their decision. Radio New Zealand subsequently repeated parts of their broadcast despite a warning from the Solicitor-General that contempt

[12] At 58.
[13] At 51–52.

charges might be forthcoming. The Solicitor-General then commenced proceedings for contempt of court.

B. Arguments

The Solicitor-General argued that Radio New Zealand was in contempt for two reasons:[14]

1) Contacting the jurors in order to gain comments about the verdict; and
2) Broadcasting the comments obtained.

These actions impacted the "safekeeping of an impartial and effective system of justice" and had "the tendency to undermine the administration of justice".[15] Therefore, it was argued that they met the general test for contempt. However the Solicitor-General did concede that contempt would not be committed every time the media simply approached a juror; there must also be an attempt to gain information regarding the deliberations and the verdict.[16]

There was a distinct difference between the treatment afforded to the jurors and that given to Radio New Zealand. Despite swift action being brought against the radio station, no claim for contempt was brought against the juror that spoke to the media. Although no comment was put forth for this difference, it is interesting to note that this reflects the statutory position outlined above. It is generally less acceptable to limit a juror's freedom of expression than it is to limit the ability of media or legal professionals to publish disclosures.

Before proceedings were underway, Radio New Zealand stated that they were acting on advice that their actions were legal. They claimed that they were free to talk to jurors so long as they protected

[14] At 52–53.
[15] At 53.
[16] At 57.

anonymity and did not breach the confidentiality of the jury room.[17] Additionally, they claimed that where there was no intention to undermine the administration of justice, the conduct needed to *actually* prejudice justice. Furthermore, this prejudice needed to be a foreseeable consequence of their actions.[18] As there was no intention to undermine justice in broadcasting the juror's comments, there needed to be actual prejudice for the action to succeed and this was lacking. This argument was rejected, as the need to fairly administer justice was important regardless of intention to undermine.[19] All that was required was an intention to carry out the contemptuous act; Radio New Zealand clearly had this level of intention. So the courts moved to consider whether their conduct should constitute contempt.

C. Decision

In finding that publishing the juror's comments was contemptuous, the Court raised the importance of three features of the jury system: finality of verdicts, free participation in jury deliberations and privacy of jurors.[20] Although the *Radio NZ* case is widely cited as the leading case on this area of law it drew these three factors from the earlier Court of Appeal decision *R v Papadopoulos*.[21] The importance of these factors can therefore be determined through consideration of both decisions.

The finality argument is based on two purportedly fundamental points. The first is that the jury's function ceases when the verdict is delivered. Any investigation into the case once the verdict has been given undermines finality, as it will "endeavour to prolong the life of the jury" beyond the trial period.[22] Media investigation into and

[17] At 52.
[18] At 55.
[19] At 55.
[20] At 53.
[21] *R v Papadopoulos* [1979] 1 NZLR 621 (CA).
[22] *Radio NZ* , above n 4, at 54.

publication of juror deliberations thereby extends the trial and impacts finality.

The second fundamental basis behind the finality argument is that the jury system is based on community respect for a decision rather than the reasoning behind it.[23] Jurors are therefore free to base their decisions on any evidence they like without explaining their reasons.[24] As all jurors may be deciding differently, publishing the reasoning of one juror may not be representative of the group while publishing the reasoning of several jurors may reveal conflicting views.[25] Uncertainty could therefore be created regarding what actually occurred and the core principle of respect for the outcome not the reasoning would be undermined.

The second reason behind secrecy — the impact on free participation in deliberations — is based on the idea that allowing publication in one case may negatively impact future trials. The requirement that jurors make their decisions collectively rather than by allowing one or two individuals to dominate is another core principle of the system.[26] If the media is allowed to publish comments by jurors about their fellow jury members then there is the risk that jurors could become exposed to ridicule. This may then cause some jurors to refrain from voicing their opinions for fear that their comments will be broadcast post-trial.[27]

To further support this idea that publication may undermine free and frank discussion the court referenced the frequently cited statement from Cardozo J:[28]

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[23] At 54.
[24] At 54.
[25] *Papadopoulos*, above n 21, at 626.
[26] *Radio NZ* , above n 4, at 54.
[27] *Papadopoulos*, above n 21, at 626.
[28] *Clark v United States* 289 US 1 (1933) at 13.

> Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.

With some jurors less willing to speak up during deliberations, the collective decision making power of the jury is undermined. This therefore influenced the *Radio NZ* court to find that the media was in contempt by publishing the juror's comments.

Privacy, the third reason behind the *Radio NZ* decision, received the least discussion.[29] Rather than developing an extensive argument in favour of protecting privacy the court simply noted that jurors are under the impression that they will remain anonymous and this impression should be upheld. This lack of analysis may be due to the fact that New Zealand did not fully develop a tort of privacy until some years later.[30] Despite the lack of analysis, it is clear that the judges thought privacy was an important enough factor to be taken into account.

Having determined that the practice of interviewing jurors was likely to prejudice the administration of justice the court then considered the competing values contained in the New Zealand Bill of Rights Act 1990 (NZBORA).[31] Section 14 of NZBORA protects freedom of expression, in this case for both the jurors and the media. Although this was held to be an important consideration, the court also needed to consider the protection afforded to the right to a fair trial and the right to be presumed innocent.[32]

The court determined that the right to a fair trial would be undermined if jurors were open to media scrutiny.[33] If the media were free to

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[29] *Radio NZ* , above n 4, at 54.
[30] Confirmed 11 years after the *Radio NZ* decision in *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[31] *Radio NZ* , above n 4, at 58.
[32] New Zealand Bill of Rights Act 1990, s 25.
[33] Jennifer Tunna "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 Canta LR 79 at 82.

publish juror comments then future jurors may fear judgment and condemnation from their peers were they to decide against public opinion. These fears may then prevent jurors from being truly impartial and the right to a fair trial may be prejudiced. Additionally, the potential impact to appeals or retrials must be considered. If comments regarding deliberations were to be published, future jurors may be swayed by these comments.[34] This potential biasing of future jurors is a clear impact on the right to a fair trial.

As a result of these potential impacts, the Court upheld the right to a fair trial over the right to freedom of expression.[35] Additionally, the Court noted that freedom of expression is commonly limited in areas of the law such as defamation, whereas the right to a fair trial is more frequently favoured and upheld.[36] As such, the Court concluded that in this situation it was appropriate to limit freedom of expression in order to protect the principles of the jury system (finality, free discussion and privacy).[37] Punishing behaviour such as that of the present case was therefore justified and reasonable despite the limitations it imposes on freedom of expression.[38]

There has not been much call to directly challenge these findings in subsequent cases although subsequent developments in the law have subtly contributed to this area of contempt.

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[34] At 91.
[35] *Radio NZ* , above n 4, at 64.
[36] At 60.
[37] At 59
[38] At 64.

IV.

Further Relevant Law

A. Statute

Legislation post-*Radio NZ* shows the difficulty in maintaining the importance of secrecy while still imposing as few limitations as possible. The Evidence Act 2006 shows a willingness to protect deliberations that is clearly in line with the *Radio NZ* decision. This legislation states that a "person *must not* give evidence about the deliberations of a jury".[39] This is a sharp indicator that secrecy of the jury room is more important than a juror's unfettered freedom of expression. This Act is unusual in that it is one of the few provisions willing to expressly prevent jurors themselves from disclosing information rather than simply limiting others. However the Act goes on to allow for exceptions to the rule in exceptional circumstances,[40] suggesting that the requirement of secrecy cannot be absolute. Additionally, this section is limited to comments made while giving evidence and does not extend to comments made to the media or the public.

An unwillingness to completely ban jurors themselves from speaking out about their deliberations can be seen in the rules regulating lawyers' conduct.[41] In order to avoid disclosures without restricting free expression for jurors, limitations have instead been placed on lawyers. The rules provide that lawyers must not "*initiate contact* with

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[39] Section 76(1) (emphasis added).
[40] Section 76(3).
[41] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

jurors after the verdict where the contact is likely to bring the system of justice into disrepute".[42] As with the Juries Act, these rules prevent others from seeking out juror disclosures but do not prevent jurors from approaching others with their stories. Overall, these rules and the Evidence Act both indicate a desire to prevent disclosure of jury deliberations while at the same time a reluctance to impose harsh limitations on jurors.

B. Case Law

While the *Radio NZ* decision made it clear that publishing juror interviews is contemptuous it did not completely clarify what will be covered by this rule.[43] Several subsequent cases have confirmed the view that disclosure is not ideal.[44] Others take a similar stance and outline that disclosure of juror's names or address is unacceptable.[45] This is due to the belief that if jurors are concerned that the defendant may be able to contact them post-verdict they may be less willing to convict and therefore less able to carry out their duty to be impartial.[46]

Despite these decisions, there has been no clear stance on the culpability of jurors that choose to talk to the media. The *Radio NZ* decision did not comment on whether the juror that made the comments to Radio New Zealand could also be held in contempt and subsequent cases have also failed to cover this area, choosing instead to focus on the media.[47] Arguments that one party should be liable while the other should not are flawed as it would not be possible for the media to make contemptuous publications without a juror first

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[42] Schedule 1, ch 13.2.3 (emphasis added).
[43] Burrows and Cheer, above n 6, at [9.11].
[44] See for example, *Wong v Registrar of the Auckland High Court* [2008] 1 NZLR 849 (HC).
[45] See for example, *P(CA50/12) v R* [2012] NZCA 325.
[46] At [14] and [19].
[47] Tunna, above n 33, at 103.

making disclosures.[48] Therefore there is still a lack of clarity in this area of the law.

Additionally, there appears to have been an increase in tolerance of such publications post *Radio NZ* that is inconsistent with the decision.[49] This was most obviously seen following the retrial of David Bain. Having returned a verdict of not guilty, various members of the jury approached the media to discuss their experiences.[50] One of these interviews included comments that despite the not guilty verdict the juror did not feel Bain was innocent as well as comments regarding misconduct by other jurors.[51] These disclosures were much greater inroads into jury secrecy than occurred in the *Radio NZ* case.[52] Due to this extensive nature of the disclosure it is at least arguable that their statements had "the tendency to undermine the administration of justice".[53] Despite this, no allegations were made against either the media or the jurors.[54] This suggests that the *Radio NZ* decision to limit the freedom of the media to publish has not been consistently applied as expected.

C. Media Regulations

Media regulations have been implemented post-*Radio NZ* that aim to ensure the media respects the rights and interests of jurors. The Media Guide for Reporting the Courts and Tribunals 2013 informs members of the media that they must not interview the jurors or report any

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48 At 103.

49 Ursula Cheer "Contempt: Testing the Boundaries in Relation to Juries" (22 November 2012) Online Insider <http://insider.thomsonreuters.co.nz>.

50 David Fisher "Bain juror: we were hounded" *The New Zealand Herald* (online ed, Auckland, 7 June 2009); TVNZ One News "Juror in David Bain trial breaks her silence" (19 November 2012) <tvnz.co.nz>.

51 "Juror: 'I never found David Bain innocent'" *The New Zealand Herald* (online ed, Auckland, 19 November 2012).

52 Burrows and Cheer, above n 6, at [9.11].

53 *Radio NZ* , above n 4, at 53.

54 Burrows and Cheer, above n 6, at [9.11].

other comments issued by them.[55] The guidelines further protect jurors by requiring that they not be photographed, filmed, "or otherwise identified".[56] These guidelines are clearly in accordance with the view that such actions would constitute contempt.

Nevertheless, this guide does have some inconsistencies. This Media Guide includes the In-Court Media Coverage Guidelines 2012 as an appendix.[57] The 2012 guidelines include the statement that "[j]urors must not be recorded in the courtroom or elsewhere *other than when the foreperson of the jury delivers the jury's verdict*".[58] Although this exception to the no recording rule is not referred to anywhere else and does not have legislative force,[59] it is interesting to consider as a proposed exception to the rule.

Post-*Radio NZ* law and the inconsistencies in its application highlight the difficulty in striking a correct balance between secrecy and disclosure. This then raises the question of whether the present legal position is the correct one.

V.

Validity of the Current Law

The considerations proposed in *Radio NZ* to justify the present state of the law do not fully canvass all the issues involved. The impacts to finality, free discussion and privacy are not the sole factors that the court should have considered to reach a fully reasoned decision.

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[55] *Media guide for reporting the courts and tribunals: Edition 3.1* (Ministry of Justice, July 2013) at 29.
[56] At 29.
[57] At 49.
[58] In-Court Media Coverage Guidelines 2012, sch 4(2) (emphasis added).
[59] Schedule 1.

Additionally, these three factors are conceivably not overriding or essential enough to warrant the limitations to free expression.

A. Finality and Uncertainty

As discussed above, the finality argument is based on two ideas:

1) Allowing interviewing of jurors would prolong the life of a trial; and
2) Jurors may provide conflicting reasons for their decisions thus creating uncertainty.

This first argument is a valid reason to limit freedom of expression for both jurors and the media. Litigation must come to an end at some point so that all involved may move on with their lives.[60] If the media is allowed to continue publishing comments on a case, a final verdict may not be so final. As seen with the Bain retrial, the media would not be prevented from publishing comments made by jurors three years after the verdict.[61] As such, some limitation on free expression is warranted in order to prevent extended repetition of concluded events.

However the second argument is flawed as it conflicts with the principles of open justice. Open justice is typically based on the idea that the losing party should know why they lost.[62] In most other areas of the justice system, decision makers are required to publish reasons for their decisions.[63] It is therefore inconsistent that judges and other decision makers are required to provide reasons for their decisions while juries are not despite the equally serious consequences.

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[60] Benjamin M Lawsky "Limitations on Attorney Postverdict Contact with Jurors" (1994) 94 Colum L Rev 1950 at 1959.
[61] *The New Zealand Herald*, above n 51.
[62] *Flannery v Halifax Estate Agencies Ltd* [1999] 1 WLR 377 cited in Mary-Rose Russell and Marnie Prasad "More criminal justice reform" [2012] NZLJ 157 at 158.
[63] Russell and Prasad, above n 62, at 158.

Some academics propose that there is good reason for requiring judges to provide reasons but preventing jurors from doing so.[64] This is based on the fact that jurors are not given formal education and training to teach them how to make a decision based on the evidence. As such, it is argued that their reasons would not be as rational and reasoned as those of other decision makers. Admittedly jurors are not given formal education on how to make their decision based on the evidence, but perhaps this should not prevent them from writing a brief statement explaining the key influences on their decision.

Others credit the decision not to require jurors to provide reasons to the fact that juries are not accountable to the public as judges are.[65] While judges can be removed from office for consistent bad reasoning there are no such sanctions for jurors.[66] This argument therefore suggests that there is no point in requiring reasons from jurors, as they have no real incentive to provide proper, logical decisions.

While it is true that jurors cannot be punished for not providing poor reasons, there are still benefits from openness that suggest they should be allowed to do so. In American states where publication of juror comments is allowed, such publications have shown to increase public understanding of the verdict and the system as a whole.[67] With controversial verdicts in particular, the public may be more likely to accept the outcome if they are aware of the reasoning that led to that verdict.[68] These benefits to the public from allowing disclosure should not be overlooked.

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[64] Abraham S Goldstein "Jury Secrecy and the Media" [1993] U Ill L Rev 295 at 314.

[65] Nicole B Casarez "Examining the Evidence: Post-Verdict Interviews and the Jury System" (2003) 25 Hastings Comm & Ent LJ 499 at 566.

[66] At 566.

[67] At 501.

[68] At 502.

Additionally, it has been suggested that anonymity of jurors may be contributing to less reasoned decisions.[69] As jurors are not required to explain their decisions at all it may be that they are deciding based on entirely irrelevant concerns. Once they have made their arbitrary choice they can then simply "disappear into the crowd" having damaged the justice system rather than aiding it.[70] Surely nobody would consider this exercise of the jury's powers to be at all appropriate but by refusing to allow the media to enquire into deliberations there is nothing to stop such acts.

Overall, the benefits of allowing jurors to discuss their reasoning outweigh the potential negative impact to finality. The only really negative impact is the potential for trials to be drawn out beyond their verdicts. In contrast, allowing disclosure upholds the principles of open justice, informs parties of why they lost or won and improves public understanding.

B. Free and Frank Discussion

The second concern of the court in *Radio NZ* was that allowing publication might lead to limitations on free and frank discussion in the jury room. The court was concerned with preventing jurors from simply agreeing with public opinion rather than considering the actual merits of the case. If a juror feels their views may be published then they may simply follow the general public's opinion rather than put forward any conflicting views.[71] This would understandably limit justice, as cases would not be decided according to their merits. In order to ensure cases are decided according to the evidence presented in court the sanctity of deliberations should therefore be upheld.

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[69] Christopher Keleher "The Repercussions of Anonymous Juries" (2010) 44 USF L Rev 531 at 562.

[70] At 562.

[71] See Abraham Abramovsky and Jonathan I Edelstein "Cameras in the Jury Room" (1996) 28 Ariz St LJ 865 at 120; and Lawsky, above n 60, at 1959.

As well as promoting justice, arguments in favour of secrecy claim that individual participation will be damaged if jurors are allowed to reveal comments made by their peers. If a juror feels that their views might be published then they may be worried about appearing politically correct or may hold things back that they feel would make them appear stupid.[72] Assuring jurors that their comments will not be repeated is therefore thought to encourage more sensitive jurors to put forward their opinions.[73] The result of this is that fuller debates should take place once every participant feels comfortable expressing their opinion. These debates would then lead to a more just outcome in line with fair trial rights.

The main argument against the need to protect free and frank discussion is that it is not clear whether publication actually has an impact on deliberations.[74] One American study examining the information the media publishes from jurors determined that very few disclosures involve negative comments about other jurors.[75] Only five out of 696 articles involved a juror disclosing "potentially embarrassing or inappropriate information" about a fellow juror.[76] The juror discussed could only be identified in two out of these five articles. It was even rare for a juror to disclose positive thoughts or comments made by others.[77] This evidence suggests that an individual juror's comments will not be revealed unless they choose to discuss them. As disclosures are unlikely to harm other jurors, this is not a valid reason to prevent disclosure.

Due to the fact that New Zealand media is not currently allowed to publish juror comments it is unclear whether these results would be

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72 Abramovsky and Edelstein, above n 71, at 883.
73 Alison Markovitz "Jury Secrecy During Deliberations" (2001) 110 The Yale Law Journal 1493 at 1508.
74 At 1513.
75 Casarez, above n 65, at 560.
76 At 560.
77 At 560.

applicable to New Zealand jurors. Without clear evidence that disclosure does in fact negatively impact deliberations, it seems unjust to use this as a justification for limiting freedom of expression.

Additionally, the free and frank discussion that the *Radio NZ* decision aims to protect may not in fact be occurring. Discussions are already limited by the natural desire most people have to avoid having their opinions judged and attacked by strangers.[78] Furthermore, in any small committee type situation some dominant personalities will end up suppressing the views of the more introverted.[79] Jury deliberations therefore may not be as free and inclusive as the *Radio NZ* decision assumes. Allowing disclosure may not make jurors more afraid to share their opinions and even if it did these jurors could have been unwilling to express their views anyway.

C. Privacy and Protection

Although it received the least discussion in the *Radio NZ* case, the privacy justification for upholding secrecy of deliberations appears to be the most supported rationale. Nevertheless, it is also one of the most controversial issues and the arguments are strong on both sides.

Historically speaking, the argument that privacy must be protected is unsupported. When the jury system developed (and for several decades following this) communities were so small that everyone would know the individuals on the jury.[80] This system was consistent with the idea that individuals were to be fairly judged by their peers.[81] With the entire community knowing who served on a given jury, the privacy of

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[78] Tunna, above n 33, at 82.

[79] Brendan Cassidy "Some thoughts on Removing the 'Gag' on Jury Deliberations" [2000] Alternative Law Journal 2 as cited in Tunna, above n 33, at 83.

[80] Laura N Wegner "Juror Anonymity in Criminal Trials: The Media, the Defendant, and the Juror" [2010] 3 Alb Gov't L Rev 429 at 431.

[81] Tunna, above n 33, at 85.

jurors was necessarily limited. In America, this historical position led to unwillingness to withhold a juror's identity that persisted until the 1970s.[82] Although this historical justification provides an interesting perspective, conditions today are such that a defendant is unlikely to know the jurors hearing their case.[83] The historical position is therefore not a useful argument in favour of disclosing jurors' information and comments.

The more recent argument for post-trial privacy stems from the idea that jurors are compelled to perform a service for a limited time. After they have completed their duty to the courts, jurors should be allowed to return to their lives without further interruption.[84] Allowing the publication of jurors' names or opinions is seen as subjecting them to additional burdens.[85] If the media is allowed to publish comments from jurors they may be encouraged to invade individuals' privacy until they get a dramatic story. Such invasion is inconsistent with the idea of leaving jurors alone after they have done their duty. As such, the media should not be free to invade the privacy of jurors who do not seek out attention.

Concurrently with simply protecting abstract privacy rights, preventing publication of jurors' names and opinions aims to protect individuals from harassment and potential physical harm. Although one would hope that counsel for the losing party would know better than to badger a juror for information the same cannot be said of the losing party themselves or the media.[86] Particularly in high-profile cases, the media may be bold enough to harass jurors until they divulge enough information to make a dramatic story. In determining the penalty to be

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[82] Wegner, above n 80, at 440.

[83] At 449.

[84] Kenneth J Melilli "Disclosure of Juror Identities to the Press: Who Will Speak for the Jurors?" [2009] 8 Cardozo Pub Law, Policy and Ethics J 1 at 29.

[85] At 29.

[86] Markovitz, above n 73, at 1506.

imposed upon Radio New Zealand, their harassment of the jurors was held to be a significant aggravating factor.[87]

There is the potential for such harassment to become so bad that jurors are forced to make major changes to their lives until the public loses interest.[88] After one high-profile American trial, jurors were forced to temporarily move houses in order to avoid the press.[89] Similarly, jurors have been approached at their homes, physically pursued and had the press camp outside their houses.[90] The potential for harassment is therefore an important consideration that deserved more discussion in the original *Radio NZ* decision.

Some advocates for protecting privacy go further and claim that allowing the media to pursue stories might cause the jurors serious injury. This is particularly relevant in criminal cases with dangerous defendants.[91] If the media is allowed to disclose which jurors argued for conviction and which for acquittal these defendants or their families may pose a real risk to the jurors' safety.[92] This potential for danger could then lead the jurors to be less impartial and more biased in favour of acquittal in order to protect themselves.[93] Preventing jurors and the media from discussing deliberations therefore decreases the risk that jurors will be harmed as a result of their decision.

Those who argue for disclosure refute this claim on the basis that protection from defendants is unnecessary. While jurors have faced harassment from the media following verdicts, they argue that no one

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87 *Solicitor General v Radio New Zealand Ltd (No 2)* HC Wellington CP531/92, 6 September 1993.
88 Markovitz, above n 73, at 1506.
89 David Weinstein "Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options" (1997) 70 Temp L Rev 1 at 38.
90 Melilli, above n 84, at 1.
91 Abramovsky and Edelstein, above n 71, at 884.
92 At 884.
93 Wegner, above n 80, at 438.

has been killed as a result of serving on a jury.[94] Regardless of the truth of this claim, it does not mean that jurors have never had their safety threatened. Equally, just because no one *has* been harmed, does not mean that no one *will* be harmed in the future. There are reports that jurors have in fact been threatened with harm following disclosure of their names.[95] It therefore seems that the argument in favour of protecting jurors is stronger than the claim that no protection is necessary.

Despite this, it is possible that modern life may justify disclosure. By living in an age of Facebook, Twitter and other online activities the right to privacy may be slowly eroding.[96] Why should the media be prevented from publishing information jurors give them when the jurors are already disclosing so much of their private lives online? This increased publicity does not entirely remove the right to privacy but media publication may not majorly impact privacy as proponents of secrecy claim.[97]

Equally, there is a modern trend in favour of openness that should potentially extend to jurors. It is now common for television cameras, photographers and microphones to be allowed in court so as to broadcast proceedings to the public;[98] it is even possible to broadcast trials live under certain circumstances.[99] While the presence of cameras does not in itself prove that all aspects of a trial should be open to the public it is indicative of a trend towards openness. It may be that these developments extend to jurors in the future with the result that they are free to disclose their thoughts to the media.

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[94] Keleher, above n 69, at 559.
[95] Melilli, above n 84, at 2.
[96] Keleher, above n 69, at 550.
[97] At 550.
[98] Simon Mount "The Interface Between the Media and the Law" [2006] NZ L Rev 413 at 417.
[99] In-Court Media Coverage Guidelines, sch 4(6).

Having considered the merits of each of the arguments put forth by the court in *Radio NZ* there are three further concerns that should have been raised: research, profit and the potential to discourage future jurors.

D. Legitimate Research

The first factor that the court in *Radio NZ* did not consider in detail is the impact that disallowing publication has on legitimate research. By preventing anyone from inquiring into what goes on in a jury room, society misses out on a wealth of information. Without questioning jurors it is not possible to know whether they are influenced by the evidence or by factors external to the merits of the case.[100] Instead, information about how jurors are deciding must be appropriated from other jurisdictions where investigation is allowed. This inability to gain insight into jury processes is cited as the main complaint to the English Act barring investigation.[101] The fact that it is not possible to determine whether jurors are deciding according to the law or external factors can lead to some highly undesirable results.

One such instance of undesirable conduct can be seen in the English case of *R v Young*.[102] In that case, a jury convicted the defendant of murder after consulting a Ouija board in the jury room.[103] The only reason the court was able to consider this misconduct in ordering a retrial was because it took place after hours rather than during deliberations. Similar behaviour may frequently be occurring during the course of deliberations without any external person knowing. This infringes the right to a fair trial protected by s 25 of NZBORA, as jurors are not deciding impartially based on the evidence.

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[100] Tunna, above n 33, at 106.
[101] Tunna, above n 33, at 82. The English Act is the Contempt of Court Act (UK), s 8.
[102] *R v Young* [1995] QB 324 (CA).
[103] Tunna, above n 33, at 106.

This infringement can be remedied by allowing investigation into deliberations. Allowing jurors to discuss what goes on in the jury room results in any misbehaviour being brought to light and questioned.[104] Having made the court aware of these issues, strategies can be put into place to prevent the inappropriate behaviour from reoccurring. Discovering and discussing misconduct is therefore the first step in creating a fairer trial process. Without research into how jurors are deciding, the misconduct cannot be disclosed or remedied.

One counter argument to this is that the media is not the appropriate party to bring such misconduct to light. It is generally thought that the media in general is not particularly concerned with revealing cases of misconduct and impartiality.[105] Instead, their main concern is selling their publications via dramatic, public interest stories. These stories would not reveal the more run of the mill juror misbehaviour and therefore the system has no better insight into wrongdoing than they do presently.

E. Ability to Profit

A second issue not discussed in *Radio NZ* that is frequently raised in the American literature is the impact of allowing jurors to profit from disclosures.. This argument against disclosure focuses on the idea that jurors may aim to create a dramatic verdict simply to profit from selling their experience.[106] They may endeavour to decide a trial based on what would make the best story rather than what is actually the just outcome.[107] This would then impact the defendant's right to a fair trial, as the jury would not decide impartially. Although jurors do not admit to causing an unjust outcome simply to profit this does not mean that

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[104] At 106.

[105] Melilli, above n 84, at 13.

[106] Sarah A Zawada "Prohibiting Jurors from Working as Trial Consultants in Retrials: A Careful Balancing Act between the First and Sixth Amendments" (2005) 89 Marquette Law Review 179 at 189.

[107] Casarez, above n 65, at 549.

they actually have not done so.[108] There have been reports of jurors making up to $5,000 for selling their stories following a controversial verdict.[109] So allowing the media to pay for juror disclosures may have a negative impact on fair trial rights.

Nevertheless, there might be a hidden benefit from allowing jurors to profit from their disclosures. Allowing jurors to sell their experiences could cause them to pay more attention to the facts of the trial and become more engaged with the process so that they can sell a complete story.[110] The defence attorney in one American case consented to the recording of jury deliberations in the belief that it would cause the jurors to pay closer attention to his defence so as to avoid appearing ignorant.[111] In another case, the foreman of the jury was reported as paying extra attention to the evidence because he wanted to write a book about his experience.[112] Given the impacts of profit on jurors in America the *Radio NZ* case should have considered this issue in making their decision.

F. Discouraging Future Jurors

One final argument in favour of upholding secrecy that was not discussed in *Radio NZ* is the potential for future jurors to be discouraged from serving. If jurors know that they may face harassment or have their opinions revealed to the public they may be less willing to do their duty and sit on a trial. As such, there could be a higher rate of attempts to be excused from service.[113] Following a high-profile Australian case where juror comments were published it was found that there were three times as many requests to be excused

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108 Marcy Strauss "Juror Journalism" (1994) 12 Yale L & Pol'y Rev 389 at 403.
109 Zawada, above n 106, at 189(n 66).
110 Casarez, above n 65, at 556.
111 *Samll v Estate of Calder* Me.CV 95-518 (1996) as cited in Abramovsky and Edelstein, above n 71, at 875.
112 Casarez, above n 65, at 556.
113 Tunna, above n 33, at 83.

from jury duty as there had been before the trial.[114] Consequently, regardless of any actual harm caused by disclosure there was clearly a public perception that serving on a jury where disclosure is allowed was a negative thing. In order to avoid discouraging participation it may therefore be best not to allow disclosure of deliberations.

VI.

Alternatives to the Present Situation

As seen in part V, the decision of *Radio NZ* did not completely consider all the relevant issues at hand. Due to this lack of consideration, there may be benefits that the present system is barred from obtaining as well as negative impacts that would be avoided by adopting a different approach. Numerous alternatives have been proposed in New Zealand and overseas that are designed to account for these gaps. The most effective and relevant alternatives from New Zealand, America and Europe will be considered in this part.

A. Codify the Present Position

The Law Commission's 1999 report on Juries in Criminal Trials recommends such codification similar to that of the United Kingdom.[115] This would be the most straightforward alternative to the present position and would ensure that the state of the law is clear to all who may be impacted by it. Equally, such codification would clearly show Parliament's position on the issue and render discussion as to its value essentially moot. However the Law Commission does not recommend simply copying the United Kingdom provisions lest New

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[114] NSW Law Reform Commission *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986) at [11.23].

[115] Law Commission *Juries in Criminal Trials: Part Two* (NZLC PP37, 1999) at [327].

Zealand inherit the flaws as well as the benefits. Section 8 of the Contempt of Court Act 1981 (UK) has been widely criticised as inflexible and unable to allow for things such as research or investigation into misconduct.[116] Due to the desire to allow "responsible academic research" to be conducted, codification must ensure disclosure is not completely prohibited.[117]

In her discussion of the *Radio NZ* case, Jennifer Tunna also advocates codification and proposes that the court has almost struck the right balance regarding the various issues.[118] Tunna recommends that the Juries Act 1981 be amended so as to make it an offence to solicit information from a juror, disclose any juror's identity or offer a fee in exchange for information.[119] Under her amendments, it would also be an offence to disclose any information where there is "a real risk" that doing so would "undermine the administration of justice".[120] This proposed change is clearly in line with the rule of *Radio NZ* and would ensure that issues regarding harassment and juror misconduct in order to profit would not arise.

However, Tunna does feel that the *Radio NZ* outcome decision should be modified somewhat so as to incorporate a public interest defence.[121] This would mean that the media and jurors would be free to make disclosures so long as they were of "legitimate public concern".[122] This addition to the law, Tunna argues, would allow juror misconduct and miscarriages of justice to be brought to light while still protecting the administration of justice. As such defences are already available for actions such as privacy claims it should not pose any great

116 Tunna, above n 33, at 94.
117 Law Commission, above n 115, at [327].
118 Tunna, above n 33, at 102.
119 At 110.
120 At 109.
121 At 102.
122 At 102.

difficulty to implement.[123] While this addition would contribute towards solving the problem of jurors conducting their deliberations in highly undesirable ways it does not solve all potential problems resulting from the *Radio NZ* decision.

Only allowing jurors to disclose things of legitimate concern may limit the benefits gained by allowing disclosure. As discussed above, publishing reasons behind verdicts can make the public more accepting towards controversial results.[124] This increased acceptance would not occur for cases that are not considered to be of legitimate public concern. Additionally, as discussed above, allowing jurors to publish their experiences may result in them paying more attention to the trial.[125] This increased attention may not result if jurors feel that they will not be able to discuss their involvement. As it may be difficult for laymen to identify when something will be of legitimate public concern or not, they will be unable to know whether they can publicise or not and would tend to err on the side of non-disclosure. The effect of increased attention is therefore unlikely to occur.

Tunna also proposes further changes to the Juries Act to allow further disclosure. One such change is an amendment that allows disclosure contributing to research into jury service so long as the research is authorised by the Attorney-General.[126] This reflects comments from both the court in *Radio NZ*[127] and the Australian legislature[128] regarding the need for such insight. While it is clear that such research is desirable, it is uncertain exactly when the Attorney-General would authorise such research. Further guidelines as to when the Attorney-General must authorise research would be beneficial in this regard.

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123 At 102.
124 Casarez, above n 65, at 502.
125 At 556.
126 Tunna, above n 33, at 110.
127 Above n 4, at 58.
128 For example, Jury Act 1977 (NSW), s 68A(3).

Overall, these proposals would be an improvement on the present system as they increase certainty while still allowing limited disclosure.

B. Allow Jurors and the Media to Freely Discuss Deliberations

One drastic alternative to the present New Zealand system is that of the American law. Following a trial, American jurors are free to do as they please although they are certainly under no obligation to discuss the case with anyone.[129] Much like the New Zealand system, the disclosure debate in America is based on two competing principles: freedom of expression and right to a fair trial.

Those in favour of disclosure base their argument on the right to free speech and the freedom to receive information as protected by the First Amendment.[130] The right to free speech is said to justify jurors discussing their experiences while the freedom to receive information allows jurors' names to be available to the public and justifies media publication.[131] As such, the jurors should be completely free to disclose any information that they wish and the media should likewise be free to solicit and publish such information.

Those who claim disclosure should be restricted likewise base their argument on the constitution. The Sixth Amendment protects the right to a fair trial, which clearly includes an impartial jury.[132] Publishing juror identities or comments is said to cause jurors to decide based on public opinion thereby creating a biased system.[133] In some instances the courts have held that this Sixth Amendment right outweighs other considerations and ordered that juror information remain secret. However, this provision has also been used as an argument in favour

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[129] 50A CJS *Juries* § 534.
[130] US Const amend I.
[131] Wegner, above n 80, at 443.
[132] US Const amend VI.
[133] Wegner, above n 80, at 444.

of disclosure as jurors will "perform their respective functions more responsibly in an open court than in secret proceedings".[134] As such, courts are generally unwilling to hold that the Sixth Amendment right outweighs that of the First Amendment.

The result of this balancing exercise between the rights has led American courts to allow both jurors and the media to discuss deliberations. Rather than approaching the issue as one where a case must be made for disclosure, American provisions only allow for anonymity as a "drastic measure" when the jury truly needs protection.[135] Such anonymity is generally reserved for use during a trial as the courts aim to avoid prejudicing the jurors against the defendant by making them think they need protection.[136]

Interestingly, the United States Supreme Court has not been terribly concerned with arguments based on juror privacy post-verdict.[137] The courts generally feel that jurors can protect their own interests by simply saying no when approached by the media. They therefore do not need the law to protect them.[138] Most discussion of juror privacy has instead been limited to pre-trial jury selection processes. Even when privacy has been raised as a potentially valid concern, the courts have emphasised that it must still be balanced against the need for openness, public confidence and a fair trial.[139] This and the protections in the First Amendment reflect an overall attitude in favour of free speech that is far less prevalent in New Zealand law.

In line with this attitude, courts are generally unwilling to demand that jurors be interviewed even to discover evidence of misconduct. This

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134 *Estes v Texas* 381 US 532 (1965) at 588.
135 50A CJS *Juries* § 513.
136 50A CJS *Juries* § 513.
137 Casarez, above n 65, at 570.
138 Casarez, above n 65, at 571.
139 *Press Enterprise Co v Superior Court* 464 US 501 (1984) as cited in Casarez, above n 65.

reluctance is based on the view that a juror's duty is deemed complete upon the return of a verdict.[140] In some states, rules have been introduced requiring lawyers to seek leave of the court before interviewing jurors about their verdicts.[141] Such rules have subsequently been deemed constitutional restraints on the attorneys' freedom of speech. However these rules do create an inconsistency between the freedom of lawyers and the freedom awarded to the media who are free to interview without leave.

It is perhaps not surprising that this system has many of the opposite positives and negatives to the New Zealand law. One major benefit that the New Zealand system should strive to incorporate is the way the American system allows for in depth research to be carried out. Such research is a clear benefit to the legal system as a whole and the New Zealand system would benefit from some jurisdiction specific research rather than having to rely on American research. Additionally the American system may improve public understanding of verdicts as a result of publication of juror comments. As it is unclear whether disclosure impacts free and frank discussion positively or negatively New Zealand may also see an improvement in deliberation quality if they adopt the American system of allowing publication.

One key drawback of the American system is that it undermines finality, as the public is able to continue discussing and criticising cases once a verdict has been returned. With no limits on the media's ability to publish, cases may be dragged up several years later if a juror decides to come forward for their 15 minutes of fame. Additionally, this system largely fails to protect against harassment of jurors, as their names are readily available and allows jurors to profit from their service. These issues ultimately mean that it would not be appropriate to simply implement the system in New Zealand as is, although some

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140 50A CJS *Juries* § 534.
141 See, *Tasin v SIFCO Industries Inc* 553 F Supp 2d (NE Ohio 1990).

middle ground may be available so that New Zealand can gain the benefits without the negatives.

C. Require Jurors to Provide Reasoned Verdicts

In 2009 Belgium instituted their solution to the balancing exercise by requiring jurors to give the main reasons behind their verdict.[142] Once the jury has reached a verdict regarding guilt, a panel of three judges is invited into the jury room to aid the jurors in expressing their reasoning.[143] The foreman then signs the written statement of reasons and the case ends.[144] These Belgian provisions allow the three judges to order a new trial if they find that the jurors erred in relation to the evidence or the application of the law.[145] This approach enables that juror misconduct is brought to light and not allowed to impact trials.

This form of disclosing deliberations may also be beneficial to justice as a whole by making the jurors pay closer attention. As discussed above, a desire to publish their stories may lead to jurors paying increased attention to the evidence. It is possible that this effect could extend to jurors who know that they will be asked about their decision. As jurors would not want to appear stupid by not being able to back up their verdict, they would ensure that their verdicts have principled bases. This would improve the system overall by making it more just and less reliant on jurors who decide cases based on coin tosses.[146]

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142 Russell and Prasad, above n 62, at 159.

143 Stephen C Thaman "Should Criminal Juries Give Reasons for their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v Belgium*" (2011) 86 Chi-Kent L Rev 613 at 624.

144 Russell and Prasad, above n 62, at 159.

145 Thaman, above n 143, at 624.

146 In *Vaise v Delaval* (1785) 1 TR 11, 99 ER 944 (KB) the court refused to accept evidence that a jury had reached their conclusion by way of a coin toss.

A similar system established in Spain proved to be highly effective at discovering how jurors were deciding. Although early juror reasons were brief and rather sparse, as time went on the reasons given became more detailed and expressive.[147] This suggests that the system may be highly beneficial to both those wanting to research juries and to the public wanting to know why controversial decisions were given. Furthermore, it is in line with the principles of open justice and consistent with the requirements that other decision-makers provide reasoned decisions.

Overall, this system is an improvement on the present state of law in New Zealand. It would aid research, sharpen jurors' attention to court proceedings and increase the justice of the system generally. Additionally, it avoids the negative impacts associated with disclosure as jurors' identities are protected, trials are not drawn out past their verdicts and there should not be any impact on free and frank discussion provided that identities are not disclosed. As such, it is a potentially valid alternative to the law as stated in *Radio NZ*.

D. Allow Disclosure to Legal Professionals Only

One further proposition to balance the desire for secrecy and freedom of speech is to allow limited disclosure to legal professionals only. This could be achieved through the establishment of a code or regulation making it legal for lawyers to interview jurors post-trial so long as their actions did not constitute harassment. Such a system was established in some American states through a *Moral Code of Professional Responsibility*.[148] This code was essentially designed to prevent lawyers from pestering the jurors post-verdict. As such, it prohibits a lawyer from communicating with a juror if the juror has shown a desire not to communicate or the communication would constitute harassment.[149]

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147 Thaman, above n 143, at 631.

148 David N Averyt "Paying Former Jurors for Consultation on a Retrial: Suspect Tactic or Good Lawyering?" (2006) 57 Ala L Rev 853 at 859.

149 At 860.

Although this was established in the American context, a similar code could be established in New Zealand to allow some disclosure.

Enabling investigation into deliberations in this manner would improve the court system as a whole. Allowing lawyers to examine how jurors decided a given case would ensure that potential misconduct — such as that of the *Young* case — would be picked up. Identification of problems in the system would therefore allow measures to be put in place to stop future wrongdoings. Some disclosure is a clear first step towards improving the system as a whole.

Limiting disclosure to legal professionals would also prevent against the negative effects generally associated with disclosure. There would not be any increased harassment or impact on privacy as there is no disclosure to the public.[150] Lawyers are also unlikely to rely on statements that one juror makes about another so there would not be any impact on frank discussion.[151] Lastly, finality would be preserved as interviewing would likely take place soon after the trial.

The major drawback of this proposal is that neither the media nor the public gains any insight into the reasons behind the verdict. With the code only applying to interviews from legal professionals the media is still barred from soliciting information from jurors. Equally their freedom to publish if information is leaked remains limited. The benefits that the public may gain from wide disclosure are therefore as lacking as under the present law.

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[150] At 868.
[151] At 868.

VII.

Conclusion

Overall, the factors put forward in *Radio NZ* to justify secrecy are not the final word on the matter. As it is unclear whether finality, freedom of debate or privacy would be impacted as *Radio NZ* proposed it is unfair to represent these factors as demanding secrecy. Additionally, issues relating to research, juror profit and the inconsistent application of *Radio NZ* suggest that the present situation should be altered.

In order to reform the current law to a more workable position it should incorporate elements from the various alternative systems. Including the best aspects of each system would ensure that the potential harms of disclosure are avoided while at the same time the benefits of such disclosure can be obtained. Embracing a requirement that jurors provide reasoned verdicts would satisfy the need for openness, research and education that is currently not met under the *Radio NZ* ruling. Alternatively, limited—or full—disclosure could be allowed to achieve these benefits and show the importance placed on freedom of expression.

Additionally, although contempt of court is generally an area of law controlled by the courts it may be best to codify any amendments that are made. Legislation in this area would greatly improve public understanding on what the law is. This would be particularly useful as the media and the public may otherwise be found liable under this form of contempt without knowing that their actions were wrong. Such amendments and codification would hopefully lead to a better balance between media freedom and protection of the jury system.