Piercing Through the Veil of Jury Deliberations: An Analysis of the Jury Secrecy Rule and Proposals for Reform

SARAH SHANAHAN*

Abstract—The rule that the deliberations of a jury are secret and must not be used to overturn a jury's verdict is firmly rooted in nearly 250 years of common law precedent. The courts' unwavering support of the "jury secrecy rule" has elevated it to sacrosanct status, resulting in a near-absolute ban on inquiring into the details of a jury's deliberation process. As such, the veil of secrecy over the jury's deliberations has become impenetrable, allowing instances of serious juror misconduct which undermine a defendant's right to a fair trial to pass by the Court's attention unnoticed. Section 76 of the Evidence Act 2006 encapsulates the pedigree and principles behind this jury secrecy rule and governs the admissibility of evidence pertaining to a jury's deliberation. However, the current operation of s 76 fails to achieve an appropriate balance between important values and interests. These include: the interest in ensuring justice is achieved, the value of having clarity in the law, the public's interest in accountability, and the defendant's right to appeal an improper verdict. The secrecy of jury deliberations has remained unchallenged for too long and must be changed. Section 76 must be rewritten to allow the Court to pierce through the veil of secrecy over a jury's deliberations where genuine and serious instances of juror misconduct are alleged on appeal.

I INTRODUCTION

Juries are integral to a well-functioning criminal justice system. They are the factfinders tasked with assessing evidence and ultimately reaching a verdict. Juries are also symbolically important in representing the community's conscience. Further, juries inhibit states from exercising unfettered power over

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the criminal justice system and fulfil the age-old notion of being tried by one's peers.[1] However, jury deliberations are intensely protected with secrecy and shielded from inquiry, which means jurors hold extraordinary power which remains unchecked. The Supreme Court of New Zealand recently stated that: [2]

> [22] A distinctive feature of our system of trial by jury is that the jury must hold its deliberations in secret and must not give reasons for its verdict. Trial courts go to great lengths to ensure this veil of secrecy is not breached.

Perhaps this age-old secrecy has prevailed for too long and requires revisiting.

The secrecy of jury deliberations is protected by s 76 of the Evidence Act 2006, which states that "[a] person must not give evidence about the deliberations of a jury".[3] This provision encapsulates a nearly 250-year-old common law rule known as the "secrecy rule".[4] Sections 76(3) and (4) of the Evidence Act set out the only exception to this rule, which is that evidence of a jury's deliberations may only be given where the circumstances are "so exceptional that there is a sufficiently compelling reason to allow that evidence to be given".[5] To determine whether that condition is met, the judge must consider the public interest in protecting the secrecy rule and in ensuring that justice is done.[6] It is important to note from the outset that, in New Zealand, the secrecy rule relates solely to the admissibility of evidence. In that sense, it is quite limited. Impeding on the secrecy of jury deliberations for the purposes of academic research, for example, is not prohibited under New Zealand law—unlike the secrecy rule in England and Wales, where the prohibition on the disclosure of jury deliberations is more extensive.[7]

Although intensely protected, the secrecy of jury deliberations often means that instances of juror misconduct are overlooked. This is because barring investigation into the jury's deliberations prevents juror misconduct from being addressed or remedied on appeal.[8] While there must be some allowance for imperfection in our criminal justice system, the courts are also responsible for

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1 Jesse Slankard "Jury Secrecy, Contempt of Court and Appellate Review" (LLM Research Paper, Victoria University of Wellington, 2017) at 4.

2 *Rolleston v R* [2020] NZSC 113, [2020] 1 NZLR 772.

3 Evidence Act 2006, s 76(1).

4 *Rolleston v R*, above n 2, at [23].

5 Section 76(3).

6 Section 76(4).

7 See Lewis Ross "The curious case of the jury-shaped hole: A plea for real jury research" (2023) 27 E&P 107.

8 Slankard, above n 1, at 6.

protecting fair trial processes and ensuring that juror misconduct that undermines these processes is adequately addressed.[9] The way the secrecy rule currently operates has the effect of limiting the court's power to fulfil this responsibility. If the law does not allow such instances to be explored or addressed, then there is a significant flaw in the law itself that must be changed.

The secrecy rule in its current formulation fails to appropriately balance the interests of jurors with competing interests and sets too high of a threshold to pierce through. While the overall integrity of the jury system should remain intact, the secrecy of jury deliberations should not remain absolute when genuine concerns about juror misconduct arise. If left unaddressed, these concerns may undermine a defendant's fundamental right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990. As Clifford Holt Ruprecht stated, "[t]o insist on the near-absolute secrecy of jury deliberations, as courts and commentators routinely do, is to ignore the need for balance, favoring pragmatic secrecy over principled openness".[10]

Jury deliberations should generally remain secret. Removing the veil of secrecy entirely and providing a "general right of access" to jury deliberations would neglect the value secrecy provides in contributing to the fair and efficient administration of justice.[11] However, the law of jury secrecy must be rewritten to allow an exception where genuine and serious allegations of juror misconduct arise post-trial, such as instances of juror bias or the reliance on extraneous material.[12] This would strike the appropriate balance between protecting jurors' interests and the jury system's integrity while also accounting for the interests of accountability and the "public's demand to supervise the jury's activity".[13] Therefore, rewriting the secrecy rule will improve the criminal justice system by ensuring that the power held by juries is not abused to undermine defendants' fundamental fair trial rights, thus increasing public confidence in the system overall.

As a preliminary point, it is necessary to note that this article critically analyses the secrecy of jury deliberations in criminal trials—it does not analyse jury deliberations in a civil trial context. Accordingly, any subsequent reference

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9 *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118 at [4].

10 Clifford Holt Ruprecht "Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy" (1997) 146 U Pa L Rev 217 at 218.

11 At 219.

12 Other forms of misconduct may also warrant an inquiry but are outside the scope of this article, such as improper pressure from *Papadopoulos* directions, jurors using the Internet, or bullying within the jury.

13 Ruprecht, above n 10, at 218.

to a "trial" refers to criminal trials. Further, this article focuses on jury secrecy in the context of appellate courts in which it is alleged that a miscarriage of justice by way of juror misconduct has occurred. A court has far greater power to address juror misconduct while a trial is ongoing. However, once the verdict has been given, the secrecy rule is triggered, rendering it near-impossible for appellate courts to inquire into jury deliberations.

Part II explores the history behind the secrecy rule. Part III unpacks s 76 of the Evidence Act, which encapsulates the secrecy rule in New Zealand legislation. Part IV then critically analyses the principles used to justify the modern application of the secrecy rule, before Part V proposes a proper and just secrecy rule according to appropriate values and interests. Part VI considers when it might be warranted to pierce through the veil of jury secrecy. Finally, Part VII proposes a rewritten secrecy rule which achieves the appropriate balance between protecting the sanctity of the jury system and ensuring defendants receive a fair trial. This includes discussion on why changing the current law on jury secrecy is necessary to improve the criminal justice system overall.

II The History of the Jury Secrecy Rule

Few rules in the criminal justice system are so tenaciously protected as the rule that the deliberations of a jury are secret.[14] Many other virtuous privileges integral to the justice system do not share the same level of protection. For example, client legal privilege—accepted as a cornerstone of our criminal justice system—may be lost where the privileged communication between a client and their solicitor is made for a dishonest purpose or to commit an offence.[15] Comparatively, it is near-impossible to overrule the secrecy of jury deliberations. To unpack why that is, it is helpful to first explore the origins of the secrecy rule in common law.

A Vaise v Delaval

The secrecy rule traces back to 1785 with the English case of *Vaise v Delaval*.[16] In *Vaise*, two jurors indicated in an affidavit that the jury had determined its verdict by tossing a coin. Lord Mansfield, credited as the secrecy rule's "architect and proponent",[17] rejected the jurors' evidence, stating that "[t]he Court cannot

14 Jill Hunter "Jury Deliberations and the Secrecy Rule: The Tail that Wags the Dog?" (2013) 35 Syd LR 809 at 809.

15 Evidence Act, ss 54 and 67(1).

16 *Vaise v Delaval* (1785) 1 TR 11, 99 ER 944 (KB).

17 Hunter, above n 14, at 810.

receive such an affidavit from any of the jurymen themselves".[18] John Henry Wigmore describes the rule as the doctrine of *nemo turpitudinem suam allegans auditur*: "A witness shall not be heard to allege his own turpitude."[19] The rationale behind Lord Mansfield's judgment was to protect the jurors against self-incrimination, as they would be confessing to conduct of "a very high misdemeanour".[20] Instead, evidence of such conduct would have to come from an outside source.[21] Because of *Vaise,* jurors may not divulge what occurred within the jury deliberation room, even if they know misconduct had occurred and wish to confess to it.

The secrecy rule is firmly rooted in seemingly unchallenged historical precedent.[22] However, Professor Jill Hunter of the University of New South Wales argues that "precedent with respect to jury confidentiality has in fact been a moving feast" which "does not reveal a single thread of consensus going back to the mists of common law time".[23] Instead, Hunter states that Lord Mansfield's judgment in *Vaise* was an act of "blatant judicial intervention".[24]

Indeed, before *Vaise*, "the unquestioned practice had been to receive jurors' testimony … without scruple".[25] In support of this, Wigmore lists numerous cases between 1590 and 1779 in which jurors' evidence of deliberations was (or could have been) received. For example, in the 1696 case of *Dent v Hundred of Hertford,* an affidavit from the foreman stating that "the plaintiff should never have a verdict whatever witnesses he produced" was admissible evidence and overturned the verdict.[26] Further, before *Vaise,* evidence from a juror was in fact preferred over non-juror hearsay evidence.[27] In *Aylett v Jewel*—predating *Vaise* by six years—the Court held that an affidavit from a non-juror that alleged the jury had determined its verdict by lot was insufficient to quash the verdict because it was not an affidavit from a juror.[28]

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18 *Vaise v Delaval*, above n 16, at 11.

19 John Henry Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, Little, Brown & Co, Boston, 1940) as quoted in Alison Markovitz "Jury Secrecy During Deliberations" (2001) 110 Yale LJ 1493 at 1501.

20 Slankard, above n 1, at 5.

21 *Vaise v Delaval*, above n 16, at 11.

22 Hunter, above n 14, at 817.

23 At 817.

24 At 819.

25 Wigmore, above n 19, at 684 as quoted in Hunter, above n 14, at 819.

26 *Dent v Hundred of Hertford* (1696) 2 Salk 645 at 645, 91 ER 546 (KB) at 546.

27 Hunter, above n 14, at 819.

28 *Aylett v Jewel* (1779) 2 Black W 1299 at 1300, 96 ER 761 (KB) at 761.

Hunter further argues that Lord Mansfield's secrecy rule has been misinterpreted and overblown, which has elevated it to sacrosanct status.[29] When interpreted correctly, Hunter explains that Lord Mansfield's wording indicates "that the jury secrecy rule was not intended to prevent suspect verdicts from being reviewed".[30] Rather, the rule was a means of *controlling* the jury by preventing fraud by a disgruntled juror unhappy with the jury's verdict.[31]

For example, the Court in *Owen v Warburton*[32] envisaged the rule preventing situations where "a juror with a partisan interest in the trial might, through frustration with fellow jurors' unwillingness to adopt his preferred verdict, suggest to them that they reach their verdict by lot".[33] Without Lord Mansfield's rule, that juror would be "well-placed to quash the verdict by outing the improperly-determined verdict" by way of an affidavit if he did not agree with the decision.[34] Lord Mansfield's relatively narrow rule has been significantly broadened beyond its original scope over time, constituting near-absolute secrecy in the present day. The courts' enduring support for the rule has elevated it to an almost sacred status; no court would dare to question or overturn it.[35] It appears that the rule has become detached from its original purpose: originally deployed to control the jury and restrict its power to overturn verdicts, it now protects corrupt jurors from having their misconduct exposed.

So, it may be the case that the history of the secrecy rule—one that is so heavily relied upon in justifying its application in the modern era—is somewhat flawed. Of course, the modern criminal justice system has developed significantly since the time before *Vaise* where juror testimony was readily accepted. Therefore, one must be cautious when making comparisons between the previous lack of jury secrecy and the modern jury system. Regardless, Lord Mansfield's rule in *Vaise*—that jurors may not provide affidavits alleging juror misconduct—has provided the foundation for the modern secrecy rule.[36] As it stands, the underlying principles for the rule that evidence of a jury's deliberation is inadmissible has moved on from the rationale given in *Vaise,* which will be explored in Part III. Perhaps then, there is less utility in questioning Lord

29 Hunter, above n 14, at 820.
30 At 820.
31 At 820.
32 *Owen v Warburton* (1805) 1 Bos & Pul NR 326, 127 ER 489 (Comm Pleas).
33 Hunter, above n 14, at 820.
34 At 820.
35 At 820.
36 At 817.

Mansfield's intention in making his judgment at the time. Nevertheless, it is significant to note that a rule so heavily entrenched in historical precedent and whose common law pedigree is routinely cited as justification for its continued existence may have developed from the words of someone who never intended its outcome.

III Section 76 of the Evidence Act 2006

The common law pedigree of the secrecy rule is encapsulated in s 76 of the Evidence Act. The way s 76 currently operates fails to achieve the necessary balance between competing interests and values related to the secrecy of jury deliberations. These interests include safeguarding the defendant's right to appeal an unsafe verdict; ensuring juries, as powerful decision-makers, are accountable for their decisions; and allowing the court to ensure the proper administration of justice. Section 76 effectively allows serious juror misconduct to go unnoticed by preventing meaningful (if any) investigation into the jury's deliberations.

A Section 76(1): the admissibility rule

Section 76(1) states that "[a] person must not give evidence about the deliberations of a jury".[37] As such, evidence of the jury's deliberation is presumed inadmissible. The provision does not make it an offence to disclose information about the jury's deliberations.[38] Rather, the provision is an admissibility rule pertaining to one's ability to give evidence about a juror or their deliberation process in any proceedings.[39]

Section 76(1) informs the court's power to order that a juror be interviewed.[40] This power lies under s 335(2) of the Criminal Procedure Act 2011, which enables appellate courts to order the examination of any witness who would have been compellable at trial. Furthermore, s 335(2) allows for "the admission of any formal statements before the court" where the court considers it "necessary or expedient in the interests of justice". Section 76 does not govern the court's decision in this capacity but rather informs the admissibility of any material obtained from the juror interview.[41] When read against s 76(1), it appears that any inquiry into the intrinsic matters of a jury's deliberation would not be considered by a court as necessary or expedient in the interests of justice

37 Evidence Act, s 76(1).

38 Slankard, above n 1, at 7.

39 *Rolleston v R*, above n 2, at [21] and [23].

40 *Smith v R* [2017] NZCA 93 at [25].

41 *Pearson v R* [2011] NZCA 572 at [19].

unless it crossed the stringent threshold in s 76(3) and (4). This is because "[i]t would obviously not be in the interests of justice to order an inquiry that could only produce inadmissible evidence".[42]

Section 76(1) is triggered after a verdict is delivered.[43] Therefore, the timing of raising an allegation about a juror's conduct can mean the difference between being able to investigate the allegation and being statutorily barred by s 76.[44] When an issue within the jury room is brought to the trial judge's attention while the trial is still ongoing, the court has greater flexibility to take remedial action.[45] Under s 22 of the Juries Act 1981, a trial judge may discharge either an individual or entire jury if the judge considers the juror "incapable of performing, or continuing to perform, the juror's duty", or if they are disqualified from being a juror.[46] However, once the verdict has been given, the court's inquisitorial and remedial powers are severely limited by the secrecy rule.[47] Therefore, the current law of jury secrecy values the court's ability to ensure that a defendant is *receiving* a fair trial, but not that they *had received* a fair trial.[48]

The restriction of s 76(1) on the court's remedial abilities is evident by comparing the cases of *R v N*[49] and *Pearson v R*.[50] In *R v N*, an allegation of juror bias was raised during a trial in which the defendant was charged with rape. The trial judge received a note from the foreman stating that one of the jurors had been sexually abused in a way similar to the victim in the trial and that the juror believed the defendant to be guilty.[51] The trial judge promptly interviewed the juror to determine "whether or not there was any possibility that her verdict had been influenced by what happened to her".[52] The question went to intrinsic matters of the jury's deliberation because it pertained to evidence the juror relied on in coming to her decision; an inquiry of this kind would have been barred by the secrecy rule once a verdict was entered.[53]

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42 *Rolleston v R*, above n 2, at [21].

43 *R v R* [2016] NZCA 444 at [58].

44 At [58].

45 At [58].

46 Juries Act 1981, s 22(2).

47 *R v R*, above n 43, at [58].

48 At least in the context of misconduct within the jury room. An appellate court has the ability to ensure that the defendant received a fair trial in other areas where a miscarriage of justice may have occurred, such as responding to a mistake of law made by the trial judge.

49 *R v N* (2005) 21 CRNZ 621 (CA).

50 *Pearson v R*, above n 41.

51 *R v N*, above n 49, at [4].

52 At [4].

53 Evidence Act, s 76(1).

Conversely, in *Pearson v R*, an allegation of juror bias was raised on appeal on the basis that "[t]he foreman suggested to the other jurors that the accused was probably already in prison for rape and had probably done it before".[54] The Court declined to interview the allegedly biased juror because inquiring into how the juror had reached their decision would have produced intrinsic evidence inadmissible under the secrecy rule.[55]

These conflicting outcomes demonstrate the different tests applied to allegations of juror misconduct based on the time the allegation is raised. However, the effect of s 76 is that only the allegation which is raised earlier can be remedied. Yet, both cases carry the same risk of creating a miscarriage of justice and undermining the defendant's fair trial rights. Section 76 inappropriately limits the court's ability (and indeed responsibility) to remedy instances of juror misconduct that arise after the trial. The provision does not strike the correct balance between ensuring the finality of a verdict and the defendant's right to appeal a verdict which may undermine their fair trial rights, thereby creating a miscarriage of justice.

B Section 76(2): matters extrinsic to the jury deliberation process

Section 76(2) explicitly provides that the exclusionary rule in subs (1) does not apply to evidence that falls outside the jury's deliberations.[56] Thus, the secrecy rule distinguishes between matters extrinsic to the jury's deliberations, which are not protected, and intrinsic matters, which are protected. Inquiries into extrinsic matters do not start at the presumption of exclusion like intrinsic matters do. Therefore, extrinsic matters are not required to reach the exceptionally high threshold in subs (3).[57] Instead, the test in determining when to make an inquiry regarding extrinsic matters is "whether granting an interview would be 'in the overall interests of justice'".[58] Alternatively, in the event an interview was to prove the allegations, the test in determining when to make an inquiry is whether it could provide a successful ground of appeal.[59]

Intrinsic matters include "[s]tatements made, opinions expressed, arguments advanced, or votes cast by members of a jury in the course of their

54 *Pearson v R*, above n 41, at [12].
55 At [19].
56 Evidence Act, s 76(2).
57 Section 76(3).
58 *Knight v R* [2018] NZCA 71 at [8].
59 At [8].

deliberations in any legal proceedings."[60] Effectively, "jurors may not testify about the effect of anything on their or other jurors' minds, emotions or ultimate decision".[61] Such information reveals how or why the jury arrived at their verdict, illuminating the very process the secrecy rule shields from public view.

Defining extrinsic matters is more challenging. Section 76(2)(a) provides that evidence about "the competency or capacity of a juror" is extrinsic to the jury's deliberation and thus is not rendered inadmissible by subs (1).[62] This dovetails with the notion that "individual jurors should be competent in the sense that they are mentally and physically capable of acting as jurors in the trial".[63] This requirement is informed by ss 7 and 8 of the Juries Act, which set out who is disqualified from being a juror.[64]

Section 76(2)(b) provides that evidence relating to the conduct of, or knowledge gained by, a juror that may disqualify them from that position is extrinsic to a jury's deliberations.[65] Disqualifying conduct includes improper conduct during the trial, such as being asleep[66] or drunk.[67] Disqualifying knowledge includes "knowledge of inadmissible prejudicial evidence received from a source outside of trial", or any prior knowledge the juror has about the defendant, a witness, or the case itself.[68] The listed categories are not exhaustive and include evidence that jury members failed to see or hear the announcement of the verdict,[69] or that a juror had refused to participate in deliberations.[70]

The distinction between extrinsic and intrinsic evidence is often arbitrary, making the courts uncomfortable with its outcomes.[71] The most infamous example is the English case of *R v Young,* wherein four jurors used a Ouija board

60 *R v Pan* 2001 SCC 42, [2001] 2 SCR 344 at [60].

61 At [77].

62 Evidence Act, s 76(2)(a).

63 Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [133].

64 Juries Act, ss 7 and 8. Disqualified persons include the Governor-General, judges, and lawyers, amongst others.

65 Evidence Act, s 76(2)(b).

66 *R v Chen* [2009] NZCA 445, [2010] 2 NZLR 158 at [74]; *Hazelwood v R* [2018] NZCA 44; and *R v Morris* [2001] 1 NZLR 1.

67 *Ex parte Morris* (1907) 72 JP 5 (KB).

68 *Rolleston v R*, above n 2, at [29]. The Court also commented at [29] that "[n]ot all prior knowledge of that kind will necessarily be significant", and that New Zealand's size means that jurors will occasionally have a connection with, or knowledge of, parties or witnesses at an unproblematic level.

69 *R v Papadopoulos* [1979] 1 NZLR 621 (CA).

70 *Tuia v R* [1994] 3 NZLR 553 (CA).

71 *Rolleston v R*, above n 2, at [26].

in determining their verdict.[72] Much like New Zealand's position, the English Contempt of Court Act 1981 forbade inquiries into the intrinsic matters of the jury's deliberation.[73] The Court determined that because the alleged conduct occurred in a hotel room, the conduct was extrinsic to the jury's deliberations, and ordered an inquiry accordingly.[74] The Court found that using the Ouija board was a "material irregularity" and could have prejudiced the appellant by influencing the jury's verdict, but failed to inquire as to whether it in fact prejudiced the appellant.[75] Nevertheless, the Court quashed the defendant's conviction and ordered a retrial.[76]

Some have questioned whether the Court would have reached the same result had the Ouija exercise occurred inside the jury room.[77] The Hon Peter McClellan, former judge of the New South Wales Supreme Court, thought there would have been a different outcome, arguing that "[t]he supernatural forces would have been allowed to operate" had the misconduct occurred in the jury room.[78] Indeed, the *R v Young* decision heavily implied that the location of the misconduct was determinative as to whether the Court could inquire into the misconduct.[79] The Court considered whether it could also inquire into what transpired in the jury room following the misconduct, but ultimately limited its scope to the events of the hotel room, because inquiring into the deliberations would "force the door of the jury room wide open".[80] Therefore, it is likely the misconduct would have been overlooked had it occurred in the jury room.

R v Young demonstrates the fine line between what a court might consider 'extrinsic' or 'intrinsic' to the jury's deliberations. Had nothing else changed but the location of the juror misconduct in *R v Young*, the misconduct would have had the protection of secrecy. Accordingly, the case might have been dismissed despite the fact that the same misconduct and miscarriage of justice had occurred. What is evident in this case is the arbitrariness of the courts' extrinsic–intrinsic distinction when an allegation of juror misconduct arises post-trial. Restricting the court's ability to inquire into juror misconduct based on an inconsequential

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72 *R v Young (Stephen)* [1995] QB 324 (CA).

73 Contempt of Court Act 1981 (UK), s 8(1).

74 Slankard, above n 1, at 13.

75 *R v Young (Stephen)*, above n 72, at 334.

76 At 334.

77 Peter McClellan "Looking Inside the Jury Room" (paper presented to the Law Society of New South Wales Young Lawyers 2011 Annual Criminal Law Seminar, Sydney, March 2011) at 64.

78 At 64.

79 *R v Young (Stephen)*, above n 72.

80 At 330.

matter, such as the location in which the misconduct occurs, is nonsensical; it unjustifiably limits the court's inquisitorial powers, allowing instances of serious juror misconduct to go ignored.

C Section 76(3) and (4): exception and threshold test to the secrecy rule

Section 76(3) defines the one exception to the sacrosanct secrecy rule.[81] This exception applies where "the judge is satisfied that the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to be given".[82] In making this determination, the judge must balance two public interests listed in s 76(4): "the public interest in protecting the confidentiality of jury deliberations generally" and "the public interest in ensuring that justice is done in those proceedings".[83] To inquire directly into jury deliberations, the information would have to meet this threshold before it could be admitted into evidence.

No New Zealand case has ever met the s 76(3) threshold.[84] Arguably, it is nearly impossible to reach, largely due to the section's ambiguous and broad language.[85] The provision neither offers guidance on what constitutes circumstances "so exceptional" to meet this extraordinarily high and vague threshold, nor states what a "sufficiently compelling reason" would be to pierce through the veil of secrecy over jury deliberations. Such ambiguous language invites subjective judicial interpretation. When faced with a lineage of historical precedent which has consistently upheld the sanctity of the secrecy rule, the courts have unsurprisingly been hesitant to rule against this precedent or define the parameters of s 76(3) without Parliament's guidance.[86]

The Court of Appeal in *Neale v R* indicated that s 76(3) allowed for a "very narrow escape hatch" through which exceptional cases might squeeze.[87] In *Worrell v R*, O'Regan P explicitly refused to suggest what these exceptional cases might be.[88] However, he did note that "this is an area of the law where each case must be carefully considered on its merits", keeping in mind the balancing exercise of s 76(4).[89] The Court in *Neale v R* suggested that instances of gross

81 Evidence Act, s 76(3).
82 Section 76(3).
83 Section 76(4).
84 *Smith v R*, above n 40, at [27].
85 Evidence Act, s 76(3).
86 Ruprecht, above n 10, at 219.
87 *Neale v R* [2010] NZCA 167 at [12].
88 *Worrell v R* [2011] NZCA 63 at [52].
89 At [52] per O'Regan P; and Evidence Act, s 76(4).

and extraordinary juror misconduct equivalent to the infamous Ouija board incident in *R v Young* would cross this threshold.[90] As such, for a court to inquire into intrinsic matters of a jury's deliberation process, it appears that the allegation must be extremely unusual, perhaps unprecedented, and of high public interest. This is illustrated by the shocking revelation of jurors using a Ouija board in *R v Young*.[91]

Although it is not entirely clear what scenarios will reach the s 76(3) threshold, case law has clarified what forms of juror misconduct will *not* reach said threshold. Allegations of improper pressure by other jurors,[92] bullying,[93] fatigue,[94] and a failure to understand the law,[95] have all failed to meet the s 76(3) threshold. This is largely because the appellate courts commonly discredit these allegations as mere expressions of regret after the trial, particularly if the court believes the juror making the allegation was the minority juror who dissented from the rest of the jury.[96] Cases have also been dismissed simply because allegations of this kind were not unusual or unique enough to reach the "exceptional" standard, as they are commonly raised on appeal.[97] For example, the Court of Appeal in *Pearson v R* noted that it "will not be unusual for minority jurors to express concerns about the verdict with which they disagreed and the process leading to it".[98] This suggests that because complaints of this kind are not unusual or unique, they do not warrant further inquiry.

However, there is a logical fallacy in the Court's reasoning. The Court suggests that the more often a certain type of juror misconduct is brought on appeal, the less likely it will find such misconduct "so exceptional" to allow an inquiry.[99] This is evidently problematic, because the more often an instance of juror misconduct is raised, the more a court should be alarmed by its prevalence. Consequently, questions arise as to whether defendants are receiving the quality of justice to which they are entitled. However, if the frequency of complaints can be used as evidence to suggest such misconduct fails to reach the threshold, this strengthens the rule which inhibits the court's ability to redress the complaint.

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90 *Neale v R*, above n 87, at [12].

91 *R v Young (Stephen)*, above n 72.

92 *R v Tainui* [2008] NZCA 119.

93 *Neale v R*, above n 87.

94 *Derrick v R* [2011] NZCA 163.

95 *Worrell v R*, above n 88.

96 See *R v Tainui*, above n 92; and *Neale v R*, above n 87.

97 *Pearson v R*, above n 41; and *Worrell v R*, above n 88.

98 *Pearson v R*, above n 41, at [17].

99 Evidence Act, s 76(3).

This demonstrates an inadequacy in the court's duty to ensure that justice is served, and that the jury's processes operate as they should: by meeting the jury's oath to be an impartial collective decision-making body.[100]

It is significant that no case has ever met the threshold, as it reinforces the strength of the rule itself. Although each case is to be determined on its facts, courts tend to reference the fact that no case has ever crossed the threshold as evidence for their own refusal to cross it.[101] As Wild J observed in *Smith v R*, "[u]nderlining the very high threshold set by s 76(3) is the fact that there appear to be no New Zealand cases where the Court has directed inquiries of the sort applied for here".[102]

Essentially, the secrecy rule is a self-fulfilling prophecy. Because the threshold for its exception has never been reached, it is subsequently harder for future cases to confront this precedent and cross the threshold. As Lord Steyn aptly remarked, when faced with a body of cases that refused to inquire into jury deliberations, the doctrine of *stare decisis*[103] compels courts "to rule that it has no jurisdiction to examine a possible miscarriage of justice in this corner of the law".[104] However, precedent is not evidence; courts should not rely on previous refusals to order an inquiry to bolster their own refusal. While the law should be consistent, it should not be stagnant. Instead, the law must be applied according to the circumstances of each case. If the circumstances indicate that serious juror misconduct has occurred, the court's previous refusals to order an inquiry into similar misconduct should not prevent an investigation.

Furthermore, if the extremity of the threshold is such that no cases have ever crossed it, this should indicate the futility of having an exception to the rule. An exception to a rule written so broadly and ambiguously that no case could feasibly satisfy it is no exception at all. In practice, unless faced with a situation as unique as jurors using a Ouija board, the secrecy rule is essentially absolute.[105] This is a significant problem considering the power that juries hold in determining a defendant's guilt or innocence.[106] Juries are not accountable to anyone, and if the secrecy of juror deliberations is absolute, then arguably, so is

100 *R v Mirza*, above n 9, at [4] per Lord Steyn.

101 *Smith v R*, above n 40, at [27]; and *W v R* [2017] NZCA 536 at [13].

102 *Smith v R*, above n 40, at [43].

103 Defined as "to stand by things decided".

104 *R v Mirza*, above n 9, at [2].

105 *R v Young (Stephen)*, above n 72.

106 Ruprecht, above n 10, at 219.

a jury's power.[107] As Lord Steyn states, "[a] jury is not above the law".[108] However, because of the high threshold of s 76(3), jurors are not held accountable for misconduct. Thus, a jury may indeed be above the law in the sense that their misconduct is overlooked.

As will be discussed in Part IV, holding the jury accountable when such misconduct occurs is paramount to the proper administration of justice and to promoting confidence in the jury's decision-making abilities.[109] Legislation which prevents the court from remedying miscarriages of justice resulting from juror misconduct through setting an impossibly high threshold can hardly promote public confidence in that law. As Lord Steyn stated, "what possible public interest can there be in maintaining a dubious conviction?"[110]

IV Critiquing the Jury Secrecy Principles

As explored in Part II, the rationale behind Lord Mansfield's secrecy rule was to protect the jurors against incriminating themselves by confessing to the misdemeanour of deciding its verdict from a coin toss.[111] However, as the rule has developed and expanded over time, courts have relied on other justifications for the rule. These justifications include the principles of preserving the finality of the jury's verdict, ensuring full and frank discussions amongst the jury, and protecting jurors' right to privacy.[112]

These principles protect the interests of jurors, who perform a difficult and often onerous public service.[113] Further, these principles are said to "go to the quality of justice received by defendants" during a trial and are thus also relevant to a defendant's fair trial rights.[114] Hence, the secrecy rule can also be seen as protecting the overarching interests of the criminal justice system by being essential to the proper administration of justice.[115]

However, while the principles underlying the secrecy rule are important, "secrecy should not be viewed as an absolute value".[116] These principles must be

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107 At 218.
108 *R v Mirza*, above n 9, at [6].
109 Markovitz, above n 19, at 1515.
110 *R v Mirza*, above n 9, at [16].
111 *Vaise v Delaval*, above n 16, at 11.
112 *Rolleston v R*, above n 2.
113 At [43].
114 At [25].
115 Slankard, above n 1, at 6.
116 Markovitz, above n 19, at 1509.

balanced against other essential principles, such as accountability of powerful decision-makers and a defendant's right to appeal.[117] Accordingly, scrutinising the principles underlying jury secrecy reveals fundamental flaws which may undermine their usefulness in attempting to justify the rule.

A Finality of verdict

The first principle of the secrecy rule is ensuring the finality of a jury's verdict. In *Rolleston v R,* the Supreme Court stated that "[s]ecrecy protects the finality of the jury's verdict by ensuring that post-verdict appeals do not descend into blow by blow post-mortems of the collective deliberation process".[118] The rule prevents "endless rehashing" over the legality of the jury's verdict and "forces the public … to accept that the process was legal, legitimately decided and rational".[119]

In *Ellis v Deheer*, Lord Atkin explained that one of the reasons behind the inadmissibility of a juror's evidence as to jury deliberations is "to secure the finality of decisions arrived at by the jury".[120] Lord Atkin noted this principle "is of the highest importance in the interests of justice to maintain".[121] Some have argued that opening a jury room to inquiry and compromising the finality of a verdict would "destroy the jury system itself".[122]

This principle is based on two fundamental points. The first point is that the jury's function ceases after the verdict is given.[123] Consequently, any investigation into a case post-verdict undermines finality by endeavouring to prolong the jury's role beyond the trial.[124] This reasoning is valid: achieving finality is of great importance to the overall efficiency of the justice system.[125] However, this desire for finality should not outweigh a defendant's right to challenge a verdict that may have been influenced by juror misconduct. A juror's function may cease when the verdict is delivered, but the defendant's right to appeal an improper verdict does not. As Hunter argues, "appeal processes are

117 At 1509.

118 *Rolleston v R*, above n 2, at [24(b)].

119 Jennifer Tunna "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 Canta LR 79 at 85.

120 *Ellis v Deheer* [1922] 2 KB 113 (CA) at 121.

121 At 121.

122 Markovitz, above n 19, at 1494.

123 Sarah Price "Don't Ask Don't Tell – The Law Surrounding Media Publications of Jury Deliberations" (2014) 3 NZLSJ 177 at 182.

124 At 182.

125 Tunna, above n 119, at 84.

integral to the maintenance of the integrity of our criminal justice system".[126] If appellate review processes are meant to "acknowledge the potential for human error to create an unfair trial", it is curious that juror error is not embraced within the criminal appeal structure.[127]

Finality should be a goal, not an obligation.[128] As the Law Commission states, "[t]he need for the finality of verdicts must be balanced against the need to guard against possible miscarriages of justice".[129] Where there are genuine concerns that justice has been thwarted, there should be mechanisms for allowing the disclosure of jury deliberations to support an appeal. Admittedly, creating a right to appeal that is too broad could cause the floodgates to open and cause a significant administrative burden on the justice system. However, as discussed, the secrecy rule currently sets too high a threshold for *any* appeal to succeed. Where a defendant's liberty is at stake, their appeal rights should not so easily be outweighed by the interest in allowing jurors "to return to their interrupted lives with as few repercussions as possible".[130] As Jennifer Tunna notes, "surely the overriding consideration, and indeed the very reason for having a justice system at all is the quest for *justice* itself".[131]

The second fundamental point behind this principle is that public confidence in the legitimacy of the jury system is based upon community respect for a decision, not the reasoning behind it.[132] However, this notion is also flawed. Under this view, a decision with at least the majority's support reached by mysterious means is more desirable than knowing how a jury came to their decision.[133] The argument suggests such knowledge could reveal the compromises and settlements made in the jury room and tarnish the appearance of a unanimous,[134] legitimate and final agreement.[135] Exposing a jury's deliberation is thus said to inevitably undermine public confidence in juries, leading to the destruction of the jury system itself.[136]

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126 Hunter, above n 14, at 821.

127 At 821.

128 At 821.

129 Law Commission *Juries in Criminal Trials: Part Two* (NZLC PP37, Vol 1, 1999) at [266].

130 Tunna, above n 119, at 85.

131 At 87 (emphasis in original).

132 Price, above n 123, at 183.

133 Tunna, above n 119, at 84.

134 Or in certain cases, a majority jury verdict, since majority verdicts have been accepted in New Zealand since 2009: see Juries Act, s 29C.

135 Tunna, above n 119, at 84.

136 At 87.

However, beyond speculation, there is minimal evidence that lifting the curtain to a jury's deliberation process would bring about the jury's demise.[137] Tunna argues that this "public confidence" argument only holds if breaching jury secrecy "will have the *inevitable* effect of leading the public to draw false and/or exaggerated conclusions as to the efficacy of the jury system".[138] Justifying the secrecy rule on the presumption that "the public will inevitably and consistently conclude that the system is not worthy of their confidence" because they disagree with a jury's reasoning is hasty and unrealistic.[139] There is no evidence to suggest this would necessarily result from an intrusion into the secrecy of jury deliberations.[140]

Having access to a jury's deliberation could, in fact, *strengthen* public confidence in the system by "increasing the jury's accountability to the public".[141] Public confidence does not come from mystery; it is difficult to be confident in a process of which one has no knowledge. Rather, public confidence derives from accountability and is "enhanced by greater transparency and scrutiny of criminal justice processes".[142] This is because "scrutiny and accountability promote good decision making and acceptance by the parties and the public of the result".[143] Judges, comparatively, are required to give comprehensive reasons for their decisions. These decisions are then able to be publicly scrutinised and subject to appeal.[144] On the other hand, juries are "essentially accountable to no one".[145]

Scrutiny and accountability result in stronger decisions because a judge is aware they will be held accountable where their decisions are not well-reasoned. Lifting the curtain on the jury's deliberations may *promote* public confidence, not undermine it. Indeed, if jurors were aware they could face consequences for juror misconduct, they would arguably be more attentive during the trial, resulting in a higher quality deliberation process.[146]

The courts' continual refusal to inquire into juror misconduct in favour of protecting the finality of the verdict has been criticised as tolerating miscarriages

137 At 87.
138 At 88 (emphasis in original).
139 At 88.
140 At 88.
141 Markovitz, above n 19, at 1515.
142 Hunter, above n 14, at 811.
143 Slankard, above n 1, at 6.
144 Murray Gleeson "The Secrecy of Jury Deliberations" (1996) 2 Newc LR 1 at 2.
145 Ruprecht, above n 10, at 218.
146 Markovitz, above n 19, at 1515.

of justice as the price for "protecting the efficiency of the jury system".[147] Lord Steyn argues that valuing the general efficiency of the jury system over remedying miscarriages of justice is "utterly indefensible".[148] If the law protects such injustices to ensure efficiency, "one may question whether the law has not lost its moral underpinning".[149] Furthermore, the notion that the efficiency of the jury system is saved by ensuring the finality of the jury's verdict offers little consolation for a convicted appellant. As Lord Steyn observed, the response to an accused or an appellant alleging a serious irregularity in jury deliberations that "'[w]e shall never know' fits uneasily with modern conceptions of fairness and due process in the criminal justice system".[150] Effectively, the secrecy rule serves to uphold the efficiency of the jury system at the cost of fairness to the defendant.

B Full and frank jury deliberations

Ensuring that jury deliberations remain shielded from public view, either on appeal or in the media,[151] arguably "promotes candour in the process of collective decision-making".[152] One fundamental value of the jury is its collective decision-making abilities.[153] Accordingly, jurors should feel empowered to participate fully in the deliberative process. As discussed in the Canadian Supreme Court case of *R v Pan*, "[w]hile searching for unanimity, jurors should be free to explore out loud all avenues of reasoning without fear of exposure to public ridicule, contempt or hatred".[154] The argument follows that without the protection of secrecy, jurors would not fully and honestly participate in deliberations.[155] This could impact future trials, as "future jurors may fear judgment and condemnation" and be deterred from jury service if it became standard practice for jurors' opinions to be scrutinised.[156]

This principle was also discussed in relation to the disclosure of jury deliberations by the media in *Solicitor-General v Radio New Zealand Ltd.*[157] The High Court expressed concern that the jury's collective-decision making power

147 *R v Mirza*, above n 9, at [5].
148 At [19].
149 At [5].
150 At [12].
151 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC).
152 *Rolleston v R*, above n 2, at [24].
153 Price, above n 123, at 183.
154 *Pan v R*, above n 60, at [50].
155 *Rolleston v R*, above n 2, at [24].
156 Price, above n 123, at 185.
157 *Solicitor-General v Radio New Zealand Ltd*, above n 151.

would be undermined if the media published jury deliberations. The Court identified a risk that disclosure would "limit justice, as cases would not be decided according to their merits", but by jurors following popular opinion to avoid judgment.[158] However, the chance that "some timid soul" on a jury will necessarily give way to their fears of being judged by the public and thus fail to participate fully in deliberations is "too remote and shadowy to shape the course of justice".[159] While freedom of debate is an important value that should be fostered, "it should not trump concerns about the jury's competency or impartiality". The need to protect against juror misconduct should override any privilege of secrecy.[160] Furthermore, a near-absolute secrecy of jury deliberations is not required to mitigate the risk of full and frank discussions being compromised as a result of media publication of a jury's deliberations. Practical limits on the media's power to publish such information could protect against public scrutiny of a jury's deliberations. Such limits could include prohibiting publication of a juror's identity to ensure anonymity is retained. This would still allow for internal inquiries of a jury's deliberation process for the purpose of addressing allegations of juror misconduct raised on appeal.

Because part of a jury's value lies in its collective decision-making, there is a strong public interest in encouraging full and frank discussions amongst a jury.[161] However, the fatal flaw in this principle is that the argument assumes that jury secrecy necessarily ensures freedom of thought and full participation from jurors. As Tunna notes, this assumption is "arguably unsustainable".[162]

First, it is common practice in other jurisdictions for jurors to be encouraged by trial judges to report instances of juror misconduct. For example, jurors in New South Wales are commonly directed by trial judges to disclose if extraneous material is found in the jury room.[163] It is therefore not the case that jurors' views are entirely shielded from scrutiny; they are made aware that they could be subject to it from their fellow jurors. As such, the very "environment within which deliberation occurs does not necessarily promote free and frank discussion regardless of whether secrecy is maintained".[164]

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158 Price, above n 123, at 192.

159 *Clark v United States* 289 US 1 (1933) at 16 per Cardozo J, as quoted in Markovitz, above n 19, at 1512.

160 At 1512.

161 See Law Commission, above n 63, at [133].

162 Tunna, above n 119, at 82.

163 See for example in *Montaperto v R* [2021] NZCA 170 at [37].

164 Tunna, above n 119, at 82.

Secondly, discussions are often naturally limited by the desire to avoid having one's opinion be judged and attacked by strangers.[165] Dominant personalities may also suppress the views of the more introverted individuals in a group setting.[166] A study by Young, Cameron and Tinsley in 1999 found that "dominant jurors often affected the eventual verdict because they were the ones who put their point across most forcefully".[167] Domineering behaviour amongst juries is particularly relevant when deliberating on a Friday, where jurors are pressured by other jurors to reach a verdict to avoid returning on Monday.[168] As such, the assumption that verdicts are reached by full and frank deliberations may be "illusory", particularly considering that courts lack the ability to monitor the process.[169] This is a concerning finding because it highlights that the assumption relied on to justify the secrecy of jury deliberations may be false.[170]

C Privacy of jurors

The third principle underlying the secrecy rule is ensuring the juror's right to privacy by protecting them from "pressure to explain the reasons which actuated them in arriving at their verdict".[171]

Jurors are under the impression they will remain anonymous both during and after the trial.[172] Intruding on the secrecy of jury deliberations to investigate allegations of juror misconduct is considered an unreasonable infringement on a juror's privacy because if deliberations were made public during an appeal, a juror's privacy may be invaded by the media, or they may face harassment by the public.[173] Therefore, the secrecy rule is said to protect the privacy of jurors:[174]

> … by ensuring that they are not drawn into subsequent appeals and that they are not exposed to criticism or worse by members of the community

165 Price, above n 123, at 193.

166 Tunna, above n 119, at 83.

167 See Warren Young, Neil Cameron and Yvette Tinsley *Jury Trials in New Zealand: A Survey of Jurors* (October 1999) at 179.

168 See for example *R v Wilson* (2004) 21 CRNZ 192 (CA); and *Derrick v R*, above n 94. Both were dismissed in favour of the secrecy rule.

169 Tunna, above n 119, at 83.

170 The question of whether relaxing the secrecy rule would inhibit the frankness of jury deliberations—and to what extent it would do so—is admittedly unknown and requires further study.

171 *Ellis v Deheer*, above n 120, at 121.

172 Price, above n 123, at 184.

173 At 195.

174 *Rolleston v R*, above n 2, at [24].

> who may not agree with the views jurors express about the case in deliberations.

Upholding the secrecy of jury deliberations under this principle is flawed. It is difficult to reconcile how an inquiry into a jury's deliberation would necessarily breach a juror's right to privacy. The discourse surrounding the limitation on a juror's privacy by encroaching on the secrecy rule often imagines the most extreme of scenarios—that there is no secrecy of jury deliberations at all. This is neither desirable nor realistic considering the courts' steadfast hold on jury secrecy and the value that secrecy provides in contributing to the fair and efficient administration of justice.[175]

However, it is illogical to argue that *any* limitation on the secrecy rule will necessarily breach a juror's right to privacy. There is no reason for a juror's identity to be revealed when inquiring into the deliberation process, because the juror's identity is irrelevant to whether juror misconduct occurred.[176] Practical measures could be undertaken to ensure that jurors remain anonymous, such as conducting inquiries into a jury's deliberation in a closed court system or by an internal process. This would protect the integrity of deliberations to the greatest possible extent while still giving credence to the defendant's right to appeal an improper verdict.

For example, in the New South Wales case of *R v Skaf,* a finding of juror misconduct led to a miscarriage of justice after it was found that two jurors conducted experiments at the alleged crime scene.[177] The jurors who were interrogated remained anonymous. This indicates that formal enquiries that investigate matters intrinsic to a juror's reasoning as to their verdict can occur without breaching a juror's privacy. Thus, the "scrutiny of jurors' reasons for their verdict does not, of itself, breach juror anonymity".[178]

Protecting jurors from harassment by the media is a more legitimate concern.[179] This is particularly important in high-profile trials and controversial verdicts that attract media interest and incentivise the intrusion of a juror's privacy to obtain a sellable story.[180] The issue of a juror's right to privacy being infringed by the media has occurred in New Zealand before, perhaps most

175 Ruprecht, above n 10, at 219.

176 Jason Donnelly "Decisions Without Reasons – Rethinking Jury Secrecy" (LLB(Hons) Dissertation, University of Western Sydney, 2008) at 16.

177 *R v Skaf* (2004) 60 NSWLR 86 (NSWCCA).

178 Hunter, above n 14, at 822.

179 Markovitz, above n 19, at 1506–1507.

180 Law Commission, above n 63, at [447].

notably in *Solicitor-General v Radio New Zealand Ltd* (the *RNZ* case).[181] An RNZ reporter was found in contempt of court for contacting ex-jurors from a high-profile murder trial. The reporter published comments by a juror who agreed to speak on the matter and expressed doubts about the jury's guilty verdict. In determining the penalty, the High Court found that RNZ's harassment of the jurors and breach of their privacy was a "significant aggravating factor".[182]

However, justifying the secrecy rule with reference to the privacy of jurors fails to recognise that some jurors may waive their right to privacy by disclosing information about the jury's deliberation themselves, either by posting on social media or agreeing to speak to the media, such as in the *RNZ* case.[183] Jurors may even seek the media themselves. For example, following the high-profile retrial of David Bain, a juror approached TVNZ to speak about her experience and made disclosures about the deliberations. The juror spoke on television, alleging that other jurors had conducted research, both online and by visiting the alleged crime scene, and brought outside material into the deliberations.[184] No further action was taken to remedy or investigate these allegations, nor were steps taken to bring contempt of court charges against TVNZ.

In the *RNZ* case, the High Court noted that the reactions of other jurors contacted affirmed their belief that "generally jurors serve in the impression that their privacy will be respected and their identity remain undisclosed".[185] The privacy of jurors who wish to remain anonymous should indeed be upheld. However, it necessary to note that one of the jurors *agreed* to speak to the reporter, effectively waiving their right to privacy. Therefore, the sanctity of jury deliberations cannot be upheld under the pretence that jurors expect to not be approached by the media if jurors willingly waive their right to privacy and approach the media themselves.

V A Proper and Just Law on Jury Secrecy

There are numerous values and interests that should be at the forefront of consideration in formulating a "proper and just" jury secrecy rule. These include the interest in ensuring justice is done in a particular case, the value of having clarity in the law, the public's interest in holding powerful decision-makers accountable, and the defendant's right to appeal an improper verdict. Striking the

181 *Solicitor-General v Radio New Zealand Ltd*, above n 151.

182 Price, above n 123, at 196.

183 *Solicitor-General v Radio New Zealand Ltd*, above n 151.

184 Interview with David Bain juror (Janet McIntyre, *Sunday*, TVNZ, 18 November 2012).

185 *Solicitor-General v Radio New Zealand Ltd*, above n 151, at 55.

correct balance between these competing interests is imperative to the proper administration of justice due to the power juries hold as the factfinders in a trial and the potential consequences their decision can have on an individual's freedom.

A Verdict finality versus a defendant's right to appeal

A proper and just secrecy rule must value the finality of a verdict, but it must not entail refusing all appeals in which juror misconduct is alleged. Many have raised the proverbial "floodgates" argument in response to the proposition of piercing through the veil of jury secrecy to uphold the defendant's appeal rights.[186] This argument alleges that impeding on the secrecy of jury deliberations would set a precedent whereby every disgruntled defendant would appeal their verdict on the basis of juror misconduct.[187] This might bring the finality of the jury's verdict into question more regularly and result in a significant administrative burden on the criminal justice system with an influx of appeals.[188]

However, fear of the worst-case scenario should not prevent inquiry into jury deliberations, particularly when the reward is ensuring the defendant's fundamental fair trial rights by allowing them to question improper verdicts. It is not the case that *any* intrusion into jury secrecy will necessarily result in an unmanageable influx of groundless appeals. There is scope to loosen the law's tight grip on the secrecy of jury deliberations to allow a degree of intrusion into the deliberation process without causing the floodgates to open.

While it would be undesirable to open the floodgates, it is even less desirable to allow cases where a defendant's fair trial rights have been undermined to fly under the radar. The threshold test for allowing an inquiry should be lowered. This would allow for genuine cases that allege serious juror misconduct (and have some form of evidential basis, such as a juror's affidavit) to be inquired into. However, the standard should not be lowered to the point where baseless appeals could cause a significant strain on the courts.

B Clarity and certainty in the law

A proper and just secrecy rule must reflect the value of having clarity in the law. As discussed in Part II, the current secrecy rule does not indicate what constitutes an exception to the rule. This unclarity, combined with the legacy and sacrosanct

186 See for example Donnelly, above n 176, at 24.

187 See *R v Papadopoulos*, above n 69, at 626.

188 At 626.

status of the secrecy rule itself, has resulted in the courts being hesitant to define the circumstances that would warrant piercing the veil of jury secrecy.[189]

For an appeal based on juror misconduct to succeed, a proper and just law on jury secrecy must strive for clarity to guide the court. The starting presumption should remain that jury deliberations are secret and inadmissible.[190] This reflects the value secrecy provides in giving jurors assurance that their deliberations will not be made public. However, even important and valuable rules must have exceptions.[191] A proper secrecy rule should have a clear demarcation of circumstances that will be protected by secrecy and those that will not. For example, while trivial or inconsequential juror transgressions should not warrant an inquiry, serious and genuine allegations should. Specified exceptions could also provide courts with clarity and guidance. This could include juror misconduct involving fraud, corruption, or coercion, as is the approach in England and Wales.[192]

The law should also promote certainty in respect of courts' decisions. The strictures of the secrecy rule can result in courts making important judgments—such as whether juror misconduct resulted in a miscarriage of justice—based on inference. This is because the effect of the secrecy rule is that a court can only rely on external factors that do not concern the internal workings of the jury's deliberations. Judges can therefore only base judgements on uncertain inferences as to what *might have* happened, rather than relying on evidence from the jury room that shows with certainty what *actually happened.*[193] Decisions made on inference are unclear and therefore uncertain, and do not allow the court to fully determine whether a miscarriage of justice had occurred. A proper and just secrecy rule should result in certain decisions by the courts by providing clarity as to what instances of juror misconduct may warrant an inquiry into the jury's deliberations.

C Juror privacy versus juror accountability

A proper secrecy rule must balance the need to uphold a juror's right to privacy with juror accountability.[194] Generally, jurors should expect their deliberations to

189 See *Worrell v R*, above n 88, at [52].

190 *R v Mirza*, above n 9, at [16].

191 Hunter, above n 14, at 821.

192 Slankard, above n 1, at 18.

193 See for example *R v D* [2007] NZCA 313.

194 Ruprecht, above n 10, at 217.

be kept secret and to have their right to privacy upheld.[195] This recognises that jurors are ordinary citizens who have been tasked to perform an often difficult task; jurors should expect to return to their daily lives once they have fulfilled this duty.[196]

However, there must also be recognition that juries hold extraordinary, unchecked power.[197] Juries make decisions which impact an individual's autonomy and liberty, yet they are untrained for their role and are not accountable for their mistakes.[198] This lack of accountability, combined with the jury's general lack of training for the role, risks the jurors abusing this power. For example, the lack of oversight and protection afforded to jurors during their deliberation process allows jurors to reach a verdict by improper means or to rely on extraneous material. This risk then carries significant consequences for defendants who stand to lose their liberty. However, the secrecy rule creates a risk that abuse of this power will go unnoticed.

There is a strong public interest in holding powerful decision-makers, such as juries, accountable to prevent abuses of power.[199] A proper and just jury secrecy law should permit a juror's right to privacy to be outweighed in favour of accountability when serious misconduct occurs.[200] This is not to say that New Zealand should adopt the United Kingdom's position and imprison jurors for misconduct.[201] Nor should jurors be scrutinised for their misconduct in open court. Doing so could deter future prospective jurors from appearing for jury service—an undesirable outcome. A proper jury secrecy law could, however, ensure the anonymity of jurors who are subject to appeal by holding investigations internally, rather than in open court.

D Addressing allegations of juror misconduct on appeal

When addressing allegations of juror misconduct on appeal, a proper and just secrecy rule should focus the court's attention on the nature and seriousness of the misconduct and its impact on the trial. This follows the approach taken by trial judges, who have far greater flexibility in their approach to misconduct that

195 Hunter, above n 14, at 824.

196 Tunna, above n 119, at 83–84.

197 Donnelly, above n 176, at 44.

198 Ruprecht, above n 10, at 218–219.

199 See Ruprecht, above n 10, at 218–219.

200 At 219.

201 See *Attorney General v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991, in which a juror was sentenced to six months' imprisonment for researching and telling the jury about the defendant's criminal history.

arises while the trial is ongoing.[202] As such, this should remove the need to distinguish between extrinsic and intrinsic matters of the jury's deliberation, as set out in s 76(2).

Adopting the approach taken by trial judges focuses the court's attention on ensuring the defendant's fair trial rights are protected. As Lord Steyn stated in *R v Mirza*, "there is a positive duty on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right".[203] A proper jury secrecy law must allow the court to fulfil this duty by giving the court greater power to address allegations of juror misconduct on appeal; focusing on the nature and seriousness of the misconduct and its impact on the defendant's fair trial rights ensures that is achieved.

VI When Should the Court Pierce the Veil of Jury Secrecy?

The law should allow the court to pierce through the secrecy of jury deliberations when a defendant's fair trial rights are genuinely at risk due to juror misconduct. However, the case law demonstrates that s 76 prevents this from occurring by favouring the jury's interests and protecting the jury system's sanctity. Even extrinsic matters, which are exempt from secrecy, cannot be meaningfully or thoroughly investigated due to the overarching influence of the secrecy rule.

The following examples are specific forms of juror misconduct which may warrant an exception to the secrecy rule and allow the court to inquire into the jury's deliberations.

A Juror bias

Where bias has allegedly impacted the jury's verdict, the secrecy rule should permit an investigation that intrudes on the jury's deliberations. This is because juror bias directly conflicts with the defendant's right to be tried in front of an impartial jury.[204]

A defining feature of juries is the vast range of "experiences, knowledge and perspectives" that jurors bring to the table.[205] Inevitably, jurors may also bring biases which could influence their decision-making process. A juror's predispositions about a defendant's gender, sexuality, or ethnicity might

202 For example, under s 22 of the Juries Act, a trial judge may discharge a juror or jury.

203 *R v Mirza*, above n 9, at [4].

204 New Zealand Bill of Rights Act 1990, s 25(a).

205 Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998) at 238.

influence their decision,[206] as well as preconceptions about certain offences or complainants, such as myths surrounding rape victims.[207] Also, a juror may be biased because of a personal connection to the case or the defendant.[208]

Evidence of juror bias falls under the exception to the secrecy rule in s 76(2) as constituting extrinsic matters.[209] As such, evidence of juror bias is not presumed inadmissible under s 76(1) and could form the basis for ordering an inquiry into the allegedly biased juror.[210]

However, while bias may not be precluded from inquiry, the application of s 76 nevertheless restricts the court's power to investigate juror bias properly. To avoid triggering the s 76(3) threshold test, courts restrict their inquiries into juror bias to factors deemed extrinsic to the jury's deliberation.[211] This includes questioning whether a relationship of bias exists, but not whether the bias affected the juror's deliberative process, given this would constitute an intrinsic matter. If the court determines that an inquiry into juror bias, even one limited to extrinsic matters, would nevertheless produce evidence that is intrinsic to the jury's deliberation, the court may refuse an inquiry entirely.[212] Therefore, s 76 restricts the court's inquisitorial power. Indeed, s 76 limits the scope of an investigation to one which does not directly answer whether bias affected the jury's verdict, but leaves the court to *infer* from extraneous factors whether it *could have.* As discussed in Part IV, such an approach does not achieve the clarity and certainty for which a proper law of jury secrecy should aim.

Rolleston v R demonstrates the limitation that s 76 has on the court's inquisitorial power to remedy juror bias and highlights the arbitrariness of the extrinsic–intrinsic distinction.[213] The appellants in *Rolleston* alleged that the jury's foreman (S) was biased and thus argued that a miscarriage of justice had occurred. This was because the appellant's brother, who was often present during

206 Juror bias against Māori was the subject of the recent Supreme Court leave decision of *Borell v R* [2020] NZSC 101. The appellant argued that her fair trial rights were undermined because there were no procedures to counteract the risk of racial bias within the jury. Although the Court acknowledged the issue's importance, the Court declined Ms Borell's application for leave.

207 See generally Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Processes: Comparing adult rape trials with those of the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020).

208 *Rolleston v R*, above n 2.

209 Such evidence goes towards the juror's capacity to be a juror under s 76(2)(a).

210 However, the test for miscarriages of justice must still be met: see *R v Bates* [1985] 1 NZLR 326 (CA) at 328.

211 *Rolleston v R*, above n 2.

212 *Pearson v R*, above n 41.

213 *Rolleston v R*, above n 2.

the trial, bullied S at high school. The appellants submitted that this informed a likelihood S would be prejudiced against them, undermining their fair trial rights.[214]

The Supreme Court ordered an inquiry into S, determining that "[a] closer look was required".[215] The Court held "the inference was reasonably available that S remembered" the appellant's brother from school "and in a prejudicial light".[216] However, the Court carefully limited the inquiry to whether S's prior knowledge of the case, witnesses or the defendants, prevented (or appeared to prevent) them "from bringing an open mind to jury deliberations".[217] As such, the inquiry focused on ascertaining the nature and extent of the relationship between the appellants and S (an extrinsic matter) but did not touch on how those factors impacted the verdict. Taking this approach carefully skirts around the secrecy rule, because questioning whether S's bias impacted the jury's deliberations would directly intrude into intrinsic matters, thereby triggering the secrecy rule.[218]

An appellate court's focus should be on the nature and seriousness of the alleged misconduct when addressing juror misconduct, not on the extrinsic–intrinsic distinction. Such an approach achieves a more appropriate balance between the jury's interests and those of the defendant. The outcome of *Rolleston* further supports this argument. The inquiry ordered in *Rolleston* led to a dead-end; S insisted on his impartiality and that he did not recognise the appellant's brother.[219]

While it is not necessarily the case that S *was* biased, limiting the inquiry to one which only asks S about extrinsic evidence meant the Court failed to inquire adequately into whether there was apparent or actual bias. The law should have allowed the Court to interview (and potentially cross-examine) S on the content of his deliberations. This would likely have ensured the truthfulness of his interview statements and revealed whether any bias actually influenced the jury's verdict.

Determining whether bias exists based on the statement of the allegedly biased juror is illogical; the juror can simply deny that any bias exists, and unless there are reasons to question the juror's veracity, the appeal will be dismissed.

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214 At [7].
215 At [47].
216 At [47].
217 At [30].
218 At [31].
219 At [49]–[55].

Interviewing the other jurors on whether S demonstrated any bias against the defendant could have remedied the issue and provided a satisfactory answer to whether the jury's verdict was ultimately biased. This is not possible under the current secrecy rule because it would clearly go towards intrinsic matters which are barred from investigation.[220]

This is problematic because even in cases where an inquiry is ordered, limiting the scope of the inquiry to solely extrinsic matters means the law fails to truly determine whether a miscarriage of justice had occurred. Instances of juror misconduct that seriously undermine the defendant's fair trial rights remain overlooked and unresolved, even if exempt from the secrecy rule. Therefore, s 76 strikes an inappropriate balance between protecting the secrecy of jury deliberations and upholding a defendant's right to an impartial jury.

B Extraneous material

A fundamental part of the jury's role is to reach a verdict solely on the evidence raised and challenged at trial.[221] This is because the principle of open justice demands that a defendant has the opportunity to challenge evidence which may be used to convict them.[222] Therefore, when a jury comes into possession of material *not* raised at trial, the jury may rely on this material as unchallenged evidence to determine their verdict.[223] This poses a significant risk to a defendant's fair trial rights.

Such outside material could be inadmissible or irrelevant;[224] it might be highly prejudicial to the defendant, such as their conviction history.[225] Or the material might simply be inaccurate, such as legal definitions from a different jurisdiction.[226] The risk of extraneous material appearing in the jury room has been particularly exacerbated by the advent and prevalence of the Internet, which has made conducting independent research into the defendant, the case, or the law easily accessible to jurors.[227] When jurors possess extraneous material, a fair

220 Evidence Act, s 76(1).

221 Jury Rules 1990, sch 1 form 2.

222 Dominic Grieve, Attorney General for England and Wales "Trial by Google? Juries, social media and the internet" (speech to University of Kent, 6 February 2013).

223 It is also a breach of the juror's oath to rely on extraneous material: see Jury Rules, sch 1 form 2.

224 Robbie Manhas "Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms" (2014) 112 Mich L Rev 809 at 809.

225 *JM v R* [2016] NZCA 383.

226 *R v R*, above n 43.

227 Law Commission *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017) at [4.12].

jury secrecy law should allow thorough investigation into the extent to which the material influenced the jury's verdict.

However, not every instance of jurors possessing extraneous material will warrant an inquiry. As the Supreme Court stated in *Guy v R*, "the mere fact that the jury had access to material that had not been part of the evidence at the trial does not automatically mean that the trial was unfair or that there was a miscarriage of justice".[228] However, highly prejudicial extraneous material in the possession of the jury demands thorough investigation.[229]

For example, in *Montaperto v R,* a more than 30-year-old conviction was overturned after concluding that the original jury was biased towards the defendant.[230] Twenty years after the trial, one of the jurors confessed to having received information during the trial that linked the defendant to another high-profile murder case at the time. This was particularly egregious considering it was revealed post-trial that the defendant was innocent regarding the separate murder. Therefore, there seems no reason to doubt that the jury reached their verdict on highly prejudicial and incorrect information. The Court of Appeal held there was "a real risk of miscarriage of justice", warranting a further inquiry.[231]

Like in *Rolleston,*[232] the Court was careful to explain that the inquiry sought to ascertain extrinsic matters, such as whether the jurors had "recalled receiving information about the appellant that was not part of the evidence, what the evidence was", and "whether a juror had disclosed information to the jury that the appellant was a suspect" in the separate murder case.[233] The Court intentionally did not ask the jurors to disclose specific details about their deliberations, thus avoiding the secrecy rule of s 76(1) and the stringent threshold in s 76(3).[234]

However, there is arguably little difference between whether the jury had been *told* of the information (an extrinsic matter) and whether they had *relied* on the information (an intrinsic matter). Indeed, it could be argued that one may even imply the other. For example, in cases of prejudicial extraneous material being disclosed to the jury, it is difficult to conceive that such information would not then impact the jury's deliberation process, even if only subconsciously.

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228 *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [83].

229 *Smith v R*, above n 40; and *JM v R*, above n 225.

230 *Montaperto v R*, above n 163.

231 At [43]

232 *Rolleston v R*, above n 2.

233 *Montaperto v R*, above n 163, at [24].

234 Evidence Act, ss 76(1) and (3).

Either way, the jury's mind would have been tainted by extraneous material that infringes the principle of open justice. As such, making the distinction is futile. The ability for serious juror misconduct to be inquired into and remedied should not rest on such a fine distinction. This is because such an arbitrary distinction could have easily resulted in a different outcome, protecting the gross miscarriage of justice. A different court might have easily determined that the inquiry in *Montaperto* would cross too far into intrinsic matters and bar themselves from making an inquiry, allowing an unjust verdict to remain final.

VII MOVING FORWARD

A How should the secrecy rule be rewritten?

The current law on jury secrecy prevents appellate courts from fulfilling their duty to address irregularities in the jury system. This illustrates a major flaw in the functionality of the secrecy rule. Even where evidence suggests that juror misconduct may have significantly undermined a defendant's fair trial rights, the law may prevent this from being established or remedied by the court. In these circumstances, the law protects verdicts that were reached by improper or even illegal means.[235]

A law that protects miscarriages of justice and unjust verdicts cannot be said to facilitate the interests of justice. Therefore, the law governing the secrecy of jury deliberations must be rewritten to "end its hide-bound status and become neither a captive of the past, nor a hostage to the legislature", and change to "reflect the fundamental principles of accusatorial justice".[236]

A rewritten secrecy rule must value the finality of a jury's verdict and avoid opening the floodgates to an influx of meritless appeals, whilst also ensuring that when the safety of a jury's verdict is genuinely in question, it may be appealed and subsequently remedied. Maintaining a high—but not impossible—standard for when appeals on the grounds of juror misconduct may succeed will balance a defendant's fair trial rights. Such a standard also mitigates the risk of creating a requirement for piercing the veil of jury deliberations that is too administratively burdensome on the courts.

The starting presumption should remain that evidence of a jury's deliberation will generally remain secret and inadmissible on appeal. However, there must be a clear, defined, and achievable threshold to override this presumption. For example, the threshold could specify that evidence of a jury's

235 Hunter, above n 14, at 813.

236 At 824.

deliberation may be admissible when there is evidence of a severe and genuine risk to the safety of the verdict by way of juror misconduct.

To achieve clarity, the law could then specify what examples of juror misconduct may reach this threshold, such as juror bias, relying on extraneous material in deliberations, or improper pressure from judicial directions. These examples would not be exhaustive or conclusive, with each case ultimately determined by its particular circumstances. However, specific statutory examples would provide courts with the guidance currently missing from s 76. Certainly, every juror brings their own biases and predetermined notions to the jury room. Even so, not every instance of juror bias or receipt of extraneous material will necessarily amount to juror misconduct. Only when there is a demonstrably unjust impact on the jury's deliberations or the verdict of a trial should the secrecy of jury deliberations be disturbed.

Juries have a duty to act impartially, to make their decisions according to the evidence, and to come to their decision after full, frank, and collective deliberations.[237] However, the law should not merely presume that jurors fulfil this duty, but rather ensure that they do. Where a juror breaches this duty such that it amounts to a miscarriage of justice and undermines a defendant's fair trial rights, the law should allow investigations into the conduct and the intrinsic matters of the jury's deliberations to hold them accountable.

The evidence produced from the investigations must then be made available to the court to overturn an improper verdict. Thus, a rewritten law of jury secrecy which allows the court to inquire into serious instances of juror misconduct will strike the appropriate balance between the "pragmatic tolerance of imperfection and the public's demand for accountability".[238]

Lastly, the secrecy rule should remove the distinction between intrinsic and extrinsic matters of the jury's deliberations. As the preceding case law demonstrates, such a distinction significantly restricts the court's inquisitorial powers and limits the scope of any inquiry to external factors only, obscuring whether a miscarriage of justice had occurred. Instead, the new secrecy rule should retain the approach to instances of juror misconduct that arise while the trial is ongoing, focusing on the nature and seriousness of the misconduct, and the impact it has on the trial.[239] This will mean the law is appropriately focused on protecting the defendant's fair trial rights, which should be treated as paramount regardless of the time at which issues of juror misconduct arise.

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237 Law Commission, above n 63, at [133].

238 Ruprecht, above n 10, at 219.

239 *R v R*, above n 43, at [59].

B How does this new rule improve the criminal justice system?

Upholding the fundamental right to a fair trial in front of an impartial jury is a "key component of the administration of justice in New Zealand".[240] Juror misconduct has the potential to severely undermine this right by resulting in a verdict reached by improper means. If the law governing the secrecy of jury deliberations allows a defendant's fair trial rights to be undermined by barring investigation into serious juror misconduct, the law is fundamentally unjust and must be changed.

The rewritten law on the secrecy of jury deliberations proposed in this article would significantly improve the criminal justice system. It would ensure the defendant's fair trial rights are upheld by allowing instances of juror misconduct that threaten this right to be investigated and remedied. Improvements would also follow in terms of public confidence. As discussed, the mystery and impenetrability of the current jury system does not incite public confidence in its ability to produce just outcomes for defendants. Rather, public confidence in juries and their decisions derives from accountability, openness and scrutiny.[241] A law which allows the courts to check and balance the jury's decision-making power would ultimately result in greater public confidence in the jury's decision-making abilities and overall efficacy. This would create a stronger jury system overall.[242]

C Law Commission's previous recommendations

The recommendations set forth in this article are neither new nor extreme. Before the enactment of the Evidence Act, the Law Commission made similar recommendations in its report, *Evidence Code and Commentary,* published in 1999.[243] This report proposed a defined exception to the secrecy rule, now enshrined in s 76, which is that "[a] person cannot give evidence about the deliberations of a jury concerning the substance of a proceeding *except in so far as that evidence tends to establish that a juror has acted in breach of the juror's duty*".[244] The Commission stated that the intention of this provision was to

240 Stephen Dunstan, Judy Paulin and Kelly-anne Atkinson *Trial by Peers? The Composition of New Zealand Juries* (Department of Justice, 1995) at 3.

241 Slankard, above n 1, at 6.

242 See Markovitz, above n 19, at 1515 for reasons why the publication of jury deliberations may strengthen the jury system.

243 Law Commission *Evidence Code and Commentary* (NZLC R55, Vol 2, 1999).

244 At 192 (emphasis added).

"maintain the secrecy of jury deliberations, but at the same time [allow] evidence to be given if a juror breaches his or her duty as a juror".[245]

The Commission further noted that "[t]his section does away with the distinction made in the common law that depends on whether the impropriety occurred within or outside the jury room", or the extrinsic–intrinsic distinction which has been discussed.[246] Furthermore, the Law Commission has recommended that "legislation on jury secrecy could clarify what aspects of a jury's deliberations are admissible or disclosable", noting that "absolute secrecy is undesirable".[247]

Evidently, legal reform of jury secrecy in the form proposed in this paper has been a long time coming, even predating the enactment of the Evidence Act and s 76 itself.

VIII Conclusion

For centuries, the jury deliberation process has been highly regarded as sacrosanct and integral to the proper functioning of the criminal justice system. It has been afforded an unparalleled level of secrecy and protection, tracing back most famously to *Vaise v Delaval*.[248] Section 76 of the Evidence Act encapsulates the legacy of the jury secrecy rule, which is that jury deliberations must remain secret and cannot be admissible in court to overturn a verdict.[249] The principles underlying this rule are that: (i) a jury's verdict must be final, (ii) full and frank discussions amongst a jury must be encouraged, and (iii) jurors' privacy must be protected.

However, s 76 fails to achieve the necessary balance of competing values and interests that are relevant to the jury's deliberations. The secrecy rule currently elevates the jury's interests over any other competing interests, such as ensuring justice is achieved in a particular case, the public's interest in holding powerful decision-makers accountable, and the defendant's interests in appealing an improper verdict. A secrecy rule that cannot balance these interests renders the power juries hold over the trial process unaccountable, and thus absolute.

Although intensely shrouded in protection by its pedigree in common law and its steadfast endorsement from the courts, the secrecy of jury deliberations protects improper verdicts by allowing serious instances of juror misconduct to

245 At 193.

246 At 193.

247 Law Commission, above n 129, at [270].

248 *Vaise v Delaval*, above n 16, at 11.

249 Evidence Act, s 76(1).

go overlooked. This undermines the fundamental right to a fair trial and public confidence in the criminal system overall.

The law governing the secrecy of jury deliberations must change. Whilst a jury's deliberations should generally remain secret, there must be an allowance for allegations of serious juror misconduct to be properly addressed, investigated and remedied on appeal. Such misconduct may risk the safety of the jury's verdict by creating a miscarriage of justice, undermining the defendant's fundamental right to a fair trial. Only when the law allows such misconduct to be remedied may the balance between the necessary values and interests truly be achieved.