

MANAGING PREJUDICIAL PUBLICITY

An empirical study of criminal jury trials in
New South Wales

Michael Chesterman, Janet Chan and Shelley Hampton

February 2001

The report of a collaborative research project of
the University of New South Wales and
the Law and Justice Foundation's Justice Research Centre

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Summary of report

The nature and scope of the project

The project to which this report relates is a collaborative research project of the University of New South Wales and the Law and Justice Foundation's Justice Research Centre. The Australian Research Council provided additional funding.

In 41 selected criminal trials held in NSW between mid-1997 and mid-2000, the jurors, the judges and the principal counsel on both sides were asked to participate in structured interviews, conducted after the trial was concluded. The interviewees were asked about their impressions of how prejudicial media publicity associated with the trial might have affected the perceptions of the jurors and the verdicts reached. They were also asked about a number of associated matters, such as what in their view were the principal issues for determination by the jury and what steps, if any, were taken within the trial process to prevent or mitigate any prejudice potentially arising from publicity. Independent research into the scale and nature of the media publicity associated with each trial was also carried out and where possible the transcripts of the trial proceedings were studied.

The underlying aim was to complete a set of 41 case studies, from which insights into the effects of prejudicial publicity on criminal trial juries might be obtained. As far as the researchers are aware, this particular methodology has not been used in any previous investigation of this topic, either in Australia or overseas.

In determining the range of applicability of the conclusions reached, a number of important background features of the system of administration of criminal justice in NSW must be borne in mind. These include the following:-

1. The restrictions imposed by the law of *sub judice* contempt on the dissemination of potentially prejudicial publicity by the media, notably in the period immediately preceding a criminal jury trial and during the trial itself.
2. The availability of ‘remedial measures’ to mitigate possible prejudice, such as a judicial warning to a jury to avoid or ignore media publicity and a decision to shift the venue of a trial to a location suitably remote from the place of commission of the alleged offence.
3. The significant periods of time typically elapsing between the events most commonly attracting substantial specific publicity – namely, the commission of the alleged offence, the arrest and charging of the accused and the committal proceedings – and the commencement of the jury trial itself.

To the extent that these features are not present in any other common law jurisdiction, whether in Australia or overseas, the conclusions reached in this research must be treated as a less reliable guide to the situation in that jurisdiction.

Thirty-eight of the 41 chosen trials attracted some degree of publicity, appearing before and/or during the trial, which related specifically to the offence and/or the accused. These included 25 trials which also attracted ‘generic’ publicity, that is, publicity relating to some general issue raised by the case. The remaining three trials were the subject of generic publicity only. Thirty-five of the 41 trials took place in metropolitan Sydney and the remaining six in cities or towns outside Sydney. Thirty-one were held in the Supreme Court and the remaining 10 in the District Court. In the majority of the trials (30), the principal offence charged was unlawful homicide.

One particular group of 25 trials within the chosen group – namely, those trials which were held in metropolitan Sydney and attracted a moderate or high level of specific publicity – constituted a significant majority, possibly approaching two-thirds, of all the comparable trials occurring between mid-1997 and mid-2000. By contrast, in other categories of case, such as non-metropolitan trials and trials attracting generic

publicity only, the numbers studied were very small and could in no way be considered representative.

Before research commenced, the Attorney General authorised the researchers under section 68A(3) of the *Jury Act 1977* (NSW) to solicit information from jurors about their deliberations for the purposes of the project. Letters were sent to jurors from the Sheriff's Office on the researchers' behalf. The only jurors interviewed were those who chose of their own volition to contact the researchers. Pursuant to the terms of the Attorney General's authorisation, and to undertakings given to the participating jurors, neither the identities of the trials studied nor the names of jurors are to be disclosed.

In all, 175 jurors, representing a response rate of 4.3 jurors per trial (36 per cent), were interviewed. Forty-one of these, with their prior consent, provided a follow-up interview, conducted in order to clarify what they had said earlier. All interviews with jurors were conducted by telephone. The response rates for judges, prosecution counsel and defence counsel (measured in numbers of trials) were 88 per cent, 100 per cent and 90 per cent respectively.

In the analysis of the data obtained and in the formulation of the major conclusions, a key distinction was drawn between two fundamental questions:-

- (a) The incidence of 'jury recall' of publicity – that is, of one or more members of a jury both encountering (directly or indirectly) relevant publicity and remembering it at the time of the trial.
- (b) The incidence of 'influence on jurors' – that is, of publicity within the range of 'jury recall' (i) exerting an influence on the perceptions of one or more members of the jury, and (ii), as a possible but not a necessary consequence, having a determinative effect on the jury's verdict.

Jury recall

The principal findings on the incidence of jury recall of pre-trial publicity were as follows:-

1. Jurors chiefly recalled media reports of the commission of the alleged offence (this occurred in 78 per cent of the trials in which reports were in fact published). They less frequently recalled reports of the arrest of the accused (50 per cent). They recalled reports of committal hearings or other pre-trial proceedings even less frequently (38 per cent). Recall of pre-trial specific publicity in other categories was piecemeal: for example, a prominent ‘one-off’ media story about an accused, might, but not necessarily would, be recalled. Jury recall was most frequently of general features of the relevant publicity rather than of precise details. In 53 per cent of the trials in which some form of pre-trial publicity was recalled by at least one juror, the publicity was discussed in the jury room. Jurors were frequently aware of broad themes canvassed in generic publicity occurring pre-trial, but did not usually recall particular items of such publicity.
2. There are reasons for believing that counsel and, to a lesser extent, trial judges tended to over-estimate the level of recall of these matters. But in five instances, two of which involved material on the Internet, a jury became aware of publicity which was not known to the judge or to counsel.
3. By way of significant exception to the foregoing generalisations, jurors were more likely to recall pre-trial publicity – for example, reports of pre-trial proceedings – in three situations. These were when (a) it related to accused people who are independently well-known in the community; (b) it related to offences committed in the area where they live; or (c) they did not encounter it until after the trial began. Other familiar explanations for pre-trial publicity being recalled – for example, that it appeared unusually close to the start of the trial or was especially prominent – were also discernible.

Despite judicial instructions, one or more members of a jury were likely to follow newspaper coverage of the trial itself. This occurred in all of the 34

trials that received coverage, even though in a number of them one or more other members of the jury expressed disapproval. In 32 of these 34 trials, the coverage was discussed, at least briefly, in the jury room. Other publicity during the trial, such as television or radio reports or commentary or relevant generic publicity, was less likely to be noticed than judges or counsel seemed to expect.

Influence on jurors

In this context, the media publicity usually treated as relevant was that which, as far as could be ascertained, had been recalled by the relevant jury. As the conclusions under the previous heading indicate, this was usually less in quantity than the publicity actually associated with the case.

In the 38 trials which were attended by specific publicity, very few of the 167 respondent jurors considered that this publicity may have influenced them (only four per cent, with a further 13 per cent not responding to the question) or their fellow-jurors (seven per cent, with a further 12 per cent not responding). The equivalent figures for generic publicity were slightly higher. The expectations of counsel, particularly defence counsel, and of the trial judge were that influence would have been more prevalent.

These assertions by jurors were not taken at face value. Instead, they were examined in the light of other factors tending to suggest whether or not individual jurors, or in addition the verdict itself, had been subject to media influence.

These factors included the following:

- (a) The existence of significant disagreements in the course of the jury's deliberations.
- (b) The jury reaching a verdict by way of compromise or 'horse-trading'.
- (c) Fellow-jurors not participating actively in discussion.
- (d) The opinions of the trial judge, of counsel and of the researchers (as readers of the transcript of proceedings where possible) regarding

what were the principal issues that the jury should have addressed in arriving at a verdict.

- (e) The opinions of ‘professional assessors’ – that is, the trial judge, counsel and, if the issue was considered in appellate proceedings, members of the NSW Court of Criminal Appeal – on two matters. These were (i) the overall standard of performance of the jury, including particularly whether the verdict was ‘safe’, in the sense of being justifiable on the evidence, and (ii) whether the evidence in the case was such that a verdict could easily be reached.
- (f) The weight and the extent, if any, to which the publicity was biased for or against the accused.
- (g) The existence of any factual material in this publicity that was not replicated in the evidence.

Many of the resulting findings as to the incidence of influence on jurors are inevitably based on subjective evaluations. The principal findings are as follows:-

1. Jurors often believed that newspaper coverage of their trial was inaccurate and/or inadequate. In 22 (65 per cent) of the 34 trials in which there was jury awareness of coverage, one or more jurors said this in their interview even though the issue was not specifically raised by the interviewer. In all but four of these, that is, in 18 (55 per cent) of the 34 trials, the inaccuracy or inadequacy was discussed in the jury room.
2. Juries were equally successful in identifying the relevant issues regardless of whether the publicity was negative or positive towards the accused. Also, the quantity of negative publicity did not seem to make a difference to the proportion of verdicts that were ‘safe’.
3. Where the evidence presented in court was strong in favour of guilt or clearly insufficient to establish guilt beyond reasonable doubt, so that the verdict was one which could easily be reached, juries were comparatively successful in identifying relevant issues and in delivering a ‘safe’ verdict. They were less successful in trials where the evidence was equivocal. In trials in the latter category, therefore,

there was greater reason to believe that publicity may have affected the verdict.

4. In 30 of the 40 trials in which the jury was required to deliver a verdict, all of the 'professional assessors' considered the verdicts 'safe'. In a further eight trials, the verdicts were '*possibly* unsafe', in the sense that defence counsel, or in one instance prosecution counsel, considered that it was not supported by the evidence. In the remaining two trials, the verdicts were considered 'unsafe', on the grounds that two or more of the 'professional assessors' held this opinion.
5. In three of the 40 trials, it seemed likely that publicity was determinative of the verdict, though in a further seven trials, it may *possibly* have been determinative. Publicity was found to be likely to have influenced individual jurors, but not the verdict, in a further 11 trials, and it may *possibly* have had this effect in a further five trials. It was unlikely to have had any influence on the verdict or on individual jurors in the remaining 14 trials.
6. In the two trials in which the verdict was 'unsafe', it was in line with the tenor of surrounding publicity. In one of these, involving an acquittal, it seemed likely that publicity was determinative of the verdict. In the other, this was assessed as 'possible'.
7. In the eight trials in which the verdict was 'possibly unsafe', it was again in line with the tenor of surrounding publicity. It seemed likely in one of these that publicity was determinative of the verdict. This seemed possible in a further three trials, including one in which the publicity was generic only. It seemed possible in a further two of these eight trials, but unlikely in the remaining two, that publicity, while not determining the verdict, exerted an influence on one or more individual jurors.
8. In 12 of the trials in which the verdict was 'safe', it was at odds with the tenor of the publicity. It seemed likely in six of these, possible in a further one, and unlikely in the remaining five, that publicity, while not determining the verdict, exerted an influence on one or more individual jurors.

9. In the remaining 18 trials in which the verdict was 'safe', it was in line with the tenor of the publicity. It seemed likely in one of these that publicity was determinative of the verdict. This seemed possible in a further three trials. It seemed likely in a further five of these 18 trials, possible in a further two and unlikely in the remaining seven, that publicity, while not determining the verdict, exerted an influence on one or more individual jurors.
10. In five trials, unbeknownst to counsel or the judge, some or all of the jury discovered that the accused had previously been convicted of or charged with an offence similar to that now faced. The juries dealt with or 'managed' this prejudicial information with varying degrees of success. For example, in one trial, where the verdict was 'possibly unsafe', this discovery apparently created prejudice in the minds of some of the jurors, resulting in conflict within the jury and a compromise verdict. In another, where the verdict was 'safe', one juror ensured that another, still undecided, was not told this information until the verdict was reached. In a third, where the verdict was also 'safe', the jury did not believe the informal source who provided the information, and apparently put it out of their minds.

Other matters investigated

The background role played by the legal rules restricting media publicity for current and forthcoming trials was examined in general terms. More specific attention was paid to the use of remedial measures in the 41 trials investigated.

The use of change of venue was examined with reference to nine cases where the alleged offence was committed outside metropolitan Sydney. In three of these, there was no change of venue; in four, the change was only 'partial', in the sense that it did not reduce greatly the prevalence of publicity emanating from the area where the offence was committed; in the remaining two there was a 'total' change. Amongst the seven 'partial change' and 'no change' cases, there was a higher incidence of jury recall

of pre-trial specific publicity than within the total range of trials investigated. There was also an above-average incidence of cases where it appeared likely that publicity influenced the perceptions of individual jurors, if not also determined the verdict. But the numbers involved are too small to support general conclusions.

In six cases, defence counsel made a pre-trial application for a permanent stay of proceedings or for an adjournment on the ground of pre-trial specific publicity adverse to the accused. In only one of these was the application successful. In all of them, the verdicts were 'safe'. The verdicts were also 'safe' in three cases where defence counsel applied unsuccessfully for a discharge of the jury on the ground of prejudicial publicity appearing during the trial.

In addition, opinions were obtained from the judges and counsel interviewed as to the effectiveness, in general terms, of existing remedial measures and legal restrictions on publicity. They were also asked if they were ever concerned that a jury might be unduly influenced by generic publicity, and if so, what could be done about it. Overall, the responses of defence counsel displayed significantly less confidence in the current situation than those of the judges or of prosecution counsel.

The interviews with jurors also touched on several topics that did not form part of the range of issues specifically investigated. These topics included the following:

- (a) The process, which was sometimes difficult, of reaching a unanimous verdict. In 61 per cent of the trials studied, unanimity was attained comparatively easily; in 22 per cent, a majority group had considerable difficulty in persuading the remaining jurors to agree to a verdict; in 17 per cent, the verdict was reached by compromise. Some impressions were gained of the impact of judicial exhortations to the jury to try to attain unanimity. The requirement of unanimity appeared generally to have compelled those jurors whose opinion ultimately prevailed to provide grounds to justify this opinion.

- (b) Obtaining a sufficient understanding of the legal principles to be applied by the jury, on procedural issues and on the jury's role. Some juries had difficulty understanding the judge's directions, notably on the ingredients of manslaughter and on the meaning of 'beyond reasonable doubt'. In some trials, there was confusion as to whether the jurors should take their own notes of the evidence, whether transcripts would be made available to them, and/or what was the precise role to be played by the jury.
- (c) The experience of serving on a jury. For some jurors, the experience was very positive; in others, it provoked negative feelings such as frustration with fellow-jurors, stress and fear for their safety. Several jurors suggested that counselling or 'debriefing' would be beneficial after a long and stressful trial.

General conclusions

Given that high-profile trials were selected for study, the proportion in which the verdict was considered likely to have been 'publicity-driven' rather than based on the evidence was relatively small (eight per cent). In only one of these trials did the judge and counsel think that the verdict was 'unsafe', and it was an acquittal. In another, according to defence counsel the verdict may have been 'unsafe', though neither the prosecution counsel nor the judge held this view. This is the closest that any trial that we studied came to being a wrongful conviction brought about by the influence of publicity. In the third case, the verdict was considered 'safe'.

In a further group (10 per cent), it was considered possible only, rather than likely, that the verdict was 'publicity-driven'. These include one guilty verdict that was found on appeal to be 'unsafe'. This was, however, a difficult case in which the jurors were comparatively successful in identifying the issues. They could simply have erred in their evaluation of complex evidence rather than deferring to the influence of publicity. In the remaining trials in this group, defence counsel was alone in considering the verdict to be 'unsafe'. It is a matter of possible concern, however, that these included one trial in which the publicity was generic only.

In a number of other cases, evidence of influence on the perceptions of individual jurors was found, but the jury as a whole succeeded in dealing with, or ‘managing’, this influence so that ultimately it appeared not to be determinative of the verdict. In a few instances within this group, however, the jury arrived at a ‘safe’ verdict by the chancy and unpredictable route of a compromise, rather than by addressing the relevant issues fully and directly.

If it is appropriate to interpret these findings as demonstrating a relatively satisfactory level of resistance of NSW juries to publicity, this appears attributable chiefly to five causes. They are as follows:-

1. On account of legal restrictions on publicity and the considered use of remedial measures, jurors are normally not exposed either (a) to pre-trial specific publicity which is both intensely prejudicial in content and published close to the time of commencement of the trial, or (b) to publicity during the trial which is intensely prejudicial.
2. On account of these limits on the content and timing of publicity, jurors overall are not likely to recall pre-trial specific publicity, even in general terms, let alone in detail. This broad generalisation is a factor of major importance even though there are significant exceptions to it and even though it does not deal with generic publicity. But it has validity as a generalisation.
3. While jurors are quite likely to track down at least the newspaper coverage of the trial itself, they are generally not vulnerable to influence from biased or incomplete coverage because they frequently identify, and at times are quite scornful about, the bias and incompleteness.
4. A significant proportion of the juries discharge their duty, spelled out to them by the judge, to scrutinise the evidence carefully and, if necessary, at length. An important factor inducing them to do this is the requirement that their verdict be unanimous. Where this process is in fact carried out in their deliberations, any influence exerted by publicity on the perceptions of individual jurors is quite likely to be overridden by contrary evidence, or (if the evidence suggests the same

conclusion as the publicity) to be superseded as a factor determining the verdict. In this sense, some juries, though by no means all, confront or 'manage' the publicity successfully.

5. Both in this context and elsewhere, frequently jurors - individually and collectively - attain a significant level of independence in both thought and action. While this may at times lead them into pursuing irrelevant lines of inquiry, it helps to prevent them simply caving in to media pressure.

These relatively positive conclusions do not provide justification for wholly or substantially dismantling legal restrictions on publicity for criminal cases, because they presuppose the existence of these restrictions. They do however provide grounds for reconsidering specific aspects of the content and the application of *sub judice* principles. They suggest also that changes of venue are often desirable, but should preferably be 'total' rather than 'partial'. Finally, they suggest that judicial instructions to juries regarding publicity should encourage them strongly to trust their own capacity to recall and understand the evidence and the issues to be resolved, rather than any version of these conveyed expressly or impliedly by media publicity, specific or generic.

Further empirical research could usefully be conducted into the impact of publicity on NSW trials outside the range with which this project was primarily concerned: for example, on trials conducted outside metropolitan Sydney, or trials exposed to generic publicity only. Research into matters treated as ancillary to this project is likely also to be beneficial: for example, into the degree of individual juror commitment to jury decision-making or into practical difficulties experienced by jurors. Any such research should be consciously structured, as isolated interviews with jurors cannot reveal very much about likely patterns within the system as a whole.

Introduction

Objectives of the study

1. Judges, legal practitioners and officers engaged in the administration of criminal justice in Australia maintain a concern that criminal juries may be susceptible to influence from media publicity to such an extent that on occasions they may not be able to deliver an unbiased and impartial verdict. Many other members of the community share this concern. To the extent that it is soundly based, there is an infringement of the basic principle of criminal procedure that a jury should determine its verdict solely on the basis of the evidence, argument and judicial instructions that it encounters in the courtroom.
2. The research project to which this report relates addresses the topic of media influence on criminal trial juries in New South Wales. Its concern is with 'prejudicial publicity', that is, publicity which has the potential to exert an influence on a jury. It focuses chiefly on material published to the community at large by the mass media, that is, on newspaper articles and television and radio broadcasts. Where relevant, however, attention is also paid to prejudicial publicity disseminated in books or magazines or on the Internet.
3. The centrepiece of the project is a set of case studies, in which the most prominent element is a series of structured interviews. The case studies covered a selected group of 41 criminal trials held in New South Wales during the years 1997–2000. Those invited to assist us with interviews were the jurors, the judges

and the sole or principal counsel¹ on each side (prosecution and defence) in the 41 trials.

4. Our principal research questions are as follows:

- To what extent and in what circumstances are criminal trial verdicts affected by prejudicial publicity? In particular, in what ways does the likelihood that jurors will encounter and recall publicity and, if so, that the jury, or individual jurors, will be influenced by it, vary according to each of the following factors:
 - (a) whether the publicity occurred before or during the trial
 - (b) in relation to pre-trial publicity, the period of time between its publication and the commencement of the trial
 - (c) the quantity and prominence of the publicity
 - (d) whether the tenor of the publicity was prejudicial to the accused, neutral, or favourable to the accused
 - (e) whether the publicity referred specifically to the case and/or to the accused
 - (f) whether the publicity referred to the general issues raised in the trial
 - (g) whether the trial was conducted in Sydney, another city in New South Wales or in a country town
 - (h) whether the jury was drawn from the locality where the alleged offence was committed

¹ In a large majority of our trials, counsel were barristers. However, in a couple of trials, defence counsel was a solicitor.

- (i) whether the evidence was such that a verdict could easily be reached?
 - How is the impact of prejudicial publicity perceived by jurors? How do they manage the impact of such publicity in their deliberations and decision making?
 - How is the impact of prejudicial publicity perceived by judges and lawyers involved in the trials? How do they manage the impact of such publicity within the trial process?
 - How effective are the legal restrictions on publicity and the remedial measures available to the court in ensuring that jury trials are not unfairly influenced by prejudicial publicity?
5. An outline of the main features of prior research on these issues appears at paras 34–68 of this chapter. This overview suggests that the present project is the first in the common law world to seek out, on a systematic basis, the views of recent members of juries on this aspect of the trials in which they were engaged, to compare what they said with the opinions of the judges and counsel involved in the same trials, and to subject the differing impressions to critical analysis.

Assumptions about the impact of publicity on juries

6. In previous research in this area, a major deficiency has been the relative lack of first-hand information from jurors themselves about the role played by publicity. While many experiments with mock juries have been conducted, the question of what really occurs in the jury room has generally been left to speculation by people outside the jury room. Numerous hypotheses have been put forward by judges, legal practitioners, academic lawyers, social scientists and law reform agencies. But these hypotheses have scarcely been tested through systematic research into the operations of real-life juries.

7. At one end of the broad spectrum of opinion on this topic is an assumption that jurors individually and juries collectively are likely to be aware of, and distinctly susceptible to, influence from prejudicial publicity. It is not quite suggested that they are wholly open to manipulation by the mass media, but that their capacity to exercise independent and impartial judgment in the face of strong media opinions is limited.
8. This view of the impact of prejudicial publicity on jury decision making appears to underlie some recent judicial decisions, of which two may be cited here:
 - In December 1997, the Supreme Court of Victoria considered the likely effect on a jury of a short four-paragraph article on page 24 — the last page of the business section — of *The Australian*. The article contained disparaging comments on the evidence given by the accused in a fraud trial then taking place in Melbourne. The Court held that publication of the article was a contempt of court. In the Court's opinion, the publicity had a 'real and definite tendency', as a 'matter of practical reality'² to prejudice the fairness of the trial on account of the risk of influence on any member of the jury who read it.³
 - During September 1997, in three child sexual assault cases in the District Court of NSW, the judges discharged the juries on account of publicity given during, or immediately prior to the commencement of, the trials to a Government Minister's press release of an official report on paedophilia. The publicity referred to statements by the Minister, based on the report's findings, to the effect that paedophile

2 The quoted phrases reflect the current authoritative test of liability for *sub judice* contempt: see eg. *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 34 (Wilson J).

3 *Attorney General of Victoria v Nationwide News*, Unreported, 22 December 1997, Gillard J.

offenders were likely to have committed many more offences than those for which they were charged and convicted.⁴

9. At the other end of the spectrum, one finds two linked assumptions producing a very different conclusion. The first, to quote from a High Court judgment in 1982, is that

*... the growth both in intensity and range of mass media coverage in modern times carries with it a greater liability to transience in its hold on the public mind. What is news today is no longer news tomorrow.*⁵

10. The second is that the good sense and sturdy individualism of jurors make them virtually immune from media influence. Jurors, it is argued, are highly sceptical about media publicity. They can genuinely put it on one side in order to focus on the evidence, argument and judicial instructions that they encounter in the courtroom. The requirement of unanimity of verdict ensures that any prejudices generated in individual jurors have no effect on the ultimate outcome because their more impartial fellow-jurors ensure that the evidence is properly scrutinised and provides the real basis for the verdict. This assumption about jury behaviour was summarised as follows by the Federal Court

4 See eg. 'Whelan blamed as sex trial aborted' *Sydney Morning Herald* 11 Sept 1997, p4. 'Legal naivete' (Editorial) *Daily Telegraph* 11 Sept 1997, p10. 'Minister's claims end sex trial' *Daily Telegraph* 11 Sept 1997, p17. 'Second sex trial aborted over Whelan comments' *Sydney Morning Herald* 12 Sept 1997, p1. 'Judges who abort trials' [Editorial] *Sydney Morning Herald* 13 Sept 1997, p44. 'New trial means more anguish' *Daily Telegraph* 13 Sept 1997, p17. 'Aborted trial set Bega murder suspect free' *Sydney Morning Herald* 14 Nov 1997, pp1-2. 'Released on bail: and two girls died in remote bushland' *Daily Telegraph* 14 Nov 1997, p3. 'Suspect on bail 2 years facing sex charges' *Sydney Morning Herald* 15 Nov 1997, pp1, 6. 'The scandal of the Bega murder suspect' *Sun-Herald* 16 Nov 1997, p3. 'Resign, Your Honour' (Mike Carlton) *Sydney Morning Herald* 17 April 1999, p34. 'Laws of contradiction' (Mike Carlton) 24 April 1999, p34. 'The demon within him: no parole for child sex killer' *Daily Telegraph* 28 April 1999, p17. '146 second chances: beast of Bega in and out of court' *Daily Telegraph* 29 April 1999, p7. 'Blaming judges no route to justice' (Richard Ackland) *Sydney Morning Herald* 30 April 1999, p15.

5 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 136 (Wilson J).

in a 1979 case: ‘It is wrong to assume that jurors do not have or will not exercise a critical judgment of what they see, read or hear in the media.’⁶

11. In 1985, the divergence of judicial views was described as follows in the Court of Appeal of NSW:

*There lie at the speculative core of many legal doctrines assumptions about the conduct and capacity of ordinary men and women to whom a disparate array of characteristics are attributed, ranging from extreme obtuseness to almost divine prescience depending on the interest to be advanced or protected. Assessments of the possible or probable conduct and responses of juries fall within much the same category and are equally speculative. It was suggested, however, that jurors, as ordinary members of the community, have developed defences or analytical filters by which to repel or dilute the remorseless assaults of the media. I have no idea whether this is so or not.*⁷

12. In one segment of our interviews with judges and legal practitioners we sought their opinions on the effectiveness of the legal system’s response to the issue of prejudicial publicity. The views conveyed to us, which are outlined in Chapter 6, included some as divergent as these on the fundamental question of juror susceptibility.

The ingredients of media influence on a jury

‘Jury recall’ and ‘influence on jurors’

13. From the point of view of genuine fairness and justice, the most serious consequence that may arise from prejudicial publicity

6 *Duff v R* (1979) 39 FLR 315 at 333 (Brennan, McGregor and Lockhart JJ).

7 *Attorney General (NSW) v John Fairfax & Sons Ltd & Bacon* (1985) 6 NSWLR 695 at 699 (Samuels JA).

bearing upon a criminal trial is that the jury's verdict should be effectively determined, not by the evidence and the relevant law, but by the publicity.

14. If this is to happen, a four-stage process must take place:

Stage 1 — the offending publicity must be *encountered* (directly or indirectly) by one or more members of the jury

Stage 2 — it must be *recalled* by at least one jury member (at least subconsciously) at the time of their deliberations

Stage 3 — it must *influence their perceptions* of the case, despite their exposure in court to evidence, argument and the judge's directions, and

Stage 4 — that influence must be *determinative*, in the sense that it prompts the jury to render a verdict against the weight of the evidence, or at least contributes substantially to this outcome.

15. If only one or two jurors initially encounter the relevant publicity, an important issue is whether all or most of the other jurors get to know about it before or during deliberations. Stage 4 is unlikely to be reached if the content of prejudicial publicity known to only one or two jurors is never relayed to any of the others.
16. Even if only Stage 3 is reached, there is significant cause for concern. There is a very fine line between a verdict which, although supportable by the evidence, was the product of deliberations significantly influenced by the publicity, and a verdict in which the influence exerted by publicity was the determining factor.
17. Throughout this report, the fundamental distinction between Stages 1 and 2 of this process, on the one hand, and Stages 3 and 4, on the other, plays an important role. The issues raised in Stages 1 and 2 can be collapsed into a single question: whether

at the time of deliberations one or more members of a jury were aware, consciously or subconsciously, of relevant publicity. In the report, this question will be given the shorthand label of *jury recall* of the publicity. It might be thought that a phrase such as 'jury awareness' would capture the concept more satisfactorily. But this diverts attention from the fact that, wherever pre-trial publicity is in issue, it must not only be encountered at some point of time, but also remembered by the juror at the time of deliberations. The corresponding shorthand label for the question posed by Stages 3 and 4, taken together, will be *influence on jurors*.

18. The vital point to be borne in mind about the relationship between these two composite questions is that, in relation to any specific item or items of publicity, the first is a prerequisite of the second. Influence on jurors cannot be exerted by publicity unless jury recall is present. This means, among other things, that a number of individual newspaper articles, television broadcasts and other items of publicity that we have taken into account in assessing the level of jury recall in the trials that we have investigated fall out of consideration when we proceed to assess the level of any influence on jurors.

'Specific' and 'generic' publicity

19. The bulk of legal principles and procedures relating to prejudicial publicity are focused on *specific* publicity, that is, prejudicial media coverage regarding named defendants to criminal proceedings and/or aspects of a case before the court. However, the issue of *generic* publicity has received increasing attention in recent years.⁸

⁸ See eg. JC Doppelt, 'Generic Prejudice: How Drug War Fervor Threatens the Right to a Fair Trial' (1991) 40 *American University Law Review* 821; N Vidmar, 'Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials' (1997) 21 *Law and Human Behavior* 5.

20. Generic publicity has been defined as ‘media coverage that does not specifically relate to a defendant’s case, but is of such pervasiveness that it paints a defendant with an incriminating and indelible brush’.⁹ While specific prejudices arise from knowledge and attitudes about a specific case, generic prejudices come from other sources of experience. These may include media publicity, but they also include such things as personal knowledge and experience, rumour and gossip.¹⁰ Usually the prejudice is based on some stereotypical beliefs about certain categories of offence or offender. Generic prejudice may be subliminal and it is not always possible to distinguish between prejudice induced by the media and values held by individuals or communities.¹¹ In extreme situations involving ‘heinous’ crimes, jurors may not care about the guilt or innocence of the accused, but simply want someone to be punished.¹²
21. It is of course possible that the prejudicial publicity associated with a particular case may have both specific and generic content. Indeed, the very reason why newspapers or broadcast programs decide to give prominence to a specific case or a specific accused person is often that they view the case as illustrating some broad theme which has featured in concurrent or recent generic publicity. This association between the two types of publicity occurred in many of the trials that we studied.

9 Doppelt, above n8 at 822.

10 Vidmar, above n8.

11 Doppelt, above n8 at 833.

12 Doppelt, above n8.

Relevant aspects of criminal justice administration in New South Wales

22. Although in our view the findings of this project have significant validity throughout Australia, its primary concern is with criminal jury trials in New South Wales. Several basic features of the administration of criminal justice in that State are therefore of fundamental relevance. They assist assessing both the relationship of our project to other jury research projects and the significance of its findings for jury trials generally.
23. Of primary importance is the content and practical effect of those rules of New South Wales law that are designed to minimise the possibility that juries will be induced by prejudicial publicity into delivering verdicts that are not supported by the evidence. These fall into two groups, which may be labelled respectively ‘publicity restrictions’ and rules authorising ‘remedial measures’. In addition, various practical aspects of the preparation of cases for trial and the conduct of trials are significant. Attention is drawn to these aspects of trial practice at appropriate places in this report.

Publicity restrictions

24. Amongst the publicity restrictions, one can identify two categories. First and most important, there are the *sub judice* rules.¹³ These are the principles of contempt law that prohibit media publications which have a ‘real and definite tendency, as a matter of practical reality’¹⁴ to prejudice the fairness of a current or forthcoming trial by virtue of possible influence on the jury. The main types of publication prohibited are those that

13 For a recent outline and discussion of reform options, see NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000).

14 See eg. the *Hinch* case, above n2 at 34 (Wilson J).

might convey to the jury (a) material which is both prejudicial and generally not admissible in evidence, such as the prior convictions of the accused, or (b) strong messages as to the verdict which it should render.¹⁵ To an important degree they reinforce exclusionary rules of evidence. In contempt proceedings, the onus is on the prosecutor, who is usually the Attorney General acting on the advice of the Crown Solicitor, to establish the elements of liability beyond reasonable doubt.

25. In addition, courts in many types of proceeding have statutory power to make non-publication orders where they are necessary to protect the administration of justice. One of the grounds on which a court may prohibit, at least temporarily, the reporting of evidence is that it may prejudice the fairness of other concurrent or future proceedings. Thus the fairness of a criminal jury trial may be protected by a non-publication order covering some or all of the evidence at the committal proceedings,¹⁶ or at a prior criminal trial relating to the same accused. On occasions, chiefly because of gaps and uncertainties in the rules authorising the making of non-publication orders, a trial judge requests media representatives to refrain from publishing specified material until the jury has delivered its verdict.¹⁷

'Remedial measures'

26. The second set of rules designed to prevent juries being influenced by media publicity comprises those rules of criminal procedure which empower a judge, or in rare instances a magistrate or an appeal court, to employ what we are calling

15 The *Hinch* case, above n2, illustrates both of these.

16 In *Re Robins SM; Ex parte West Australian Newspapers Ltd* (1999) 20 WAR 511, it was emphasised that the committing magistrate must have compelling reasons to believe that suppression of publication is necessary to protect the fairness of any forthcoming trial of the offence.

17 See NSW Law Reform Commission, above n13, Chapter 10.

‘remedial measures’.¹⁸ These are measures which are designed to minimise the impact of prejudicial publicity, or to prevent a verdict which may be tainted by such publicity from being delivered or, if it has been delivered, from being acted upon.

27. The remedial measures most commonly invoked in Australia are as follows:

- delaying the start of a trial
- changing its venue to a location where the publicity has not been significantly disseminated
- instructing the empanelled jurors to avoid contact with publicity or, if they encounter it, to take no notice of it
- discharging a jury before verdict.

28. The following measures are available to courts in Australia, but are infrequently employed:

- challenging potential jurors ‘for cause’, on the ground that they are likely to be incurably biased on account of exposure to prejudicial publicity
- questioning jurors, eg. under section 55D of the *Jury Act 1977* (NSW), as to whether they have encountered specified items of publicity
- (in some jurisdictions) directing, if the accused so elects, eg. under section 16 of the *Criminal Procedure*

18 For an outline, see eg. M Chesterman, ‘Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy’ in N Vidmar (ed), *World Jury Systems* (Oxford University Press, Oxford, 2000) 125 at 147–151.

Act 1986 (NSW), that the case be tried by a judge sitting without a jury¹⁹

- setting aside a verdict of guilty
 - ordering a permanent stay of proceedings.
29. The second set of rules, making available these remedial measures, is necessary because the first set is not watertight. Despite the existence of publicity restrictions, prejudicial publicity still appears from time to time. There are at least three reasons for this.
30. The first reason is that the *sub judice* rules themselves permit such publicity when it is justified in terms of either open justice or freedom of communication on matters of public interest. There will generally be no contempt when the publication charged is a fair and accurate report of public legal proceedings — such as an inquest or the committal proceedings for the offence being tried — that has been published in good faith.²⁰ Similarly, there will be no contempt if the publication is sufficiently beneficial to the public by virtue of disseminating information to the community, or contributing to a public debate, about some general issue of public interest.²¹
31. Secondly, a climate of prejudice against or (conceivably) in favour of an accused may arise out of a series of media

19 On account of the constitutional requirement of jury trial for offences prosecuted on indictment (Commonwealth Constitution, s 80), this option is not available for the trial of offences against a law of the Commonwealth: *Brown v R* (1986) 160 CLR 171. See generally Chesterman, above n18 at 130–131, 133–134.

20 The report must be substantially accurate and its contents must be presented as a report rather than as statements of fact: see eg. *R v Pearce* (1992) 7 WAR 395.

21 See the High Court decision in the *Hinch* case, above n2; applied in *Attorney General for the State of New South Wales v John Fairfax Publications Pty Ltd* [1999] NSWSC 318, 9 April 1999, Barr J.

publications none of which, taken individually, is sufficiently prejudicial to attract liability in contempt.²²

32. Thirdly, the *sub judice* rules are disobeyed from time to time. Similarly, a non-publication order may be deliberately or accidentally breached. When this happens, irrespective of whether or not those responsible for an offending publication are consequently convicted of contempt of court or for breach of a non-publication order, the publication itself will have gone out into the community and may exert an influence on the jury.
33. Accordingly the system relies on remedial measures taken in the criminal proceedings to plug any gaps left by the operation of publicity restrictions. Yet even if remedial measures were 100 per cent effective, juries might still encounter, and be influenced by, publicity about the case. One simple reason is that remedial measures may not be invoked because the relevant publication did not come to the attention of counsel or the judge. This is much more of a possibility nowadays than (say) five years ago because of the arrival of new technologies of communication. A story about the case might appear on an interstate or overseas current affairs program broadcast on cable television. Alternatively, a juror may locate relevant information on the Internet.

22 For discussion of a striking English example, the Michelle and Lisa Taylor case, see M Stephens and P Hill, 'The Role and Impact of Journalism' in C Walker and K Starmer, *Miscarriages of Justice: A Review of Justice in Error* (Blackstone Press, UK, 1999) 263 at 264–267. Even though the general climate of media prejudice against two women charged with murder and accessory to murder respectively was thought sufficiently prejudicial to warrant the reversal of jury verdicts of guilty, the Attorney General determined that no individual media publication would attract contempt liability and therefore took no contempt proceedings.

Existing research into the impact of media publicity on jury trials

Different jurisdictions and different approaches to research

34. There is by now a substantial empirical literature on the effects of prejudicial publicity on juror perceptions. The studies that have been undertaken differ greatly in their approach to the topic. Some are confined to pre-trial publicity and its impact on the perceptions, prior to trial, of those who might be empanelled as jurors. Others endeavour to assess in addition, or instead, the effect of jurors being exposed to evidence, argument and directions from the trial judge. Some involve real jurors, or citizens who, within a real-life situation, might be called on to serve as jurors in a trial that has in fact attracted significant publicity. Others use invented publicity, mock juries and simulated trial proceedings. Some are concerned wholly or primarily with specific publicity, others wholly or primarily with generic publicity.
35. Further discussion of the differences between jury research methodologies appears at the beginning of Chapter 2 of this report.
36. A further important point of differentiation is simply that the studies described in the literature have been carried out in different places. While the basic features of common law jury trials do not vary greatly amongst common law jurisdictions, there are sufficiently important differences in their mode of operation to indicate that it is unsafe to transplant findings from one jurisdiction to another without taking account of these differences. For this reason, and because our own study focuses specifically on actual criminal trials in a particular jurisdiction — that is, New South Wales — the ensuing short outline of the literature is classified according to the country where the relevant research occurred.

Australia

37. While a few broad empirical investigations into the operation of criminal trial juries have been conducted in Australia,²³ none of them has addressed specifically the impact of prejudicial publicity. It has at most been an issue raised in passing. We are aware of only one specific instance, in which former members of a jury were asked about the impact of a television program containing prejudicial material.²⁴
38. Most of the empirical work carried out has, instead, been for the purpose of persuading a court dealing with a criminal case that it should employ a remedial measure. In two relatively recent instances referred to in reported judgments, the findings of empirical research into the effects of substantial pre-trial publicity adverse to the accused were tendered as evidence in an application by the defence to be permitted to challenge potential jurors 'for cause'. In both of them, however, the trial judge rejected the evidence on methodological grounds.²⁵ In another case, the evidence admitted in support of an application (ultimately unsuccessful) for the overturning of a conviction and a permanent stay of proceedings in a particularly high-profile case tried in Melbourne included a report, prepared by a community polling organisation, of a telephone survey conducted in Melbourne. A random sample of 301 Melbourne residents were asked whether they were familiar with the name

23 See in particular NSW Law Reform Commission, *Empirical Studies — The Jury in a Criminal Trial* (1986) (an in-house paper prepared by the NSW Law Reform Commission, referred to in its Report No. 48, *The Jury in a Criminal Trial*, 1986, para 1.14); M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994).

24 This was done in 1985 in the course of the Australian Law Reform Commission's inquiry into the law of contempt.

25 See *Bush v R* (1993) 43 FCR 549; *Connell v R (No. 6)* (1994) 12 WAR 133. For commentary, see H Selby, 'The Pre-trial Use of Survey Evidence by Trial Judges' in *Another Dimension — Proceedings of the 28th Australian Legal Convention* (Hobart, September 1993) at 125; Chesterman, above n18 at 151–152.

of the accused and, if so, what they remembered about the case. The results were only moderately helpful to the applicant.²⁶

39. More recently, a study of the effects of a specific item of pre-trial publicity — a ‘one-off’ story about an accused person — was tendered in evidence by the defendant to *sub judice* contempt proceedings in the Supreme Court of NSW.²⁷ The study²⁸ was designed to gauge the potential effect of pre-trial publicity generated by two linked articles in an edition of the *Sydney Morning Herald*, forming part of a ‘special report’ into the drug trade in Australia. These contained lengthy descriptions and a photograph of a Vietnamese man, who was alleged, along with others, to be a ‘drug boss’. The man was said to have an English nickname, ‘Uncle Six’. The articles were published some five months before he was due to stand trial on drug charges before a jury in the District Court. An experiment, conducted on behalf of the defence, sought to assess the capacity of 109 volunteer respondents to remember the content of the relevant newspaper articles, which had been shown to them fourteen days earlier for

26 See *Glennon v R*, Unreported, Court of Criminal Appeal, Victoria, 13 December 1991; on appeal, *R v Glennon* (1992) 173 CLR 592. For example: *Crocket J also found as a fact that the possibility that a juror would recall the publication of the respondent’s prior conviction was “slight”. In coming to this conclusion, his Honour undertook a careful analysis of the public remarks made by Hinch and endeavoured to assess public awareness and consciousness of the remarks made years previously, principally by examining the findings of a poll ... conducted at the request of the respondent’s advisers by Irving Saulwick and Associates... The form of questions asked in the poll and an analysis of the responses given by a random sample of 301 people in the Melbourne area... The evidence of Mr Saulwick was that the poll indicated that some 33 to 45 per cent of the adult population of Melbourne had heard of the respondent’s case in some form or another. Significantly, however, no respondent to the survey volunteered knowledge of a previous conviction of the respondent. ... The evidence of the poll indicated that people knew about the case in a general, vague way but did not have knowledge of the prior conviction.* (Mason CJ and Toohy J at 599–602).

27 *Attorney General for the State of New South Wales v John Fairfax Publications Pty Ltd* [1999] NSWSC 318, 9 April 1999, Barr J.

28 N Vidmar, *An Analysis of the Potential Effects of Pretrial Publicity Regarding Regina v. Van Ia Duong*, Unpublished report (1999) prepared for Freehill, Hollingdale and Page, Solicitors. [Used with permission of author and of Freehill, Hollingdale and Page.] This study is described in I Freckelton, ‘Social Psychology, Survey Evidence and Prejudicial Publicity’ (1999) 6 *Psychiatry, Psychology and Law* 215.

the alleged purposes of research into the reading habits of newspaper readers.

40. The impact of the articles, in so far as they constituted specific media publicity, was claimed by the defendant to be very small. This was because none of the respondents could remember spontaneously the name of the accused as a person featured in the articles, and only two remembered the nickname 'Uncle Six'. A partial explanation offered for this low incidence of recall was the proposition, supported by separate expert testimony, that Asian names and faces are not well remembered by non-Asian people. Subsequently, the name and the nickname of the accused were read out to the respondents, alongside other Asian names (including two fictitious ones and the name of another of the alleged 'drug bosses'). At this point, a significant proportion (15 per cent in one sub-group, 10 per cent in the other) identified it as that of a person connected with the drug trade, and larger numbers of respondents recognised the nickname. But because comparable proportions of the respondents had the same reaction to one or more of the other Asian names, including the fictitious ones, the conclusion urged by the defendant was that there was a substantial level of generic prejudice against people with Asian, and especially Vietnamese, names. There was a general belief that these people were 'associated with organised crime and the drug trade'.²⁹
41. In the contempt proceedings, however, the judge did not accept that this conclusion resolved the case in favour of the respondent. His view was that insufficient attention was paid to various factors that distinguished the circumstances of the experiment from those of the criminal jury trial that (according to the Crown case) had been exposed to prejudice. These included: (a) the possibility that a single juror might have encountered and recalled the newspaper articles and relayed

29 Vidmar, above n28 at 22.

their contents to fellow-jurors; (b) at the hearing, there would be stimuli to the recollection of the jurors, in so far as they would be repeatedly reminded of the name, the appearance and probably the nickname of the accused; (c) other matters described in the articles would most likely appear in evidence, tending also to trigger recollection; and (d) jurors who initially read the article might have kept and re-read it, because it was presented as a special report of an investigation into the drug trade, with indications of further articles to be published. In his view, these factors suggested that the actual jury would be more likely than the survey respondents to remember the name of the accused and the prejudicial content of the articles. They were not outweighed by the consideration that the time-lapse between the publication and the scheduled date for the trial was five months, more than ten times the period between exposure of the respondents to the articles and their attempts to recall what was contained in them.

New Zealand

42. In a major research paper recently prepared for the New Zealand Law Commission, jurors in 48 completed criminal trials, along with the judges who had presided, were interviewed post-trial on a wide range of subject-matters. The juror response rate was 6.5 per trial (54 per cent). The trials studied included as many high-profile cases as was feasible. Among the many issues covered was the impact of publicity, but this topic was not given particular emphasis.
43. This paper, prepared by Warren Young, Neil Cameron and Yvette Tinsley, is entitled *Juries in Criminal Trials, Part Two: A Summary of the Research Findings*.³⁰ Throughout the present report, it will be referred to as ‘the New Zealand Report’.

30 W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials, Part Two: A Summary of the Research Findings* (Law Commission of New Zealand, Preliminary Paper 37, Vol 2, 1999 (NZLC PP37)). Citations of this Paper will relate to a summary version, published on the Commission’s web-site at <www.lawcom.govt.nz>.

44. In 23 of the 48 trials (48 per cent) studied for the New Zealand Report, at least one juror recalled seeing or hearing some pre-trial publicity, but these jurors were 'very much in the minority'.³¹ In total, only 58 of the 312 jurors interviewed (19 per cent) said that they recalled any such publicity. Two of these said it might have had some impact on their thinking about the case.³² The principal conclusion as to pre-trial publicity was that 'in only one case were we able to detect some evidence that pre-trial publicity may have influenced the deliberations of the jury collectively'.³³
45. The New Zealand Report found greater awareness of publicity during the trial. While there were only 20 cases (42 per cent of the sample) in which one or more jurors encountered it, the total number so doing was 106 (34 per cent of the jurors interviewed).³⁴ None of them considered that it influenced them in any way.³⁵ The principal conclusion in this context was that 'media coverage during the trial itself probably had limited impact and was unlikely to have affected the final outcome'.³⁶
46. The authors of the New Zealand Report summarised their reasons for these two conclusions as follows:

In summary, ... jurors were only rarely aware of sufficient details of pre-trial publicity to enable them to form any bias or prejudice. When they were, for the most part they reported that they consciously made an effort to put that aside and focus on the evidence alone; and when they did not, other jurors in the process of collective deliberations generally overrode

31 New Zealand Report, para 7.48.

32 New Zealand Report, para 7.49.

33 New Zealand Report, para 7.53.

34 New Zealand Report, para 7.48.

35 New Zealand Report, para 7.49.

36 New Zealand Report, para 7.55.

*any individual bias or predetermination. While some other jurors were more affected by media coverage during the trial, there is similarly no evidence that any of the collective deliberations of the juries in the sample were ultimately driven or even influenced by this. It is impossible to know whether this was because the jury took the judge's instructions to heart or because they thought that it was unfair or inappropriate to take media publicity into account in any event.*³⁷

47. Other findings on specific issues set out in the New Zealand Report provide significant corroboration for our own findings on equivalent issues in New South Wales. They will be referred to at appropriate places in this report.

The United States of America

48. The prolific American literature in this area is almost entirely based on different methodologies to that of the New Zealand Report or of our own project. Most of it sets out the findings of experimental studies. In a number of these studies, the experiment was confined to exposing mock jurors to real-life or simulated publicity and assessing their reactions. In others, it went further. In simulated trial situations, the survey subjects were asked also to consider evidence, listen to judicial instructions to ignore publicity and deliberate with their fellow (mock) jurors.
49. The relatively few American surveys that have explored the impact of actual publicity for one or more real-life cases³⁸ have not, however, investigated the effect of the trial itself. Instead, they have focused only on the extent to which potential, though not the actual, members of the juries in those cases

37 New Zealand Report, para 7.57.

38 See eg. E Constantini and J King, 'The Partial Juror: Correlates and Causes of Prejudgment' (1981) 15 *Law and Society Review* 9; G Moran and BL Cutler, 'The Prejudicial Impact of Pretrial Publicity' (1991) 21 *Journal of Applied Social Psychology* 345.

(a) encountered and recalled this publicity and (b) were induced by it to form a view as to the guilt or innocence of the accused. In the USA, unlike New South Wales, there are no legal constraints, generally speaking, preventing researchers or indeed journalists³⁹ from interviewing jurors about their deliberations once the trial is completed. Yet, perhaps surprisingly, this approach to investigating specifically the impact of publicity has not been employed on a systematic basis, so far as we are aware, in the jury research described in the published literature.⁴⁰ This factor sharply differentiates American research findings from those set out in this report, or indeed in the New Zealand Report.

50. Another factor to be borne in mind when considering the American studies of the impact of pre-trial prejudicial publicity is the virtually unconstrained freedom of the American media to publish overtly prejudicial material right up to the time of trial. The fact that there are 'no holds barred' affects the real-life studies, and an assumption to this effect underlies the experimental studies. Accordingly, in both types of studies, the juror respondents are typically exposed to media stories that do one or more of the following: express negative opinions about character of credibility of the accused; convey incriminating evidence; reveal prior convictions of the accused; state that he/she has confessed to the offence(s) charged; and describe graphically the sufferings inflicted on the victim(s). In the real-

39 Both the incidence of interviews of American jurors by journalists and the issues raised by this phenomenon are discussed in NS Marder, 'Deliberations and Disclosures: a Study of Post-Verdict Interviews of Jurors' (1997) 82 *Iowa Law Review* 465. At 518–519, there is a brief outline of the somewhat uncertain limitations, as yet not resolved by the Supreme Court, to the principle that, by virtue of the First Amendment, journalists are entirely free to question jurors once the trial is over.

40 A celebrated jury research project in the 1950s and 1960s, reported in H Kalven and H Zeisel, *The American Jury* (Little Brown and Co, Boston, 1966), included systematic interviews of jurors and some recording of civil jury deliberations, but the topic of media publicity was not specifically addressed. We are aware of some current projects involving the questioning, post-trial, of jurors in actual cases. In some of these, the impact of publicity may well be a specific topic of investigation.

life studies, this publicity may have continued more or less unchecked from the time of the offence or the arrest of the accused, thereby reinforcing recollections that might otherwise fade. The lapse of time between its cessation and the commencement of the trial (real or simulated) may be negligible.

51. All these background elements of the research conducted in the USA contrast starkly with the real-life circumstances of criminal jury trials in Australia,⁴¹ or indeed, of those on which the New Zealand Report is based. In both these places, the *sub judice* rules, as explained above, prohibit the media from disseminating publicity with such high prejudicial content so close to the time of commencement of a forthcoming jury trial. It follows that a 'high profile trial' in the USA is very different, in terms of the quantity, intensity and timing of the prejudicial publicity surrounding it, to a 'high profile trial' in Australia or New Zealand.
52. This contrast may be illustrated by reference to the report of one of the few American projects involving real-life cases.⁴² In January 1988, a sample group of people eligible for jury service within a region of Illinois were asked about their attitudes to the media coverage of a drug offences case. During 1987, the case had been specifically discussed in 35 newspaper articles, of which many were front-page stories. It had in fact been included by one newspaper in 'their December poll of the top ten stories of 1987'.⁴³ Most of the coverage was adverse to the accused. This case was, however, described in the article as only 'moderately publicised'. In the second case, which according to the authors 'undeniably' deserved the description 'highly

41 See generally M Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America' (1997) 45 *American Journal of Comparative Law* 109.

42 Moran and Cutler, above n38.

43 Moran and Cutler, above n38 at 350.

publicised',⁴⁴ the prejudicial publicity was very intensive between June and September 1988, then intermittent up till and during the period of the interviews in December 1988 and January 1989.

53. Publicity of similar intensity, also disseminated close to the time of assessment of juror prejudice, was the subject of an experimental project in 1990.⁴⁵ The researchers exposed one group of mock jurors to 'high factual bias' publicity concerning a man accused of committing armed robbery. This comprised both a television commentary, revealing that he had a substantial record of prior convictions, and a newspaper article, reporting that the police had found incriminating evidence at the home of his girlfriend. Another group of jurors was exposed to 'high emotional bias' publicity. This comprised a short hospital interview with the distressed mother of a seven-year-old girl who to all appearances - there being number-plate evidence and a description of a passenger - had been killed by the alleged robber in a hit-and-run accident shortly after the robbery. In order to assess the effect of a delay between exposure to publicity and prejudice remaining, some members of each of these groups were questioned about their impressions of the publicity and its effect on them immediately after their exposure to it. The remaining members were questioned twelve days later.
54. The important point for present purposes is that in Australia or New Zealand media stories of this nature could not lawfully be published as little as twelve days or even three months before the trial, let alone immediately before its commencement. Case-law on the *sub judice* rules suggests that putting either 'high factual bias' or 'high emotional bias' material of this nature into the

44 These judgments of the two cases studied appear in Moran and Cutler, above n38 at 355.

45 GP Kramer, NL Kerr and JS Carroll, 'Pretrial Publicity, Judicial Remedies, and Jury Bias' (1990) 14 *Law and Human Behavior* 409.

public domain would be distinctly risky within (at the very least) the last six months before the scheduled or the likely date of commencement of the trial. In our own survey of the incidence of prejudicial media articles or broadcasts relating to the trials that we studied, we encountered very few of significance that were published less than six months before the trial. None of them contained prejudicial material that remotely approached the level of bias described in the American study.

55. This is not to say, however, that the substantial American literature is of no relevance to the subject-matter of this report. What follows is a brief outline of some of its more important conclusions.
56. A recent article⁴⁶ reports the results of a meta-analysis conducted on 44 empirical studies in America, covering 5,755 subjects. Five of the studies reviewed involved real-life potential jurors and the remaining 39 used mock jurors. The meta-analysis shows that pre-trial publicity adverse to the accused may have a significant impact on jurors' perceptions of a case. Jurors exposed to such publicity are more likely to return a guilty verdict than those exposed to limited or no publicity. By combining the data sets across 44 studies, the analysis overcame the statistical limitations of studies with small sample sizes. It suggested that the strongest impact of pre-trial publicity on jurors occurs before the trial. The effect on jurors remains significant after the trial (before or after deliberation), but its scale is reduced. In cases involving serious crimes, such as murder or sexual abuse, the effect of pre-trial publicity is greater than in cases involving less serious crimes.
57. Although the underlying mechanisms responsible for this impact have received relatively little research attention, the

46 NM Steblay, J Besirevic, S Fulero and B Jimenz-Lorente, 'The Effects of Pretrial Publicity on Juror Verdicts: a Meta-Analytic Review' (1999) 21 *Law and Human Behavior* 219.

general assumption is that negative pre-trial publicity generates prejudice among jurors regarding the accused person's guilt. The assumption is not necessarily that jurors are passively manipulated by publicity stimuli. One hypothesis — the so-called 'story model' — is that negative pre-trial publicity does not simply provide damaging pieces of information, but a 'belief framework' or schema which is biased against the accused. In consequence, it acts as a 'filter through which subsequent evidence is perceived'.⁴⁷

58. This leaves open the possibility of publicity generating differential - often seen as inconsistent - impact on verdicts in specific cases. For example, where evidence presented at trial contradicts the schema provided by pre-trial publicity, the juror may find it difficult to reconcile the contradiction and may therefore reject either the evidence or the schema. Alternatively, the case may contain features that reinforce some pre-existing prejudice on the part of the juror, so that the impact of pre-trial publicity may not be as strong.
59. The 1990 study mentioned earlier⁴⁸ suggests that the impact of heavily prejudicial publicity, whether of a factual or emotional nature, was not significantly reduced by judicial instructions to ignore publicity. More significantly, it was not reduced either by exposure to trial evidence or by the process of deliberation in the jury room. A lapse of twelve days after encountering the publicity did however lessen the impact of the factual, though not the emotional, publicity. This could have been simply because the relevant factual material had been forgotten. It

47 Steblay, Besirevic, Fulero and Jimenz-Lorente, above n46 at 231.

48 Kramer, Kerr and Carroll, above n45; in addition, see eg. CA Studebaker and SD Penrod, 'Pre-trial Publicity: the Media, the Law and Commonsense'(1997) 3 *Psychology, Public Policy and the Law* 428; NL Kerr, 'The Effects of Pretrial Publicity on Jurors' (1994) 78 *Judicature* 120; JA Tanford, 'The Law and Psychology of Jury Instructions' (1990) 69 *Nebraska Law Review* 71.

should be added, however, that in a later experiment⁴⁹ it was found that the impact of emotional pre-trial publicity did not differ significantly in any way from that of factual publicity, nor indeed did the medium used (print or television) produce any significant difference.

60. Experimental studies with simulated jurors in the USA have also concluded that exposure to negative generic publicity tends to produce a higher proportion of guilty verdicts. In addition, it appeared that judicial warnings and adjournments were likely to be ineffective in mitigating the impact. Even a change of venue might not work as the publicity might pervade the whole country.⁵⁰

Canada

61. Research involving jurors revealing the content of their deliberations is prohibited in Canada by section 649 of the Criminal Code. In addition, significant legal restrictions are imposed on media publicity relating to criminal jury trials. As in Australia, much of the research into the impact of prejudicial publicity has been carried out in order to support applications for remedial measures such as a change of venue or judicial permission to challenge jurors for cause.⁵¹
62. In a study⁵² based on one of the most sensational cases in Canadian history, that of Paul Bernardo, 155 residents of

49 JR Wilson and JH Bornstein, 'Methodological Considerations in Pretrial Publicity Research: is the Medium the Message?' (1998) 22 *Law and Human Behavior* 585. Doubts have, however, been expressed to us about the methodology used in this project.

50 See eg. Doppelt, above n8; MJ Saks, 'What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?' (1997) 6(1) *Southern California Interdisciplinary Law Journal* 1.

51 See eg. N Vidmar and JWT Judson, 'The Use of Social Science Data in a Change of Venue Application: a Case Study' (1981) 59 *Canadian Bar Review* 76; N Vidmar and J Melnitzer, 'Juror Prejudice: an Empirical Study of a Challenge for Cause' (1984) 22 *Osgoode Hall Law Journal* 487.

52 JL Freedman and TM Burke, 'The Effect of Pretrial Publicity: the Bernardo Case' [1996] *Canadian Journal of Criminology* 253.

different parts of Canada and the USA were asked about their awareness of publicity surrounding the case and their opinions as to Bernardo's guilt or innocence on charges of the rape and murder of two teenage girls. They were then given a fictitious account of the evidence at the trial (which was yet to be held), in which the prosecution evidence was relatively weak, and were asked again for their opinions on this issue. Those who had been most exposed to the publicity were most inclined to consider him guilty initially, but their opinions changed significantly towards innocence after they had read the 'evidence'. Those who had encountered none or relatively little of the publicity were less inclined to consider him guilty initially, but shifted somewhat towards doing so after exposure to the 'evidence'. When the opinions of residents of Ontario (where the events occurred) were segregated from the others, the differences between levels of exposure to the publicity appeared to have no effect, either before or after they read the 'evidence'. Some respondents were told additionally that Bernardo had prior convictions for rape. This seems to have prompted those with low levels of exposure to pre-trial publicity to be more likely to vote for a guilty 'verdict' after the 'trial', but to have had no effect on those who had had high levels of exposure.

63. While acknowledging the limits of experimental projects, the investigators reached conclusions that appeared in conflict with some of the American research findings. They found that the potential jurors in their project who were predisposed to think the accused was guilty on account of pre-trial prejudicial publicity 'seemed to be able to put their initial opinions aside and consider the case on its merits'.⁵³ The significant exception was, however, when this publicity included 'especially

53 Freedman and Burke, above n52 at 267.

damaging' information — that is, in their experiment, information about prior convictions.

64. Another study was carried out of the prejudice generated by media reporting of detailed and graphic testimony in a public inquiry into allegations of child sexual abuse at a specific institution. It was found that potential jurors in forthcoming trials of some members of the institution were likely, as a result of the reporting, to be less sceptical of the complainants' account.⁵⁴ The results suggested also, in contrast to one American study mentioned above, that newspaper publicity was likely to be less prejudicial (other things being equal) than television programs. The researchers attributed this to the proposition (supported in part by other American research) that emotional publicity has greater 'staying power' than factual publicity.
65. The researchers also commented that the respondents to their survey believed that their impartiality was not affected even though experimental conditions had produced strong and statistically significant effects. They suggested three possible reasons for this: (a) jurors do not recognise that their judgment has been affected; (b) they decide to give socially desirable responses even though they are aware of their bias; or (c) they are truly able to set aside their emotional reactions and make decisions impartially.
66. According to the classification of publicity outlined in paras 19–21 above, the prejudicial media coverage in this case included specific publicity (comprising allegations against the accused), reinforced by generic publicity (relating to child sexual abuse). The significance of generic publicity in its own right has also been examined in Canadian research. For instance, a study

54 See JRP Ogloff and N Vidmar, 'The Impact of Pretrial Publicity on Jurors: a Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case' (1994) 18 *Law and Human Behavior* 507.

described in a recent article⁵⁵ analysed the responses of 849 real-life members of jury panels being challenged for cause⁵⁶ as part of the process of selecting juries for 25 child sexual abuse trials. They were asked under oath whether, knowing only the nature of the offences being tried, they would in their opinion be able to set aside any personal biases, follow the judge's instructions and decide the case with a fair and impartial mind. On average, 36 per cent replied in the negative. Some of these potential jurors attributed this response to personal experience of this sort of offence. Others, however, stated that their attitude was simply that of not being able to apply the presumption of innocence. In their minds, a person accused of a child sexual abuse offence would, in effect, be presumed guilty unless and until proven innocent. The article acknowledges that allowance must be made for other undisclosed reasons, such as the desire to evade jury service. But its conclusion is that continuing media publicity about child sexual abuse as a particularly damaging species of sex offence would have played a significant role in creating generic prejudice of this type.

United Kingdom

67. As in Canada, research involving inquiries into the deliberations of jurors is unlawful in the United Kingdom. Section 8(c)(1) of the Contempt of Court Act 1981 makes it an offence to 'obtain, disclose or solicit' particulars of deliberations. No exemption for research purposes is provided.

55 Vidmar, above n8.

56 In Canada, several appeal court decisions have made the procedure of challenge for cause more readily available to accused persons than in Australia. It can be invoked when the accused can establish that due to a significant level of generic prejudice in the community (whether or not media-generated) about some important element of the trial — for example, the nature of the offence, or the race of the accused — there is a 'realistic potential of partiality': *Williams v R* (1998) 159 DLR (4th) 493 at 502; see too *R v Parks* (1993) 84 CCC (3d) 353.

68. In the United Kingdom, there has been some experimentation with mock juries regarding their reaction to knowing that the accused has a prior criminal record.⁵⁷ This will be referred to in Chapter 4.

Range of possible research findings

69. At the beginning of this chapter, Australian judicial and professional assumptions about the impact of publicity were briefly described. Within these assumptions, jurors appear variously as (a) highly susceptible to influence, (b) generally immune to influence or (c) somewhere in-between. Much the same applies within the research just outlined, though here the divergent views are attributable in part to markedly different degrees of freedom for the media to report and comment on criminal cases.
70. The particular focus of our research is the impact of publicity, specific and/or generic, on the conclusions ultimately reached by individual jurors and on the verdict of the jury as a whole. These conclusions, along with the verdict, are reached only after the jurors have been exposed to the evidence of witnesses, the arguments of counsel and the judge's directions regarding the evidence and the relevant law.
71. By this stage, any prejudice, initially engendered by publicity that the jurors have encountered and recalled, may have ceased to carry any weight. As a broad generalisation, this was, in fact, the conclusion reached by the authors of the New Zealand Report with reference to the 48 trials that they studied. It is also

57 See WR Cornish and AP Sealy, 'Juries and the Rules of Evidence' [1973] *Criminal Law Review* 208; S Lloyd-Bostock, 'The Effect on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study' [2000] *Criminal Law Review* 734.

consistent, up to a point, with the findings of the Canadian study based on the Bernardo case.

72. An alternative outcome is that any prejudicial publicity (pre-trial or during trial) which the jurors have encountered and recalled is still influential. It may determine the opinion of one or more of the jurors, or indeed the verdict arrived at unanimously by the whole jury. This is the outcome suggested in a significant proportion of the American studies. They cast doubt on the capacity of courtroom evidence, judicial directions and jury deliberations to displace prejudices initially generated by media publicity. The Canadian studies of generic prejudice do not expressly produce this result. They do, however, suggest clearly that in severe cases the influence of generic publicity may be substantial enough to override what happens in the courtroom.
73. No choice between these different portrayals of the impact of publicity would of course be applicable uniformly to all jury trials. Not even the more committed adherents of either the thesis of juror susceptibility or the thesis of juror immunity would assert such uniformity.
74. The supposition underlying our research is in fact that, as suggested by the New Zealand Report, a jury's experiences in the courtroom and the jury room are potentially, under Australian conditions, of considerable importance in diluting the impact of any prejudicial publicity within the range of juror recall. An associated supposition is that, given the legal rules inhibiting what the media may publish in Australia, juror recall, at least of pre-trial publicity, may fall well short of what is in fact published about the case or the issues raised in it. But it is unsafe to assume therefore that no influence on jurors occurs. It is certainly unsafe to accept this proposition in relation to any individual case merely because no juror engaged in it believed that the associated publicity was influential.

75. Our methodology, as described in the next chapter, is designed to identify, within the range of trials studied, (a) what items of prejudicial publicity were or might have been actually recalled, so as to have been within the consciousness of at least one juror at the time of deliberations; and (b) which of these items, if any, might have exerted influence despite the potentially mitigating effects of the courtroom and jury room experience.
76. Throughout our research, we have anticipated that there would be no simple answers to these questions.

The structure of the report

77. The structure of this report reflects to a significant degree our analysis, summarised at paras 13–18 of this Chapter, of the factors that may result in individual jurors, or the jury as a whole, being influenced as to their decision by prejudicial publicity. In particular, it reflects our distinction between ‘jury recall’ of publicity and the ‘influence on jurors’ exerted by any publicity actually recalled.
78. Chapter 2 describes our research methodology and the characteristics of our samples of interviewees.
79. The core of the report is to be found in Chapters 3, 4 and 5. Chapter 3 deals with juror recall: it describes our findings as to the circumstances in which the jurors in the trials that we studied encountered and recalled, at the relevant time, relevant publicity. Chapter 4 deals with influence on jurors: it describes our findings as to whether, and if so in what circumstances, they may have been influenced by such publicity as they encountered and (consciously or subconsciously) recalled. Chapter 5 reviews the role that publicity restrictions and remedial measures played in the trials that we studied.

80. In Chapter 6, we summarise the professional opinions on these same two topics — publicity restrictions and remedial measures — expressed by the judges and legal practitioners whom we interviewed. In Chapter 7, we outline some impressions gained from juror interviews on a range of ancillary matters. Chapter 8 contains our overall conclusions and our suggestions as to further research.

Research methodology

An overview of jury research methodologies

81. Although the simulation experiment is by far the most popular method employed in empirical studies into jury decision making, it is only one of several methods available to researchers. Other methods⁵⁸ include archival analyses using statistical correlation, field experiments, shadow jury, post-trial interviews with jurors, and case studies.⁵⁹
82. Each method has its strengths and weaknesses.⁶⁰ The greatest strength of simulation experiments is in terms of internal validity (validity in making causal inferences) because random assignment of subjects to treatments ensures that the only difference between the experimental and the control groups is the experimental manipulation. However, because the realism of trial simulation varies, and (mock) jurors do not make decisions under the same conditions as real jurors, the external validity (generalisability) of mock-jury experiments is weak.⁶¹ It is also difficult to simulate long trials. In dealing with the impact of pre-

58 See discussion in MJ Saks, 'What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?' (1997) 6(1) *Southern California Interdisciplinary Law Journal* 1.

59 See RK Yin, *Case Study Research: Design and Methods* (2nd edition, Sage Publications, Newbury Park, California, 1994) for a full discussion of the case study as a social science research methodology. For the use of case study methods in jury research, see JP Levine, 'The Case Study as a Jury Research Methodology' (1996) 24(4) *Journal of Criminal Justice* at 351–360.

60 Based on discussion in Saks above n58, Levine above n59 and Yin above n59.

61 Saks above n58 at 4–6.

trial publicity on jurors, simulation experiments have been criticised for their ‘artificial settings’.⁶² For example, researchers operationalise ‘high publicity’ conditions by exposing every juror to a high level of the same publicity, a situation relatively uncommon in actual trials. The ‘high publicity’ conditions also tend to contain very damaging information about the defendant, such as a prior criminal record or an alleged confession, whereas actual media coverage may not be consistently prejudicial. Finally, the effect of evidence is infrequently taken into account in these experiments, even though evidence has been found to be ‘three times more important in determining jury verdicts than any juror or defendant characteristics’ in studies of actual trials.⁶³ In fact, researchers in mock-jury experiments are acutely aware of the power of case information, so that the case facts used in these experiments are deliberately set to be ambiguous so that the probability of detecting the effects of other, more subtle, variables are maximised.⁶⁴

83. Archival analyses using statistical correlation make use of data from representative samples of real trials.⁶⁵ While such studies may have strong external validity, they are weak on internal validity and are limited by the availability and quality of archival data.⁶⁶
84. Field experiments, which involve the manipulation of experimental conditions on real jurors in real trials, have strong internal as well as external validity, but are almost never done

62 See eg. J Brusckke and WE Loges, ‘Relationship Between Pretrial Publicity and Trial Outcomes’ (1999) 49(4) *Journal of Communication* at 104–120, and Saks above n58 at 19.

63 Brusckke and Loges above n62 at 106–107.

64 Saks above n58 at 19; Brusckke and Loges above n62 at 107.

65 Brusckke and Loges above n62 is one example of such a study.

66 Saks above n58 at 3–6.

because of our legal culture's aversion to random allocation of accused persons or litigants to different treatment conditions.⁶⁷

85. Shadow juries, which involve the use of mock juries for real trials, are expensive as well as of limited value for drawing inferences about cause and effect.⁶⁸
86. As indicated in Chapter 1, the law in some jurisdictions prohibits post-trial interviews of jurors. Where permitted, they are valuable for understanding real trials and have good external validity if multiple trials are used. But one weakness of this approach is the reliability of jurors' accounts, which may be distorted or incomplete.⁶⁹
87. Case studies involve the investigation of one or more real trials, typically drawing on multiple sources of data to capture the complex factors that influence jury decisions.⁷⁰ Case study as a research method has often been criticised for its weakness in both internal and external validity.⁷¹ However, as Robert Yin argues, the goal of case study research is not statistical generalisation, but theory building and refining.⁷² Case studies should not be seen as surveys with a small sample size (for example, a single case study is not the same as a survey with n=1), but a series of experiments in real life.⁷³ They are

67 Saks above n58 at 8–9. For an Australian example of using randomized court treatment, see the ACT Reintegrative Shaming Experiment on the Australian Institute of Criminology's Restorative Justice website: <www.aic.gov.au>

68 Saks above n58 at fn8.

69 Saks above n58 at 6.

70 Levine above n59 at 354–356.

71 Levine above n59 at 352–353.

72 Yin above n59 at 30–32.

73 It is significant that Donald T Campbell, one of the gurus of experimental design, wrote the foreword to Yin's book (at n59). He compares the case study approach to the old physical science laboratory 'experimental isolation' paradigm, which differs from the 'randomized assignment to treatment' model in that 'each rival hypothesis must be specified and specifically controlled for'. See Yin, above n59 at page x, 'Foreword'.

necessary for studying situations where there are ‘many more variables of interest than data points’.⁷⁴ The generalisability of case study research can be strengthened by the use of replications (multiple case studies) and examination of rival theories.⁷⁵ As Levine argues, case studies can generate hypotheses that can be tested in future research, uncover hidden factors that affect jurors, take into account the complexity of the trial and corroborate findings using other methods.⁷⁶

88. The imperfection of any single research method is not an impediment to understanding jury decisions. If replications (conducting different studies under different conditions) and triangulation (using different methodologies or sources of data) produce similar results, we can be more confident of our conclusions.⁷⁷

Research questions and research method

89. As indicated in Chapter 1, our principal research questions are as follows:

- To what extent and in what circumstances are criminal trial verdicts affected by prejudicial publicity? In particular, in what ways does the likelihood that jurors will encounter and recall publicity and, if so, that the jury, or individual jurors, will be influenced by it, vary according to each of the following factors:
 - (a) whether the publicity occurred before or during the trial

74 Yin above n59 at 13.

75 Yin above n59 at 31.

76 Levine above n59 at 354–356.

77 Saks above n58 at 5.

- (b) in relation to pre-trial publicity, the period of time between its publication and the commencement of the trial
 - (c) the quantity and prominence of the publicity
 - (d) whether the tenor of the publicity was prejudicial to the accused, neutral, or favourable to the accused
 - (e) whether the publicity referred specifically to the case and/or to the accused
 - (f) whether the publicity referred to the general issues raised in the trial
 - (g) whether the trial was conducted in Sydney, another city in New South Wales or in a country town
 - (h) whether the jury was drawn from the locality where the alleged offence was committed
 - (i) whether the evidence was such that a verdict could easily be reached?
- How is the impact of prejudicial publicity perceived by jurors? How do they manage the impact of such publicity in their deliberations and decision making?
 - How is the impact of prejudicial publicity perceived by judges and lawyers involved in the trials? How do they manage the impact of such publicity within the trial process?
 - How effective are the legal restrictions on publicity and the remedial measures available to the court in ensuring that jury trials are not unfairly influenced by prejudicial publicity?

90. Our research, using a multiple case-study approach, is based on the examination of 41 criminal jury trials where there was significant media publicity. These trials were conducted between 1997 and 2000 in the Supreme Court or the District Court in a metropolitan or non-metropolitan venue in New South Wales. Although jurors in the trials were surveyed as part of the research, it must be emphasised that the unit of analysis (the ‘case’) is the trial, not the juror.
91. The criminal jury trials were chosen on the basis that there was media publicity *directly* relating to the case or to the accused, before or during the trial (38 trials), and/or a background of contemporaneous *generic* publicity that expressed a strong point of view in relation to one or more broad social issues relevant to the case (three trials). An example of generic publicity would be the publication of articles and editorials about ‘battered women syndrome’ around the time of the trial of a woman charged with the murder of her allegedly violent husband. It is important to note that 25 of the 38 trials with specific publicity were also conducted against a background of generic publicity. Mostly, this reinforced a message about the case or the accused that was conveyed by the specific publicity. Indeed, the existence of generic publicity often provided a reason why the case generated specific publicity.
92. Several techniques were employed for data collection: post-trial interviews of jurors, trial judges, defence counsel and prosecutors, and content analysis of trial transcripts and media stories. In addition, we obtained useful information from the officer within NSW Crown Solicitor’s Office who has primary responsibility for advising the Attorney General regarding the instigation of *sub judice* contempt proceedings.

Research process

Identifying trials and collating media reports

93. We identified potentially relevant trials from a variety of sources. These sources included newspaper reports, electronic legal databases (eg. the Butterworths database of unreported cases and the Austlii databases of Supreme Court and Court of Criminal Appeal judgments) and trials suggested by judges, counsel and the Crown Solicitor's Office. By searching national, state, regional and local newspapers, press clippings of each case were compiled. These compilations included reports of the event/offence, the arrest of alleged offender(s), bail and committal hearings, the trial itself and any post-trial publicity. If the trial involved a high-profile accused or victim, samples of reports specifically about the person published up to two years before trial were also collated. In a few cases, we also viewed videotapes of television news coverage.
94. We also used other methods of tracking down publicity. In relation to a few of our cases a pre-trial application for a remedial measure, such as a change of venue or a stay of proceedings, was made or was given consideration. Here we were generally able to obtain from the presiding judge, from counsel or from law reports a list of the items of publicity relied upon, and in a couple of instances copies of relevant newspaper items.
95. We also took into consideration any relevant publicity disseminated other than through the traditional mass media — eg. on the Internet or in a book — when it was drawn to our attention by counsel, judges, prosecuting authorities, jurors or any other source.
96. In addition, we collected any contemporaneous generic publicity on relevant issues that were published shortly before or during the trial. In several instances, counsel drew our attention

to generic publicity that had caused them some concern during the trial.

The trials studied

97. Table 2.1 summarises the characteristics of the trials chosen for the study. Of the 41 trials, 31 were conducted in the Supreme Court and 10 in the District Court. Thirty-five of them were held in metropolitan venues (34 at Queens Square or Darlinghurst, within the central Sydney area; one at Parramatta) and the remaining six were conducted in 'non-metropolitan' venues. This meant, more precisely, that the trial occurred in a venue outside metropolitan Sydney, so that a trial in a city such as Wollongong would be classified 'non-metropolitan'.
98. In the 41 trials studied, there were 47 defendants. Given that the sample was chosen on the basis of the existence of significant media publicity, it is not surprising that the majority of trials involved serious offences. Taking the most serious offence charged in cases with multiple charges, the largest number of trials involved unlawful homicide (30). The remaining cases involved assault (including sexual assault) (4), drugs (4) and other offences (3).
99. As mentioned in para 91, 13 of the trials that we studied received significant media publicity *specific* to the case, three were attended by purely *generic* publicity, and the remaining 25 received both specific and generic publicity. In about seven of these cases, the specific publicity appeared to us to be potentially less influential than the generic publicity. This classification reflects the nature of the publicity which, as far as we could ascertain, *actually* occurred before and/or during the relevant trials.

TABLE 2.1 Characteristics of trials (n=41)

	Frequency	Percentage
Jurisdiction		
Supreme Court	31	76%
District Court	10	24%
Location		
Metropolitan	35	85%
Non-metropolitan	6	15%
Most Serious Offence		
Unlawful homicide	30	73%
Assault (incl. sexual assault)	4	10%
Drugs	4	10%
Other offences	3	7%
Nature of publicity (actual)		
Specific only	13	32%
Specific-plus-generic	25	61%
Generic only	3	7%
Nature of publicity (recalled)		
Specific only	13	32%
Specific-plus-generic	23	56%
Generic only	5	12%

100. For the particular purpose of assessing the influence, if any, exerted by publicity in our group of trials, we have however adopted a different approach to classifying them by reference to the publicity associated with them. In this context, what matters is not the publicity that *actually* occurred, but the publicity that was *recalled* by at least one member of the jury. This is because, as stated above in Chapter 1 at para 18, ‘influence on jurors cannot be exerted by publicity unless juror recall is present’. Applying this concept of publicity within the range of jury recall, we found that 13 of the trials were associated with specific

media publicity, five with purely generic publicity, and the remaining 23 with both specific and generic publicity. This difference between these figures and those given in the preceding paragraph arises because, in two of the 25 trials in which the *actual* publicity was both specific and generic, the publicity within in the range of *jury recall* was generic only. As far as we could ascertain, none of the specific publicity relating either of these trials was recalled by any of the jurors.

Permission and access

101. Prior authorisation to solicit information from former jurors regarding their deliberations was obtained from the Attorney General under section 68A(3) of the *Jury Act 1977* (NSW).⁷⁸ This permission was subject to strict conditions ensuring anonymity and confidentiality for everyone who granted us an interview. Furthermore, our undertakings to the Attorney General and to the jurors who participated prohibited us from disclosing publicly the identities of the trials in the study. It follows that the answers supplied by any of our respondents may only be disclosed in the context of a general discussion of some aspect of the criminal justice system.
102. Before commencing the research, we also obtained approval from the former and the present Chief Justice of New South Wales, the Chief Judge of the District Court, the Sheriff of NSW, the Directors of Public Prosecutions for NSW and for the Commonwealth, and the Presidents of the Bar Association and the Law Society.
103. Once trials were identified, either the New South Wales Office of the Director of Public Prosecutions or the Commonwealth

⁷⁸ Section 68A(1) prohibits the soliciting of information from a juror or former juror for the purpose of obtaining information on the deliberations of a jury. Under subsection (3), however, soliciting may take place 'in accordance with an authority granted by the Attorney General for the conduct of a research project into matters relating to juries or jury service'.

Director of Public Prosecutions gave us access to the trial transcript, unless this was precluded by a restriction on publication of the evidence or of some aspect of it. We then compiled summaries of the basic facts in each case and the matters raised by prosecution and defence counsel, as well as any recorded applications by counsel, directions by the judge to the jury or warnings by the judge to the press regarding publicity. In trials where we did not have access to the transcript of proceedings, our first interview was with either the prosecution counsel or the trial judge, in order to ascertain as many of the details as possible. Any gaps in details were filled in during our remaining interviews.

Identifying and contacting jurors

104. The next phase of research involved identifying and contacting trial jurors in each selected trial. As all information about jurors is confidential, the Office of the Sheriff (NSW) assisted us by identifying the postal addresses of relevant jurors and sending out our letter inviting them to participate in the project. The letter outlined the basic parameters of the project and informed jurors that they were under no obligation whatsoever to participate. It also emphasised that participants' identities would remain confidential and that published material would not link responses to any identifiable trial. The Sheriff's Office also provided a demographic breakdown of the jurors on each of the selected trials (gender, year of birth, occupation and residential postcode).
105. Two weeks after this initial postal contact was attempted, the Sheriff's Office mailed out a copy of the invitation to those jurors who had not responded. This invitation was accompanied by a short covering letter by way of reminder. No further attempt was made to contact jurors.

106. In accordance with this process, the only jurors whose identity became known to us were those who agreed to participate in our research. Jurors commonly only revealed their first names and, while most elected to give us their telephone number, a few elected to call us at the appointed time on the project's toll-free number. All jurors were interviewed by telephone. Shelley Hampton and Carolyn Morris conducted the interviews. A total of 175 jurors were interviewed in relation to 41 trials.
107. At the conclusion of the interview, jurors were asked whether they would object to being contacted at a later date to take part in a brief follow-up telephone interview designed to probe their response in greater depth. Of the 175 respondents, only eight said they would prefer not to be contacted again and all of the jurors finally approached agreed to take part in the follow-up interview. The initial interview data were reviewed to identify jurors who had given responses that were of particular interest or could usefully be supplemented. If those jurors had indicated that they would be willing to take part in a follow-up interview, they were contacted. All jurors who were contacted for a follow-up interview were first given the option to withdraw their consent to it, but none of them did so. In total, follow-up interviews were conducted with 41 jurors from 16 trials. Michael Chesterman conducted all follow-up interviews over the telephone.

The jurors interviewed

108. A total of 175 jurors were interviewed out of a potential respondent pool of 480⁷⁹ jurors for the 41 trials.

79 In four trials there were less than 12 jurors by the time of deliberations. In a fifth trial, the Sheriff's Office could only extract contact details for half of the jury from its database.

109. The average response rate for the 41 trials was 4.3 jurors per trial or 36 per cent — the highest being eight jurors per trial (67 per cent) from three trials, and the lowest being one juror per trial (eight per cent) from two trials. The median response rate was four jurors per trial or 33 per cent. We achieved a lower response rate than we had hoped for, but some of the trials in the study took place more than 18 months prior to the letters being sent out, and many potential respondents may have changed their addresses from that appearing the Sheriff's Office database.
110. Table 2.2 summarises the demographic characteristics of the jurors who participated in the study, and to the extent possible, compares these characteristics with those of the population of jurors in the 41 trials.
111. Roughly half of the jurors in our sample were male and half were female. Females were marginally over-represented compared with the potential pool of jurors. The majority of jurors were over 35 years of age. The 26 to 35 age-group was significantly under-represented in our sample, while the 46 to 55 and 56 to 65 age-groups were slightly over-represented. Jurors who participated in the study worked in a variety of occupations, with significant proportions from professional occupations (19 per cent) and clerical, sales and service sectors (26 per cent). Around 5 per cent of the sample listed 'home duties' as their occupation. These were all female respondents. The overall distribution of occupational categories shows that there is no significant difference between jurors in our sample and the potential pool of jurors in this variable.

TABLE 2.2 Demographics of jurors

	Jurors in study (175)		Potential pool of jurors (480)	
	Frequency	Percentage	Frequency	Percentage
Sex				
Male	87	50%	267	55%
Female	88	50%	213	45%
Age at trial				
18–25	17	9%	61	13%
26–35	24	14%	110	23%
36–45	37	21%	90	19%
46–55	49	28%	112	23%
56–65	40	23%	84	17%
66 and over	8	5%	23	5%
Occupation				
Unemployed	18	10%	18	4%
Retired	20	12%	20	4%
Managers/administrators	12	7%	28	6%
Professionals	34	19%	78	16%
Associated professionals	7	4%	17	4%
Trades and related	19	11%	61	13%
Advanced clerical & service	8	5%	23	5%
Interm clerical, sales & service	33	19%	84	17%
Interm production & transport	4	2%	20	4%
Elemental clerical, sales & service	3	2%	24	5%
Labourers and related	0	0%	14	3%
Home duties	8	5%	36	7%
Student	7	4%	31	6%
Missing	0	0%	26	6%

TABLE 2.2 Demographics of jurors (cont.)

	Jurors in study (175)		Potential pool of jurors (480)	
	Frequency	Percentage	Frequency	Percentage
Education				
Primary school	3	2%	*n/a	*n/a
Leaving certificate (Yr 10)	37	21%	*n/a	*n/a
Higher school certificate (Yr 12)	22	13%	*n/a	*n/a
TAFE certificate/diploma	51	29%	*n/a	*n/a
Undergraduate uni degree	43	24%	*n/a	*n/a
Postgraduate uni degree	18	10%	*n/a	*n/a
Other	1	1%	*n/a	*n/a
Income				
\$25,000 or less per year	53	30%	*n/a	*n/a
>\$25,000 to <\$50,000 per year	74	43%	*n/a	*n/a
>\$50,000 to \$100,000 per year	38	22%	*n/a	*n/a
\$100,000 or more per year	4	2%	*n/a	*n/a
No Answer	5	3%	*n/a	*n/a

*n/a = data not available

Surveys of judges and lawyers

112. Key individuals professionally involved with the 41 trials in the sample — that is, the presiding judge and the principal counsel appearing on both sides — were sent a letter requesting interviews about the possibility of influence from media publicity, or from other extrinsic factors, on the jury in their trial(s). Attached to this letter was a Research Statement outlining the research objectives and methodology.

113. Michael Chesterman conducted all interviews with judges. With two exceptions, these were conducted in person, and in all cases a structured questionnaire was used. Michael Chesterman and Janet Chan shared the task of interviewing prosecution and

defence counsel. Most of these interviews were conducted by telephone. However, several interviews with prosecution counsel were conducted in person when the trial transcripts were not accessible and a longer interview was required to establish the pertinent facts of the case before moving on to the standard set of questions. The majority of interviews were tape-recorded with permission from the interviewees. Where permission was not granted or taping was not feasible, written notes were taken.

114. The judges' response rate was excellent. Interviews were conducted with 21 judges who presided over 37 of the 41 trials.⁸⁰ The two judges who declined to be interviewed had between them presided over four trials in the sample.
115. The response rates from counsel were likewise excellent. All prosecution counsel agreed to be interviewed.⁸¹ Thirty defence counsel who were involved in 36 trials⁸² agreed to be interviewed.⁸³ In one case where there was significant pre-trial publicity and a change of defence counsel before trial commenced, an additional interview was conducted with the pre-trial defence counsel. The six remaining defence counsel declined, either in principle or in the particular circumstances, to be interviewed.

80 Twenty-three different judges presided over the 41 trials in our sample. While a separate interview was conducted regarding the characteristics of each trial, repeat-interviewees were only asked once for their general comments about managing the impact of media publicity [ie. questions 13–15 in Appendix B].

81 Twenty-four different Crown Prosecutors acted as counsel in the 41 trials in our sample. While a separate interview was conducted regarding the characteristics of each trial, repeat-interviewees were only asked once for their general comments about managing the impact of media [ie. questions 13–15 in Appendix C].

82 Thirty different barristers (or, in a few instances, solicitors) acted as defence counsel for the 47 accused in the 41 trials in our sample. While a separate interview was conducted regarding the characteristics of each trial, repeat-interviewees were only asked once for their general comments about managing the impact of media [ie. questions 13–15 in Appendix C].

83 Of the six trials involving two co-accused, only one defence counsel declined to be interviewed.

116. All but two of the judges were male; similarly, only two female lawyers were interviewed. One of the female judges presided over two trials within the sample and one of the female lawyers acted in two trials.

Research instruments

117. A structured questionnaire was used for all interviews. A copy of these instruments is included in the Appendices.

Initial juror interviews

118. Jurors were asked questions about each of the following broad topics (see Appendix A for full details):

- their recollections of the case
- factors which in their view affected their verdict and that of the jury as a whole
- awareness of specific publicity⁸⁴
- awareness of generic publicity
- possible impact of media publicity on their perception of the case and their conception of the verdict
- perception of their role as a juror
- their demographic characteristics.

84 In the juror survey instrument reproduced in Appendix A, this is referred to as 'publicity specifically about the case' (see Qns 12 and 13). But in fact we also asked for their recollections about publicity including information about the accused (see Q16(b)) and, in collating the data, treated this also as 'specific publicity'. This extended concept of 'specific publicity' was used in our interviews with judges and counsel.

119. The instrument was pre-tested by Maria Karras and Shelley Hampton on three former criminal trial jurors known to the research team. The main objective of the pre-test was to investigate whether the subjects found the questions comprehensible, coherent and logical. The terms of the questionnaire were amended on the basis of these responses.
120. A major concern in the design of the instrument was the length of time it would take to complete the interview. On the basis of the pre-test, it was estimated that each interview would take 30 to 40 minutes. For the overwhelming majority of the 175 juror telephone interviews this was an accurate estimate; however, on six occasions the respondents spoke for over 120 minutes about their experiences and, in one instance, the respondent spoke for 210 minutes.

Follow-up juror interviews

121. The follow-up interviews of 41 jurors from 16 trials were conducted in order to clarify or confirm information conveyed in the initial interviews. The questions covered the following issues:
- the juror's awareness of specific publicity at the time of the offence, arrest, bail, committal and trial (or knowledge of those matters from any other source)
 - other jurors' demonstrated knowledge of specific publicity at these times
 - the juror's pre-trial knowledge of any high-profile accused or victim and the sources of that knowledge
 - other jurors' demonstrated knowledge of a high-profile accused or victim and the sources of that knowledge
 - further delineation of juror's awareness of generic publicity about the issues raised in the trial

- other jurors' demonstrated knowledge of generic publicity about issues raised in the trial
- jury discussions about specific and/or generic publicity
- judicial directions about specific and/or generic publicity
- the evidence and other factors that were important for the juror in reaching a conclusion
- the evidence and other factors that other jurors revealed as important in reaching their conclusions
- the process by which disagreements were resolved during deliberations
- whether the juror thought that he or she might have been influenced by the publicity.

Surveys of judges and lawyers

122. Questions posed to the trial judge and to counsel on both sides were similar. They were designed to cover, as far as possible, the same topics as were raised with jurors. These were as follows (see Appendices B and C for full details):

- any unusual features of the jury selection process or the jury itself
- the factors which should have affected the verdict and whether the interviewee believed that the jury did take account of those factors
- awareness of media publicity
- remedial action taken or considered in response to media publicity

- perceived influence of media publicity on verdict or on jurors' perceptions of the case
- jury's request for help or advice
- jurors' understanding of their role
- general comments on the use of remedial measures, the efficacy of the *sub judice* rules and the appropriate ways of dealing with generic publicity.

123. In addition, discussions were held with the officer within the Crown Solicitor's Office who had primary responsibility for advising the Attorney General regarding proceedings for *sub judice* contempt. The principal aim of this inquiry was to ascertain in general terms whether consideration had been given to instituting any such proceedings against a media publisher on the ground that material published by it had a tendency to prejudice any of the trials in our study.

Ethical issues

124. A number of ethical issues arose in the study. As indicated above, researching jury deliberations raises issues regarding juror anonymity and confidentiality. The Attorney General's permission to carry out the research, granted under s 68A(3) of the Jury Act, was conditional upon the researchers' undertaking to guarantee juror anonymity and confidentiality. Furthermore, the design and methodology of the research had to comply with conditions prescribed by the University of New South Wales' Ethics Secretariat Committee on Experimental Procedures Involving Human Subjects [CEPIHS]. The following procedures were adopted to address these ethical issues.

Contact with jurors

125. In consultation with the Attorney General and the Sheriff of NSW, we arranged for the Office of the Sheriff to identify jurors on the selected trials from its database and to mail the letter of invitation (in Sheriff's Office envelopes) to individual jurors. Two weeks after the initial letter was sent, the Sheriff's Office mailed a second copy of the letter and a short covering note by way of reminder. Unless jurors chose to respond to these two invitations to participate, their identities and contact details remained unknown to the researchers. No further attempts were made to contact these jurors.

Informed consent of jurors

126. The letter of invitation to jurors stated: 'Your involvement would be completely voluntary and you could withdraw at any time... Following the telephone interviews, we will ask some jurors to speak with us in person about their jury experience. If you are one of those asked, you would not be obliged to be involved in the second part of the study merely because you assisted us in the telephone survey. If you feel that you would like further information about the project before deciding whether or not to take part, please contact [names of research staff and Freecall phone number].'

127. We emphasised the voluntary nature of participation again when jurors contacted us for further information or to elect to participate in the project. At the end of the initial interview, jurors were asked if they would be willing to have their names and contact details added to a list of potential follow-up interviewees. They were told that they were under no obligation to do so. All jurors contacted from this list were reminded that they could still decline to participate before any follow-up interview commenced.

Anonymity and confidentiality

128. The invitation to participate informed jurors that the Attorney General had granted the researchers permission to conduct the research and that the Sheriff's Office had sent the letter on the researchers' behalf in order to protect the anonymity of jurors. The letter stated that 'If you choose not to participate in the telephone survey, we will not know your identity. If you are in fact willing to take part, we will of course come to know your name, but we will be bound by an undertaking to the Attorney General not to disclose it to anyone.' It also stated: 'At no time will your identity or the specific details of the trial on which you served be made public.'
129. In addition, members of the research team interviewing jurors gave an undertaking at the commencement of the interview that neither the respondent's identity nor the name of the trial they were involved in would be revealed in the report.
130. Every effort has been made to ensure that the interviewees and the trials are not identifiable. All names and contact numbers provided by jurors were destroyed once follow-up interviews on each trial were completed. All remaining records identify jurors only by allocated trial and juror numbers, eg. 17-J1. In the drafting of this Report, every attempt has been made to ensure that the identity of the trials that we have investigated is not apparent. A draft of its major chapters was read by an officer of the Attorney General's Department and by the Solicitor for Public Prosecutions in order to check that the trials were not identifiable.
131. Similar precautions, to protect anonymity and to ensure informed consent, were adopted for the interviews with judges and lawyers. It was made clear to all judges and lawyers that the researchers would not disclose to them or to anyone else any information obtained from jurors relating specifically to any trial. All analysis was conducted at a statistical or general level.

Validity issues

132. In this section, we review the basic reasoning underlying our analysis and some of the basic concepts, and we comment on their meaning and their validity.

Jury recall

133. In the foregoing outline (see Chapter 1 at paras 13–18) of a ‘four-stage process’ that would produce the very serious consequence of a verdict being determined by publicity rather than by evidence, the first two stages are that the publicity must have been encountered, directly or indirectly, by one or more jurors and that it must have been recalled at the time of jury deliberations. We have combined these two stages into the concept of ‘jury recall’.

134. We acknowledge, of course, that ‘recall’ of something read, seen or heard some time ago is not always conscious. A juror might well say to us that she did not ‘recall’ encountering any publicity for a particular aspect of a criminal case — for example, the committal proceedings — whereas in fact she did read a lengthy newspaper article or see a television program, the contents of which remained in her subconscious mind and influenced her view of the case.

135. There seemed little that we could do to take account of this aspect of human memory. In so far as we addressed the problem, it was through asking individual jurors whether they recalled any jury room discussion of publicity, and whether or not it related to items of publicity that the juror had independently recalled at the time of the trial.

136. Another reason why this question about jury room discussion was included is that, as mentioned at the beginning of this chapter, our unit of analysis is the trial not the individual juror. We have tabulated our individual juror responses on jury recall

so as to record, not the number and proportion of individual jurors recalling any particular item or items of publicity, but the number of trials in which at least one juror recalled publicity. Obviously, given that our response rate among jurors was only 4.3 jurors per trial, our replies on this issue were likely to understate, perhaps seriously, the number of trials in which at least one juror recalled the publicity.

137. The inclusion of a question on jury room discussion assisted in two ways to redress, if only partially, this distortion in our findings. Firstly, it prompted our interviewees to tell us about publicity that they themselves did not recall but which one or more other jurors (often not interviewed by us) did recall. Secondly, in so far as the influence of any publicity recalled by a juror will be much enhanced if all jurors are told about it, this question helped to put us in touch with the recalled publicity of greatest significance for us.
138. Even with these correcting factors, we recognise that our findings are highly likely to understate the actual level of individual juror recall. But they can, in our judgment, provide the basis of conclusions framed in terms of likely patterns of recall. The conclusions on jury recall set out in Chapter 3 are indeed framed in this way.
139. *Pre-trial and 'in-trial' publicity.* In determining the circumstances in which jury recall occurred in our trials, or indeed in which it is likely to occur in trials generally, a fundamental distinction that we have drawn is between *pre-trial publicity* — that is material published before the jury is empanelled — and publicity appearing during the trial. From now on in this Report the latter category is called, not very elegantly, *in-trial publicity*.
140. Generally speaking, the issue of individual juror recollection of material encountered some time earlier is important only in relation to pre-trial publicity. Except perhaps in long trials, one can assume that any in-trial publicity encountered by a juror will

also be recollected at the time of deliberations. Conversely, the notion of a juror having to retrieve from his or her memory an impression of an item of publicity encountered some time earlier does not arise in relation to all items published before the trial. This is because material initially published before the trial may only come to the notice of a juror after the trial has commenced.

141. Subject to these qualifications, the distinction between pre-trial and in-trial publicity is of fundamental importance for our findings about jury recall.
142. *Factors in measuring pre-trial publicity.* Our assessments of the incidence of jury recall of publicity in our trials were made by reference to the publicity actually appearing, so far as we were able to track it down. Our approach to tracing publicity is outlined in paras 93–96 above.
143. In seeking to frame propositions on this topic which can be applied generally, we focused predominantly on *specific* publicity. This we define (see Chapter 1 at para 19) as publicity dealing expressly with the case or the accused. We found some level of pre-trial specific publicity in 38 of our 41 cases and we classified the relevant items of publicity by reference principally to three factors.
144. The first was the event(s) to which an item related. Here we have four categories: *reports of the offence*, *reports of the arrest* or charging of the accused, *reports of earlier proceedings* relating to the offence (the most common of these being committal proceedings), and a miscellaneous category of *publicity for other matters*. In this final category there were sometimes items of publicity that bore entirely on the accused and did not refer at all to the trial. This final category is inevitably open-ended, but the first three categories have a sufficient degree of uniformity as between different trials to provide a basis for comparison.

145. Our second factor was the *timing of the publication*. More precisely, it was the lapse of time, which we measured in months, between the publication of the relevant item and the commencement of the trial. Evidently, this is an important factor to be taken into account in deducing from our responses some overall pattern of likelihood of jury recall.
146. Thirdly, we made an assessment of the overall *weight* of all the pre-trial specific publicity associated with each trial, categorising it either as heavy, moderate or light. In this process, we paid particular attention to the opinions on the matter conveyed to us by the trial judge and counsel engaged in the trial. Inevitably, this classification is subjective. As with the timing of a publication, its importance for the process of endeavouring to discern some overall pattern of likelihood of jury recall is obvious.

Influence on jurors

147. In any interview situation, respondents may be motivated to give what they regard as socially desirable answers to questions posed by researchers. We expected that this motivation might significantly affect the answers given by jurors to one of our central questions: whether they believed that their perception of the case or their verdict was influenced by media publicity. In fact, we did indeed receive very few positive answers to this question, and several of the few positive answers that we received were qualified by the comment 'perhaps' or 'only a little'.
148. We did not believe that all of the numerous negative answers, denying any likelihood of influence, should be taken at face value. We therefore considered it particularly important that these claims by jurors of total or substantial immunity from influence should be subjected to whatever processes of cross-checking were available.

149. Our principal method was to compare them with other information, gained chiefly from our interviews, which might tend either to substantiate or to refute them. Specifically, we adopted the following measures with a view to assessing the ultimate effect of media influence:

- (a) Taking account of the impressions formed by individual jurors as to the extent of influence, if any, exerted by publicity on the perceptions or the verdict of their fellow-jurors. In so doing, we have paid heed to any suggestions by jurors that their fellow-jurors appeared to form early in the proceedings, and to adhere to, a firm opinion which might have been based on media-induced prejudice.
- (b) Examining the jurors' accounts of any of the following occurrences:
 - (i) significant disagreements in the course of the jury's deliberations
 - (ii) the jury reaching a verdict by way of compromise or 'horse-trading'
 - (iii) changes in a juror's own opinions as to the appropriate verdict during the course of the trial and the deliberations
 - (iv) fellow-jurors not participating actively in discussion, and/or displaying no interest in the issues to be resolved.
- (c) Gathering together the opinions of the trial judge, of counsel and of ourselves (as readers of the transcript of proceedings where possible) regarding what were the principal issues that the jury should have addressed in arriving at a verdict. We have done this in order to make a comparison with what the jurors themselves identified for

us as the issues believed to be important. These included issues such as the facts that the Crown would have to disprove in order to rebut a defence, the weight of particular items of circumstantial evidence, the credibility of witnesses and the comparative worth of conflicting expert evidence.

- (d) Taking account of the opinions of what we call the ‘professional assessors’ — namely, the trial judge, counsel on both sides and, if an appeal against the verdict was lodged, the NSW Court of Criminal Appeal — as to (i) the overall standard of performance of the jury, including (but not limited to) their opinions as to whether the verdict was ‘safe’,⁸⁵ and (ii) whether the evidence in the case was such that a verdict could easily be reached.
- (e) Scrutinising the publicity (specific and/or generic) that, as far as we could tell, was within the degree of recall of all or some of the jurors at the time of deliberations, in order to assess its weight and the extent, if any, to which it was biased for or against the accused.
- (f) Taking particular account of any factual material in this publicity that was not replicated in the evidence.

150. In the light of this information, notably that under headings (d) and (e), we then divided the 40 cases in which a verdict was delivered by the jury⁸⁶ into the following four categories:

85 In a number of the cases where a verdict of guilty was delivered, the accused lodged a successful appeal against conviction, on grounds relating to admissibility of evidence, the content of the judge’s directions to the jury and/or the procedure adopted in the trial. Since the appropriateness of the jury’s decision *in the light of what they saw and heard in the courtroom* was not challenged successfully, or at all, in these appeals, the success of the appeal did not imply that the verdict should for present purposes be treated as ‘unsafe’.

86 In one of our trials, the jury was not required to deliberate on a verdict.

- (a) According to the Court of Criminal Appeal, or to a majority at least of the ‘professional assessors’, the verdict was ‘unsafe’, in the sense of being unwarranted by the evidence. It was, however, in tune with the publicity. In this situation, we could legitimately be sceptical about any assertions by jurors in the trial that the publicity exerted no influence. It was at least possible, though not necessarily the case, that the verdict was ‘publicity-driven’.
- (b) According to prosecution counsel (in one case) or defence counsel (in the others), the verdict was not warranted on the evidence, but was in line with the publicity. The other ‘professional assessors’ considered, however, that the verdict was substantiated by the evidence, or at least was one that a reasonable jury could reach. Here, the verdict may have been ‘unsafe’, and an argument that it might have been publicity-driven remains.
- (c) The verdict was considered ‘safe’, that is, appropriate on the evidence, but contradicted the messages conveyed by the publicity. Here, although individual jurors may still have been influenced, the jury as a whole could be taken to have withstood any influence exerted.
- (d) The verdict was considered to be ‘safe’ and also in accord with the publicity. Here again, individual jurors may have been influenced. It was indeed possible that publicity, rather than the evidence, determined the verdict.

151. On the basis of these various assessments and items of information, we formed a final judgment on each of the 40 verdicts. This covered two issues: (a) whether or not the verdict was warranted by the evidence; and (b) whether the verdict appeared to be wholly or predominantly based on the evidence, on the influence of recalled media publicity or — as a third possibility — on some other extrinsic factor or combination of factors.

Factors generally affecting the reliability of our surveys

152. The response rates of the juror survey were 4.3 per jury (36 per cent), with a median rate being four jurors per trial. The interviewees were roughly representative of the pool of potential jurors in sex and occupation, but the 26 to 35 age-group was significantly under-represented while the 46 to 65 age-groups were slightly over-represented. This suggests that the non-respondents were from the 26 to 35 age-group. Whether their under-representation had any significant effect on the results is difficult to determine.
153. The fact that, on average, we were able to interview less than half of the jurors in each trial gives rise to some doubts about the overall reliability of our findings. We do however receive some encouragement from a statement in the New Zealand Report, where the survey response rate in a project also involving post-trial interviews was 6.5 jurors per trial. The authors of the Report stated that in their experience ‘five or six interviews per trial were sufficient to provide an accurate and consistent picture of the deliberations process’.⁸⁷ If this judgment is correct (and it was more or less borne out in the trials where we ourselves had six or more respondents), the relatively low response rate was not so much a problem as might appear at first sight.
154. A further factor affecting the reliability of our surveys is that most of our interviews took place some months after the trials took place. Judges, barristers and jurors all indicated, understandably enough, that their recollection of specific matters, such as the particular issues to be resolved in the trial, was incomplete due to the passage of time. As far as possible, we used prompting techniques to assist them in remembering what had happened.

87 New Zealand Report, para 1.7.

Reliability of assessments involving value judgment

155. At various points in the methodology just outlined, we have made assessments involving a significant measure of value judgment. For example, we made assessments on the following matters: the weight of pre-trial publicity actually accompanying each of our trials; the weight and the degree of bias of such publicity as one or more jurors recalled; the degree of success attained by jurors in identifying the relevant issues to be considered by them; the strength of the Crown case; and the likelihood that the perceptions of individual jurors were influenced, or the verdict itself determined, by the publicity. In each of these processes of assessment, we have taken account of professional opinions conveyed to us, to the extent already indicated. Michael Chesterman made the final decisions on these assessments. Shelley Hampton participated in the process through preparing initial analyses of the issues involved and/or providing a second opinion as to what the final decision should be.

Generalisability of findings to the population of criminal jury trials

156. One segment of the trials covered in this study constitutes a significant majority of all comparable criminal jury trials. These are the trials that (a) attracted a large or moderate quantity of specific media publicity before and/or during the trial; (b) took place in metropolitan Sydney; and (c) in common with all our trials, were conducted between mid-1997 to mid-2000. Within our total complement of 41 trials, 25 answered these specifications.⁸⁸ This was indeed the type of case on which we sought most to focus our energies. We were aware of only nine other similar trials which could equally well have fallen within our study, but which for different reasons were ultimately not

88 In all, there were 35 metropolitan trials in our survey, but three of these were chosen on account of generic publicity only and a further seven attracted only a small quantity of specific publicity (coupled in each case with some generic publicity).

included. In addition to these nine, there may well have been others, but not, we believe, many others.

157. We believe therefore that our findings relating to this particular category of cases provide a reasonably reliable picture of how prejudicial publicity is likely to have been dealt with in all such trials over the period in question.
158. Subject to this important exception, the trials that we studied could not be, and were not meant to be, representative of the population of criminal jury trials in New South Wales during this or any period. One of the very obvious points of differentiation is that, for reasons explained above, the majority of our cases involved extremely serious offences such as homicide.
159. Our collection of non-metropolitan trials is very small in number (only six) and could not be considered representative in their own right. The information gathered from them revealed significant differences, as might be expected, between metropolitan and non-metropolitan juries and between the trial contexts in which they operate. It showed that it would be 'unsafe' to extend any general findings in this area of study from metropolitan to non-metropolitan trials.
160. Much the same points may be made with respect to those cases that were attended by generic publicity (25 in the 'specific-plus-generic' group and three in the generic group). The number of trials during any period that might be affected by generic publicity would be impossible to determine without very extensive research. We could not claim that a sample of 28 trials was representative.

Jury recall of publicity

Introduction

161. In the foregoing outline (see Chapter 1 at paras 13–18) of a ‘four-stage process’ that would produce the very serious consequence of a verdict being determined by publicity rather than by evidence, the first two stages are that the publicity must have been *encountered* by one or more jurors and that it must have been *recalled* at the time of jury deliberations. We are using the term ‘jury recall’ to refer to these two stages in combination. In this Chapter we set out our principal findings on the circumstances of jury recall in the trials that we studied.
162. As explained in Chapter 2, the unit of analysis for this research is the trial, not the juror, so that the discussion in Chapters 3 and 4 will be primarily based on *juries in relation to individual trials* rather than *jurors in general*. Nevertheless, we are able to report some general statistical trends from the 175 jurors interviewed for this study regarding their awareness of specific or generic media publicity relevant to their trials.
163. The large majority (143 out of 175 or 82 per cent) of the jurors who took part in the research stated that they became aware of specific media publicity about the case before and/or during the trial. About nine out of ten (132 out of 143) of these jurors were aware of publicity *during* the trial, whereas only four out of ten (60 out of 143) were aware of publicity *before* the trial.⁸⁹ These

89 Fifty of 143 respondents (35 per cent) were aware of specific publicity before and during the trial.

143 jurors became aware of publicity primarily through newspapers (38 per cent) or a combination of newspapers and other sources, such as television, radio, other jurors, and discussions with friends or colleagues (47 per cent). According to the majority of these 143 jurors, the specific publicity they encountered was more or less neutral towards the accused (67 per cent). Only 26 (or 18 per cent) of them thought that the publicity was mainly negative towards the accused, while three respondents (two per cent) thought that the publicity was mainly positive.⁹⁰ Almost two-thirds of all respondents (114 out of 175) indicated that there was discussion of specific publicity in the jury room.

164. Jurors in the survey also reported a moderate level of awareness of generic publicity. The majority (105 out of 175 or 60 per cent) had watched, read or heard general media reports about a *similar crime* before the trial. A smaller proportion was aware of general media reports about *similar offenders* (36 per cent) or *similar victims* (29 per cent) before the trial.⁹¹ Seventy-one respondents (41 per cent) reported having had discussion of generic publicity in the jury room.

165. These statistical results suggest a generally high level of awareness of specific publicity and a moderate level of awareness of generic publicity among the jurors who participated in this study. Such levels of awareness are not unexpected given that the trials were chosen on the basis of the presence of significant media publicity.

166. In the following discussion, we return to our focus on *trials* rather than jurors. A distinction is made between *pre-trial publicity* — that is, material published before the jury is

90 Eight respondents indicated that they didn't know what the tone of the publicity was in relation to the accused.

91 Note that for 24 respondents this question did not apply as the alleged crime in the seven relevant trials involved no victim.

empanelled — and *in-trial publicity* — that is, publicity appearing during the trial. Generally speaking, the issue of jury recall of material encountered some time earlier is important only in relation to pre-trial publicity. Except perhaps in long trials, one can assume that any in-trial publicity encountered by a juror will also be recalled at the time of deliberations.

167. These two types of publicity will now be discussed separately with reference to specific publicity. We then set out our findings about jury recall of generic publicity.

Specific publicity — pre-trial

Patterns of recall by jurors

168. Thirty-seven trials in our sample received pre-trial specific publicity. We asked jurors for their recollections, as far as they could reconstruct them, of their awareness of such publicity at the time of their service on the jury. We asked them about the content of any such publicity that they had encountered and still recalled when they were jurors. For instance, they were asked to say whether the published material that they remembered dealt with: (a) the commission of the alleged offence; (b) the arrest and/or charging of the accused; (c) any committal or other pre-trial proceedings; or (d) any other relevant matter, such as background material about the accused or the victim. We also asked them whether any of the publicity that they mentioned to us was discussed in the jury room.

169. In broad terms, the pattern of the answers that we received was quite consistent. It is a pattern which, generally speaking, was discerned also in the research for the New Zealand Report.⁹² Table 3.1 sets out our findings.

92 New Zealand Report, para 7.51.

TABLE 3.1 Jury recall of pre-trial specific publicity (n=37 trials)

Topic	No. of trials with specific pre-trial publicity	No. of trials with recall of pre-trial publicity by at least one juror	No. of trials with discussion of pre-trial publicity by jury
Offence	32	25 of 32 (78%)	12 of 25 (48%)
Arrest	32	16 of 32 (50%)	5 of 16 (31%)
Earlier proceedings	29	11 of 29 (38%)	5 of 11 (45%)
Other publicity	28	15 of 28 (54%)	9 of 15 (60%)
Any of the above	37	32 of 37 (86%)	17 of 32 (53%)

170. As indicated in Chapter 2, paras 93–96, we found out about the actual pre-trial specific publicity referred to in the ‘pre-trial publicity’ column of Table 3.1 from our ‘professional’ interviewees (ie. the trial judge, counsel on both sides and, in a few instances, the Crown Solicitor) and from our own searches. The figures in the ‘recall’ and ‘discussion by jury’ columns include five occasions where jurors encountered and recalled publicity of which none of the professional interviewees appeared to be aware. This publicity involved material on Internet sites, a magazine article, an entry in archives and a newspaper report of bail proceedings.

171. There was thus a distinctly high incidence (78 per cent) of recall of media reports of the offence(s),⁹³ particularly when a charge of murder was involved. We were not surprised at this, given that our aim in selecting trials for study was to focus on high-profile cases. Significantly, however, most jurors said that at the time when the trial commenced they did not remember specific details of these reports.

93 At this stage of the matter, of course, the more accurate phrase is ‘alleged offence’. But for the sake of brevity, we will use the term ‘offence’.

172. In a lower proportion of cases (50 per cent) one or more jurors recalled reports of the arrest⁹⁴ of the person or persons charged. Generally this occurred in cases in which the arrest was effected at the time of the offence or shortly afterwards. Again, most jurors who remembered reports of arrests did not remember them in detail.
173. There was even less recall of reports (11 trials or 38 per cent) of what in this report are called ‘earlier proceedings’. These comprise bail or committal hearings or other pre-trial proceedings in the case. They include earlier trials of the same accused for the same offence(s), but not trials of the accused for other offences. This low level of recall was indicated to us even though in some of our trials the committal proceedings received quite substantial coverage. In others, the committals were done ‘on the papers’ and therefore, like most bail hearings, received only low-level media coverage.
174. There was only a moderate degree of recall (54 per cent) of other pre-trial publicity. This publicity covered a range of other matters: for example, trials of the accused for other offences, trials of co-accused and activities of the accused in contexts quite separate from the trial being investigated. It was recalled in just over half of our cases even though in a number of the homicide trials the media had devoted a good deal of time or space to depicting the impact of the offence on the family of the deceased.
175. The last column of Table 3.1 shows that among trials where there was recall of pre-trial publicity, around 50 to 60 per cent of the juries engaged in jury room discussion of recalled publicity within three of these four categories of publicity: namely, reports

94 In most, but not all, of our cases, there was an actual arrest. Henceforth we will use this term even for cases where the accused was charged without being arrested and taken into custody.

of the offence, reports of earlier proceedings and other pre-trial specific publicity. By contrast, any reports of the arrest that were recalled featured in jury room discussion in less than one-third of the relevant trials. It may be, of course, that the jurors whom we interviewed did not remember other such discussions that actually occurred.

176. One of the reasons commonly advanced by the interviewed jurors for not remembering, or only vaguely remembering, reports of the offence, the arrest, or committal or other pre-trial proceedings, was that there was a long interval of time between these events and their being empanelled as a juror.

177. To illustrate this point, the average elapsed time was 37.1 months (median 30) between offence and trial in our sample, 27.7 months (median 25.6) between arrest and trial, and 13.7 months (median 12) between committal hearing and trial. One of the figures in the last of these categories is consistent with statistics recently published by the NSW Bureau of Crime Statistics and Research. These showed that the average elapsed time between committal and trial outcome was 12 months for cases of acquittal, 14 months for guilty verdicts and nine months for 'other' cases.⁹⁵

178. In fact, the periods between each of these events and the trial itself varied enormously. More significantly, length of time was not enough of itself to prevent jurors recalling reports of the events in question. To illustrate this:

- The reported offence most remote in time from one of our trials occurred 174 months before the trial, but was recalled by at least one juror in the trial. At the other end

95 Bureau of Crime Research and Statistics, *NSW Criminal Courts Statistics 1999 — Higher Courts* (2000) Table 3.14. The category of 'other' cases includes persons who were acquitted of one or more charges at trial but pleaded guilty to at least one other charge.

of the scale, the reported offence occurring closest in point of time to the trial preceded it by only nine months. It too was recalled.

- The reported arrest most remote in time from one of our trials occurred 62 months before the trial and was not recalled by any juror whom we interviewed. The most remote arrest to be recalled occurred 46 months before the trial. At the other end of the scale, the reported arrest occurring closest in point of time to the trial preceded it by only nine months. It too was recalled.
- The reported pre-trial proceeding most remote in time from one of our trials occurred 37 months before the trial, but was recalled by at least one juror in the trial. At the other end of the scale, the reported pre-trial proceeding closest in point of time to the trial⁹⁶ preceded it by only six months. It too was recalled.

179. Another reason mentioned by jurors for not remembering pre-trial publicity, or for only vaguely remembering it, was that until they became jurors there was nothing in the case to interest or involve them specially. This was said even of cases of alleged murder that had striking or unusual features prompting heavy media coverage. Some jurors simply said that they did not regularly read newspapers, watch television or listen to radio, or that if they did, they did not take much notice of reports of crime.

Professional expectations

180. In our interviews with trial judges and counsel, we encountered a higher level of recall of pre-trial specific publicity. In 35 trials (or 95 per cent), the legal professionals reported being aware of

⁹⁶ We exclude here a report of a special pre-trial proceeding conducted only a few days before the relevant trial.

at least one piece of pre-trial publicity. Defence counsel, in particular, were likely to have encountered and remembered it. The presiding judges were much less aware of pre-trial publicity, except when it had been formally brought to their notice. This occurred when an application had been made to them for a temporary or permanent stay of proceedings or a change of venue, on the ground that any jury empanelled would be unduly influenced by pre-trial publicity.

181. Our survey findings provide some indications that defence counsel and, to a lesser extent prosecution counsel, trial judges and the Crown Solicitor,⁹⁷ may over-estimate the level of juror recall. In 10 of the 41 trials studied, one or more of these legal professionals considered it likely, or at least possible, that one or more particular items of pre-trial specific publicity exerted influence on the jury. Most frequently, it was defence counsel that expressed these concerns. But none of the respondent jurors in these trials was aware of the publicity in question and it was not discussed in the jury room.⁹⁸ In six of these trials, the publicity comprised or included media reports of pre-trial proceedings and in five of them it comprised or included what we have called ‘other pre-trial publicity’.
182. Our research suggests, therefore, that the legal practitioners engaged in criminal jury trials may over-estimate the likelihood of jurors encountering and recalling pre-trial publicity. This particularly applies (a) to defence lawyers and (b) in relation to reports of committal and other pre-trial proceedings. Lawyers are naturally inclined to notice such reports and absorb their content. But it would appear that lay persons, having at the time

97 That is, with reference to the Crown Solicitor’s role in advising the Attorney General as to the instigation of *sub judice* contempt proceedings.

98 As indicated in Chapter 4, there were professional expectations of influence from pre-trial specific publicity in more than 10 trials. But it was only in 10 trials that this coincided with the absence of any indication of juror recall of the relevant publicity.

no particular interest in the case, pass over them, or at most retain only a fleeting memory of them.

Circumstances prompting greater than usual recall by jurors

183. Our major findings on the incidence of jury recall so far suggest the following proposition:

Where reports of the commission of an offence are sufficiently prominent to be recalled by one or more of the jurors who are ultimately engaged in the trial — this being generally many months and sometimes several years later — it does not necessarily follow that they will recall other pre-trial specific publicity. In particular, they are quite likely not to recall reports of pre-trial proceedings.

184. This generalisation may not hold, however, under at least six circumstances which, taken separately or in combination, are likely to affect jurors' recall of publicity. These circumstances are as follows:

- (i) when the accused is someone well known in the community for reasons other than having been charged with the relevant offence(s)
- (ii) where the offence(s) occurs near the place of residence of one or more of the jurors
- (iii) in relation only to reports of the arrest of the accused — where the arrest occurs relatively soon after commission of the offence (say, within a month)
- (iv) where especially high prominence is given to the case in the media
- (v) where there is a relatively short time-span between the reported event (the committal proceedings, for instance,

or some other pre-trial matter) and the commencement of the trial

- (vi) where the publicity in question appears pre-trial but does not come to the juror's notice after the trial began.

185. The issue of particular interest in our research is the degree of importance that should be attached to the first two of these factors. Table 3.2 sets out our findings in relation to them.

TABLE 3.2 Jury recall of pre-trial specific publicity in special circumstances (n=37 trials)

Topic of publicity	Number of trials where publicity actually occurred	Number of trials where publicity was recalled by at least one juror	
		Defendant was well-known	Defendant not well-known
Offence	32	2 out of 4 (50%)	23 out of 28 (82%)
Arrest	32	4 out of 6 (67%)	12 out of 26 (46%)
Earlier proceedings	29	4 out of 6 (67%)	7 out of 23 (30%)
Other publicity	28	6 out of 6 (100%)	9 out of 22 (41%)
Any of the above	37	6 out of 6 (100%)	26 out of 32 (81%)
		Offence occurred in area where jurors live	Offence did not occur in area where jurors live
Offence	32	8 out of 8 (100%)	17 out of 24 (71%)
Arrest	32	8 out of 8 (100%)	8 out of 24 (33%)
Earlier proceedings	29	4 out of 8 (50%)	7 out of 21 (33%)
Other publicity	28	5 out of 8 (63%)	10 out of 20 (50%)
Any of the above	37	8 out of 8 (100%)	24 out of 30 (80%)

Accused people who are independently well known

186. In our survey, jurors frequently remembered pre-trial publicity when the accused was a ‘household name’ or at least a person well known in the community. This is not to say that they necessarily recalled media reports or commentary relating to the specific case in which they were empanelled. More often, what they recalled was publicity appearing over a significant period of time and focusing on the accused rather than the offence(s) charged (this helps to explain why the percentages in the first row contradict the general proposition). In most instances, though not all, this encouraged them to build up a negative mental picture of the accused. In this context, reports of any past legal or investigative proceedings that had involved the accused — including trials for other offences — did feature among the publicity remembered. But except in a couple of instances, jurors recalled only the general tenor of the publicity, rather than specific allegations relating to the accused.

187. To a greater extent than other pre-trial publicity, material of this nature featured in jury room discussion. Also, when the notoriety surrounding the accused could be linked with some continuing message conveyed by generic publicity — eg. that corporate high-fliers sometimes seek to evade their financial liabilities — the existence of this publicity and its connection with the trial were more likely than in other cases to be remembered and discussed by jurors.

188. Here, there is evidently an overlap with category (iv) in the above list, in so far as offences allegedly committed by well-known people are likely to attract heavy publicity. But this is not necessarily the case.

Offences in the juror’s locality

189. We found in our trials that jurors were more likely to remember pre-trial publicity if the offence occurred in the neighbourhood where they lived. This was clearly the case when both the

offence and the trial occurred in the same city, town or region outside Sydney. It was also suggested to us by a couple of cases — though the numbers are insufficient to establish the point with any certainty — that it may be true in situations where an offence committed in metropolitan Sydney is tried in Sydney and one or more of the jurors happened to live in the relevant suburb.

190. Here again, there is often an overlap with category (iv), in so far as offences occurring outside Sydney are quite likely to receive heavy publicity in local media.

191. The existence of this overlap provides significant justification for one of the standard ‘remedial measures’ for prejudicial publicity: namely, the practice of shifting the venue for the trial of high-profile offences occurring in a provincial location to a place some distance away. There are of course other reasons why a change of venue may be desirable. If it does not occur, the jury may include one or more friends or relatives of the accused, the victim or a witness, or the local feeling aroused against the accused may be so strong that the jury feels under undue pressure to bring in a verdict of guilty. But in so far as the grounds for a change of venue in such a case include the proposition that jurors drawn from the town or region where the offence occurred are relatively likely to encounter and recall local pre-trial publicity, they receive some support from our research. This matter is discussed further in Chapter 5.

Offence and arrest reported close together

192. We also found that jury recall was more likely where the arrest occurred relatively soon after the commission of the offence. This exception to our generalisation is entirely predictable. In some of our cases, the media reports of the offence itself also stated that a person had been arrested and charged. In others, the arrest occurred within a month. In those situations, eight out of nine (89 per cent) of the juries which recalled reports of the offence also recalled reports that the arrest had taken place.

Where the gap was more than two months, this percentage fell to only 43 per cent (six out of 14 trials). As the numbers of cases in the two categories were small, these figures must be treated with caution.

Especially prominent publicity

193. This circumstance, and the succeeding one (a short period between publicity and trial), are well recognised as factors increasing the likelihood of jury recall. They receive strong emphasis, for instance, in *sub judice* contempt judgments,⁹⁹ when the court is determining whether the publication charged had the requisite tendency to exert influence on the jury in forthcoming proceedings.

194. Our findings suggest, however, that publicity of great weight may not, of itself, be as significant a factor as either (i) the accused being a well-known person or (ii) the offence being 'local'. Amongst our trials, there were three where the pre-trial publicity for the case was, in our assessment, heavy, but neither of these two features was present. Although, in each of these three, one or more jurors recalled reports of the offence, reports of pre-trial proceedings were not recalled. In only one of them did one or more jurors recall reports of the arrest (which occurred three months after the offence).

A relatively short period between publicity and trial

195. In general terms, the importance of this factor received some confirmation from our research. For example, where the time between the committal or some other pre-trial proceeding and the trial itself was less than 12 months, reports of the pre-trial proceeding were recalled by at least one juror in 54 per cent of

⁹⁹ See eg. *Attorney General for NSW v John Fairfax & Sons Ltd & Bacon* (1985) 6 NSWLR 695; *Attorney General for NSW v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

the cases. This figure fell to only 33 per cent when the time difference was more than 12 months. However, this difference of 20 percentage points must be viewed with caution because the number of trials involved is relatively small.

196. We did however encounter two cases where the offence and the arrest received no coverage, or virtually no coverage, but one or two isolated items of publicity reflecting adversely on the accused appeared within a comparatively short period before the trial. The periods of time between the publicity and the trials were five months or less. In one of these cases, the publicity was quite prominent. The accused in each of them was not otherwise well known and the offences were not 'local'. In neither of them did it appear to us that any juror recalled the publicity. There being only two instances in our survey, all that this can be said to indicate is that publicity occurring within a relatively short period before the trial is not necessarily recalled.

The particular phenomenon of pre-trial publicity encountered after the trial begins

197. This final category simply reflects the fact that some material published before the trial may, from the point of view of a juror, be experienced as 'in-trial publicity'. This may happen because it remained extant in some communicable form until the time of trial, or because it was encountered and recalled by some other person, then communicated to the juror after the trial commenced. In either event, because the jurors are already engaged with the trial, they are likely to take particular notice of the publicity and to recall it during the hearing and the deliberations. From the point of view of juror reactions, such publicity, although published pre-trial, is equivalent to in-trial publicity.
198. The overall significance of this phenomenon is hard to assess because it is hard to predict how often, and in what circumstances, pre-trial publicity will come to a juror's attention in this way. One possibility is that, having not encountered the

publicity before the trial, the juror hears about it from a friend or relative. This may be the spontaneous response of the friend or relative to being told of the juror's engagement in the trial. We came across two instances of this happening. But it is difficult, if not impossible, to predict the circumstances in which this particular pattern of events is likely to arise.

199. Other things being equal, the phenomenon of pre-trial publicity being noticed by a juror only after the trial has begun is clearly more likely when the material is published in permanent or enduring form — eg. in a book or a monthly magazine or even in archives — rather than in a daily newspaper or on radio or television. In this context, the possibility of material remaining on an Internet web-site for some weeks or months after initial publication must be borne in mind. In the trials we studied, we in fact heard of jurors coming across pre-trial publicity after the trial has begun in each of these four ways — in a book, in a magazine, in archives and (on two occasions) on the Internet.
200. In both of the cases involving the Internet, material that was distinctly prejudicial vis-à-vis the trial in question was, it seems, on a particular web-site, and may indeed have been there for some time. Having been discovered by one of the jurors, it was apparently revealed to some of the other jurors before or during deliberations. These incidents illustrate how, in sharp contrast to material broadcast on television and radio, prejudicial material on the Internet may be accessible to jurors over a significant period of time and may not be easily detectable by criminal trial lawyers or others concerned with the administration of criminal justice.
201. In four out of these five situations — those involving the magazine, the archives and the Internet — the judge and counsel involved would seem to have been unaware of the relevant publications. In these particular instances, they under-estimated the nature and level of juror contact with prejudicial publicity. On the other hand, counsel and the judge in another trial that we

studied became aware of prejudicial material on the Internet which, as far as we can tell, never came to the jury's attention.

Specific publicity — 'in-trial'

Accounts from jurors

202. As already suggested, the separate question of a juror remembering publicity, as distinct from initially encountering it, generally does not arise when the publicity is encountered during, rather than before, the trial. An exception might be when a juror comes across publicity early in a long trial, since it could be forgotten by the time that deliberations begin.
203. Once jurors embark on their duties, publicity about the case or the accused that then comes to their notice is in fact treated very differently from publicity that they encountered beforehand. This will be the case irrespective of whether the material was initially published before the trial (as just discussed) or after it began (the more normal situation).
204. Our interviews suggest strongly that jurors become subject to two conflicting impulses. On the one hand, this publicity is of particular interest to them because of their crucial role in the trial. For them, the case is no longer just another criminal matter receiving media attention. On the other hand, early in the trial they are given directions by the presiding judge seeking to rein in their curiosity. Jurors are told *either* (a) that they should refrain as far as possible from making any contact (direct or indirect) with media publicity, and should in any event ignore its contents, *or* (b) that they are not expected to refrain from making contact with it, but they must still ignore it.

205. We found that individual jurors react in very different ways to this conflict. This finding is significantly corroborated in the New Zealand Report.¹⁰⁰
206. In every trial that received media coverage of its proceedings, at least some of the jurors kept in touch with this coverage. There were in fact media reports of the proceedings of 34 of the 41 trials.
207. For these 34 trials, we interviewed 154 jurors. One hundred and nineteen of these 154 jurors (77 per cent) encountered publicity, including four jurors who were prepared to disobey judicial instructions to the extent of taking special steps to ensure that they knew how the media were reporting their trial. We were told, for instance, of a juror making a special order for daily delivery of a local newspaper that carried lengthy reports because the offence was committed in its region. In a number of cases, newspapers, including local ones, were regularly brought into the jury room and the relevant pages read by at least some of the jurors.
208. Thirty-five respondents (or 23 per cent) reported that they did not encounter publicity, including 18 jurors (12 per cent) who felt strongly that they should avoid media reports. Some respondents told their fellow-jurors that they disapproved of their reading newspaper reports in the jury room. A few jurors indicated that they kept the relevant newspapers or cuttings aside and only read them after the trial. One respondent said she had avoided all contact with the reports during the trial because she thought that this was expected of her, even though the judge's direction only went as far as requiring the jury to give no credence to the reports that they would inevitably come across or be told about.

100 New Zealand Report, paras 7.54, 7.56.

209. Partly as a result of this difference of views, the coverage received at least some discussion in the jury room in 32 of the 34 trials that attracted in-trial publicity. The discussion, however, often went no further than the following brief quotations from our notes of interviews describe:

There was not very much discussion in the coverage and no 'meat' in it.

One of the jurors said, 'Hey, look, guys, we're famous!'

Some jurors resented the characterisation of them as 'the little old ladies on the jury.'

There was some joking discussion when a drawing of the jury appeared in a paper. We tried to pick ourselves out — no one was recognisable — by where we sat each day. We said, 'That's me!' and 'That's you!'

210. Some further material on jury room discussion of in-trial publicity appears in Chapter 4.

211. It should be noted that these responses from the jurors relate principally to newspaper reports of the trial. Our strong impression is that jurors were distinctly less inclined to watch out for television news reports of the trial, and they were even less inclined to listen to radio reports. As already mentioned in the context of pre-trial publicity, we encountered two instances of jurors finding material about the case on the Internet. This could easily occur with in-trial publicity. It is unlikely, however, that magazine reports or books dealing with the trial would be published while it was still in progress.

Professional expectations

212. On the whole, the judges and counsel engaged in the trials that we studied seemed to assume that judicial instructions to stay away from, or at least take no notice of, media coverage of the trial would not be strictly obeyed. They assumed also that, even if a

juror conscientiously tried to avoid publicity, a partner, relative or friend might well tell her or him about it. To this extent, expectations conformed with what we were told by jurors.

213. In a significant proportion of the trials, defence lawyers identified what they thought to be inaccuracy or bias in this coverage. In view of the professional assumption that jurors might well be paying attention to it, they commonly conveyed to the judge their concern that the coverage might influence the jury. Generally, the judge's decision as to what remedial measure, if any, should be adopted was based on a finding about the degree of prejudice potentially resulting from the inaccuracy or bias, rather than an assumption that no member of the jury would have encountered the report. The measure most commonly adopted was to repeat the judicial instruction to ignore media reports.

Juror capacity for independent action

214. These findings about jurors following newspaper coverage, together with the incidents involving the Internet mentioned earlier, illustrate a more general proposition about jury behaviour that was corroborated in other statements made to us by jurors. This is that individual jurors or groups of jurors do, from time to time, act on their own initiative to seek out information which they believe might be relevant to their task. In so doing, they do not necessarily have the approval of the whole jury, and they may consciously disobey judicial instructions.
215. A rather unpredictable example reported to us was that a juror allegedly resorted to watching the ABC television dramatisation *Joh's Jury*, not just once but four times, in order to obtain guidance on how a jury should deal with disagreement among its members. We were also told of individual jurors visiting the scene of the crime, making inquiries from shooting ranges and gun clubs and undertaking their own analysis of an accused

person's handwriting. In each of these cases they relayed back to their fellow-jurors some information which they themselves, at least, thought to be relevant to the jury's task.

216. This general proposition that jurors are not always docile creatures would not come as a surprise to many judges and criminal trial practitioners. A number of them referred to the likelihood of independent action by jurors in their interviews with us. Examples of it happening are also described in the New Zealand report.¹⁰¹

Generic publicity

217. We asked jurors about their awareness, at the commencement of the trial, of any potentially relevant generic publicity appearing before the trial. We found that juror capacity to recall such publicity in general terms, and to connect it with the case in which they had become involved, was quite significant. This did not mean, however, that their recall of individual items of generic publicity was noticeably precise.

218. To illustrate this, in 23 of our trials pre-trial generic publicity dealing with issues raised in them was mentioned, at least in general terms, by at least one juror. In 15 of these trials, the topic of the publicity attracted some discussion in the jury room. Our interviewees, however, did not identify any particular media stories as forming the basis for their recollection. In addition, in one trial, a particular newspaper item that appeared very shortly before the trial, thereby causing some concern to defence counsel because of its possible relevance to a central issue in the trial, was not apparently noticed by any juror.

101 New Zealand Report, paras 7.41–7.45.

219. In addition, in seven of our trials we located in-trial generic publicity dealing with issues raised in the trial. On five of these seven occasions it was noticed by one or more jurors and in all but one of these five occasions, it became the subject of discussion in the jury room. In both of the other two trials, however, where the jurors appear not to have noticed the publicity, its relevance to the trial was very obvious.

Conclusions on patterns of jury recall

220. Our research has, we believe, produced some important results.

221. As we see it, our findings on pre-trial specific publicity challenge two propositions accepted by many judges and counsel (particularly defence counsel) and underlying much of the law of *sub judice* contempt. One is to the effect that in cases where the offence itself has received significant coverage, jurors will normally recall, at the time of trial, publicity for matters other than the commission of the relevant offence(s). The second is to the effect that one-off publicity about an accused may well be recalled although there is little or no publicity relating to the offence itself.

222. Our findings suggest, however, that save in the ‘exceptional’ categories discussed earlier, the level of recall of publicity other than reports of the offence(s) is not high. In particular, reports of pre-trial proceedings appear to fade from jurors’ memories (if they were ever encountered). This is the case even when they do remember, at least in a general way, encountering reports of the offence that were published a good deal earlier.

223. This is not to say that the exceptional categories, notably those relating to ‘well-known’ defendants and to offences committed near where the jurors live, are of little significance. Together, they account for a considerable proportion of cases

where pre-trial media publicity is substantial. Their existence is of major importance for any rethinking of the laws and practices relating to restrictions on media publicity, and to the use of remedial measures, that might be prompted by the publication of this report.

224. Our findings on juror contact with in-trial publicity are somewhat more predictable. Although judges and counsel frequently speak as if adherence by jurors to judicial directions to avoid such publicity is of crucial importance, many of them recognise that it is often impossible for jurors to comply fully. Even if they themselves stay away from newspaper or broadcast reports of the trial, family members or friends will often tell them about the reports. Judges, counsel and others concerned with the criminal justice system may, however, be surprised at the extent of non-compliance with judicial directions.
225. As to generic publicity, we found that the jurors in a substantial proportion of the trials were aware of and often discussed one or more broad social questions raised by the trial. As will appear in Chapter 4, there was reason to believe that in a few of these trials individual jurors' perceptions of the issues to be resolved by them, if not also the verdict, may have been influenced by their opinions on these broader issues. Inevitably, those opinions must have been shaped to some extent by their exposure to media publicity of a generic nature, even if their capacity to identify precisely the relevant media stories was generally limited.
226. The crucial issue raised by our findings on these matters is how far the degree of jury recall of publicity that we have identified leads to influence on jury deliberations. This is the topic of the next chapter.

The influence of publicity

Introduction

227. In this chapter, we discuss the results of our research into the most important question addressed in the project: namely, whether, and if so in what circumstances, jurors who have encountered and recalled prejudicial publicity are influenced by it to any significant degree when determining their verdict.

228. Our survey of jurors¹⁰² found that they almost universally rejected the notion that publicity had had any influence on their perception of, or decision regarding, the case. For example, 98 per cent of the respondents indicated that they did not find it difficult to put the specific publicity about the case out of their mind and 99 per cent did not think that the specific publicity had made it difficult for them to assess the evidence impartially. The large majority of respondent jurors (138 out of 167, or 83 per cent) told us that the specific publicity had no influence at all on their verdict. Five respondents (three per cent) admitted to a weak influence, one a moderate influence, and one a strong influence on the verdict. About 13 per cent (22 respondents) did not answer this question. This could have been because they were individually not aware of any specific publicity or because they felt unable to say whether they might have been influenced. Furthermore, a significant majority of respondents (131 out of 167, or 78 per cent) did not think that the specific publicity had

102 Based on 167 respondents only, since eight respondents were from three trials where there was neither pre-trial specific publicity nor in-trial specific publicity.

had any influence on *other jurors* in the trial. However, seven per cent of respondents (11 out of 167) thought that the publicity had, or may have had, a weak influence on other jurors' conclusion about the verdict. Only one respondent thought that specific publicity might have had a moderate influence on other jurors, and another juror suggested that the publicity might have had a strong influence on others. About 12 per cent (20 respondents) did not answer this question.

229. Jurors' responses in relation to *generic* publicity were similar. A large majority of those answering the relevant question denied it had any influence on their own (89 per cent) or other jurors' (80 per cent) conclusion about the verdict.

230. Given jurors' almost universal denial of the influence of media publicity, the opportunities for cross-checking that our methodology provides are of particular importance. We have been able to test to some degree, any assertions by jurors that, although before reaching a verdict they encountered publicity bearing on the case, it did not affect their performance of their function as jurors. Our approach to this task is outlined in paras 266–271 below.

231. In the ensuing discussion, we first outline the impressions conveyed to us by jurors and compare them with the impressions of judges, counsel and, where relevant, the Crown Solicitor. Situations of conflicting perceptions are briefly noted. We then review the techniques of cross-checking just described. This enables us to reach conclusions as to the likely or possible incidence of (a) influence having been exerted on the perceptions of individual jurors, and (b) such influence being determinative of the verdict.

232. In this context, the important distinction is not between pre-trial and in-trial publicity, but between (i) that segment of the in-trial publicity which purports only to report the trial; (ii) other pre-trial and in-trial publicity which relates specifically to the case;

and (iii) generic publicity. In the first of these categories, photographs and film footage published in conjunction with the reports themselves are included. The second, it should be noted, comprises publications that precede the trial and those that are published during the trial but go beyond merely reporting it.

233. One final point should be made by way of introduction. The publicity that for present purposes is relevant to a particular trial is solely the publicity that, as far as we can tell, was 'recalled' by the jury, in the sense in which we have used this term. For reasons explained at the beginning of Chapter 2 and illustrated in Chapter 3, this means that in relation to many of our trials some of the publicity, particularly the pre-trial publicity, that actually accompanied the case is excluded from consideration in this chapter.

The impressions of jurors

Reports of the trial proceedings

234. As explained in the preceding chapter, our interviews suggest that many jurors, despite the tenor of judicial warnings, do follow daily newspaper coverage of the trial. Some of them actively seek it out. Others may rely on the fact that one or more fellow-jurors bring the relevant newspapers into the jury room. Jurors appear to discuss, or at least mention, newspaper reports in the jury room quite often.

235. Expecting that this might be the case, judges and counsel are generally concerned that if the coverage is prejudicial, the jury might be influenced. The most common expectation that we encountered was that it would be prejudicial to the accused. In particular, defence counsel pointed out that in many cases media coverage went little further than lengthy reports of the first day, in which the Crown's opening address, outlining its case against

the accused, was highlighted. Our independent investigation of the coverage confirmed this. In the opinion of a number of defence counsel, this unevenness in media coverage operated to the detriment of the accused. Other grounds for claiming that the reports might prejudice the defence were inaccuracies in reporting, embellishment of the reported material — for example, through catchy headlines — and the publication of photographs which depicted victims or members of their families in a favourable light, or the accused unfavourably.

236. In determining whether these expectations of prejudice are well founded, a crucial issue — though evidently not the only matter to be considered — is the credibility of the newspaper articles in the minds of the jury. The jurors' opinions on this matter, as reflected in our interviews, constitute an important finding of our research.
237. We did not explicitly ask our respondent jurors for their opinions of the quality of the media coverage of the trial. Yet a significant proportion of them, each communicating independently to us and without being prompted,¹⁰³ said that they found it to be inaccurate in a number of respects and/or generally inadequate. On account of its brevity and selectivity, it failed, in their view, to convey a good impression of what really happened in the courtroom. Furthermore, these defects in media reporting were frequently the topic of discussion in the jury room.
238. Some figures to illustrate this pattern of responses can be given. As indicated in Chapter 3, in 34 of our 41 trials, there was newspaper coverage of the trial proceedings. In all of these trials, one or more of the jurors said that they were aware of this coverage. The message that the reporting was inaccurate and/or inadequate was conveyed to us by at least one juror, more or less

103 Their comments on the quality of reporting were chiefly made in response to Question 15 in our structured interview: 'Was this publicity mainly negative, positive or neutral towards the accused?' See Appendix A.

spontaneously, in 22 out of these 34 trials (65 per cent). In 18 out of these 22 trials, that is, 53 per cent of the 34 trials where one or more jurors were aware of the media coverage, the defects in it were discussed in the jury room. It is possible that these percentages would have been higher if we had specifically raised the matter in our interviews.

239. The jurors raising this topic generally made it clear, expressly or by implication, that they saw no reason to pay any heed to the reports because they themselves were much better placed to know and understand the proceedings. They said variously that they were amused or they were angry at the poor quality of the reporting, though they were not surprised because they noticed that reporters often spent very little time in the court. Some jurors said that their opinion of the quality of media reporting generally was irretrievably diminished by their experience as a juror. They were sometimes distinctly more critical of the quality of reporting than the judges or counsel involved in the trial.

240. The following observations by jurors illustrate a particularly high level of juror disenchantment with media reporting of their trial:

[Newspaper reports are] a lot of crap normally... [Discussing the reports] was the highlight of the day.

If you didn't know any better, you would have thought that the reporter was watching another murder trial, not ours.

[The coverage by newspaper X] was the comic relief of the day.

241. Other critical comments were more moderate in tone.

242. As on the issue of obedience to judicial instructions, jurors here displayed a degree of independence of mind. Not being wholly controllable by judges, they were also not mere puppets in the

hands of the media. Our findings on this issue replicate very closely those described in the New Zealand Report.¹⁰⁴

243. Consistent with these comments, only a small proportion of jurors considered that they, or indeed their fellow-jurors, were influenced by media reporting of the trial, in relation to either their perceptions of the case or their verdict. This is a necessary implication of findings outlined earlier in this Chapter, at para 228. Individual comments in our interviews were often quite emphatically to the opposite effect.

I don't know how stupid they think jurors are. When something wrong was reported, we didn't read it and go, 'Oh, was I asleep for that?' We knew we had heard everything, so papers didn't influence us.

244. Accordingly, on this issue, there was a significant discrepancy between what jurors told us, on the one hand, and the expectations of judges and counsel (notably defence counsel), on the other.

245. It is of course possible that jurors were wrong in considering the newspaper coverage to be inaccurate and/or inadequate. Their own understanding of what occurred in court may have been highly inadequate, and the newspapers may have compiled quite accurate summaries. But the important point is that in nearly two-thirds (65 per cent) of the trials in which jurors came into contact with these summaries, one or more of the jurors put little or no faith in their accuracy, and in more than half of these trials, the jury discussed the perceived inaccuracy.

246. Of course, this perception by many jurors that the media coverage was defective, and therefore non-credible, does not dispose of the argument that they might have been influenced other than by allegedly factual reporting. In particular, it leaves

104 New Zealand Report, para 7.55.

open the possibility that photographs or films depicting accused people, victims, members of victim's families or even witnesses may stimulate an emotional response of which the juror may be scarcely aware.

247. The responses of a number of jurors suggested that in their own opinion they had recognised this possibility and, through labelling the photograph in their own minds as either negative or positive towards its subject, had successfully countered any influence. Only in one case did a couple of jurors believe that they, or their fellow-jurors, might have been influenced by a particularly unappealing photograph of the accused. In six cases, one or more jurors commented on the difference between the neat, well-dressed appearance of the accused in court and the less attractive image conveyed in videotaped records of interview.

248. On the other hand, counsel in a number of trials thought that photographs accompanying newspaper reports were capable of influencing at least the jurors' perceptions of the case, though probably not the verdict. In one case, counsel for the prosecution described the photos of the relatives and girlfriend of the deceased victim as 'personalising' them, to the possible detriment of the defence case. On this issue, therefore, there was once more a discrepancy between the opinions of jurors as to their susceptibility to media influence and expectations of judges and counsel on this issue.

Other publications relating specifically to the case

249. As already indicated, the pre-trial specific publicity recalled by the jurors in our study was chiefly confined to three categories: (a) relating to 'household names', or other well-known people facing charges; (b) relating to crimes committed near the juror's place of residence; (c) encountered directly or indirectly by the juror after the trial began. In a couple of instances — eg. one

involving a web-site — jurors actively sought out the publicity in this last category.

250. In-trial publicity that contains material other than a report of the trial proceedings does occur from time to time. But it is not common because of the restrictions imposed by the *sub judice* doctrine. Those jurors who came across it were likely to take notice of it and recall it because of their role as jurors. But a number of them said that they did take seriously the judge's instruction to avoid publicity and, as already mentioned, we got the impression that they did not make a point of following television or radio broadcasts relating to the trial.

Categories of potentially prejudicial information

251. What categories of information or 'message', if any, within this range of publications conveyed to jurors in these various ways and potentially present in their minds while they discharged the duties of a juror, did they see as possibly influencing either their own or their fellow-jurors' perceptions? According to the responses we received from our surveys, including the responses from judges and counsel, there were five relatively predictable categories.

252. In Table 4.1, we summarise the responses we received. We then offer some comments on each of the five categories of information or 'message'.

TABLE 4.1 Jury's awareness of potentially prejudicial information (n=41 trials)

Type of information	No. of trials where at least one juror was aware of this information
Prior convictions or charges	5
Unfavourable depiction of the accused	9
Sympathetic depiction of the victim	1
Unsympathetic depiction of the victim	3
Sympathetic depiction of the accused	3

253. (a) *Prior convictions or charges.* The first and most important of the five categories involves jurors learning, directly or indirectly from media publicity, that an accused has previously been convicted of, or charged with, a crime similar to the offence, or one of the offences, charged in the trial.¹⁰⁵ This appears to have happened in five of the cases investigated. The judge and counsel on both sides were concerned that it might happen and in three of the five cases took specific steps to try to prevent it. In none of them, however, were they aware that it had in fact happened.

254. Not surprisingly, some of our respondent jurors expressed the opinion that at least some fellow-members of their jury, if not they themselves, were or appeared to be influenced by acquiring such information. This reaction among our respondents was not, however, universal. Had the judge or counsel known that jurors were in possession of it, they would undoubtedly have been concerned about its potential for influence. Further discussion of this particular category of prejudicial information appears below.

105 The cases where the jury came across either of these two types of information — that the accused had been convicted of one or more similar prior offences and that he/she had been charged with one or more such offences — are discussed without differentiation. This is one of the measures that we have adopted to ensure that our trials are not identifiable.

255. (b) *Unfavourable depiction of the accused.* In a further nine cases, one or more jurors suggested that they themselves and/or some at least of their fellow-jurors may have been influenced by unfavourable media descriptions of the accused. This proposition was not strongly urged, however, and was generally contradicted by the assertions of other jurors that no influence was exerted.
256. Defence counsel in these cases, and to a lesser degree the judge and prosecution counsel, manifested a significantly stronger belief that these depictions of the accused might unfairly influence the jury. In a number of other cases, they expressed the same concern, whereas the jurors interviewed all thought that neither they nor their fellow-jurors, although aware of the relevant publicity, were influenced at all by it. The types of publication involved in this group of cases included a report of an associated trial suggesting that the accused may have been an accessory to the commission of another offence and a broadcast commentary impugning the credibility of the accused.
257. (c) *Sympathetic depiction of the victim.* In only one of our cases did a juror express the view that a sympathetic description of the victim might have influenced fellow-jurors. This was however suggested several times by defence counsel in other cases, and on occasions by judges or prosecuting counsel.
258. (d) *Unsympathetic depiction of the victim.* This was a significant aspect of the specific media publicity relating to three of our cases. To a limited extent, respondent jurors in one of them considered that this might have exerted an influence on them individually, or on their fellow-jurors. Yet in all three of them, the judge, prosecution counsel and/or defence counsel thought that this influence might be quite significant.
259. (e) *Sympathetic depiction of the accused.* A message conveyed by the publicity in three of our cases was that on account of the particular circumstances of the case the accused was especially

deserving of sympathy. In only one of these cases did one or more jurors believe that influence might have resulted. On the other hand, either or both counsel in each of the cases believed that there was a definite possibility of influence. The presiding judges were less sure.

260. In relation to all of these five types of information or 'message', therefore, at least one juror, on the one hand, and judges and counsel, on the other, were at one in considering that there was potential for influence. But the concerns of counsel — most frequently, defence counsel — and of judges were stronger and related to a significantly wider range of publications within the five categories. Accordingly, there was a significant discrepancy between the perceptions of the jurors and professional expectations.

261. The discrepancies in perception can be illustrated in a more general way. In only one of our 41 trials did all the interviewed jurors agree that the publicity of which they were aware was mainly negative towards the accused. In a further 12 trials, the opinion of jurors was divided, at least to the extent that publicity was considered by one or more jurors to be negative towards the accused and was thought by one or more other jurors to be merely neutral. Trial judges thought that there was negative publicity in four trials. But prosecution counsel identified 12 such trials and defence counsel identified negative publicity in 22 trials.

Generic publicity

262. As explained in Chapter 3, in a substantial proportion of the trials jurors told us that they were aware of one or more broad social questions raised by the trial and, in a number of instances, discussed the issues in the jury room. Inevitably, the opinions formed by them individually, and on occasions expressed in these discussions, must have been shaped to some extent by

their exposure to media publicity of a generic nature. We considered this to be the case even though their capacity to specify individual stories published pre-trial, or to identify relevant stories published during the trial, was generally limited.

263. The broad social questions that, as they saw it, were raised by the trials, were numerous and wide-ranging. The opinions that they or their fellow-jurors formed often reflected current attitudes towards the type of offence charged: eg. abhorrence of child sexual abuse. Alternatively, they exemplified popular tendencies to create stereotypes: eg. associating particular groups within the community with particular types of offence or particular modes of conduct. Often, but not invariably, the jurors' opinions on these issues were accompanied by strong emotional reactions.
264. The possibility that contemporaneous media publicity on some general theme relevant to the trial might have exerted a weak influence on themselves and/or on fellow-jurors was suggested to us by individual jurors in seven of our trials. In four of these trials, the publicity was directly linked with, and reinforced, other specific publicity (ie. they were 'specific-plus-generic' cases). In the other three cases, no such direct link existed.
265. Interestingly, in two of these seven cases, the professional estimates of the scale of any impact of this publicity appeared lower than the estimates of the jurors concerned. On the other hand, in a number of other cases, moderate professional concerns on this score were not replicated at all in the jury room. Some counsel whom we interviewed pointed out that sometimes the content of generic publicity, even if it had been both 'slanted' and prominent in recent times, actually constituted legitimate background information that a well-informed juror might be expected to bring to the jury room.

Independent factors suggesting media influence

The methodology employed

266. Our principal technique for cross-checking juror statements regarding media influence on their perceptions and their verdicts — which were generally to the effect that little or no such influence existed — has been to compare them with other data gained chiefly from our interviews. It is important to recognise, however, that the reliability of this process has definite limits. On average, we contacted distinctly less than half the jurors in our trials. In addition, most of our interviews took place some months after the trials took place. Judges, barristers and jurors all indicated, understandably enough, that their recollection of specific matters such as the particular issues to be resolved in the trial was incomplete due to the passage of time.
267. One of our main objectives in the ensuing analysis relates to the last two stages of the ‘four stage process’ set out in Chapter 1 at paras 13–18. We have sought to distinguish between (a) influence that may have gone no further than to affect individual jurors’ perceptions of the case and (b) influence that may have had the much more significant effect of determining the verdict of the whole jury. While the first of these outcomes is clearly undesirable, it is the second, with its potential to produce a miscarriage of justice, that is most to be feared in any criminal trial process.
268. Our methodology in carrying out this analysis has several steps.
269. Firstly, we adopted the following measures with a view to assessing the ultimate effect of media influence:
- (a) Taking account of the impressions formed by individual jurors as to the extent of influence, if any, exerted by publicity on the perceptions or the verdict of their fellow-jurors. In so doing, we have paid heed to any suggestions

by jurors that their fellow-jurors appeared to form early in the proceedings, and to adhere to, a firm opinion which might have been based on media-induced prejudice.

- (b) Examining the jurors' accounts of any of the following occurrences:
 - (i) significant disagreements in the course of the jury's deliberations
 - (ii) the jury reaching a verdict by way of compromise or 'horse-trading'
 - (iii) changes in a juror's own opinions as to the appropriate verdict during the course of the trial and the deliberations
 - (iv) fellow-jurors not participating actively in discussion, and/or displaying no interest in the issues to be resolved.
- (c) Gathering together the opinions of the trial judge, of counsel and of ourselves (as readers of the transcript of proceedings where possible) regarding what were the principal issues that the jury should have addressed in arriving at a verdict. We have done this in order to make a comparison with what the jurors themselves identified for us as the issues they considered important. These included issues such as the facts which the Crown would have to disprove in order to rebut a defence, the weight of particular items of circumstantial evidence, the credibility of witnesses and the comparative worth of conflicting expert evidence.
- (d) Taking account of the opinions of what we call the 'professional assessors' — namely, the trial judge, counsel on both sides and, if an appeal against the verdict was

lodged, the NSW Court of Criminal Appeal — regarding two issues. These were (i) as to the overall standard of performance of the jury, including (but not limited to) their opinions as to whether the verdict was ‘safe’,¹⁰⁶ and (ii) whether the evidence in the case was such that a verdict could easily be reached.

- (e) Scrutinising the publicity (specific and/or generic) which, as far as we could tell, was within the degree of recall of all or some of the jurors at the time of deliberations, in order to assess its weight and the extent, if any, to which it was biased for or against the accused.
- (f) Taking particular account of any factual material in this publicity that was not replicated in the evidence.

270. In the light of this information, notably that under headings (d) and (e), we then divided the 40 cases in which a verdict was delivered by the jury¹⁰⁷ into the following four categories:

- *Category 1* — According to the Court of Criminal Appeal, or to a majority at least of the ‘professional assessors’, the verdict was ‘unsafe’, in the sense of being unwarranted by the evidence. It was, however, in tune with the publicity. In this situation, we could legitimately be sceptical about any assertions by jurors in the trial that the publicity exerted no influence. It was at least possible, though not necessarily the case, that the verdict was ‘publicity-driven’.
- *Category 2* — According to prosecution counsel (in one case) and defence counsel (in the others) the evidence at trial did not support the jury’s guilty verdict, but the verdict

106 For reasons outlined in n85, an appeal against conviction did not necessarily imply that the verdict was ‘unsafe’.

107 In one of our trials, the jury was not required to deliberate on a verdict.

was in line with the publicity. However, the other ‘professional assessors’ considered that the verdict was substantiated by the evidence, or at least was one that a reasonable jury could reach. Here, the verdict may have been ‘unsafe’, and an argument that it might have been publicity-driven remains.

- *Category 3* — The verdict was considered ‘safe’, that is, appropriate on the evidence, but contradicted the messages conveyed by the publicity. Here, although individual jurors may still have been influenced, the jury as a whole could be taken to have withstood any influence exerted.
- *Category 4* — The verdict was considered to be ‘safe’ and also in accord with the publicity. Here again, individual jurors may have been influenced. It was indeed still possible that publicity, rather than the evidence, determined the verdict.

271. It should be noted that, in assessing whether a jury’s verdict was or was not in line with the evidence or the publicity, the question was often not just whether the jury should have acquitted or convicted. In a number of the cases, the principal choice open to the jury lay between convicting of a lesser offence or a greater one, or convicting on some only or on all of a number of similar charges.

Analysis of the juries’ deliberations and the verdicts reached

272. Before providing details of the cases falling under these four categories, it is helpful to first examine the broad statistical patterns of our findings. The main question investigated here is how far, it at all, juries’ decisions — in terms of (i) their success in identifying relevant issues and (ii) the quality of their verdict — were likely to be affected by (a) the quantity and bias of the publicity they encountered and (b) by the evidence to which they were exposed in court.

TABLE 4.2 Quality of jury decision by nature of publicity (n=40 trials)

Jury Decision	No. of trials where publicity known to jury was:			
	Negative towards accused - light in quantity	Negative towards accused - moderate in quantity	Negative towards accused - substantial in quantity	Positive towards accused
Identification of relevant issues:				
Not successful	3 (22%)	3 (23%)	2 (25%)	2
Moderately Successful	8 (57%)	5 (39%)	4 (45%)	1
Highly successful	2 (14%)	5 (39%)	2 (22%)	1
Unknown	1 (7%)	-	1 (11%)	-
Total trials	14	13	9	4
Verdict:				
Unsafe	3 (21%)	3 (23%)	2 (22%)	2
Safe	11 (79%)	10 (77%)	7 (78%)	2
Total trials	14	13	9	4

273. Table 4.2 shows the result of cross-tabulating the success of juries in identifying relevant issues and the quality of their decisions with the nature and quantity of publicity known to the jury. Since there were only four trials where the publicity was positive towards the accused, the quantity of publicity in these trials is not analysed. However, it appears that, broadly speaking, juries were equally successful in identifying the relevant issues regardless of whether the publicity was negative (67 to 78 per cent successful) or positive (50 per cent successful) towards the accused.

274. Of the verdicts attended by negative publicity, 77 to 79 per cent were 'safe', that is they belonged in what we have defined as Category 3 or 4 since none of our 'professional assessors' considered them to be 'unsafe'. Whereas only half of the

verdicts where the publicity was positive towards the accused were thought to be 'safe' in this conservative sense. Finally, the quantity of negative publicity did not seem to make a difference. The figure of 77 to 79 per cent 'safe' verdicts in negative publicity cases was achieved irrespective of whether the publicity was light, moderate or substantial in quantity.

TABLE 4.3 Quality of jury decision by strength of evidence (n=40 trials)

Jury Decision	Evidence presented in court	
	Strong	Equivocal
Identification of relevant issues:		
Not successful	2 (14%)	7 (27%)
Moderately successful	4 (29%)	15 (58%)
Highly successful	7 (50%)	3 (11%)
Unknown	1 (7%)	1 (4%)
Total trials	14	26
Verdict:		
'Unsafe'	—	10 (38%)
'Safe'	14 (100%)	16 (62%)
Total trials	14	26

275. In contrast, Table 4.3 cross-tabulates the success of juries in identifying relevant issues and the quality of their decisions with the strength of the trial evidence. In the first column, it shows the trials where, having regard to the opinions of our 'professional assessors', we classified the verdict as one which could be reached relatively easily. These were cases where the evidence presented in court was strong in favour of guilt or clearly insufficient to establish guilt beyond reasonable doubt. Juries were highly successful in identifying relevant issues in 50 per

cent of these 14 trials, and in a further 29 per cent, they were moderately successful. Where, however, the evidence was equivocal, in the sense of not clearly pointing to a verdict one way or the other, juries were highly successful in only 11 per cent of trials, and were moderately successful in 58 per cent. Similarly, 100 per cent of the verdicts were considered 'safe' in the group of trials in which a verdict could be reached relatively easily, compared with only 62 per cent of the verdicts where the evidence was equivocal.

276. These results suggest that publicity, whether positive or negative, was unlikely to impair either the capacity of jurors to identify the relevant issues or the quality of their decision in those trials where a verdict could be easily reached on the evidence. In assessing the significance of this finding, it is important to bear two additional matters in mind. One is that in a large majority (90 per cent) of the trials studied, the publicity was negative towards the accused. The other is that in a significant proportion of these trials the accused was acquitted, or was convicted of an offence of lesser weight than the most serious offence charged. Further details on these issues are set out in the ensuing discussion of the 40 trials, categorised according to the quality of the verdict and the tenor of the publicity. But an important general conclusion that can be drawn at this stage is that negative publicity was not enough of itself to induce a jury to convict an accused on an offence where the evidence for the prosecution was clearly insufficient to establish guilt beyond a reasonable doubt.

277. By contrast, where the evidence was equivocal, the success-rate for juries in identifying issues and reaching an acceptable verdict was distinctly weaker, leaving scope for an inference that they may have been susceptible to influence from publicity. A partial explanation for this lower figure is that, as indicated below, all but two of the cases of 'unsafe' verdicts belong in what we have defined as 'Category 2'. This category contains

cases in which our professional assessors disagreed as to whether or not the verdict was justified by the evidence. As we saw it, the existence of this disagreement constituted strong grounds, irrespective of other considerations, for treating the case as one in which a verdict could not be reached relatively easily.

278. We now examine the 40 trials individually or in small groups, applying again our techniques for assessing the impact, if any, of the publicity which we believed to be within the knowledge of the jury. Here we offer an assessment of each of them, reflecting the following matters:

- Whether the verdict should be considered 'unsafe', or may have been 'possibly unsafe', or should be considered 'safe'.
- Whether it is likely that the verdict was determined by the publicity, or it is merely possible that this occurred, or not at all likely.
- Whether it was likely, merely possible, or not at all likely, that publicity exerted an influence on the perceptions of one or more individual jurors.

279. In the result, five assessments or 'gradings' are employed, as follows:

- It is *likely* that the publicity was determinative of the verdict
- It is *possible only* that the publicity was determinative of the verdict
- It is *likely* that the publicity influenced individual jurors' perceptions of the case
- It is *possible only* that the publicity influenced individual jurors' perceptions of the case

- It is *unlikely* that the publicity influenced individual jurors' perceptions of the case.

280. It will be noted that if the impact of publicity in a trial is given either of the first two gradings, this necessarily implies that influence on individual jurors was also either 'likely' or 'possible'. This follows from the fact that, as depicted in the 'four stage process' set out in paras 13–18 of Chapter 1, publicity cannot be determinative of a verdict (Stage 4) unless it has been found to have influenced one or more individual jurors' perceptions (Stage 3). Double counting is avoided by *not* showing this lesser proposition — that is, that influence on individual jurors was 'likely' or 'possible' — in the assessments of influence on individual jurors' perceptions.

281. In this part of our analysis, our starting-point is the four-way classification of the trials described above.

Category 1 (two cases):

The Court of Criminal Appeal or a majority of the 'professional assessors' considered that the verdict was not 'safe'. The verdict was, however, in line with the tenor of the publicity.

282. The common feature of the two cases in this category is that, according to the preponderance of professional opinion, the verdict was 'unsafe'.

283. In one of them, the jury acquitted after a brief period of deliberations. Their conduct in so doing was considered by both counsel and by the judge to be surprising in the light of the evidence. It fell in line with media publicity which depicted the victim as distinctly undeserving and the accused as meriting sympathy. None of the respondent jurors considered that media

influence played a part, though the professional (and our own) assessment of the publicity was that it was extensive, distinctly slanted in favour of the accused and reinforced by generic publicity. In their deliberations, the jury appeared to deviate significantly from the issues that counsel and the trial judge considered to be of prime importance.

284. Within this category, we appear therefore to have encountered one trial, involving an acquittal, in which it is likely that strong media publicity was determinative of a verdict that, according to the preponderance of professional opinion, was ‘unsafe’.

*Assessment (one case):
verdict 'unsafe'; likely that publicity determined verdict.*

285. In the other case in this category, a conviction for a lesser offence was thought acceptable by counsel and ‘understandable’, though perhaps borderline, by the trial judge. It was however quashed by the Court of Criminal Appeal as ‘unsafe and unsatisfactory’. The publicity was fairly intensive, adverse to the accused (partly through eliciting sympathy for the victim) and reinforced by generic publicity. Yet none of the jurors interviewed thought that it exerted any influence on the verdict.
286. In this case, the jury overall appeared to have been quite successful in identifying the important issues to be resolved by them. The professional opinion about the task that they faced in sifting through the evidence was that, in relative terms, it was far from easy. There were many complex matters to be resolved. The jury in fact experienced considerable difficulty in reaching a verdict and ultimately compromised on a lesser verdict.
287. In this case, it seems appropriate to say no more than that the influence of media publicity adverse to the accused may possibly have played a role in the jury’s decision to convict the accused of a lesser offence rather than delivering a verdict of not

guilty. This is because another quite legitimate interpretation of the verdict is simply that the difficulties that the jury faced in dealing with distinctly complex evidence led it into error. In any event, it does appear from our investigation that the jury examined the issues raised in evidence at some length and made a sustained attempt to base its verdict upon them.

*Assessment (one case):
verdict 'unsafe'; possible that publicity determined verdict.*

Category 2 (eight cases):

The verdict was in line with the tenor of the publicity. Either prosecution counsel (in a case involving an acquittal) or defence counsel (in the other seven cases, all of which involved convictions) considered the verdict to be 'unsafe'. However, according to the trial judge and the opposing counsel, the verdict was correct or at least was reasonably open to the jury on the evidence.

288. The difference between this category and its predecessor is that here the professional assessment that the verdict was not warranted by the evidence was a minority opinion only. The most that could be said, therefore, in criticism of the verdict, is that it *may* have been 'unsafe'. This view of the matter receives some support from the following considerations relating to appeal proceedings.

289. In two of the seven cases where defence counsel held this minority opinion, no appeal was lodged.¹⁰⁸ In a third case, an appeal was lodged, but against sentence only. In these three

108 In one of them, a comparatively recent case, it is possible that we are not aware of pending appeal proceedings. It is not a case, however, where defence counsel thought that any defect in the verdict was attributable to publicity.

cases, therefore, doubts about the quality of the verdict were insufficient to prompt the legal representatives of the accused to mount a challenge to it.

290. In the remaining four cases, appeals were lodged against conviction. The prejudicial impact of publicity was not, however, included as a ground of challenge in any of these appeals. In two of them, the grounds of appeal did not bear at all upon the performance of the jury: that is, they did not allege any failure on the jury's part to reach a verdict that was reasonably open to it on the evidence. In the remaining two, it was argued that the jury did fail in this regard, rendering the verdict 'unsafe and unsatisfactory'. But in both these appeals, the Court of Criminal Appeal, having reviewed the evidence, rejected this ground of appeal.

291. In the single case in this category where the jury acquitted the accused, none of the respondent jurors considered that media influence played a part. The professional (and our own) assessment of the publicity was that it was quite prominent overall, particularly during the trial. In the view of defence counsel, the publicity may have engendered feelings of sympathy for the accused, though he also considered (as did the judge and prosecution counsel) that these feelings would independently have been prompted by the evidence. In their deliberations, the jury as a whole was quite successful in identifying and addressing the issues that counsel and the trial judge considered important. In the result, it is possible that some or all of the jurors were influenced by publicity, but it is unlikely that the publicity was determinative of the verdict.

*Assessment (one case):
verdict possibly 'unsafe'; possible that individual jurors
influenced.*

292. In three of the seven cases involving convictions, defence counsel, while expressing doubts about the verdict, did not believe that the jury's failure in this regard should be ascribed to influence from publicity.
293. In two of these three cases, while the publicity depicted the accused somewhat unfavourably, it was of comparatively low intensity. It did not contain any significant prejudicial material that was not replicated in the evidence. No juror believed that it exerted influence. The two juries, facing a fairly difficult task in view of the nature of the evidence, were overall quite successful in identifying the relevant issues and they discussed them at length. For all these reasons, the most appropriate conclusion about these two cases is that it is unlikely that influence from publicity was determinative of the verdict, or indeed affected individual jurors' perceptions about the case.

*Assessment (two cases):
verdict possibly 'unsafe'; unlikely that individual jurors
influenced.*

294. In the third case where defence counsel expressed this view, one of the jurors thought that fellow-jurors may have been influenced by moderately intense specific publicity which was adverse to the accused, and another thought that relevant generic publicity may have had this effect. This jury also faced a fairly difficult task because of the nature of the evidence and was quite successful overall in identifying the relevant issues and subjected them to sustained discussion. In view of these comments by respondent jurors about publicity, however, the possibility that it exerted an influence should be assessed as stronger than in the two trials just mentioned. An appropriate conclusion is that influence from publicity may possibly have been determinative of the verdict.

*Assessment (one case):
verdict possibly 'unsafe'; possible that publicity determined
verdict.*

295. By contrast to the three trials just discussed, defence counsel in the remaining four cases in Category 2 expressed a positive view that the doubtful verdict may have been attributable, in part at least, to media influence.

296. In one of these cases, the jury discovered, apparently from a report of earlier proceedings, prejudicial information within the category of previous convictions or charges of the accused for offences comparable to those now charged. This information was not contained in evidence put before them in court. There was also publicity of moderate weight attracting sympathy for the victim. The outcome of deliberations was a conviction for the lesser offence. But a ground of defence was rejected, which in the view of defence counsel had not been negated by the prosecution beyond reasonable doubt. It appears from our interviews that this ground was not given full consideration, and indeed that one or more jurors adhered to the view, formed at the outset, that in view of this prejudicial information the accused should be convicted of the greater offence. Ultimately, as indeed the judge discerned as a possibility, the jury reached its verdict in this moderately difficult case through compromise. In these circumstances, there was in our view a significant likelihood that publicity was determinative of the verdict.

*Assessment (one case):
verdict possibly 'unsafe'; likely that publicity determined
verdict.*

297. In another case within this sub-group of four, only defence counsel believed that the predominantly circumstantial evidence in a trial accompanied by heavy specific publicity adverse to the accused did not support the verdict of guilty. This publicity did not, however, disclose any material that could not be gathered by the jurors from the evidence. The jurors seem to have had limited success in identifying the relevant issues, and it appears that a few of them took little or no part in the deliberations. Only one of the eight jurors interviewed believed that the publicity may have influenced fellow-jurors. The difficulty of the case for the jury was noted by the judge and both counsel. We would suggest that influence from publicity may possibly have been determinative of the verdict.

*Assessment (one case):
verdict possibly 'unsafe'; possible that publicity determined verdict.*

298. In another case in this sub-group, the jury was generally successful in identifying the issues and they discussed them at some length. Defence counsel's doubts about the verdict were expressed somewhat hesitantly. A respondent juror's view that fellow-jurors may have been influenced related not to the specific publicity, but to some relevant generic publicity. The content of this publicity was not, of course, covered in the evidence. The case was relatively difficult to resolve. In our assessment, it is unlikely that influence from publicity was determinative of the verdict, but possible that it affected individual jurors' perceptions of the case.

*Assessment (one case):
verdict possibly 'unsafe'; possible that individual jurors influenced.*

299. In the final case in this category, wholly generic publicity suggesting guilt on the part of people similar to the accused was believed by defence counsel to induce the jury into reaching a suspect verdict. Defence counsel did, however, say also that the Crown case was strong. Our interviewees suggested that the jury was aware of the existence of this publicity, which was of moderate weight. Its content was not, of course, put before the jury in evidence. One of the jurors acknowledged the possibility of being influenced to a limited extent and, along with another juror, indicated that fellow-jurors may have been influenced and, indeed, appeared to be prejudiced against the accused. It was suggested also that some of the jurors seemed to take no real interest in discussing the evidence. The jurors who did consider the evidence in detail were not particularly successful in identifying the key issues. We would view this as the only case in our study in which solely generic publicity may have played a role in producing a verdict that might be open to question. In our assessment, influence from publicity may possibly have been determinative of the verdict.

*Assessment (one case):
verdict possibly 'unsafe'; possible that publicity determined verdict.*

Category 3 (twelve cases):

The verdict was considered 'safe', and contrary to the tenor of the publicity.

300. A finding to this effect about any of our trials is essentially encouraging. Assuming that both the propriety of the verdict and the tenor of the evidence have been correctly assessed, it

implies that any influence exerted by the publicity on the perceptions of individual jurors cannot have been determinative. It is true that if any such influence existed, it was not necessarily overridden in what may be called the 'right' way — that is, through due consideration of the evidence by the jury — but at least it was, in fact, overridden.

301. Only one of the cases in this category involves a conviction for the most serious offence charged. In this case, jurors recalled generic publicity of a relatively lightweight nature that reflected adversely on the credibility of prosecution witnesses. Its content was not replicated in the evidence and none of the interviewed jurors believed that it affected themselves or fellow-jurors. The jury appeared to have been distinctly successful in identifying the relevant issues. According to our 'professional assessors', this was a case in which, relatively speaking, their task was easy. For all these reasons, it is unlikely that the publicity had any significant effect on the perceptions of individual jurors. If the publicity did have an effect on juror perceptions, it was overridden by what they saw and heard in the courtroom and by the deliberations.

*Assessment (one case):
verdict 'safe'; unlikely that individual jurors influenced.*

302. In the remaining eleven cases in this category, the publicity was adverse to the accused, but the verdict brought in by the jury was either outright acquittal (four cases) or a 'lesser verdict' (seven cases). In this latter group, the principal choice for the jury was between (a) conviction for a greater offence, or for the whole range of a number of offences charged, and (b) conviction for a lesser offence, or for some only of all the offences charged. In each instance, the jury's verdict was for the latter alternative.

303. In four of these eleven cases, the professional assessors again thought that the jury's task was relatively easy. Prosecution counsel conceded that the Crown case was weak overall, or that it ran into evident difficulties on one or more key issues. In these four cases the jury overall was successful, if not distinctly successful, in identifying the key issues. The publicity adverse to the accused was particularly strong in one case, containing amongst other things information, not revealed in court, within the category of prior conviction or charging of the accused for a similar offence. In another case, the publicity was of moderate intensity. In the remaining two cases publicity was of low intensity or generic only. It was not suggested by any of the interviewed jurors that they themselves felt influenced by publicity or that their fellow-jurors seemed to have been influenced. Again, we would say of these cases that it is unlikely that the publicity had any effect on the perception of individual jurors. If there was any effect, it was overridden by what the jurors saw and heard in the courtroom and by the deliberations.

*Assessment (four cases):
verdict 'safe'; unlikely that individual jurors influenced.*

304. In a further four cases, the jury's task was not considered easy, yet they were either moderately or distinctly successful in identifying the relevant issues and they addressed them at length during deliberations. Specific publicity adverse to the accused was either strong (one case) or moderate (three cases) in bias and quantity. The content of the publicity was replicated in part in the evidence. In each instance it was reinforced, though to varying degrees, by generic publicity. In one of these cases, the final verdict involved a certain element of compromise, but the disagreement so resolved concerned only how the jury should apply to detailed evidence a general principle, on which they had reached agreement. In three of the cases, one or more

individual jurors were disposed, for differing periods during the deliberations, to find the accused guilty as charged. This inclination may have been prompted, at least in part, by publicity. In each of these three cases, the deliberations were prolonged and difficult. In the fourth case, it was suggested to us that a couple of the jurors seemed uninterested and/or unable to understand the key question to be resolved.

305. Taking all these matters into account, our assessment of these four trials is as follows. In the first three cases it seems likely, and in the fourth case it seems possible, that the publicity had an effect on the perceptions of some individual jurors. If it did, then ultimately, and with some difficulty, this effect was overridden, in part by what the jurors saw and heard in the courtroom, but chiefly during the deliberations.

Assessment (three cases):

verdict 'safe'; likely that individual jurors influenced.

Assessment (one case):

verdict 'safe'; possible that individual jurors influenced.

306. In the remaining three cases in Category 3, however, the jury appeared not to have been successful in identifying the relevant issues. None of the cases could be described as 'easy' for the jury to decide. But aspects of the way in which the verdict was reached suggest the following interpretation of events. Firstly, publicity does appear to have exerted an influence on the perceptions of individual jurors. Secondly, the reason why it was not ultimately determinative was *not* that the jury as a whole, or even a significant proportion of its members, gave due and full consideration to the issues raised in the evidence. Instead, the 'safe' verdict was in each case the result of a compromise in the jury room.

307. Two of the cases within this sub-group were associated with a high volume of publicity distinctly adverse to the accused, the content of which was generally not replicated in evidence. Individual jurors told us that some of their fellow-jurors displayed prejudice against the accused, which could well have been publicity-generated, and/or were uninterested in discussing the evidence in detail. On the other hand, it seems that some members of the jury were determined not to acquiesce in a verdict driven by publicity rather than by their assessment of the evidence before them. Even if their own understanding of the relevant issues was limited only, they adhered to views that conflicted with those suggested by the media coverage. Eventually, the two juries reached lesser verdicts that were quite acceptable on the evidence. But they did so by way of a compromise between strongly opposed factions.
308. A similar pattern of events is discernible in the third case in this sub-group. Here the publicity was principally generic, and of moderate prominence.
309. An appropriate way to sum up our findings regarding these three cases is as follows. Publicity does appear to have influenced the perceptions of individual jurors. The reason why it was not ultimately determinative was that other jurors, although not particularly successful in identifying the relevant issues, adhered strongly to a point of view that was in opposition to what the publicity suggested.

*Assessment (three cases):
verdict 'safe'; likely that individual jurors influenced.*

Category 4 (eighteen cases):

The verdict was considered 'safe', and was in line with the tenor of the publicity.

310. This is the largest category, comprising 18 of the 40 cases in which a verdict was delivered. It includes two cases where the judge, having said that the verdict was clearly acceptable on the evidence, added that if he were trying it without a jury, he might have reached a lesser verdict. In a third case, we have reason to believe that defence counsel considered the verdict of guilty to be unsafe but we were not able to confirm this by means of an interview. Subject to this, the verdicts were considered on all sides to be 'safe'.
311. For obvious reasons, the cases in this category are not immediately informative as to the objective impact of publicity on a verdict. In particular, it is quite conceivable that a verdict that appears at first sight to have been based on the evidence was in fact determined by the influence of media publicity. An alternative possibility is that the verdict was substantially evidence-driven, but the perceptions of one or more jurors were influenced by publicity. A third possibility is of course that publicity played no role at all.
312. The category includes a number of cases in which one or more jurors thought that influence might have been exerted. The verdicts reached were one acquittal, one lesser verdict and sixteen verdicts of guilty as charged.
313. In the sole case resulting in an acquittal, the publicity depicting the victim unfavourably was both specific and generic, and was of significant weight. Its specific content was more or less covered in the evidence. The Crown case had some difficult

problems to overcome. Some members of the jury seem to have been moderately successful in identifying the relevant issues, though others were not. The discussion of the issues was quite protracted.

314. In the case which resulted in a lesser verdict, the relatively substantial specific publicity was not clearly slanted one way or the other. Much of its content was revealed in the courtroom. We were told that some of the jurors were not greatly interested in the evidence, but those who were seem to have been successful in identifying the issues. The verdict was reached by compromise.

315. In neither of these two cases was it suggested in our interviews that individual jurors were, or appeared to be, predisposed for or against the accused on account of the publicity. Taking this into account, our assessment of both of these cases, despite their differences, is the same. It is that the perceptions of some individual jurors may possibly have been influenced by the publicity, but it is unlikely that any such influence was determinative of the verdict. Instead, any possible influence was superseded by what the jurors saw and heard in the courtroom and by the deliberations.

*Assessment (two cases):
verdict 'safe'; possible that individual jurors influenced.*

316. Out of the remaining sixteen cases, in all of which the accused was found guilty as charged, seven can be disposed of quite shortly. These cases include three trials where the publicity was specific-plus-generic (in one of them, at a high level of intensity, in the others at a moderate or low level) and one trial where it was specific only and of moderate intensity. Subject to one important qualification, the content of the specific publicity was replicated in the courtroom. The qualification is that in one case,

contrary to the expectations of counsel and the judge, by informal means the jury obtained the information that the accused had previously been charged with a similar offence. Our respondent jurors said to us, however, that this information was not believed. In the remaining three of these cases, the publicity was generic only, and of moderate or low intensity. In one of these three cases, our understanding of what occurred in the jury room is limited because of a low response-rate by jurors.

317. In all of these cases, (a) the jury appears to have successfully identified the relevant issues; (b) they addressed these issues at length in their deliberations; and (c) we were told nothing in our interviews to suggest that individual jurors were affected by prejudice from the media coverage. In three out of the seven cases, the jury's task was considered relatively easy by the judge and by counsel.

318. Our conclusion in relation to these seven cases is that it is unlikely that the perceptions of individual jurors were influenced by the publicity. If they were, it is unlikely that any such influence was determinative of the verdict. Instead, any influence was superseded by what the jurors saw and heard in the courtroom and by the deliberations.

*Assessment (seven cases):
verdict 'safe'; unlikely that individual jurors influenced.*

319. In another case, intense specific publicity, coupled with some generic publicity, was both favourable and adverse, in different ways, to the accused. The jury was distinctly successful in identifying the relevant issues in what the judge and counsel depicted as a relatively easy case, and they addressed these issues at length in their deliberations. It was suggested that different members of the jury may have been influenced in different directions by the conflicting messages contained in the

publicity. Our assessment is that the publicity was not determinative of the verdict. It is likely that aspects of the publicity influenced the perceptions of individual jurors. But any such influence was superseded by what the jurors saw and heard in the courtroom and by the deliberations.

*Assessment (one case):
verdict 'safe'; likely that individual jurors influenced.*

320. A further four cases are broadly comparable (for present purposes) to the sub-group of seven just discussed, notably in so far as the jury appears to have identified the relevant issues and considered them at length. But there are a couple of important differences. In three of the cases, some of the respondent jurors considered that the publicity may have exerted an influence on fellow-jurors, or that one or two of their fellow-jurors were disposed towards a guilty verdict from a very early stage. In one of the three cases, some of the interviewed jurors thought that they themselves may have been influenced. In the fourth case, contrary to the expectations of counsel and the judge, the jury obtained information within the category of prior conviction or charging of the accused for a similar offence.
321. In each of the four cases in this sub-group, the publicity was specific-plus-generic and was substantial in quantity and bias (even allowing for the fact that in one case there was countervailing publicity depicting the victim unfavourably). In two of these cases, the judge and counsel considered that the jury's task was relatively easy.
322. It seems likely in these four cases that the perceptions of some individual jurors were in fact influenced by the publicity. But it is unlikely that any such influence was determinative of the verdict. Instead, any influence was superseded by what the jurors saw and heard in the courtroom and by the deliberations.

*Assessment (one case):
verdict 'safe'; likely that individual jurors influenced.*

323. In a further case in Category 4 that the judge and the counsel thought to be relatively easy for the jury, the publicity was principally generic and not particularly prominent. The jury as a whole appears to have placed undue weight on the weakness of a dock statement by the accused, and therefore to have taken insufficient account of other important matters. Our interviewees also suggested that some of their fellow-jurors were disposed to reach a verdict of guilty from a very early stage of the proceedings. In this case, we consider it possible that the perceptions of some individual jurors were influenced by the publicity, with the consequence that this influence was possibly determinative of the verdict.

*Assessment (one case):
verdict 'safe'; possible that publicity determined verdict.*

324. In another case, considered by the judge and counsel to have not been easy for the jury, there was substantial specific publicity adverse to the accused. Most of its content was replicated in the evidence. An interviewed juror appeared to have been very successful in identifying the issues, which were discussed at length. But this juror claimed that some of the other jurors remained prejudiced against the accused from the outset and took little part in the deliberations. Due to a low response-rate, our understanding of what occurred in the jury room is limited. But it seems likely that the perceptions of some individual jurors were influenced by the publicity, and it is possible that this influence was determinative of the verdict.

*Assessment (one case):
verdict 'safe'; possible that publicity determined verdict.*

325. In a comparable case, again not easy for the jury, there was significant adverse publicity, both specific and generic. Most of the content of the specific publicity was replicated in the evidence. The jury seems to have been distinctly successful in identifying the issues, which were discussed at length. But it was claimed in our interviews that some jurors remained prejudiced against the accused from the outset and took little part in the deliberations. It was also claimed that other jurors displayed little or no interest in the evidence. Once again, it seems likely that the perceptions of some individual jurors were influenced by the publicity, and it is possible that this influence was determinative of the verdict.

*Assessment (one case):
verdict 'safe'; possible that publicity determined verdict.*

326. The final case in this category was again considered by the judge and counsel not to be easy for the jury. There was a moderate quantity of specific publicity adverse to the accused, the content of which was replicated in evidence. There was also some generic publicity that might have operated in his favour. In addition, contrary to the expectations of counsel and the judge, a group of jurors, though not the whole jury, obtained information within the category of prior conviction or charging of the accused for a similar offence. In consequence, it appears that some members of this group were inclined to consider the accused to be guilty without addressing the evidence in detail. Other jurors were, however, distinctly successful in identifying the relevant issues, and they considered them at length, finding it difficult to determine the verdict.

327. In these unusual circumstances, our assessment is as follows. It seems clear that the perceptions of individual jurors were influenced by the publicity, and it must be considered likely that this influence was determinative of the verdict.

*Assessment (one case):
verdict 'safe'; likely that publicity determined verdict.*

Summary of conclusions

TABLE 4.4 The impact of publicity on quality of jury verdict (n=40 trials)

Impact of publicity	Quality of jury verdict				Total
	Cat. 1: 'Unsafe'	Cat. 2: 'Unsafe'?	Cat. 3: 'Safe'	Cat. 4: 'Safe'	
Determine verdict					
Likely	1	1	—	1	3 (8%)
Possible only	1	3	—	3	7 (18%)
Influence individual juror(s)					
Likely	—	—	6	5	11 (28%)
Possible only	—	2	1	2	5 (13%)
Unlikely	—	2	5	7	14 (35%)
Total	2 (5%)	8 (20%)	12 (30%)	18 (45%)	40 (100%)

328. Table 4.4 summarises the results of the foregoing analysis. The assessments of each of the 40 cases are classified according to (a) whether the publicity known to the jury may have had some impact on the verdict, or on individual jurors' perceptions and (b) the quality of the verdict. We continue to use the four-way classification of verdicts outlined above. This, in brief, is as follows:

- Category 1 — the verdict is to be considered 'unsafe', but was in line with the publicity

- Category 2 — the verdict was thought ‘unsafe’ by a minority of our ‘professional assessors’, but was in line with the publicity
- Category 3 — the verdict was ‘safe’ and contradicted the messages conveyed by the publicity
- Category 4 — the verdict was ‘safe’ and in line with the publicity.

329. Whether or not this summary suggests that the overall ‘record’ of the juries in withstanding publicity is good, moderate or poor is a matter for subjective evaluation. But in commenting on it, taking into consideration also some of the matters noted in our review of the individual trials, some positive and some negative observations may be made.

330. Some of the positive ones are as follows:

- There is no instance of a conviction in Category 1 (that is, one considered ‘unsafe’ by the majority of our ‘professional assessors’) in relation to which we treat the influence of publicity as ‘likely’ to have been determinative. The only ‘unsafe’ verdict in which we assess the impact of publicity in this way is an acquittal.
- The two other verdicts which were, as we see it, ‘likely’ to have been determined by publicity were, respectively, a ‘possibly unsafe’ (Category 2) verdict and a ‘safe’ (Category 4) verdict of guilty as charged. They were rendered by juries who, unknown to the judge or to counsel, were aware of information within the category of prior conviction or charging of the accused for a similar offence. The courts consistently treat this information as one of the most serious examples of prejudicial publicity, not because it lacks probative value but because jurors are likely to over-estimate its probative value. The fact that the

juries concerned may unfortunately have allowed it to influence, if not determine, their verdict does not detract from the consideration that, in so doing, they were in fact bringing genuinely evidentiary material into account rather than merely yielding to emotive content in the publicity. This situation is discussed further below.

- At first sight, it may appear that there is a high total number of trials (seven, representing 18 per cent) where publicity may ‘possibly’ have been determinative of the verdict. All but one of these trials, however, resulted in verdicts that were either ‘safe’ or, at worst, ‘possibly unsafe’. The conclusion that the publicity may ‘possibly’ have determined the single ‘unsafe’ verdict or the ‘possibly unsafe’ verdicts is, moreover, distinctly speculative in most of these cases. There existed understandable alternative reasons: notably, that the evidence was complex and the decision finely balanced. In addition, we include in the ‘possibly unsafe’ category several trials where challenges to the jury’s performance were not made in appeal proceedings or, if made, they were rejected. All told, it is unlikely that within this group of cases a genuine miscarriage of justice, attributable to the impact of publicity, actually occurred.
- The point to be made about the significant group of cases (16, representing 41 per cent of the total) where we considered it ‘likely’ or ‘possible only’ that publicity influenced the perceptions of individual jurors is that, in our judgment, the influence went no further than that. The juries were exposed to influential publicity, but they dealt with it in such a way that it did not, ultimately, determine the verdict.
- Given that all of the trials chosen for study were associated with significant levels of specific and/or generic publicity,

it is encouraging to have concluded that in a significant number (14 trials or 35 per cent) it is 'unlikely' that the publicity influenced the perceptions of individual jurors, let alone determined the verdict.

- The trials that we have investigated include, as their major component, a significant majority of the high-profile trials conducted in metropolitan Sydney during the last three years. To have encountered amongst these no more than this limited incidence of possible miscarriages of justice or other less serious effects of publicity is an encouraging outcome.

331. On the other side of the coin, this review of the impact of publicity is susceptible to negative interpretation in at least the following ways:

- The fact that we deemed it 'possible', if not 'likely', that publicity may have been determinative of the verdict in as many as 10 trials (25 per cent) is enough to raise cause for concern.
- In one of the cases in which we believed that publicity was 'possibly determinative', the publicity in question was generic only, and not of great intensity. Its 'message' involved stereotyping people within particular community groups as likely to commit offences of the type involved in the case. The verdict was a 'possibly unsafe' conviction of the accused. If in fact this conviction was 'unsafe' and was determined by the publicity, one confronts the unwelcome possibility that the outcome of numerous other jury trials of people within these same groups for the same type of offence might be similarly determined.
- There are reasons to be concerned about three of the Category 3 cases where contrary to the tenor of the publicity a 'safe' verdict emerged even though it was

‘likely’ that the publicity influenced individual jurors’ perceptions. This is because the jury arrived at the ‘safe’ verdict by the chancy and unpredictable route of a compromise, rather than by addressing the relevant issues fully and directly.

- Amongst our small group of six trials conducted outside metropolitan Sydney, two involved verdicts (one ‘safe’; the other ‘possibly unsafe’) which were possibly determined by publicity and a third was within the group of three Category 3 cases just referred to. This suggests that any encouraging aspects of our findings regarding metropolitan trials should not be assumed to apply automatically to non-metropolitan trials.
- In no less than 13 (43 per cent) of the 30 trials (Categories 3 and 4) in which the verdict was ‘safe’, the task for the jury was considered relatively easy by the judge and counsel. If our study had included less ‘easy’ cases, the proportion of ‘safe’ verdicts might well have been lower, and the possibility of verdicts being determined by publicity rather than the evidence might have been higher.

332. Table 4.5 repeats the analysis summarised in Table 4.4, with reference only to a particular group of 25 trials. These are the trials which (a) were conducted in metropolitan Sydney; (b) attracted a large or moderate quantity of specific publicity; and (c) in common with all of our trials, took place between mid-1997 and mid-2000. It will be recalled (see Chapter 2 at paras 156–157) that this group constitutes a significant majority of all comparable criminal trials. Compared with Table 4.4, the figures show slightly higher proportions of ‘unsafe’ or ‘possibly unsafe’ verdicts, and of a likelihood or a possibility that publicity determined the verdict. It is noteworthy, however, that this group, when compared with the remaining 15 trials not represented in Table 4.5, contains a higher proportion of trials where the evidence was equivocal and the verdict was therefore

not one which could be reached easily. As indicated above in paras 275–277 and Table 4.3, this factor is associated in our sample with reduced success by juries in identifying the relevant issues and in arriving at a ‘safe’ verdict.

TABLE 4.5 The impact of publicity on quality of jury verdict: Metropolitan trials attracting moderate or substantial specific publicity (n=25 trials)

	Quality of jury verdict				Total
	Cat. 1: 'Unsafe'	Cat. 2: 'Unsafe'?	Cat. 3: 'Safe'	Cat. 4: 'Safe'	
Determine verdict					
Likely	1	1	—	1	3 (12%)
Possible only	1	2	—	1	4 (16%)
Influence individual juror(s)					
Likely	—	—	4	4	8 (32%)
Possible only	—	1	1	2	4 (16%)
Unlikely	—	2	1	3	6 (24%)
Total	2 (8%)	6 (24%)	6 (24%)	11 (44%)	25 (100%)

333. An important issue emerging from these summaries and the accompanying comments is that of the different degrees of success of different juries in taking steps to counter any influence from publicity. As we see it, some of the juries did quite overtly confront, indeed ‘manage’, the impact of publicity upon their trials. In others, the influence from publicity on some jurors was not directly acknowledged. In this event, a likely consequence was that the jury split into factions. In the concluding section to this chapter, we explore this general issue briefly.

‘Management’ of publicity by juries

334. The idea that juries in high-profile trials, or in trials potentially affected by generic publicity, should seek, and should indeed be encouraged, to ‘manage’ the impact of publicity stems naturally from the fact that no group of jurors can realistically be expected to be wholly ‘impartial’ throughout the trial. The law recognises that every juror will bring general preconceptions and prejudices into the jury room and, in the case of trials subjected to specific publicity, may also bring or develop impressions about the case derived from this publicity. The law’s aim cannot be to eliminate all partiality of this nature. Instead, ‘what must be avoided is the formation of prejudiced opinions which are held so strongly that they cannot be swayed by contrary evidence put before the juror in the courtroom’,¹⁰⁹ or, it should be added, by the contrary arguments of fellow-jurors.
335. In an important sense, a general finding set out near the beginning of this chapter provides an important instance of jurors, individually and collectively, ‘managing’ publicity. This is our finding that in nearly two-thirds of the trials that received in-trial newspaper coverage, one or more jurors commented on the inaccuracy or inadequacy of this coverage, and that in more than one-half of the trials, the inaccuracy or inadequacy was discussed in the jury room.
336. Widely divergent degrees of success in jury management of publicity can be discerned within the foregoing review of individual trials. The range of possibilities can be well illustrated by a closer look at three of the five trials in which, unbeknownst to the judge or counsel, some or all of the jurors became aware that the accused had previously been convicted of, or charged with, an offence significantly resembling the charge now being

109 Australian Law Reform Commission, *Contempt* (Report No. 35, 1987), para 281; and see generally the discussion at paras 280–285.

tried. As far as we can tell, some at least of the jurors in each of these cases appreciated that this was not information which they were expected to know, let alone take into account in reaching their verdict.

337. In one of these three cases (a case in Category 2), information of this nature was, it seems, acquired by a juror from a report of bail proceedings, recalled at the time of trial and relayed to the whole jury. It appears to have generated conflict within the jury, which ultimately and with great difficulty compromised on a verdict of guilty of a lesser offence. Our impression is that a ground of defence was not given full consideration, and also that one or more jurors adhered to a view, formed at the outset that, considering what they knew about the accused, he should be convicted of the more serious offence. We would treat this pattern of events, if it is in fact what occurred, as exemplifying relative failure by the jury to confront the implications of the prejudicial material.

338. In the second case (a case in Category 4), the jurors who gave us interviews expressed concern that other jurors had discovered the relevant information about the accused from a site on the Internet. One of the interviewees, having been told about this during deliberations, claimed to have taken steps to ensure that an undecided juror, not yet apprised of the information, should be shielded from it until after a verdict was reached. These steps included threatening to write to the judge if a promise to conceal the information from the undecided juror was not forthcoming. The promise was, it seems, given and adhered to. The undecided juror's decision in favour of conviction, reached without knowledge of the information, paved the way for a unanimous verdict of guilty. This was, as we see it, a case where a difficult situation arising from the unexpected acquisition of this prejudicial information was handled as well as might be hoped for.

339. A completely different picture emerged in the third case within this group (also a case in Category 4). The relevant information about the accused, derived from media reports some time earlier, had been conveyed to a juror after the trial began by a friend or acquaintance. But, when told the information, neither that juror nor the rest of the jury believed it to be true. The two members of the jury who described the incident to us thought that they and their fellow-jurors were therefore successful in putting the information out of their minds during the deliberations. They were genuinely shocked and surprised to discover after the trial that it was true.
340. We should add that in several other cases in our study jurors said that they were relieved to be told by the judge or the Sheriff's officer, after having rendered a verdict of guilty, that the accused had a criminal record. They felt that this information provided corroboration for their decision. Their views differed, however, as to whether they should have been aware of this during the trial.
341. It is noteworthy that a similarly mixed pattern of juror responses on the issue of the impact of knowledge of prior convictions is outlined in the New Zealand Report.¹¹⁰ The discussion there covers also the situation of open court disclosure of the record of the accused. An interesting finding in that connection is that in two of the cases investigated, the introduction of evidence about it 'seems to have been counter-productive and alienated the jury, because it was seen as unfair or a sign of prosecution desperation'.¹¹¹
342. An article¹¹² describing research recently conducted with mock juries in England concludes, however, that where the prior

110 New Zealand Report, paras 6.12–6.16.

111 New Zealand Report, para 6.16.

112 S Lloyd-Bostock, 'The Effect on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study' [2000] *Criminal Law Review* 734.

record contains a recent conviction for an offence similar to the charge being tried, there is a tangible prejudicial effect. The article suggests that 'very thin information about a previous conviction (the name of the offence) is evidently sufficient to evoke quite a rich stereotype, so that a similar recent conviction (especially for sexual abuse of a child) is potentially damaging for no reason that the law permits'.¹¹³ On the other hand, revealing old or dissimilar convictions may not create any significant prejudice.

343. This outline of findings, from our own research and from other sources, supports the general proposition that, even where the publicity to which a jury is exposed is highly prejudicial in content, different juries achieve markedly different levels of success in resisting its influence. Within our data can be found other illustrations of this proposition: for example, in relation to publicity generating sympathy for the accused, or adverse feelings towards the victim.
344. A challenge for those administering criminal justice, therefore, is to use remedial measures and other comparable techniques as effectively as possible to assist juries to 'manage' publicity successfully. This theme will be revisited at several points in the ensuing chapters.

113 Lloyd-Bostock, above n112 at 754.

Publicity restrictions and remedial measures

345. This chapter considers what role the principal legal responses to prejudicial publicity, as identified in Chapter 1, played within the trials that we studied. Some comments are offered about the effectiveness of these legal responses in particular instances, so far as we could ascertain it. We comment also on some situations where a restriction could have been imposed on publicity, or a remedial measure could have been adopted, but this step was not taken.

346. The next chapter is also concerned with the legal responses to prejudicial publicity. In it, we summarise the findings of our survey of the opinions of judges and counsel as to the appropriateness, in general terms, of the current laws and practices relating to publicity restrictions and remedial measures. Our survey of these matters, which was conducted concurrently with our interviews relating to specific trials, also raised the issue of how generic publicity might most effectively be managed.

The part played by restrictions on publicity within the trials studied

347. It will be recalled that two types of legal restriction on publicity were identified in Chapter 1. These are (a) the general restrictions pursuant to which penalties may be imposed on publishers under the law of *sub judice* contempt and (b) the *ad hoc* restrictions that may be imposed upon them by judicial

officers through the granting of non-publication orders, or of injunctions on *sub judice* grounds.

348. These two types of restriction play distinctly different roles in relation to the specific criminal trials with which they are associated. The prosecution or conviction of a publisher for *sub judice* contempt does not have any direct impact on the degree of prejudice to which the trial may be subject. These events presuppose that a risk of prejudice to a trial has already arisen, and they represent the law's response by way of penalising, or endeavouring to penalise, the publisher in order to deter future infringements of *sub judice* restrictions. By contrast, non-publication orders and injunctions against apprehended contempts are preventative strategies. Their aim, in the current context, is to ward off prejudice that might otherwise impair the fairness of a specific trial on account of publicity that might influence the jury.

Proceedings for sub judice contempt

349. We have been informed that prosecutions for *sub judice* contempt were given official consideration in the context of eight of the trials that we have studied. On grounds of confidentiality, and because, as just said, the taking of any such proceedings would have had no direct impact on the degree of prejudice to which those trials were subject, we will not make any further comment on this aspect of our survey.
350. This is not to imply that the existence of *sub judice* restrictions has no significance for the conclusions that we have drawn about the impact of prejudicial publicity, as regards either these trials specifically or criminal jury trials in New South Wales generally. In fact, their importance is fundamental. In crude summary, the two preceding chapters contain two major findings. One is that jurors appear to recall distinctly less pre-trial publicity than is professionally supposed. The other is that

they are better able than is often suggested to withstand the influence of such publicity as is present in their minds when they deliberate on their verdict. The important point to bear in mind is, however, that these generally optimistic findings are made in the context of a legal regime that incorporates the law of *sub judice* contempt. Its provisions significantly inhibit the media from disseminating publicity that is strongly and overtly biased for or against the accused, either during the trial itself or during the months immediately preceding it.

351. None of the trials that we have studied was in fact exposed to continuing publicity of this nature. The pre-trial publicity chiefly focused on the commission of the offence and/or the arrest of the offender, both of which events generally occurred many months before the trial. The in-trial publicity, while at times exhibiting bias one way or the other, was mainly confined to reporting the trial proceedings.
352. In the cases where pre-trial publicity adverse to the accused was sustained over a long period — these being, broadly speaking, the cases where the accused was independently well-known or where the offence occurred and was significantly publicised in the region from which the jury was drawn, for example, a country town — there was significantly greater recall by jurors. It appeared also that the views of some of them, at least, were influenced by publicity significantly favouring one side in the trial. Where the publicity, whenever published, revealed an inadmissible and seriously prejudicial item of information — for example, the prior conviction or charging of the accused for a similar offence — it again appeared that some jurors, at least, were influenced. The verdicts in these cases did not, as it happens, fall in line with the publicity at the expense of the evidentiary material put before the jury. But in other such cases, they might well have done.

353. Accordingly, even if our findings were replicated in other similar surveys conducted in Australia, they would not of themselves provide grounds for assuming that *sub judice* restrictions were unnecessary. They might support the proposition that these restrictions could safely be relaxed to some extent. Alternatively or in addition, they might provide a basis for asserting that the court in a *sub judice* case should be more reluctant to hold that the principal criterion of liability — namely, a ‘real and definite tendency, as a matter of practical reality’,¹¹⁴ to prejudice the relevant trial — has not been satisfied. But the fundamental point remains: our findings presuppose the existence of a regime of *sub judice* restrictions and would carry little or no validity if that regime were to be wholly or substantially dismantled.

Orders or requests to the media not to publish material

354. As it happens, in none of the cases that we studied was a non-publication order made in either the trial itself or in pre-trial proceedings. However, in four of the trials, the judge, out of concern for jury prejudice, requested media representatives to refrain from disclosing a specified item of information prejudicial to the accused. These requests were made either in proceedings before the trial or at the trial itself and they were, it seems, complied with. A reason prompting the judge to use the language of request rather than binding order was that the scope of judicial power to make such orders is both limited and uncertain.¹¹⁵

355. Although these requests were apparently complied with, this compliance was not always effective to prevent one or more of the jurors coming across the relevant item of information through other means and passing it on to their fellow-jurors. In

114 See *Hinch v Attorney General of Victoria* (1987) 164 CLR 15 at 34 (Wilson J).

115 See eg. NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper No. 43, 2000), paras 10.22–10.42.

one of these four cases (being a case that in the preceding chapter we allocated to Category 4 — verdict in line with both evidence and publicity), the information was ascertained by the jury by indirect means and was not considered credible within the jury room. In another of them where it was also discovered, its significance seems to have been under-estimated. In yet another, the jury apparently did not come across the information about which a request to the media had been made. These last two cases fall within Category 3 — verdict in line with evidence but not publicity.

356. It may be conjectured that if in these cases the media had given significant prominence to the information, the jury would have been subjected to prejudicial influence. Indeed, in the last two, the judge's request to the media may well have been crucial in enabling the jury to reach a verdict which the 'professional assessors' considered to be appropriate but which contradicted the overall tenor of the publicity associated with the case.

The part played by remedial measures within the trials studied

357. Of the remedial measures mentioned in Chapter 1, the most significant within the trials that we studied were change of venue and judicial directions to the jury to avoid or ignore publicity. The ensuing discussion will be primarily concerned with these two.

Changing the venue

358. There are good reasons to believe that pre-trial publicity is more likely to be encountered and remembered by a juror if it relates to an offence committed near his or her place of residence. Where an offence is committed, and the trial is conducted, in a relatively small community, such as a New South Wales country town, a juror is also more likely, other things being equal, to know or

know of one or more of the participants in the trial and/or to have a significant emotional involvement with the case. He/she is likely to be subject to what may be called 'local community pressures'. Reasons such as these support the current practice of frequently shifting the venue for the trial of serious high-profile offences committed in non-metropolitan areas to Sydney or to another non-metropolitan location. Change of venue does, however, have significant disadvantages, notably that witnesses may have to travel long distances to the hearing.

359. In six of our 41 trials, the venue was shifted in response to these considerations. This group of six can be further subdivided into what may crudely be called 'total' and 'partial' changes of venue. The two 'total change' cases involved movement of the trial to a court that was well removed from both the local community pressures and the local publicity that would have attended the trial if no change of venue had occurred. In the four cases of 'partial change', the distance between the place of commission of the offence and the place of trial was sufficient to eliminate the local community pressures, or at least to reduce them substantially. But it seemed not to reduce greatly the impact of publicity emanating from the area where the offence was committed. In one of these four, an application for a further change of venue was made on this ground shortly before the trial commenced, but it was rejected.
360. In another three of our 41 trials, no change of venue took place even though the local community pressures and the local publicity seemed sufficiently intense to suggest that it should at least be given consideration. In one of these three 'no change' cases, a pre-trial application for change of venue was rejected.
361. As indicated in Chapter 3, our research confirms that pre-trial specific publicity is more likely to be encountered and remembered by a juror if it relates to an offence committed near his or her place of residence outside metropolitan Sydney. Indeed, we encountered indications that the members of a jury

dealing with an offence committed in a Sydney suburb will have less recollection of pre-trial publicity if they are drawn from elsewhere in Sydney, and may therefore be less susceptible to influence. The patterns observed in the nine cases where change of venue either occurred or was a possible option support these findings in a general way. In particular, the ‘no-change’ cases feature prominently in the small list of trials in which reports of pre-trial proceedings or of other matters occurring pre-trial were recalled by at least one juror.

362. It is more difficult to establish any link between the decision taken about venue — ie. whether there should be no change, a partial change or a total change — and the issues explored in Chapter 4: namely, whether there was influence on individual jurors’ perceptions and, if so, whether it was determinative of the verdict. The seven ‘no change’ and ‘partial change’ cases do, however, include two of the cases in Category 2, where the verdict was thought by prosecution or defence counsel to be ‘unsafe’ in the light of the evidence. In our judgment, in one of the cases, this influence may possibly have been determinative of the verdict. This group of seven cases also includes three in the remaining categories where the verdict was considered ‘safe’. In all three of these, it appears likely that individual jurors were affected by prejudice against the accused, and in one of them the influence may possibly have been determinative of the verdict.
363. The proportion of these trials where we assessed influence on individual jurors to be ‘likely’, if not also possibly determinative of the verdict, is relatively high (five of seven trials, ie. 71 per cent). The comparable figure for all the trials in which the jury determined a verdict is 21 of 40 trials, ie. 53 per cent.
364. Individual jurors in some of these seven cases spoke to us of the pressures of seeking to reach a verdict in a trial location where local media highlighted the trial. In two of the three ‘no change’ cases, they indicated that fellow-jurors acknowledged being acquainted with one or more of the trial participants.

365. To sum up this discussion of change of venue, our research was primarily concerned with trials held in metropolitan Sydney. Most of these dealt with offences committed in metropolitan Sydney. In 32 of our trials, the presence of these two features ruled out serious consideration of any change of venue. This only arose in the remaining nine cases, namely the ‘full change’, ‘partial change’ and ‘no change’ cases referred to above.
366. In this discussion, we have identified amongst the seven ‘partial change’ and ‘no change’ cases a higher incidence of juror recall of pre-trial specific publicity than exists within our total sample of 41 trials. We have identified also an above-average incidence of cases where it appeared likely that publicity influenced the perceptions of individual jurors, if not also determined the verdict.
367. The number of cases involved, however, is insufficient to support any but the most tentative conclusions. The points made here are intended only (a) to highlight the importance of change of venue as a remedial measure, and (b) to suggest the possibility that changes are not occurring sufficiently frequently, or to sufficiently remote locations.

Judicial directions to jurors regarding publicity

368. In almost all the cases that we studied, the jury was instructed at the beginning of the trial to avoid contact with, or at least to ignore the content of, pre-trial and in-trial publicity. Sometimes this instruction was repeated during the trial, particularly when counsel (usually defence counsel) drew the judge’s attention to inaccurate or biased media coverage of the proceedings. Occasionally, this repetition was a lesser measure adopted by the judge in response to an application to abort the trial and discharge the jury on account of prejudicial coverage.
369. Our research suggests that an instruction to avoid all contact with media coverage of proceedings was only partially effective. An instruction to ignore the content of this coverage would

appear, however, to have been valuable — perhaps more so than has been professionally realised — in so far as it encouraged jurors to trust their own first-hand, individual recollections of the evidence and argument. It may have inspired jurors to be confident in their abilities in this regard and thereby encourage and confirm the reaction to media reports of the trial which we found to be quite common — namely, that they are inevitably incomplete and are often inaccurate, if not demonstrably biased.

Other remedial measures

370. In six of our cases, an application for a permanent stay of proceedings or for an adjournment on the ground of pre-trial specific publicity adverse to the accused was made by defence counsel. One of the adjournment applications was granted, but the other five applications were rejected. Despite the concerns of the applicants, the verdicts in these trials were classified in the preceding chapter as either in Category 3 ('safe', and against the tenor of publicity) or Category 4 ('safe', and in line with publicity). In the light of our findings in Chapter 4 regarding juror recall of pre-trial publicity, this is less surprising than it may seem at first sight.
371. In three of our cases, defence counsel applied unsuccessfully for a discharge of the jury on the ground of prejudicial in-trial publicity. Again, each of the verdicts ultimately reached by the jury was within Category 3 or 4, according to our assessment. In one of these cases, none of the jurors appears to have encountered the item of publicity on which the application was based. In the other two, it seems that at least one juror did, but little or no weight was attached to it.
372. These instances are consistent with our general findings about in-trial publicity. 'Slanted' coverage of proceedings, particularly when it occurs on television or radio, may not actually be noticed by jurors. Moreover, if it is, it may be treated with the same sort of scepticism as is often accorded to purportedly

factual reports of the proceedings. In either of these situations, a discharge would be unnecessary.

373. It may be noted finally that in two cases not mentioned above, earlier trials of the accused had been aborted because of specific prejudicial publicity appearing during the hearing. These measures did not, of course, directly impinge on the later trial that we studied.

Professional opinions on legal responses to publicity

374. We posed a series of questions to the judges and lawyers engaged in our 41 trials regarding their perceptions of the general effectiveness of the law and practice governing (a) restrictions on publicity and (b) the remedial measures for dealing with the possibility of undue influence exerted by media publicity. What follows is a brief outline of the principal views conveyed to us.

Effectiveness of publicity restrictions

TABLE 6.1 Effectiveness of legal restrictions on publicity

Respondent	Effective	Not entirely effective	No opinion expressed	Total
Crown	15 (68%)	4 (18%)	3 (14%)	22
Defence	14 (54%)	10 (38%)	2 (8%)	26
Trial judge	15 (75%)	1 (5%)	4 (20%)	20

375. Respondents were asked whether they thought that the legal restrictions on publicity rules, were effective in preventing juries from being unduly influenced. As Table 6.1 shows, the majority of prosecution counsel (68 per cent) and trial judges (75 per cent) thought that these restrictions were generally effective, although three of these counsel and four of the judges did not express an opinion either way. A smaller proportion of defence

counsel (54 per cent) also thought these measures were effective. These respondents felt that journalists generally follow these rules and are by and large responsible and careful about what they can or cannot publish.

376. A number of respondents mentioned the commercial interests of the media, their sensationalism, and the lack of experience or training of court reporters as explanations for the generally poor quality of legal reporting. Some talk-back radio commentators were singled out for particular criticism. A few defence counsel suggested, however, that prejudice could result from the *selectivity* of media coverage in criminal trials, even if the proceedings were faithfully reported:

The problem as I see it is this. On an arrest the police ... have a whole operation in place to contact the media of an arrest of someone they consider to be a public figure of some kind. ... What then happens is that, as you come to trial, the Crown opening is always covered by the media and, unless the Defence is willing to make an opening behind that of the Crown. ... The Crown has all the benefit of that [publicity].

377. Those who thought that legal restrictions were not entirely effective pointed to the content of the law as well as its lack of enforcement:

Virtually zilch, partly because our law doesn't ... prevent details about the accused from being published. At the committal the Crown makes a point of getting as many of these details as they can possibly get in. ... If 'Blind Freddy' should know all the worst parts about the case against the accused long before the matter gets to trial and virtually can never be expected to put them out of his mind, it doesn't matter how evidence comes out effectively thereafter. Our papers continually publish all details of a person once they're charged with a serious offence, including their applications for bail, which discloses any or all other convictions the accused may have had. There is effectively no law to protect the accused. It's very, very, very rare that the Attorney General takes any contempt proceedings and only in extreme cases.

378. The infrequency of contempt prosecutions and the leniency of the sanctions were also remarked upon by some interviewees. One defence counsel suggested a system of punitive cost recovery:¹¹⁶

The media need to have, lying in the background, a potentially severe sanction against them. One area that should be fixed up is that if the media report something they should not, or in a way they should not, that results in a trial being aborted, not only should the media be subjected to the possibility of contempt charges, but they should also be called upon to meet all of the expenses occasioned by the trial being aborted. Not just the expenses of the prosecutor, judge and witnesses, but also the expenses of the accused. It's an enormous expense... the best way to affect the media is hit their hip pocket.

Effectiveness of remedial measures

379. As already indicated, the remedial measures available to trial judges include giving a special warning to jurors, discharging the jury, delaying the start of a trial and changing the venue of the trial.

380. Table 6.2 shows a breakdown of the answers of judges and counsel regarding remedial measures. Nearly all of the trial judges interviewed in the study¹¹⁷ believed that these measures were generally effective, although very few had resorted to techniques such as discharging the jury. Prosecution counsel were more sceptical of the effectiveness of these measures, while defence counsel were the most sceptical of the three groups.

116 Such a system would have been established in NSW if the Cost in Criminal Cases Bill 1997 had been enacted.

117 Three trial judges did not express views relevant to the question.

TABLE 6.2 Effectiveness of remedial measures

Respondent	Effective	Not entirely effective	No opinion expressed	Total
Crown	17 (77%)	5 (23%)	—	22
Defence	11 (44%)	13 (52%)	1 (4%)	25
Trial judge	19 (86%)	—	3 (14%)	22

381. Most judges saw the standard instruction to the jury as an effective way of managing the impact of publicity under normal circumstances:

I firmly believe that the jurors attempt to do their duty. I think that a warning — unless there are extraordinary circumstances — is good enough, just to remind jurors that they have to decide the matter on the evidence they hear in the court. I often say, for example, that it would be wise not to talk about this case at home because you'll get all sorts of opinions over the kitchen sink that might even subconsciously influence you. [Interviewer: You don't warn them not to read newspapers or watch TV?] No, I don't do that. Oh, well, I haven't had a case where it has arisen. I imagine if the circumstances warranted it, I would.

382. The assumption was that jurors do take the judge's direction seriously and will carry out their duty conscientiously:

Of course, I do [think that the jurors do take seriously the admonition to ignore publicity] but we are all humans, imperfect. ... If the publicity is intense and sustained enough, you can be almost certain that somebody will be influenced — perhaps not even in an improper way — but subliminally and that's the problem. You can tell them not to do it and if you take your time with the jury and you are patient and you get a good rapport with them and you constantly keep drawing them back, I think that most jurors do conscientiously try to do it. We've all had maverick jurors and maverick juries, but they are very much the exception. I think that the average person called for jury duty is a decent, upright, responsible

person who, given proper direction and encouragement, will do what is required and do it faithfully.

383. Jurors were also thought to be more sceptical of media accounts than previously assumed:

My faith is rather pinned upon general cynicism and pessimism about the reliability of media emanations in any event. I believe that the vast majority of jurors come along and really put aside what they've read. ... I think that people have become relatively cynical about the reliability of what they hear from the media and if somebody says to them that they shouldn't take any notice of what the media says, you listen to what you hear in here, most people say, 'OK, that's fair enough.'

384. Where there was a great deal of publicity, a change of venue was considered effective, especially in country towns:

I think change of venue is a very important measure for high-profile cases in country towns. It should be used, as it's probably one of the best safeguards. A lot of crime is reported only locally, but attracts a lot of interest in a region. It's a pity we can't have interstate change of venue.

385. The majority of defence counsel in the survey were not convinced of the effectiveness of these remedial measures, although they were the only techniques available. One lawyer pointed out that it is rare for juries to be discharged because of prejudicial publicity:

In my experience, judges are very reluctant to discharge juries because of publicity. It's very rarely done, despite the way the press treats it. I have seen cases where I'm quite convinced publicity was such that the jury should have been discharged. ... [case details omitted]... Now, I've never seen, I think, publicity more calculated to be prejudicial and, yet, the judge listened carefully to our arguments, thought about it, and decided that he could cure it by directions. I think that that's just wishful thinking... A very serious countervailing interest, of course, is the cost of the trial. To abort a trial that has gone for six months would have taken a fairly courageous

judge to do it but, nonetheless, it was a case where, if the overriding principle is the interest of justice, it was warranted.

386. The assumption that jurors would follow the judge's instruction was challenged by some defence counsel who did not see jury decision making as necessarily a rigorous, logical process but sometimes an emotional one:

In my view, judicial assumptions as to how juries function are spectacularly false. The legal postulate is that juries embark on their task in a rigorously logical fashion. But I think that they adopt an impressionistic approach — all sorts of unarticulated premises operate on them, including publicity. I'm not saying that it's necessarily wrong for them to do this, but I am saying that judges should recognize the truth of the matter. It follows, in my view, that judicial directions to ignore publicity generally won't achieve the desired result. It's simply romantic [sic] to assume otherwise.

I know that the whole system rests on the assumption that a jury will do as instructed and the judge is the judge of the law and they will take note of what he says. But, in my view, that is a fiction when it comes to emotional pre-trial publicity or publicity during the trial because it impacts on the state of mind of the jury and how they are likely to receive the evidence. I mean, they are human after all. So, management of that simply by way of judicial instruction, in my view, is simply just absolute nonsense.

I remember in a trial I did, the judge told them that they mustn't go and look things up on the internet, and I thought that's the first thing they'll do tonight... Just drawing that to the jury's attention was sure to make them go home and have a look at it. ... It's like telling someone not to think about something, the harder you try not to think about it, the more you think about it.

Dealing with generic publicity

387. Judges and lawyers were asked if they were ever concerned that a jury might be unduly influenced by generic publicity, and if so, what could be done about it. As Table 6.3 shows, the majority of respondents expressed concern about the effect of generic publicity. Defence counsel were significantly more likely than crown prosecutors or judges to express such concern, with 89 per cent answering 'yes' to the question, compared with 57 per cent and 54 per cent respectively among the other groups.

TABLE 6.3 Concern regarding generic publicity

Respondents	Concerned	Not concerned	No opinion expressed	Total
Crown	13 (57%)	10 (43%)	—	23
Defence	24 (89%)	3 (11%)	—	27
Trial judge	12 (54%)	9 (41%)	1 (5%)	22

388. Those who are concerned with generic publicity see it as something that could influence the jury's perception of the evidence. As one prosecution counsel put it strongly:

I think generic publicity has a potential to influence juries more than specific publicity. Generic publicity is insidious, it is there all the time and we get conditioned to it. ... Similarly, what do we expect from drug dealers or drug-affected people committing robberies? Or, more insidiously, what do we expect from certain sections of our community, eg. the Vietnamese community in a certain locality? So, generic publicity is really, in my view, more dangerous than specific publicity, particularly if it coincides with a trial that happens to be related to the issues.

389. Similarly, a defence counsel pointed to the subliminal effect of generic publicity:

The constant media publicity about how unsafe the streets are, I feel almost certain that they have a subliminal effect. Certainly in country areas, where the reliance on the local news media is far stronger than in the cities... They certainly bring out a lot of prejudices. Even the racial identity of the accused is sometimes a problem because of the way that people are described in the media, eg. Aboriginal, Middle Eastern appearance, Asian drug dealers.

390. The problem of generic prejudice among rural communities was also mentioned by another interviewee:

I believe that juries in [country town X] are too ready to convict black people because there is continual publicity about the strife created in town by bad relations between blacks and whites. This is stimulated from time to time by community meetings run by people like [name of politician]. It is very hard when a particular part of the community is regularly associated with crime simply by 'nod and wink' comments in media publicity. Sometimes I've referred to the racial characteristics of my client in an attempt to point out how he or she may be disadvantaged by publicity, but this is a risky tactic. It can easily backfire on you.

391. Other examples of generic prejudice cited include: negative stereotypes of defence lawyers portrayed in television drama; the alleged willingness of jurors to convict defendants in heroin supply cases because of the harm and tragedy brought on by the drug; and their reluctance to accept police evidence following the Wood Royal Commission into police corruption.

392. Those who were not concerned about generic publicity saw it as 'part of our social landscape', 'human frailty', or 'an individual thing'. Most trusted that jurors would set aside any prejudice, especially if directed by the trial judge.

393. Most respondents did not think that much could be done about generic publicity. One frequently suggested remedial action is for the trial judge to speak directly to the jury and instruct them to set aside any generic prejudice:

You can instruct the jury about it. One of the things that always strikes my mind is that you can reasonably say to a jury, 'Look, the community believes that people who commit [particular offence] should be dealt with with some severity. You may have very strong views about what should be done about them. Indeed, you may regard them as monsters, but all of that doesn't help you to decide whether this particular accused before you at the moment is one of them.'

I don't think there's anything much you can do about it other than merely to warn the jury that they are to decide the matter on the evidence they hear. I might even go as far as to use the old trite comment that you can't believe everything you read in the papers or something like that.

394. Section 38(7)(a) of the *Jury Act 1977* (NSW) requires the Crown prosecutor to give a summary of the case and identify the potential witnesses before empanelling. In accordance with section 38(7)(b), jurors who feel that they are not able to impartially consider the case are then invited to excuse themselves. Some judges take a fairly broad view of the provision:

Although the Jury Act really only requires you to instruct jurors that if they happen to know anybody associated with the trial [then] they can't give an impartial verdict. They should say so and they'll be stood aside. I go routinely beyond that and explain that if the circumstances of the case are such that they feel that they can't give proper consideration to it then they should stand themselves aside or at least tell me... The Jury Act is not specific in that regard, but I see no reason why it shouldn't say that.

Under the terms of the Jury Act, you have to ask [the jurors] ... and it depends on the particular case. If it were a drug case I might say, 'If you've got strong views about drugs, you should let me know now.' I tell them that they won't be automatically discharged and that they might be required to serve somewhere else, so it's not a way of getting out of jury service. It depends on the trial.

395. Several interviewees mentioned some sort of code of ethics for journalists, but the majority acknowledged that in cases of

generic publicity, there is little that can be done to restrict publicity.

Jurors' experience of the trial process

396. This chapter deals with a number of matters that were directly or indirectly raised by jurors in the course of our interviews, but did not form part of the range of issues specifically addressed in our research. These questions are as follows:

- The process, sometimes difficult, of reaching a unanimous verdict, together with two associated issues: (a) the impact of judicial exhortations to juries to attain unanimity if at all possible; and (b) whether majority verdicts should be introduced in New South Wales.
- Obtaining a sufficient understanding of the legal principles to be applied by the jury.
- How jurors perceived the trial process and the experience of serving on a jury.

397. While feedback on some of these issues was unsolicited and therefore falls outside the scope of this project's specific research questions, the jurors' observations corroborate comparable findings on similar issues described in the New Zealand Report. The survey forming the basis of the New Zealand Report addressed the relevant issues directly, as they formed part of its wide-ranging brief. Since the jury system in New Zealand is broadly comparable to that of New South Wales, both the conclusions reached in New Zealand and the ensuing summary of comments by New South Wales jurors are likely to be of interest to administrators of the New South Wales criminal justice system.

Reaching a unanimous verdict

398. Under section 56 of the *Jury Act 1977* (NSW), criminal jury verdicts must be unanimous. In our sample of 41 trials, the jury in one trial was not required to deliberate on a verdict. Of the 40 remaining trials, all resulted in unanimous verdicts, that is, there were no ‘hung’ juries. This was by chance rather than by design. Cases involving hung juries were not excluded on methodological grounds.

399. The juries in these 40 trials delivered verdicts regarding a total of 46 accused, ie. 34 trials dealt with a single accused¹¹⁸ and six trials dealt with two co-accused. In relation to some of the accused, there were multiple charges.

400. We asked jurors about the deliberations that led to the trial verdict. The responses of jurors not only assisted in illuminating the impact, if any, of publicity on the deliberative process, but also provided information about the ways in which juror unanimity was attained. There are limitations inherent in our data because not all of the jurors in any trial took part in the survey. Where jurors spoke about their own reasoning in arriving at a verdict, we have regarded the data as reliable. However, where jurors spoke about the reasoning of fellow jurors, we have only treated the data as reliable if at least two jurors identified the gender, age, characteristics, reasoning, etc of a fellow juror such that we could be reasonably certain that they were talking about the same individual.

Unanimity reached easily

401. Jurors claimed to have easily reached unanimous verdicts regarding 28 (or 61 per cent) of the 46 accused. An ‘easily

118 Included in this total is a trial that did involve two co-accused. However, as the publicity about the trial focused exclusively on only one of the co-accused, we only interviewed the trial judge, counsel and jurors about that individual.

reached' verdict was one where there were either no disagreements among jurors during deliberations or where disagreements were minor and resolved simply and effectively through group discussion of evidence and application of the judicial directions. In some of the cases involving multiple charges against an accused, the jury reached agreement reasonably easily on a proportion of the charges laid, but had difficulty agreeing on the remainder. The verdicts delivered against these accused are not included in the figure of 28 'easily reached' verdicts.

402. The following comments exemplify what we were told about the deliberation process in some of the cases of 'easily reached' verdicts:¹¹⁹

Our jury was fantastic, stable, sane, considerate and democratic. We stuck to the judge's points and methodically went through the evidence together.

In [a] pre-deliberation secret ballot, seven voted guilty and five were undecided. So we methodically went through the evidence. One woman was a bit emotional about putting the accused in gaol and ruining his life. We spoke with her about the fact that the accused wouldn't go to gaol unless we all agreed he was guilty beyond a reasonable doubt. ... After discussion and excluding extraneous information from the scenario of what occurred on that day, we all eventually agreed that the cumulative ... evidence excluded every other suspect except the accused.

The only disagreement was how much credibility we should put in the opinion of [the expert witnesses]. We were instructed about reasonable

119 In this report, the observations attributed to individual jurors do not, as a general rule, reproduce in full the exact words used in their telephone interviews with us. This is because the initial interviews were not tape-recorded, but were written up from notes taken by the interviewer while it was proceeding. We adopted this approach in the initial interviews because we considered that if jurors were asked at the outset if they would consent to tape-recording, a significant proportion of them might decline to be interviewed. By contrast, in the follow-up interviews jurors were asked at the outset whether they would consent to tape-recording. Virtually all of them said yes.

doubt, and we pulled apart and examined the evidence quite minutely as a group to see what degree of uncertainty remained.

[We disagreed about] the issue of proof beyond a reasonable doubt. Some jurors were convinced and some not. The three jurors' arguments for finding [the accused] guilty were also very convincing but couldn't overcome the doubts held by the other nine of us. We had a 'think tank' and the next day there were only two guilty-jurors left. We talked it over again, then left the two jurors alone to talk it over and they decided to agree to the not guilty verdict.

Unanimity reached with difficulty

403. There were nine trials involving 10 accused (22 per cent of the total of 46 verdicts) in which jurors indicated that they argued long and hard to convince one or two of their number to agree with the majority. In some instances, it was suggested that a minority juror might have capitulated to the opinions of the majority. Occasionally, other jurors were characterised as either taking too long to make up their minds ('slow') or as clearly biding their time until everyone else made up their minds so that they could simply agree with the majority's decision ('uninterested').
404. Where respondent jurors identified themselves as the 'capitulating' juror in the deliberative process, they tended to describe their experience as an uncomfortable one.

On the first day of deliberations, eight jurors decided that the accused was guilty. ... Three of us were undecided but, by the last day, there were only two of us left undecided. ... I don't know how the other undecided jurors came to change their minds. The [guilty] jurors yelled at and bullied me. I capitulated.

I understood the judge's instructions to mean [that] we had to look at the evidence, not at theories. He said that if we didn't believe [a particular witness's] evidence then we couldn't find [the accused] guilty. I asked the

juror who had taken notes to read back [the witness's] testimony to me. She refused to do it. Did I not understand the judge properly? I caved in under pressure.

405. Similarly, a self-identified 'slow' juror spent several days deliberating alone after the majority jurors had agreed on a verdict. While she ultimately agreed with the majority opinion, she felt that her fellow jurors had attempted to pressure her into agreeing and doing so quickly.

I found it difficult throughout the case to measure [the accused's] act against the written law. ... I was the last juror to come to a decision and I was screamed at and abused and put under enormous pressure to agree to the guilty verdict. ... I'll be really honest with you. I'm quite clear in the decision that I made and I know why I made it and on what points I made it. But I did feel that there was a tremendous amount of pressure. ... I decided that I had to take my decision to the grave and be answerable to God. I considered all the evidence and measured it against the law and, when I felt comfortable with my decision, I came out. I'm certain that if I had decided that [the accused] was not guilty of [the charge], I would have stuck by that decision and brought in a hung jury rather than be untrue to myself.

406. In cases where two or more respondent jurors identified a 'capitulating' or 'slow' or 'uninterested' fellow juror, the opinions of the respondents ranged from compassionate to frustrated to incredulous.

There were four different approaches. (1) Jurors who sat down and worked it out, who took the analytical approach. (2) A single juror who wanted to solve the crime and wasn't satisfied that evidence presented in court did that. (3) Undecided jurors who slowly made up their minds during the course of deliberations as we discussed evidence. (4) One juror hadn't paid any attention during the trial, turned up each morning, put his head on the table and went to sleep. ... People talked through the evidence and the judge's directions. ... The last juror — who took approach 4 — probably didn't 'come around' at all, he just wanted to go home so he agreed with the rest of us.

It was a very difficult jury. [One juror] was completely irrational... very emotional, out of control, acted like a spoilt child. ...[Another] juror had strange religious leanings, kept touting 'an eye for an eye' and had moral reservations about being on a jury.

Very early on in deliberations it looked like we'd never get agreement. So, two of us... set up a whiteboard and went through every piece of information and decided whether it was or was not evidence that we should base the verdict upon. In the end, 11 of us agreed that the evidence proved that the accused was guilty. ... The 12th juror held out and, even though she finally acknowledged that she couldn't offer any reasoning for her opposite viewpoint based on the evidence at trial, and she said OK she'd agree to a guilty verdict, I don't think she really changed her mind. I'm 100 per cent comfortable with the process by which the verdict was reached but ... I'm pretty certain that the woman still thought the accused was not guilty.

Ten of us agreed pretty early in deliberations that [the accused] was guilty. Two people wouldn't budge. A male juror said he was 'incapable of making a decision.' That made us angry and we asked him why he didn't excuse himself when the Sheriff first spoke to us. A woman juror had a son the same age as [the accused]. ... We didn't want to be a hung jury. After all we'd seen and been through, we didn't want to pass that job onto someone else. The ten of us responded to the two undecided jurors by saying that we had to come to a decision and we had to discuss it until we all agreed on a verdict. We couldn't turn our back on our duty. We went through the facts again and again. I think both of the jurors may have got outside help or support from their families or friends. Both came back the next day and agreed on the guilty verdict.

407. While some of these revelations may appear to be a cause for concern within a unanimous verdict criminal jury system, all of the trial judges or counsel in these nine cases considered that the 10 verdicts were supported by the evidence in each instance.

Unanimity reached by compromise

408. There was another group of eight verdicts (17 per cent of the total of 46 verdicts) in which the jury openly compromised to achieve unanimity rather than be a hung jury. The key feature of these trials is that they all involved either multiple counts or alternative counts against the accused (although several other trials with similar features did not result in compromise verdicts). If we accept the respondent jurors' accounts as exemplified below, all of these compromise verdicts were, ultimately, unanimous. None of the compromise verdicts, it may be noted, was an acquittal.

Compromise agreement resulting in a lesser verdict

409. The first form of compromise occurred where a minority of jurors believed that the accused was guilty of a more serious charge but agreed to bring in a verdict of guilty on one or more lesser charges. This form of compromise was evident in the verdicts regarding five accused.

We had to consider the evidence and I'd say that at the beginning of deliberations half of the jury wanted to find [the accused] guilty of [the higher charge]. I could not go along with that... I found it very hard deciding whether [the accused] was guilty... I put two and two together and was very uncomfortable the whole time with the charges against [the accused]... We'd spent four or five days thinking about it so we did give it a proper going over but it still got to that stage where I thought that I'd only go for the lowest charge if possible. Another fellow was hanging out quite adamantly [for a not guilty verdict]... I went to the toilet and, when I came back, he'd swung over. ... I had to decide whether to hang the jury or go for the lowest possible charge and I was very emotional about it... I was very apprehensive about the verdict we brought in... It was in my mind all the time that [the accused] still had the right of appeal.¹²⁰

120 This quote is a composite of a number of statements concerning deliberations made by the juror in both the initial telephone survey and a follow-up interview.

The jury was very unusual in its make-up. There were several difficult jurors. There was a juror who seemed to favour a not guilty verdict... She was a very forceful woman... By day five or six of deliberations, most of the jurors agreed that [the accused was guilty of the lesser charge], but a couple of jurors were weakly inclined to go along with the antagonistic juror. It looked possible that the jury would be hung and I was personally disturbed about that because it was evident to me that the evidence certainly warranted a finding of guilt on that charge. I intervened and declared... that if we couldn't agree on a finding of guilty [on that charge], we should tell the judge and there would be a retrial. I emphasised that the Crown might run a more convincing case next time and be able to prove to the next jury that [the accused] was guilty of one of the more serious charges. She then became a very strong advocate for the [lesser verdict]... The remaining jurors were swayed by her advocacy.

410. Unlike the five trials above where a minority of jurors compromised, in two other trials it was a majority of the jurors who compromised in bringing in a lesser verdict than they thought was warranted.

411. In the first of these two cases, seven jurors agreed to bring in a lesser verdict:

We went through about two and a half days of argument. ... Then the five [lesser charge] jurors told us that they would only find the lesser charge or nothing. We discussed telling the judge that the jury was hung. Ultimately, the seven [higher charge] jurors decided, rather than [the accused] being found guilty of nothing or having a retrial, to go with the [lesser] verdict.

412. In the second trial in this category, ten jurors decided to compromise and bring in a lesser verdict. Both of the minority jurors were among the six respondents whom we interviewed. They were confident that their reasoning during deliberations had convinced the other ten jurors to agree finally with their opinion that, on the evidence, the accused was guilty of a lesser charge.

Originally, the ten other jurors thought [the accused] was guilty of [the higher charge] but a young juror and I argued that [the accused] was guilty of [the lesser charge]. We challenged them to think about it... We went back to the transcripts and looked at who said what... We were there for three days.

Ten jurors initially voted guilty [of the higher charge]... and two of us — another juror and I — voted guilty [of the lesser charge]. ... I was the youngest juror by far and I reckon their initial verdict was a product of their age and what the world used to be like rather than it is now. ... They didn't bother to consider other evidence... I had to lay out [the defence], write up all the evidence on the whiteboard for them to consider it properly... I convinced them that there was [evidence supporting the defence].

413. Three of the four remaining respondents from this trial indicated that no such agreement was reached. They said that the majority of the jury finally surrendered to the stronger personalities of the other two and, rather than hang the jury and bring about a retrial, they opted to agree to a verdict of guilty of the lesser charge. The fourth of these jurors said that, because there was not enough evidence to prove the case either way, he went along with final decision of the rest of the jury.

Like I said, at the beginning of deliberations we were 10:2. After three days of deliberations we were still 10:2. The woman juror just wouldn't budge. The rest of us were under the impression that if it was a hung jury it would be a retrial. It's hard for me to talk for the other jurors, but I think that we just capitulated because we got sick of it and didn't want to put another bunch of people through a six-week trial.

A lot of jurors didn't want to hang the jury because of the stigma of doing that... and because of the cost to the taxpayer... I think that we all accepted the lesser of two evils in agreeing to [the lesser verdict]. It was better than nothing.

414. The judge and counsel whom we consulted about this trial considered that the verdict actually reached — that is, the lesser

verdict — was acceptable on the evidence. It was in fact preferable, having regard to the onus borne by the Crown, to a conviction for the more serious offence.

Compromise agreement resulting in a more serious verdict

415. The second form of compromise verdict involves jurors who believed that the accused was guilty of a lesser charge, but agreed to convict on a more serious charge rather than hang the jury. This form of ‘trading up’ compromise was evident in a single case where eight jurors acquiesced in a more serious verdict than they thought the case warranted.

Some of the jurors believed [the accused’s] explanation. ... There was a lot of discussion about reasonable doubt. A lot of the jurors thought that [the witnesses] were telling lies and [that] the police evidence... was unbelievable. There were also heated arguments about the points of law as to [the different charges]. We all went through the evidence and the only way we could resolve the disagreements was to compromise.

Eight jurors thought that [the accused] was guilty only [of the least serious of the three charges], but four jurors — including me — wanted to convict on [the second most serious charge]. We realized that we would have to compromise if we wanted to get out of there quickly, so... some went up to [the more serious charge]. We all just had to bargain to reach a decision.

416. To complete the picture, it should be noted that this ‘trading up’ compromise in relation to one of the two co-accused in this trial was associated with a ‘trading down’ compromise in relation to the other. None of the legal professionals involved in this case considered the verdicts to be unsupported by the evidence.

Judicial directions regarding unanimity

417. It is not uncommon for juries to deliberate for some time and then inform the court that they do not believe that they can achieve unanimity. Trial judges in Australia and New Zealand are then permitted at common law, by way of a *Black*¹²¹ direction or a *Papadopoulos*¹²² direction respectively, to exhort undecided juries to deliberate further. For Australian trials, the High Court in *Black v The Queen*¹²³ suggested the following as a model direction:

Members of the jury, I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider the evidence and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence. Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom and you are expected to judge evidence fairly and impartially in that light. You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion you may have and may convince you that your original opinion was wrong. That is not, of course,

121 *Black v The Queen* (1993) 179 CLR 44.

122 *R v Papadopoulos* [1997] 1 NSLR 621 (CA). See the New Zealand Report at paras 8.1–8.14 for further discussion.

123 (1993) 179 CLR 44 at 51–52 (Mason CJ, Brennan, Dawson and McHugh JJ).

to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one. Experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they are discharged. So, in the light of what I have already said, I ask you to retire again and see whether you can reach a verdict.

418. The Court indicated its disapproval of any direction that either drew the jury's attention to the inconvenience and expense occasioned by a failure to agree or suggested that jurors should indulge in 'give and take' so as to reach a compromise verdict. In relation to the latter issue, Deane J made the following observation:¹²⁴

A juror who conscientiously holds out against a majority and thereby prevents unanimity has not failed properly to 'do what [he or she was] chosen to do'. To the contrary, he or she has done no more than discharge his or her duty to both the accused and society. Any suggestion that a minority juror should democratically submit to the view of the majority is antithetical to the jury process under the common law of this country.

419. We did not systematically investigate how often *Black* directions were given in our sample of 40 trials in which verdicts were reached. But in discussing the process of jury deliberations, 10 respondents from six trials mentioned that the trial judge had issued such a direction when the jury reported that it could not reach a unanimous verdict. In one of these the making of the direction was a ground of appeal. We are aware also of a seventh trial in the sample in which the jury received a *Black* direction because it was raised subsequently as a ground of appeal.

124 *Black v The Queen* (1993) 179 CLR 44 at 56.

420. Similar to the findings in the New Zealand Report¹²⁵ on this form of judicial direction, jurors' reactions were mixed. All 10 respondents reported that, upon returning to the jury room, the jury readdressed the facts of the case, re-read the transcript and reconsidered the evidence. But the apparent impact of the direction varied significantly.

421. According to the description given by one respondent, the *Black* direction seemed to be understood simply as advice that initial disagreements within a jury may over time be resolved.

Very early on in the deliberations it looked like we would never get agreement so we took a question re a hung jury to the judge. The judge told us to deliberate more, she said that juries often did come up with unanimous verdicts if they discussed the evidence again.

422. Sometimes the direction led the jury to negotiate their way through their disagreements. In one case with multiple charges in which the jury had agreed unanimously on some charges but not on others, the judge's instruction to deliberate further led the jurors to negotiate the remaining verdicts.

By the end, there were six charges on which we could not agree... The judge told us to go back and discuss it further... In the end it came down to us negotiating with each other.

Indeed, when we thought we couldn't decide on the last 5 or 6 charges, we told the judge and he said that we had to thrash it out amongst ourselves until we decided one way or the other.

423. According to three jurors in another two cases, the *Black* direction was used as leverage to urge undecided or 'minority' jurors to agree with the 'majority' view. In one of them, involving two co-accused, the jury reached a unanimous

125 New Zealand Report, paras 8.1–8.14.

verdict regarding one of the accused within a very short time but then spent three days deliberating on the verdict regarding the second accused. Upon reporting their inability to achieve unanimity, the judge ‘said we had to go back and make a decision one way or another’. The jury returned to the jury room and read through the transcript several more times, asked the judge to answer questions, and ultimately arrived at a unanimous verdict. This remained a source of guilt for one respondent who felt he had capitulated.

424. In the second of these two trials, jurors reported as follows:

We thought that a unanimous verdict would not be possible and sent a note to the judge. He replied that we were to deliberate until we did come up with a unanimous verdict.

We did not want to be a hung jury. After all we’d seen and been put through, we did not want to pass that job on to someone else. The ten of us responded to the two undecided jurors by saying that we had to come to a decision and that we had to discuss it until we all agreed on a verdict. We could not turn our back on our duty. We went through the facts again and again.

425. The New Zealand Report notes that sometimes the equivalent *Papadopoulos* direction was perceived by jurors as ‘a “telling off” — an expression of judicial displeasure which highlighted their failure and produced considerable pressure to go back to the jury room and get a result’.¹²⁶ A similar interpretation was apparently made of a *Black* direction by one juror in our sample. She described as follows the judge’s direction in response to the jury’s note that a unanimous verdict was not possible after 15 minutes of deliberation:

... the judge sent us back to deliberate until we reached a unanimous verdict. We felt like naughty schoolchildren.

426. We must emphasise that the findings described in this section of our report are not in any sense the product of a systematic study of the impact of *Black* directions. The observations of some of our respondents do, however, suggest that the interpretation given by jurors to such a direction may put undue weight on those parts of it which exhort the jury to reach a unanimous verdict and insufficient weight on those parts which stress the need for each juror to be sure in his or her own mind that the verdict is the right one.

Majority verdicts

427. Periodically, when a jury cannot agree on a verdict (that is, the jury is 'hung') or when jurors subsequently reveal that they did not truly agree with the verdict, public debate arises about whether New South Wales should adopt a majority verdict system in criminal trials.¹²⁷

127 For example: 'Should juries be unanimous?' [Editorial] *Sydney Morning Herald*, 7 Feb 1989, p12. 'The one in twelve angry jurors' *Sydney Morning Herald*, 10 Feb 1989, p10. 'Majorities (on juries) are sometimes wrong' *Sydney Morning Herald*, 20 Feb 1989, p13. 'Majority jury verdicts possible: Shaw' *Sydney Morning Herald*, 23 Sep 1995, p7. 'Murder trial deadlock: hung jury sparks renewed call for majority verdicts in NSW criminal hearings' *Sunday Telegraph*, 23 June 1996, pp4-5. 'Push for 11-to-1 jury verdicts' *Sydney Morning Herald*, 24 June 1996, p4. 'Jury study may end unanimous verdict tradition' *Sydney Morning Herald*, 7 Nov 1996, p6. 'Jury out on united or majority verdicts' N Cowdery & I Barker *Sydney Morning Herald*, 23 Jun 1997, p17. 'Case for majority verdicts crumbles' *Sydney Morning Herald*, 21 Oct 1997, p3. 'Majority juries "will slow justice"' *Daily Telegraph*, 21 Oct 1997, p19. 'Beyond the call of duty' [Editorial] *Daily Telegraph*, 6 Aug 1998, p10. 'New call for majority jury verdicts' *Sydney Morning Herald*, 7 Aug 1998, p3. 'Juror defends not guilty verdicts' *Daily Telegraph*, 8 Aug 1998, p5. 'Majority verdicts on trial' *Daily Telegraph*, 23 Dec 1998, p2. 'A fair verdict on juries' *Daily Telegraph*, 23 Dec 1998, p10. 'Chika's verdict: Chika vows to push majority verdicts' *Sun-Herald*, 17 Jan 1999, pp1, 10. 'Majority verdicts a good decision' *Sun-Herald*, 17 Jan 1999, p52. 'When one juror won't budge' B Lagan, *Sydney Morning Herald*, 13 May 2000, p11. 'One man against 10... the jury that went to war' *Sydney Morning Herald*, 17 May 2000, pp1, 8. 'Time for a closer look at juries' *Sydney Morning Herald*, 18 May 2000, p18. 'Hard road to a final verdict' P McGuinness, *Sydney Morning Herald*, 18 May 2000, p19. 'Political push to eradicate hung verdicts' *Sydney Morning Herald*, 18 May 2000, p6. 'Majority verdicts bill moved' *The Australian*, 18 May 2000, p6. 'Verdict on majority trials' *Daily Telegraph*, 18 May 2000, p10.

428. Presently, majority verdicts are permitted in criminal trials in five Australian jurisdictions — Northern Territory, South Australia, Tasmania, Victoria and Western Australia¹²⁸ — although such verdicts are subject to certain limitations. In Victoria, a majority verdict will stand when one juror disagrees with the remaining jurors, regardless of whether the jury consists of 10, 11 or 12 members. In the other jurisdictions, when there are 12 jurors a majority verdict is permitted where one or two jurors disagree with other members. Where the jury numbers only 10 or 11 members, a majority verdict may be returned when one juror disagrees with the conclusion of the rest of the jury. In each jurisdiction, a majority verdict may only be returned after the jury has deliberated for a specified minimum number of hours and has indicated to the judge that it cannot reach a unanimous verdict.
429. The most significant restrictions on majority verdicts in these jurisdictions relate to the type of offences to which such a verdict may be applied. Under section 80 of the Commonwealth Constitution, majority verdicts are prohibited in all jurisdictions in trials of offences against a law of the Commonwealth.¹²⁹ Furthermore, in South Australia, Tasmania, Victoria and Western Australia, majority verdicts are not permitted in murder trials.¹³⁰ Majority verdicts are inapplicable in Victoria, South Australia and Tasmania in trials for the offence of treason.¹³¹ In Western Australia, a majority verdict may not be returned in trials for any other offence punishable by life imprisonment¹³²

128 See Criminal Code (NT), s368; *Juries Act 1927* (SA), s57; *Jury Act 1899* (Tas), s48(2); *Juries Act 2000* (Vic), s46; *Juries Act 1957* (WA), s41.

129 *Cheatle v R* (1993) 177 CLR 541.

130 See *Juries Act 1927* (SA), s57(2); *Jury Act 1899* (Tas), s48(3); *Juries Act 2000* (Vic), s46(4); *Juries Act 1957* (WA), s41.

131 See *Juries Act 1927* (SA), s57(2); *Jury Act 1899* (Tas), s48(3); *Juries Act 2000* (Vic), s46(4).

132 See *Juries Act 1957* (WA), s41.

and, in Tasmania, a majority verdict is impermissible in trials for an offence punishable by death.¹³³

430. Our findings about how the juries reached unanimous verdicts within each of the three groups designated above provide a basis for speculating about how their deliberations, if not also the verdict itself, might have differed if New South Wales had had a majority verdict system at the relevant time.
431. Within the first category — ‘unanimity reached easily’ — there would, it seems, have been no difference. Each of the juries would most likely have delivered the same verdict as a unanimous one.
432. The situation would, however, have differed within the second category, that of ‘unanimity reached with difficulty’. If a majority verdict system operating in New South Wales at the relevant time had been similar to those of Tasmania, South Australia, Victoria and Western Australia — where majority verdicts are not permissible in cases involving Commonwealth offences or murder charges — one out of the ten verdicts in this category might have been delivered as a majority verdict instead of unanimously. However, if murder trials had not been exempt from 11:1 or 10:2 verdicts after a specified period of deliberation, as many as nine might have been delivered as majority verdicts. Instead of arriving after a lengthy, stressful and difficult conflict at a verdict to which all of the jurors were prepared, at least formally, to subscribe, they might have ‘agreed to disagree’ and delivered a majority verdict once the stipulated time had elapsed.
433. The group of eight verdicts in the third category — unanimity reached by compromise — includes the only example of a trial

133 See s48(3) *Jury Act 1899* (Tas).

within our survey that might have resulted in a less preferable verdict if a 10:2 majority verdict had been permissible. The strong personalities of two minority jurors may not have held the same sway if the ten other jurors knew that they could hold out for a majority verdict. However, it should be noted that this was a murder trial and, as indicated above, of the five Australian jurisdictions that currently allow majority verdicts, four of them do not do so in trials for the offence of murder.

434. We must emphasise that the findings described in this section of our report relate only indirectly to the issue whether majority verdicts might be appropriate in New South Wales. Majority verdicts were not a focus of our study: indeed, as mentioned above, we did not investigate any trial in which the jury was 'hung'. At most, our findings constitute background material for debates on this issue by illustrating some of the patterns of disagreement that may arise in jury rooms and some of the ways in which, under a system of jury trial requiring unanimity of verdict, disagreements are resolved.
435. With this caveat, the comment may be made that the findings relating to verdicts that were not 'easily reached' appear to support the proposition that the requirement of unanimity is likely to force those jurors whose opinion ultimately prevails to provide grounds to justify this opinion. This may give rise to a difficult and protracted debate with those jurors who, initially at least, disagree. It does not necessarily follow that this debate will genuinely probe the evidence that has been tendered on the issues relevant to guilt or innocence. But it is arguable that the unanimity requirement increases the likelihood that a jury's deliberations will include more than a merely superficial review of the evidence.
436. The requirement of unanimity clearly does eliminate any risk that a majority faction of 10 or 11 jurors will collude with a minority faction of two or one in simply waiting until the time when a majority verdict may be given. If the jury adopted this

tactic, it might not devote any significant time and energy to discussing the evidence. As indicated above, if this had been an available course of action in the trial referred to in paras 412–414, and had indeed been adopted, the jury might have returned a majority verdict which both differed from that ultimately delivered and was, according to our ‘professional assessors’, less acceptable than the verdict ultimately delivered.

437. Against these considerations there must of course be weighed the argument that a system of majority verdicts may well reduce the incidence of hung juries — which are regarded on all sides as a highly undesirable phenomenon — without posing any risk to the quality of verdicts. While none of the juries in our survey was in fact hung, some came close to being so. In a significant proportion of these cases (assuming for these purposes that majority verdicts were permissible in murder trials), the verdict reached by majority would most likely have been the same as that which was ultimately reached unanimously, though with great difficulty. This, for instance, could have been the outcome with the ten verdicts referred to in para 403. Both the risk of a hung jury and the stress, trauma and expense associated with long and arduous deliberations would have been reduced significantly.

Understanding and applying the relevant law

438. Throughout the trial process, jurors are instructed on their role as ‘the tribunal of fact’. They are introduced to various legal concepts including the law applicable to the offences with which the accused is charged and the defences raised. They are told that the Crown must prove that the accused is guilty ‘beyond a reasonable doubt’. They are informed that it is the jury’s duty to apply the law to the facts of the case. In general, the Crown outlines the law at the start of the trial. There are closing addresses from both the prosecution and defence counsel. At the end of the hearing, the trial judge provides more detailed instructions about how the law relates to the facts of the case. In

addition to these instructions, jurors might receive further guidance in an opening address from defence counsel.

439. The primary set of instructions, however, is that of the trial judge at the end of the trial, usually formulated after consultation with counsel, and read out to the jury. Apart from these oral instructions, the jury might also receive a written document summarising the elements of the law for reference during deliberations. The jury is also informed that it can ask the judge to clarify directions during the course of deliberations. A trial judge is caught between the demands of formulating directions regarding legal concepts that a jury of laypersons can understand while adhering to strict doctrinal requirements to ensure that there is no basis for an appeal on the ground of inadequate or incorrect directions.¹³⁴

440. As is evident in the discussion of the process by which our juries reached their unanimous verdicts, some jurors reported that their jury's deliberations involved systematic application of the legal elements of the offence(s) charged as set out by the judge to the facts in evidence.

441. It appears that this process was particularly useful in trials involving multiple charges, alternative charges or alternative defences. In such trials, jurors related that the jury was initially divided over which charge or defence was supported by the evidence. Judicial directions provided a structure for deliberations and assisted in resolving differing interpretations of the weight of evidence.

We looked at all the evidence again, drew a chart on the board, put down the charges and worked our way through them. We didn't all agree at

134 This point was made to us in our some of our interviews with counsel.

first but we eventually agreed by working through the charges from top to bottom.

442. Jurors also remarked that, while they believed intuitively that the accused was guilty of a particular offence, they had to accept that there was insufficient evidence to prove that feeling. Their task was to put aside their emotions¹³⁵ and hunches¹³⁶ and focus solely on applying the legal elements to the evidence available and that was what they concentrated on doing.

I felt that everybody was looking for something to prove [the accused] guilty [of the higher charge] beyond a reasonable doubt. There were three sets of elements that had to be proven for [the three possible guilty verdicts]. We could find evidence that proved all the elements of the [one of the lesser verdicts].

443. It is clear that most jurors attempted to follow judicial instructions diligently. On occasions, however, jurors commented that they found the judicial directions confusing and, thus of little (if any) assistance in reaching a verdict. Some jurors spoke of the different ways in which members of their jury interpreted judicial instructions and the disagreements in deliberations that flowed from those multiple interpretations. The comments dealt with four main legal issues: manslaughter, proof 'beyond a reasonable doubt', deliberate disregard of judicial directions, and the 'tenor' of the judge's summing up. Jurors also remarked on several ancillary procedural issues — the availability of transcripts during deliberations, the purpose of note taking and the concept of 'facts in evidence' — where instructions were either unclear or lacking.

135 Jurors often stated that they found it difficult to reconcile their civic duty to serve as a juror with the reluctance they felt in judging a fellow citizen, particularly in making a finding that would lead to incarceration. This difficulty was often exacerbated when the accused resembled a juror's son, daughter, other family member or friend in terms of age or personal background.

136 Jurors referred to their 'hunches' most often in cases where the jury ultimately brought in a lesser verdict than they intuitively believed was warranted.

444. The jurors' observations on each of these issues will now be described separately, with accompanying references to relevant passages in the New Zealand Report.

Understanding the law: manslaughter

445. In 19 of the 48 trials in the New Zealand study, jurors said that they had difficulty understanding the legal elements of the offence and that '[s]ome of these problems involved an inadequate understanding of the distinction between murder and manslaughter...' ¹³⁷ Several respondents who served on different trials in our study made similar claims about their own or their fellow jurors' confusion, in the wake of counsel's or the trial judge's explanation of the distinction between murder and manslaughter (and, in one instance, between these two offences and other alternative charges laid).

446. Four jurors in our study remarked that they did not realise that manslaughter was an alternative — or, in one instance, the primary — charge until well into the trial. Two of these respondents served on the same trial. They both felt that, given their jury's extreme reluctance to find the accused guilty of murder, they might have given more consideration to the evidence that supported a manslaughter verdict had they known earlier that it was an option.

The jury was not told about the alternate verdict of manslaughter until late in the trial and it was a very big issue because the jurors didn't want to find [the accused] guilty of murder. We would have considered manslaughter more if we knew about it earlier.

447. The two other jurors who were confused about the manslaughter charges suggested that their confusion might have arisen because of the timing and the brevity of the

137 New Zealand Report, para 7.13.

instructions. The first of these jurors surmised that he did not comprehend that the accused was not charged with murder until half way through the trial because he was probably too distracted by the enormity of being empanelled to concentrate when the indictment was read out. He claimed that other jurors also shared this misapprehension. The second juror thought that if the legal elements of the alternative charges had been set out at the beginning of the trial rather than at the end of the trial, 'it would have been a great help in making sense of what evidence fitted in.'

448. These comments echo the findings of the New Zealand Report. They demonstrate that some of our respondent jurors did not understand the difference between murder and manslaughter, regardless of how carefully the judge and counsel formulated their oral presentations or written directions.

Understanding the law: proof 'beyond reasonable doubt'

449. One of the foundational concepts of our criminal justice system is that the Crown must prove that the accused is guilty 'beyond reasonable doubt'. Some of our respondent jurors remarked that at least one or more members of their jury disagreed about the meaning of the concept. The source of disagreement took one of two forms: (1) lack of guidance as to the meaning of proof 'beyond reasonable doubt', or (2) lack of juror consensus on the meaning, given each juror's individual interpretation of where the Crown's evidence fell along the reasonable-unreasonable continuum.

450. Common law precedent has determined that a trial judge should not attempt to elucidate the meaning of the phrase proof 'beyond reasonable doubt'. Instead, the jury should be left to interpret it according to common sense.¹³⁸ However, jurors are unlikely to

138 See eg. *Brown v R* (1913) 17 CLR 570, *Thomas v R* (1960) 102 CLR 584, *Dawson v R* (1961) 106 CLR 1, *Green v R* [1971] 126 CLR 28.

know anything about this restriction and it is apparently not explained to them when the standard of proof is addressed by counsel or by the trial judge.

We wanted a definition of reasonable doubt because the jurors didn't understand its limits, but the guidance from the judge wasn't really of any use.

451. Several juries sought assistance from the judge, asking her or him to clarify the meaning of proof 'beyond reasonable doubt'. When the judge declined to provide further explanation, the foreperson of one jury looked up the words in a dictionary at home and the jury used the dictionary definitions to inform their deliberations the following day.
452. The New Zealand jury study found that jurors in its sample assigned varying percentages to the level of proof required to assuage reasonable doubt: '...100 per cent, 95 per cent, 75 per cent, and even 50 percent. Occasionally this produced profound misunderstandings about the standard of proof'.¹³⁹ Our study elicited responses that also revealed a wide range of interpretations.
453. In addition, several respondents mentioned that they or a fellow juror determined that anything less than '100 per cent' proof of guilt meant that the Crown had not discharged its burden of proof. Interestingly, while several jurors plainly identified the 'strong circumstantial' evidence that influenced them to reach a conclusion in line with the rest of the jury, they spoke of lingering doubts about their verdict since the trial ended. As one of these jurors commented: 'It was never proved to me 100 per cent and I still think about it.'

139 New Zealand Report, para 7.16.

454. Based on their juries' difficulties in determining whether the evidence satisfied the standard of proof, two respondents suggested that a solution might be to adopt the Scottish criminal law verdict of 'insufficient evidence' rather than leaving a jury with only the options of conviction or outright acquittal.

Jurors disregarding judicial instructions

455. The New Zealand Report found that only a small number of jurors blatantly disregarded judicial instructions, particularly instructions regarding the implications of an accused either not answering police questioning or not giving evidence during the trial. Overall, it concluded that there was 'little evidence that juries were concerned to temper the rigidities of the law by applying their own "common sense" or by bringing to bear their own brand of justice'.¹⁴⁰

456. Our respondents made very few remarks about these issues. There was, however, some indication that several jurors in one case had a heated disagreement about adhering to the judge's instructions. One or more members of another jury may have consciously disregarded judicial instructions in the interests of 'justice'.

457. The first instance involved a judicial direction that the jury must not presume that the accused was guilty because he refused to give evidence in his own defence. Two jurors admitted that they thought it odd that the accused did not testify in his defence. They said that the jury discussed it and pronounced it 'weird'. However, both jurors were certain that this was only one element among many that proved to them that the accused was guilty. One of these jurors stated that eleven jurors took to task a fellow juror who openly declared that his conclusion that the accused was guilty was based solely on the fact that the accused did not give evidence.

140 New Zealand Report, para 7.11.

458. The second possible instance occurred in a trial in which the judge instructed the jury not to consider whether certain allegations raised about the victim were true, that they were only to consider whether the accused believed the allegations. One juror reported that the jury intentionally acted in contradiction of the judge's instructions: 'No one paid any attention to whether the accused believed the allegations: it was sufficient that the jury believed them... It was an issue of justice, not of law.' It is important to note, however, that this juror is relating his assumptions about the reasoning of the entire jury. Another respondent from this trial presented a different picture of his own reasoning and declined to offer any opinion about his fellow jurors' reasoning. This juror said that his conclusion about the accused's guilt was based on the strength of the evidence supporting the accused's defence, but he added that he was not sure whether the allegations about the victim's behaviour had influenced him subconsciously.

Tenor of judicial directions

459. The New Zealand Report contains the following statement:¹⁴¹

Overall, of the 312 jurors interviewed, only 92 (30 per cent) thought that the judge communicated his or her view of the appropriate verdict. In only four of the 48 trials did a majority of those interviewed agree that the judge favoured a particular verdict, and in only two of these trials was the judge's perceived preference overtly referred to or taken into account during deliberations.

460. As mentioned previously, we did not canvass this issue explicitly in our survey of jurors. But two respondents remarked that the judge's summing up seemed weighted in favour of a certain verdict.

141 New Zealand Report, para 7.27.

461. One respondent who raised this issue served on a comparatively straightforward case where the accused admitted committing the offending act but raised a defence to the specific offence charged. The juror said he was keen to hear the judge's summing up because he expected that it would provide 'a clear pointer regarding the legal issues. ... It was very good and made it pretty clear what [the judge] thought the right decision was.' The other juror, who served on an extremely complex circumstantial trial, observed of the judge's summing up, 'I thought that the judge's summing up hinted at guilt. ... I think that he may have overstepped the mark. A couple of other jurors talked about it and they also thought that he was hinting at guilt.' Defence counsel in the same case expressed similar reservations in rather stronger terms.

Availability of transcripts and the taking of notes by jurors

462. Jurors are provided with pens and notepads at the beginning of the trial. The judge generally directs the jurors that their notes should not be a verbatim record but may serve to remind them of the evidence given and the witnesses who appear over the course of the trial. Jurors are advised that it would be inappropriate for them to spend the entire trial with their heads down taking extensive notes because the demeanour of witnesses on the stand is as much a part of the evidence as the content of their testimony. Jurors are also instructed that they can ask questions at the end of the trial to clarify evidence or legal instructions and that they may ask the judge for a (full or partial) copy of the transcript to assist them in deliberations.

463. However, as noted in the New Zealand Report, jurors interpreted this combination of instructions in varying ways.¹⁴² The following discussion draws upon the range of interpretations

142 New Zealand Report, para 3.6.

that our respondents mentioned and the resultant confusion or frustration. Respondents spoke about the impact that the lack of a transcript of the proceedings had on deliberations, about the usefulness of jurors' notes and about the relationship between transcripts and notes in deliberations.

464. Section 55C of the *Jury Act 1977* (NSW) states:

A copy of all or any part of the transcript of evidence at trial or inquest may, at the request of the jury, be supplied to the members of the jury if the judge or coroner considers that it is appropriate and practicable to do so.

465. It appears that while jurors are told that they may request a transcript of proceedings for use in their deliberations, they are not informed, or they do not understand, that the judge may deny the request if he or she deems that providing the transcript would be inappropriate or impracticable. One of our respondents stated that he only took sketchy notes during the trial because he expected the transcript to be provided for deliberations. He observed that, had he known that a transcript would not be provided, he would have put more detail in his notes. Another respondent reported that he was so perplexed by the lack of a transcript to assist him make sense of the confusing presentation of the evidence at trial that, after the completion of the trial, he was prompted to research his 'rights as a juror. I looked up the Jury Act and found that we were entitled to transcripts of the case'. This juror's misinterpretation of the statutory provision illustrates that providing the jury with a copy of the statute might not actually clarify matters unless at least one juror is familiar with reading legislation.

466. Interpretation of the judge's caution that jurors should not only listen to witnesses but also observe them in court also produced misunderstanding. A juror told us that he and his fellow jury members felt that the judge had discouraged them from taking any notes whatsoever during the trial. It seems that this misapprehension of the judge's caution was compounded by the

fact that the jury was not provided with a transcript. The respondent submitted that jurors' notes would have aided deliberations because the jurors lacked consonant, let alone accurate, recall of the proceedings and they had little evidentiary material to consider.

467. The responses of jurors who served on trials in which no or few notes were taken differed significantly from those of jurors in trials where detailed notes were taken. Not only did jurors comment on whether notes aided or hindered deliberations but also they remarked on the relationship between notes taken and transcripts provided (or the lack thereof).

468. The zeal with which some jurors made their own record of proceedings led one juror to express exasperation that a fellow juror not only took 17 exercise books of notes, but also wanted to work through every book during deliberations. Two jurors from separate trials commented that inconsistencies between jurors' notes became a source of disagreement during deliberations.

Even though we all took our own notes throughout the trial, when we compared them they were often completely different accounts of what was on the record.

469. In one instance, the jury's request for a partial transcript of the proceedings of the six-week trial was denied and they could only rely on their notes. Reaching agreement during deliberations became difficult because when a juror argued a point that was based on their own notes, other jurors had not noted the same evidence or had accorded it lesser significance. The respondent felt that it was unrealistic to expect jurors to recall everything that had happened in the course of a six-week trial, or to take thorough notes for so many consecutive weeks, and that the partial transcript should have been provided.

470. Another form of inconsistency that arose for comment was between the jurors' notes of the proceedings and the official

transcript. One respondent said that he felt extremely frustrated when one of his fellow jurors was adamant that, where a discrepancy arose between her notes and the transcript, the transcript was wrong.

471. The concerns raised by these jurors are similar to the findings of the New Zealand Report. They suggest that jurors may lack a clear understanding of the purpose of taking notes and are not sure how any notes that they have taken relate to the transcript.

Comments on the jurors' role and jury service

Perception of jurors' role and how well that role was performed

472. After the jury is empanelled, the trial judge explains the roles of all parties involved in the process: that is, the judge, prosecution and defence counsel, witnesses, sheriff's officers and, of course, the jury. A standard instruction given is that the judge is 'the trier of law' and the jury is 'the trier of fact'. While the judge sets out the law applicable to the case, it is for the jury to determine which facts in evidence the Crown has proved beyond a reasonable doubt.

473. We asked jurors about their understanding of the nature of their role and how the jury operated in practice. Jurors offered a wide range of opinions. The predominant response was neutral: jurors simply recited what they could recall of the sheriff's officers' instructions, the video that they had seen before being empanelled, or the judge's opening and closing remarks. The responses generally included: the jury is 'the trier of fact'; the jury must decide case on the basis of the evidence presented in the courtroom; the jury should not be influenced by emotions or sympathy; and jurors should not discuss the case with anyone outside the jury room.

474. There were, however, six trials in which jurors expressed strong dissatisfaction with the explanation of their role and, in particular, the inadequacy of explanations about what a 'fact in evidence' is.

There was a... juror who didn't understand what was going on. I had a quiet private conversation with her and she obviously did not understand what were 'facts', what counted as evidence in the case. She thought that evidence was what she thought, not what was presented in court.

475. Four of five respondent jurors from one trial commented that problems arose because '[o]ur role was not explained in terms that we understood or retained. Jurors forgot almost immediately what the judge said about what constitutes evidence.' It appears that although this particular jury's deliberations were 'respectful and courteous' they became bogged down because a few jurors became fixated upon 'irrelevancies' that the majority thought were patently not facts in evidence. One of the respondents was embarrassed by the 'stupid questions' that the jury had to ask the judge in order to placate the most fixated juror. He proposed to us that 'there should be some evaluation of jurors before they are empanelled. An IQ test, perhaps.' Three respondents suggested that, given the high cost of holding trials, a half-day or full-day basic introduction to group decision-making and team-building processes would have been productive, as would a more thorough grounding in 'what a fact is and the process of sifting through evidence to ascertain facts'. A juror from another trial who had been bullied by her fellow jurors concluded that juries should be made up of 'professional' as well as 'amateur' jurors. The professionals would keep the amateurs focused on the relevant issues, assist them to understand the law and, thus, negate many sources of confusion and disagreement.

476. A further opinion expressed to us in one trial, corroborating findings recorded in the New Zealand Report,¹⁴³ was that the

143 See discussion in the New Zealand Report, paras 2.48–2.54, 6.17–6.34, 6.40–6.44.

foreperson chosen at the beginning of the trial was not the best available person for the job.

Our foreman wasn't great. I think that the foreperson selection process is poor. We chose our foreman because he was so outspoken and full of himself when we first went into the jury room. There was another young man who, it turned out, was a deep thinker and really reasoned out the case. He should have been the foreperson.

477. The recommendation of the New Zealand Report on this issue¹⁴⁴ is in fact that the selection of the foreperson should be postponed until a later stage in the trial, when the jurors have had the opportunity to get to know each other.
478. Decision-making ability — or a lack thereof — was a prevalent theme of juror responses. The perceived dearth of decision-making skills was variously attributed to the following factors: youth, old age, emotionality, (perceived) low IQ, the urge ‘to get out of there’, lack of interest, a desire to drag out the deliberations as long as possible because jury service pays more than social security benefits, insufficient education to understand complex evidence, and to jurors who were housewives and, thus, lacked problem-solving skills. One juror mentioned that he had been so disillusioned by his fellow jurors’ lack of negotiating skills, and by the sense that finally the jurors just wanted to ‘get back to their real lives’, that he felt compelled to admonish them ‘that we held people’s lives in our hands’.
479. Lack of life experience — due to a juror’s youth or having led a sheltered existence — was mentioned many times as an impediment to both understanding evidence and competent decision-making. This criticism arose most often in cases where the facts were particularly gruesome or the circumstances of the offence involved a relationship between the accused and the

144 New Zealand Report, para 2.54.

victim. Jurors expressed frustration that the inexperienced jurors could not distance themselves from the unpleasant details or call upon some experience of relationships to contextualise an accused's behaviour. Similarly, in cases involving complex charges or evidence some jurors commented that their fellow jurors' lack of education proved to be an obstacle in deliberations.

480. The reluctance to bring in a verdict that would entail a probable gaol sentence was a dilemma for many jurors. Sometimes the reluctance was the product of moral concerns. Several jurors from one trial reported that a fellow juror said he had strong moral objections to judging another person. Despite agreeing that there was overwhelming evidence supporting the ultimate verdict, the juror became entangled in a philosophical quandary about bringing in a verdict that would result in the accused being incarcerated. The juror became fixated upon the spiritual consequences that jurors who took an oath would take into account in judging a fellow human being, as opposed to the lack of such concerns for jurors who took an affirmation. More frequently, jurors proposed that the reluctance to bring in a verdict was the product of juror sympathy for the accused despite proven guilt because he or she reminded them of their son, their daughter or even their younger self. The younger the accused, the more torn jurors appeared to be about judging them for youthful over-reactions to the circumstances in which they had found themselves at the time of the offence and the 'waste of (a) life' that incarceration would entail.

481. Most of these complaints about other jurors could be attributed to the clash of personalities that 'naturally' arise from the necessarily idiosyncratic combination of twelve citizens randomly chosen from the electoral roll who are brought together through the empanelment process. However, some juror observations raise issues of potentially greater concern because they identify people who might have been ineligible to

serve as jurors. Pursuant to section 6(b) of the *Jury Act 1977* (NSW), certain people are ineligible to serve as jurors due to certain personal characteristics including being ‘unable to read or understand English’¹⁴⁵ or being ‘unable, because of sickness, infirmity or disability, to discharge the duties of a juror’.¹⁴⁶

482. In several cases, jurors claimed that one of their members had difficulty following the evidence in court because of poor English comprehension skills. One juror noted that, while a fellow juror was ‘assiduous’, her lack of comprehension of the evidence during deliberations was ‘a considerable hurdle and required enormous patience, something that was not always evident’.

483. Several jurors from one trial observed that one of their members told them that he could not take part in discussions during the trial — or in deliberations once they commenced — because he was suffering from continuing depression for which he had received medical treatment. The juror refused to participate in the jury’s decision-making because he felt incapable of making decisions about his own life, let alone about someone else’s. When the other jurors asked him why he had not sought exclusion from jury service at any stage prior to or during the empanelment process, he responded that he had not thought that his illness would effect his ability to serve. His fellow jurors encouraged him to ask to be excused from jury service during the trial, but he refused to do so and they reached their verdict without his participation.

484. In another trial, a juror said an elderly fellow juror’s hearing impairment sorely tested her patience.

[He] kept tapping me on the shoulder and asking what was being said. When we were being selected, the judge asked for anyone who had hearing

145 *Jury Act 1977* (NSW), s 6(b)(11).

146 *Jury Act 1977* (NSW), s 6(b)(12).

difficulties to stand up. This man either didn't admit that he couldn't hear or he didn't hear the judge say it.

General comments about the experience of jury service

485. For some respondents, jury service was a very positive experience. One said: 'We were all astonished to find ourselves in the driver's seat and we found the process very interesting.' They described their juries as courteous, respectful, articulate, cooperative, supportive, mindful not to dominate each other and committed to working through disagreements to the satisfaction of all members. Indeed, several juries bonded so well that they met regularly to socialise long after jury service had finished. Some jurors who served with 'complete strangers' found that they resided in the same neighbourhood, and they formed ongoing friendships.
486. For other jurors, the experience was less positive. Several jurors said that they hoped never to see their fellow jurors again. A juror who was annoyed by the lack of common sense displayed by some of his fellow jurors said, 'We were excused from jury service for eight years and I hope that Alzheimer's has set in by then so I don't have to serve again.' Other jurors said that they simply found either the facts of the case too disturbing or the deliberative process — even in cases where there was no domination or tension within the jury — extremely stressful. Some jurors claimed that they had genuinely feared that the accused's friends or family might try to harm them if they brought in a guilty verdict.
487. A few jurors also reported that problems arose in their personal or professional lives that caused additional stress during their jury service. Due to the demands of some personal problems, one juror had sought to be excused from jury service at the time he received his jury summons, and several times thereafter, but was not successful. He was very disappointed that he was forced

to serve because his personal problems worsened during the trial and he was concerned that he did not serve as effectively as he might otherwise have done. Indeed, other jurors on the same trial commented that he had problems focusing on the issues.

488. Several jurors suggested that it would have been helpful if some form of debriefing with a professional facilitator had been carried out immediately after the trial so that they could ask questions or work through unresolved concerns arising from the process or from the evidence. Some respondents had initially been certain that the verdicts they brought in were correct but had subsequently come to question that certainty. One juror stated that he had sought counselling to deal with his sense of guilt at having compromised with his fellow jurors to reach unanimity rather than following his gut instinct. Many other jurors reported that, after delivering their verdict, either the judge or a Sheriff's Officer or a solicitor involved in the trial gave them further details about the accused or the case, eg. the accused's prior convictions or evidence that was inadmissible in court. Some jurors found consolation in such information because it 'affirmed' the verdict they had reached. Where the extra information contradicted the verdict reached, some jurors said that they subsequently felt 'guilty' about their verdict, especially if they had been instrumental in swaying minority jurors to their view or if they had been so swayed by other jurors. Other jurors were able to rationalise that they could only decide the case on the evidence before them.

489. Most of the respondents who spoke about how emotional they had felt after delivering the verdict said that they had simply wanted to go home immediately. But several jurors suggested that formal debriefing of the entire jury might have provided a forum for individuals to work through any residual 'guilt' or uncertainty with the guidance of a professionally trained facilitator. A few jurors said that they had used the Salvation Army 'counselling' available immediately after the trial. In one

of the trials where this service was used, we were told that some jurors 'broke down after delivering the verdict'. It is not clear, however, how widely available this service is across New South Wales, and juror evaluation of it was mixed.

490. A number of jurors expressed surprise that, even though they felt fine during and immediately after the trial, they had experienced sleeplessness, nightmares, depression and phobias in subsequent months. These jurors suggested that a free counselling service should be made available for several months after the completion of a trial, in order to assist jurors who have a delayed reaction to the stress of jury service.¹⁴⁷ A juror who served in a 'very stressful' non-metropolitan trial commented that she kept having 'flashbacks' long after the trial was finished. She added that because she lived in a small town it was difficult to find anyone 'removed from the personalities involved' to whom she could 'unload'. She felt that debriefing after the trial might have defused some of her recurring concerns.

147 We note here that the Office of the Sheriff of NSW instituted a juror support service during 2000.

Concluding observations

Jury resistance to publicity

491. In Chapter 1 of this report, two opposing conceptions of the capacity of juries to resist media influence were described. A ‘thesis of juror susceptibility’ was contrasted with a ‘thesis of juror immunity’. It was not suggested that any participants in, or observers of, the process of jury trial seriously advocated the extreme version of either thesis. But each of them can usefully be regarded as an end-point on a spectrum of opinion about jurors’ reactions to media publicity.
492. The aim of our research was to obtain better guidance, within an inevitably limited range of investigation, as to where on this spectrum the truth really lies. We have tried to ascertain whether, and if so in what circumstances, New South Wales juries are likely to be susceptible to the influence of prejudicial publicity, and whether, and if so in what circumstances, they are likely to resist such influence. Our study has focused primarily on trials conducted in metropolitan Sydney, and the applicability of our conclusions should be read accordingly
493. It will be for the readers of this report to decide what overall assessment of jury performance within this range of trials is warranted by our findings. Their opinion as to whether the juries that we investigated did, on the whole, a good or a bad job in this regard will depend significantly on their view of what level of performance could legitimately be expected.

494. Our own assessment, for what it is worth, is a relatively positive one. Given that we selected high-profile trials for study, the number of them in which we thought it likely that the verdict was 'publicity-driven' rather than based on the evidence, was small. There were three, representing eight per cent of the 40 trials in which the jury was called on to deliver a verdict. In only one of these did the judge and counsel consider the verdict to be 'unsafe', and it was an acquittal. In another, the verdict may have been 'unsafe', in so far as defence counsel, though not prosecution counsel or the judge, held this view. On our assessment, this is the closest that any trial that we studied gets to being a wrongful conviction brought about by the influence of publicity.
495. In a further group of four trials (10 per cent) we thought it possible only, rather than likely, that the verdict was 'publicity-driven'. These include one verdict of guilty that was found on appeal to be 'unsafe' and three such verdicts that defence counsel considered to be 'unsafe'.
496. These four instances cast a further shadow on what would otherwise appear to be a good record of jury resistance to publicity. But our conclusion that the verdicts in these trials were possibly determined by publicity involves a good deal of speculation. In the case in which the conviction was overturned on appeal, the jury was quite successful in identifying the relevant issues, and nothing said to us by juror interviewees indicated that publicity played an overt role. Their decision, after protracted discussion and ultimately a compromise, to deliver a lesser verdict that was found on appeal to be 'unsafe' may have been wholly attributable to the difficulties associated with evaluating a considerable quantity of complex evidence. It was acknowledged professionally that the jury's task in this trial was a difficult one.
497. Moreover, in the other three cases, even if publicity did play a role in determining the verdict, defence counsel was alone

amongst the 'professional assessors' in thinking that the verdict was 'unsafe'. Neither the judge or prosecution counsel took this view. In two of these cases, the Court of Criminal Appeal rejected the defence submission that the verdict was not sustained by the evidence. In the third, this ground of appeal was not argued, and defence counsel, in speaking to us, observed that the Crown case was 'strong'.

498. If the resistance of New South Wales juries to publicity is in fact at a level that we discussed in the trials that we have studied, this is, we suggest, attributable chiefly to five causes. They are as follows:

- On account of legal restrictions on publicity and the considered use of remedial measures (notably, change of venue, as illustrated in Chapter 5), jurors are normally not exposed either (a) to pre-trial specific publicity that is both prejudicial in content and published close to the time of commencement of the trial, or (b) to in-trial publicity that is intensely prejudicial.
- Given these limits on the content and timing of publicity, jurors overall are not likely to recall pre-trial specific publicity, even in general terms, let alone in detail. This broad generalisation is a factor of major importance even though, as we point out in Chapter 3, there are significant exceptions to it.
- So far as in-trial publicity is concerned, jurors (as we point out in Chapter 3) are quite likely to track down at least the newspaper coverage. But they are generally not vulnerable to influence from biased or incomplete coverage because, as illustrated at the beginning of

Chapter 4, they frequently identify, and at times are quite scornful about, the bias and incompleteness.¹⁴⁸

- A significant proportion of the juries discharge their duty, spelled out to them by the judge, to scrutinise the evidence carefully and, if necessary, at length. As the first section of Chapter 7 illustrates, an important factor inducing them to do this is the requirement that their verdict be unanimous. Where this process is in fact carried out in their deliberations, any influence exerted by publicity on the perceptions of individual jurors is quite often overridden by contrary evidence, or (if the evidence suggests the same conclusion as the publicity) to be superseded as a factor determining the verdict. In this sense, as suggested in Chapter 4, they confront or ‘manage’ the publicity. On occasions, however, this potential capacity to deal successfully with the publicity is not realised because individual jurors or groups of jurors fall into conflict with each other, or are not interested in genuinely evaluating the evidence.
- Both in this context and elsewhere — as illustrated in the concluding passages of both Chapter 3 and Chapter 4 — jurors individually and collectively frequently attain a significant level of independence in both thought and action. While this may at times lead them into pursuing irrelevant lines of inquiry, it helps to prevent them simply caving in to media pressure.

499. If this is a broadly correct analysis of the factors contributing to what (in our view at least) was a relatively successful record of resistance to publicity amongst a group of New South Wales juries, it is especially important to note that 25 of the metropolitan trials that we studied constituted a significant

148 Following a recent seminar presentation of our provisional conclusions, a member of the audience commented that we had found jurors to be ‘media-savvy’. This seems to us to put the point well.

majority of the metropolitan trials that attracted a large or moderate quantity of specific prejudicial publicity during the period from mid-1997 to mid-2000. Our findings imply that, in relation to this particular aspect, at least, of criminal trial process in New South Wales, the system of jury trial is relatively successful.

500. If the foregoing analysis is correct, it also has significant implications for the topic that we next address. This is the question of what changes, if any, to the current laws and practices relating to prejudicial publicity might be thought worthy of consideration in the light of our findings.

Implications of our findings for the law's treatment of prejudicial publicity

501. In this section, the two categories of legal response to prejudicial publicity that have already been identified — restrictions on publicity and remedial measures — will be separately considered.

Restrictions on publicity

502. At first sight, our findings might suggest that the existing regime of publicity restrictions — notably those imposed under the *sub judice* rules — might safely be relaxed to a substantial extent. This would be on the footing that jurors apparently recall little of pre-trial publicity and take little notice of the content of in-trial publicity.

503. A closer examination of the issue, however, suggests a distinctly more cautious approach. The existing regime of publicity restrictions, under which our surveys were conducted, is an essential backdrop to our findings. If it were wholly or substantially dismantled, there are good reasons for believing

that our conclusions would be significantly less reliable, if not wholly unreliable.

504. So far as juror recall is concerned, this can be demonstrated as follows. In those of our trials where the accused was a 'household name' or was otherwise independently well known in the community, the level of juror recall was greater than normal. Reports of committal or other pre-trial proceedings, for instance, were more likely to be recalled. The underlying principle would seem to be that a pre-trial publication given only moderate prominence may well both be remembered by and exert influence on the jury if there is already a 'threshold' of publicity about the accused. The same applied to cases where the offence was committed in the region from which the jury was drawn: for example, when it occurred outside metropolitan Sydney and there was no change of venue. These are both situations in which pre-trial interest in the case is likely to be greater than normal amongst potential jurors.

505. If, due to substantial loosening of restrictions, the publicity in such cases, or indeed in cases outside these categories, could be prominent, continuing and strongly adverse to the accused, juror recall would quite likely extend to such publicity. If, in addition or instead, the loosening of restrictions allowed prejudicial material to be published right up to the time of trial, our general conclusions as to the low level of recall would again no longer apply.

506. Similarly, our conclusion that the juries in our study resisted influence from publicity moderately well was least applicable in the cases when the publicity known to them included an inadmissible and seriously prejudicial item of information, namely, the prior conviction or charging of the accused for a similar offence. Again, if existing restrictions on publicity were dismantled so as to permit the dissemination of this or other comparable material — for example, an allegation that the

accused had confessed — our investigation suggests that the resistance of juries to influence would be seriously compromised.

507. Accordingly, our findings do not, as we see it, provide of themselves an argument for wholly or substantially dismantling the existing restrictions on publicity. But in relation particularly to the content and operation of the *sub judice* doctrine they suggest that some moderate changes are at least worthy of consideration. We make five suggestions in this regard, then offer a brief comment about the other principal form of publicity restriction, namely, non-publication orders.

Specific suggestions regarding the *sub judice* doctrine

508. In the first place, our findings appear to lend support to a proposal, recently promulgated for public comment, that the basic criterion of *sub judice* liability should be reformulated so as to disentangle two separate questions. These are (a) whether there is a sufficient risk of the jury's encountering and recollecting the publication charged, and (b) whether there is a sufficient risk that, if it is encountered and recollected, it exerts an influence on them. The classic common law formulation, with its use of the concept of 'tendency' does not explicitly do this. But our research suggests that the answer to both of these questions differs significantly, and in different ways, as between pre-trial and in-trial publicity. In the NSW Law Reform Commission's Discussion Paper, *Contempt by Publication*, a reformulation along these lines is in fact proposed.¹⁴⁹

509. A second matter for consideration flows from the proposition that a pre-trial publication given only moderate prominence may well both be remembered by and exert influence on the jury if there is already a 'threshold' of publicity about the accused. The point to be made here is that a strand of current authority on *sub judice* liability is based on a contrary assumption. There are dicta

149 NSW Law Reform Commission, *Contempt by Publication* (Discussion Paper 43, 2000), paras 4.85–4.91.

to the effect that if a prejudicial publication does little more than to repeat material already published, the earlier publications may be taken to dilute its prejudicial impact.¹⁵⁰ The implication of our research is, by contrast, that the earlier publications may simply constitute the ‘threshold’. This makes it more, not less, likely that the later publication will be recalled by those who ultimately make up the jury and may exert influence on them.

510. The third observation prompted by our research relates to the contrasting situation of a single pre-trial publication that is both prominent and clearly prejudicial, though appearing some months, rather than merely weeks or days, before the anticipated date of trial. Our conclusion on this issue, though admittedly based on a very small number of cases, is to the effect that the jurors, when empanelled, are unlikely to recall such a publication. If this is correct, a court in *sub judice* contempt proceedings should be slow to find that the publication has a ‘real and definite tendency’ to prejudice the trial, so long as the accused has not been the subject of other significant publicity and the case is not a ‘local’ one.

511. Fourthly, some comments should be made about the impact of the Internet. As we point out in Chapter 3, prejudicial material on the World Wide Web may constitute a prime example of publicity initially appearing pre-trial but only encountered by a juror after he or she is empanelled.

512. The capacity of the Web to accumulate and store huge quantities of material accordingly gives rise to special problems. That they might arise has in fact been foreseen for some time.¹⁵¹ A web-

150 See eg. *Attorney General for New South Wales v John Fairfax & Sons Ltd & Bacon* (1985) 6 NSWLR 695 at 697 (Glass JA), 710–711 (McHugh JA). For commentary, see NSW Law Reform Commission, above n149, paras 4.105–4.108.

151 See eg. C Walker, ‘Fundamental Rights, Fair Trials and the New Audio-Visual Sector’ (1996) 59 *Modern Law Review* 517; M Chesterman, ‘OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America’ (1997) 45 *American Journal of Comparative Law* 109 at 142–143.

site may bring within the reach of jurors prejudicial material about numerous people facing trial — notably, but not exclusively, their prior convictions. Undoubtedly, much if not all of this material is on the public record, in a theoretical sense. But in many cases it may never have been reported in the traditional media or, because the relevant events occurred many years earlier, the reports will have faded from public memory.

513. For these reasons, the ‘open justice’ imperative to permit public reporting of trials resulting in criminal convictions has, up to now, been generally compatible with the ‘fair trial’ imperative to shield jurors in a later case from awareness of those convictions. This pragmatic reconciliation of two fundamental objectives of criminal justice administration may, however, be seriously jeopardised by web-sites on which the earlier and often low-profile information is revived, stored and made relatively easily accessible to anyone, including a juror, who wishes to seek it out.
514. An associated problem is illustrated by the examples of jurors consulting the Web that we came across. This is, that the existence of a site containing information which is prejudicial to a specific trial may not be known to anyone professionally engaged with the relevant trial, or indeed with the administration of criminal justice generally. Yet a juror, either through prior knowledge or by using search engines, may come across it.
515. It does not necessarily follow from these considerations that the traditional techniques for restricting prejudicial publicity should be abandoned in relation to material on a known Australian web-site. Indeed, the option of initiating, or at least threatening, contempt proceedings against those responsible for the web-site

may have to be considered.¹⁵² But in the long term, given the problems associated with discovering such material and, moreover, enforcing the *sub judice* rules in relation to material hosted overseas, a fundamentally different approach may have to be given consideration. What we have in mind falls within the topic of remedial measures and will be outlined below under that heading.

516. Fifth and finally under the present heading, a brief observation in relation to in-trial publicity is that unbalanced reporting of the proceedings, even with a manifest bias towards prosecution or defence, should not be too readily assumed to exert influence. Our research suggests that jurors often assess the reporting as inaccurate and/or incomplete. It is of course a different matter if in-trial publicity goes further than reporting, so as, for instance, to reveal a prior conviction or an alleged confession that has not been disclosed in court in the presence of the jury.

Non-publication orders

517. According to our findings, outlined in Chapter 3, on the topic of jury recall of pre-trial specific publicity, reports of committal proceedings or other pre-trial proceedings in a criminal matter are generally not remembered (if indeed they were ever encountered) by the jurors empanelled for the trial. Some important exceptions were identified, notably where the accused is independently well known in the community or where the offence tried was committed in the locality where the jurors reside. Subject to these exceptions, our findings suggest that a judicial officer presiding at pre-trial proceedings should not be unduly quick to assume that a non-publication order is necessary

152 Note however that, by virtue of s 91 of the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), these restrictions may not apply (until the Commonwealth Attorney General provides otherwise) to any material of which the Internet content host or (as the case may be) the Internet service provider was unaware. See J Eisenberg, 'Safely Out of Sight: The Impact of the New Online Content Legislation on Defamation Law' (2000) 6(1) *University of New South Wales Law Journal Forum* 23.

to prevent jurors at any forthcoming trial being exposed to reports of the proceedings that contain prejudicial material. They also provide grounds for arguing against any move to impose, on grounds of concern about prejudicial publicity, a general prohibition (such as exists in the United Kingdom) on the reporting of evidence tendered at committal proceedings.

518. As indicated in Chapter 5, the judge, in a few of the trials that we studied, requested media representatives to refrain from disclosing one or more specified items of information in reports relating to the case or the accused. The request was made out of concern that the jury might otherwise be exposed to prejudice and was, it seems, complied with. A reason prompting the judge to use the language of request rather than binding order was uncertainty as to the scope of judicial power to make such orders. These instances reinforce other judicial observations in recent years to the effect that the powers of judges and magistrates in this regard are insufficiently defined. This is in fact also the provisional conclusion of the NSW Law Reform Commission in its Discussion Paper, *Contempt by Publication*. The Paper contains proposals for remedying this defect in the law.¹⁵³

Remedial measures

519. Our findings may provide some guidance to a court when the use of one of the remedial measures described in Chapter 1 is under consideration. In the ensuing commentary, the principal recognised measures are considered in turn, then some further observations are made under the general heading of assisting juries to ‘manage’ publicity.

153 NSW Law Reform Commission, above n149, Chapter 10.

Delaying the start of a trial

520. Subject to important exceptions explained in Chapter 3, potential jurors often do not notice and remember pre-trial specific publicity: for example, reports of pre-trial proceedings. This suggests that relatively short delays to dissipate the effect of last-minute items of prejudicial publicity may well be effective.

Changing the venue

521. Our research suggests that pre-trial specific publicity is more likely to be recalled by a juror if it relates to an offence committed near his or her place of residence. This helps to justify the current practice of frequently shifting the venue for serious high-profile offences committed in rural areas to other appropriate locations. This is not invariably done, as it will often increase the cost of the trial and the inconvenience occasioned to witnesses.

522. Overall, our research supports the proposition that this particular measure is often beneficial from the point of view of obtaining a jury that is likely to recall less pre-trial publicity than one drawn from the locality where the offence was committed. But, as explained in Chapter 5, a ‘partial’ change of venue — that is, to a place where newspapers and broadcast programs emanating from the place of the offence are freely accessible — may not be sufficient for this purpose. It will reduce other risks associated with not changing the venue at all: for example, that jurors may be acquainted with trial participants, or may be put under pressure by the thought that after the trial they may have to justify the verdict to members of the local community. We found some evidence that in cases where no change of venue occurs, professional concerns about these matters are justified. But if there is in fact significant concern about pre-trial prejudicial publicity, a ‘full’ change of venue is the more desirable measure.

Instructing jurors to avoid contact with, or at least ignore the content of, publicity

523. We understand from our interviews with judges that some of them regularly enjoin jurors to avoid any contact with in-trial publicity. Others, however, accept that directly or indirectly the members of a jury are highly likely to become aware of how the trial is being reported. They therefore limit their instructions on this matter to emphasising that the jury should take no notice of the content of reports of the trial.
524. As indicated in Chapter 3, our research suggests that the former type of instruction is often ineffective, at least in relation to newspaper coverage of the trial. While some jurors obey it, others do not. It has in fact the potential to create confusion and conflict amongst jurors. They may be confused in so far as nothing appears to be done systematically to prevent them bringing copies of newspapers into the jury room. Conflict may arise between those jurors who abide by the instruction to avoid media coverage and those who openly disobey it within the jury room.
525. The latter instruction may, however, be valuable — perhaps more so than has been professionally realised — in so far as it may encourage jurors to trust their own first-hand, individual recollections of the evidence and argument. It may prompt, or at least reinforce, a reaction to media coverage of the trial that we found to be common — namely that it is inevitably incomplete and often inaccurate, if not demonstrably biased. Our research suggests that such a reaction assists a jury to ‘manage’ successfully any influence that might be exerted by prejudicial material in the media reports.
526. An instruction of this sort may, and it would seem often does, deal with the matter of generic publicity. Again, we would suggest that any observations by the judge that encourage the jury to exercise their own independent judgment about such material is likely to be beneficial. Such observations will of

course include the statement that the message conveyed by the publicity will generally bear no logical relation to the specific factual matters which the jury must determine.

Discharging a jury before verdict

527. There must of course be situations when the drastic measure of terminating a partly completed trial and discharging the jury on account of in-trial publicity appears unavoidable. This would be the case, for instance, when the publicity has revealed a relevant prior conviction or an alleged confession that has not been disclosed in the presence of the jury. But our research suggests that even if less immediately harmful media publicity is noticed by jurors, it may be treated with the same sort of scepticism as they often accord to purportedly factual reports of the proceedings. Examples would be a biased headline or 'slant' in a report of the proceedings, or a published adverse comment about the credibility of a witness or the accused. If this view of the matter is correct, a discharge would be unnecessary.

Questioning jurors as to whether they have encountered publicity

528. Members of a jury may be examined by the trial judge under section 55D of the *Jury Act 1977* (NSW) in order to ascertain whether they have come across publicity relating to the case. If this provision is invoked, the examination takes place under oath. Alternatively, an examination may occur at common law, without the jurors being sworn.¹⁵⁴

529. In considering whether to invoke section 55D (or for that matter to use the common law procedure), the judge faces a dilemma. Through doing so, he or she conveys the message to the jury that prejudicial publicity of some kind has been disseminated. The jurors may well all say under examination that they have not come across it. But as indicated at the end of Chapter 3, the

154 *R v Vollmer* [1996] 1 VR 95 at 138 (Southwell and McDonald JJ).

phenomenon of jurors carrying out their own independent investigations was encountered more than once in our survey. It was also encountered during the research for the New Zealand Report.¹⁵⁵ Accordingly, after being questioned by the judge, one or more members of the jury may well decide to track it down or at least find out more about it from a family member or friend.

530. This possibility, coupled with our general impression that jurors treat in-trial publicity with scepticism, suggests that section 55D, or the equivalent common law procedure, should not be invoked lightly, if at all.

Other measures which may assist juries to ‘manage’ publicity

531. Under this heading, we explore briefly some implications of the idea, outlined at the end of Chapter 4, that juries should be encouraged to ‘manage’ publicity. Given that some influence from publicity, specific and/or generic, is likely in high-profile trials, they should as far as possible be put in a position where they can overcome this influence by identifying and focusing their deliberations on the relevant issues raised in the trial. They should also have available the means of dealing appropriately with any particular problem arising from publicity.
532. In relation to ensuring that their deliberations address the correct issues, we would simply draw attention to those parts of Chapter 7 that describe practical difficulties reported to us by jurors. Juror uncertainties regarding the nature of their own role, the meaning of judicial directions on the law, the precise grounds of defence being put forward by the accused, their own access (if any) to transcripts and the taking of notes during the trial are all likely to impair their efforts to identify and deliberate on the relevant issues. Our own findings on these matters were incidental to the main purposes of our research, but they closely resemble findings, based on more detailed research, in the New Zealand

155 New Zealand Report, paras 7.41–7.45.

Report. The point we make here is simply that a jury which is well assisted in these ways is more likely, other things being equal, to deal satisfactorily with any influence exerted by publicity.

533. It is rather more difficult to give precise content to our suggestion that jurors should also have available the means of dealing appropriately with any particular problem arising from publicity. This suggestion is prompted by our being told that in five of the trials within our sample, jurors became aware, unbeknownst to the judge or to counsel, that the accused had previously been convicted of, or charged with, a similar offence. Our account of how the juries in three of these trials dealt with this knowledge appears at the end of Chapter 4.
534. A situation such as this may well arise more frequently in the future because, as was illustrated in three out of the group of five trials, the source of such information may be a site on the Internet. Sometimes a web-site which contains such information may be known to the judge and/or counsel. But as our examples show, it equally may not be known to them.
535. We were told that, in one of the three trials described at the end of Chapter 4, a member of the jury took positive steps to shield a fellow-juror from exposure to the information. She spoke of telling the judge what had happened if her fellow-jurors did not cooperate with her in this.
536. To draw any general conclusions from this one case, or even from the group of five cases, is obviously unwise. All that can be said is that this set of circumstances would seem to need attention. It may be that judicial directions designed to help a jury to deal with this problem, if it arises, could usefully be devised. A possible further step would be to provide explicitly the means whereby any juror who knew that other jurors had acquired such information could advise the judge accordingly, in order that the judge, and possibly also counsel, could address

the jury on its significance. But obviously a measure such as this is anything but problem-free.

Suggestions regarding further research

537. At several points in this report, we have indicated that the scope of our research into the impact of prejudicial publicity on juries was confined in a number of ways. Some topics which we investigated in only a limited fashion could, we believe, form the focus of valuable research in the future, conducted along similar lines to our own.
538. One of these topics is the impact of prejudicial publicity on jury trials held outside metropolitan Sydney. There were only six such trials (15 per cent) in our sample of 41 trials. This number is small for various reasons, notably that the identification of trials which attract significant publicity only in the locality of the alleged offence and the investigation of publicity produced in country towns are very labour-intensive exercises. The six non-metropolitan trials that we did investigate differed in significant respects from our 35 metropolitan trials. It would be unsafe to assume that any general conclusions from our research could apply equally to the two groups of trials.
539. A second possible topic for future research is the impact of generic publicity. We did not focus on any particular 'messages' conveyed by generic publicity, which generally relate to offences, or to alleged offenders, falling within identifiable categories. Studies that sought systematically to explore the impact of such publicity within one or more such categories of case could produce valuable conclusions.
540. It is possible also that because as many as 31 (77 per cent) of our 41 trials occurred in the Supreme Court, our conclusions should not be treated as generally applicable to District Court trials. We

did not, however, discern any noticeable differences of relevance between these two groups of trials.

541. An assumption underlying these suggestions is of course that the results of this study — with its focus on the impact of specific publicity on juries in metropolitan trials — are considered sufficiently valid to warrant replication of our approach by way of systematic post-trial interviews. That is not a matter on which we can legitimately pronounce. We must leave it to others to judge.

542. As we see it, however, our findings are reliable at least to the extent of exploding the myth — if indeed such a myth still has currency¹⁵⁶ — that Australian juries generally are mere puppets or playthings of the media. We would expect that further research along the lines suggested above would confirm this broad conclusion. But this is not to deny that even under the current regime of *sub judice* restrictions, prejudicial publicity may have significant impact on the perceptions of individual jurors. If those restrictions were wholly or substantially abolished, such publicity could, we consider, present a significant threat to the fairness of criminal trials.

543. As outlined in Chapter 7, we obtained from our interviews a clear impression that jurors by and large are highly committed to the task with which they are confronted. It is clear that they often experience negative feelings: for example, frustration at what they perceive to be deficiencies or uncooperative attitudes in their fellow-jurors, a sense of inadequacy, lack of understanding of what is expected of them, anxiety about the decision to be reached and, on occasions, severe distress when encountering the horrifying details of serious criminal offences. But their

156 It is argued by some American authors that the combined effect of traditional and new media publications is to render obsolete the notion of the dispassionate jury which approaches its task with a genuinely open mind. See eg. NN Minow and FH Cate, 'Who is an Impartial Juror in an Age of Mass Media?' (1991) 40 *American University Law Review* 631. But, as explained in Chapter 1, American juries operate in a context of almost complete media freedom.

commitment generally induces them to trust their own judgment ultimately, and at times to engage — perhaps not always wisely — in independent action when they consider that this might assist their search for the truth. They are often perceptive and witty about the processes of criminal trials and the performance of those participating in the trial. They generally find jury service to be a highly challenging experience but it is often very rewarding as well.

544. Obtaining these impressions of jurors and their responses to jury service was ancillary to our main purposes. But they provide support for one of the significant political justifications for continuing to use juries in our legal system. That is that the jury should be viewed as an important institution of participatory democracy.¹⁵⁷ It enables citizens to play an active role in a vital aspect of government, bringing lay values to bear within it, and simultaneously enriches their own understanding of society generally and of the legal system in particular. In so far as we found the juries to have had a significant degree of success in reaching verdicts that were professionally considered ‘safe’, our research provides support also for the primary legal justification for juries — namely that their processes of collective deliberation generally produce fair and reliable decisions.
545. Further empirical research into matters such as the level of individual juror commitment to jury decision-making and the difficulties experienced by jurors may, we believe, be beneficial. It is capable of serving at least two purposes. It can assist in establishing further what level of validity should be attributed to these political and legal justifications for continuing to use juries in criminal trials. It can bring to light information that is very valuable when measures are being considered for practical improvements of the system within which juries operate.

157 See eg. N Vidmar, ‘A Historical and Comparative Perspective on the Common Law Jury’ in N Vidmar (ed), *World Jury Systems* (Oxford University Press, Oxford, 2000) 1 at 7–13.

546. To draw conclusions from data such as we unearthed is not a straightforward exercise. Isolated interviews with jurors cannot reveal very much about likely patterns within the system as a whole. We would strongly emphasise the need for a consciously structured approach in any further research that is undertaken.

Appendix A

Juror Telephone Survey

Understanding of the case

It may be many months since you served as a juror and this first set of questions is designed to refresh your memory about the facts of the case.

- Q1.** To the best of your recollection, what charges were laid against the accused?
- Q2.** What were the main arguments of the defence?
- Q3.** Please describe the accused.
- Q4.** Please describe the victim.

Factors affecting verdict

In this second set of questions I will ask you what you remember about how you came to your own conclusion about the accused's guilt/innocence on all charges and how you think your fellow jurors reached their conclusions.

- Q5.** What factors influenced your conclusion about the accused's guilt/innocence?
- Q6.** Overall, which was the most important factor?
- Q7.** In your opinion, what factors influenced your fellow jurors' conclusions about the accused's guilt/innocence?
- Q8.** In your opinion, which was the most important factor?
- Q9.** In the process of deciding the verdict, were there any major points of disagreement among the jurors?

1 Yes **2** No [go to Q12]

Q10. Briefly, what were those disagreements?

Q11. How were the disagreements resolved?

Specific media publicity

This section of the interview is about media publicity that related specifically to the case. For example, media coverage that dealt explicitly with the alleged crime and/or the accused. We're interested in your recollection of any specific publicity that you came across either before the trial began or while it was in progress. There are no right or wrong answers, only your impressions of the amount and type of publicity.

Q12. Did you become aware of any media publicity specifically about the case before and/or during the trial?

- 1 Yes 2 No [go to Q22]

Q13. Did you become aware of that media publicity specifically about the case through ...

- 1 newspapers
- 2 television
- 3 radio
- 4 discussions with friends or colleagues
[If no #1–3 responses, go to Q22]
- 5 other jurors
[If no #1–3 responses, go to Q22]
- 6 other (specify)

Q14. To the best of your recollection, did you watch, hear or read this specific publicity...

- 1 More than 6 months before the trial
- 2 3–6 months before the trial
- 3 1 month before the trial
- 4 1–2 weeks before the trial
- 5 during the trial

Q15. Was this publicity ...

- 1 Mainly negative toward the accused person
- 2 Mainly positive
- 3 More or less neutral

Q16. Did the publicity include any of the following:

(a) The accused person's name

- 1 Yes 2 No 3 Don't know

(b) Information about the accused person

1 Yes (specify below)

* prior criminal conviction(s)

* bad character

* photo of accused person

* other _____

2 No

3 Don't know

(c) Details of the alleged offence or evidence linking the accused to the alleged offences

1 Yes (specify) _____

2 No

3 Don't know

Q17. What other information or opinions relevant to the case did the publicity convey?

Q18. To the best of your recollection, how much publicity specifically about the case did you read, hear or watch before or during the trial?

- 1 A lot of publicity
- 2 A moderate amount of publicity
- 3 A small amount of publicity

Q19. If you encountered more than one item of publicity, did any single item stand out in your mind?

- 1 Yes (specify) _____
- 2 No [go to Q22]

Q20. As far as you can remember, did this piece of publicity occur...

- 1 More than 6 months before the trial
- 2 3–6 months before the trial
- 3 1 month before the trial
- 4 1–2 weeks before the trial
- 5 during the trial

Q21. Overall, was this piece of publicity...

- 1 Mainly negative towards the accused
- 2 Mainly positive
- 3 More or less neutral

Q22. Was any of the media publicity specifically about the case discussed in the jury room?

- 1 Yes
- 2 No [go to Q24]

Q23. What was the discussion about?

Q24. Did you find it difficult to put the specific publicity about the case out of your mind?

1 Yes **2** No

Q25. Did the specific publicity make it difficult for you to assess the evidence impartially?

1 Yes **2** No

Q26. Did the specific publicity influence your conclusion about the appropriate verdict?

1 Yes **2** No

Q27. In what way did the publicity influence your conclusion?

Q28. Would you say that the media publicity specifically about the case was...

- 1** no influence at all on your conclusion about the appropriate verdict
- 2** a weak influence
- 3** a moderate influence
- 4** a strong influence

Q29. In your opinion, did other jurors find it difficult to put the media publicity specifically about the case out of their minds?

1 Yes **2** No

Q30. Do you think that the specific publicity made it difficult for other jurors to assess the evidence impartially?

1 Yes **2** No

Q31. In your opinion, did the specific publicity influence other jurors' conclusions about the appropriate verdict?

- 1 Yes 2 No

Q32. In what way did the publicity influence their conclusions?

Q33. Do you think that the specific publicity was

- 1 no influence at all on your fellow jurors' conclusions about the appropriate verdict
- 2 a weak influence
- 3 a moderate influence
- 4 a strong influence

Q34. Did the judge say or do anything about the specific media publicity?

- 1 Yes 2 No [go to Q37]

Q35. What did the judge say or do?

Q36. At what stage or stages of the trial did the judge address the issue of specific media publicity?

General media publicity

Now I would like to move away from specific publicity and ask you about general media publicity relating to similar crimes, offenders and victims. We're interested in your recollection of any general publicity that you came across either before the trial began or while it was in progress. Again, there are no right or wrong answers, only your impressions of the amount and type of publicity.

Q37. Before the trial had you ever watched, read or heard general media reports about a similar crime?

1 Yes 2 No [go to Q39]

Q38. What messages about that type of crime did those media reports convey?

Q39. Before the trial had you ever watched, read or heard general media reports about offenders similar to the accused?

1 Yes 2 No [go to Q41]

Q40. What messages about that type of offender did those media reports convey?

Q41. Before the trial had you ever watched, read or heard general media reports about similar victims?

1 Yes 2 No [go to Q43]

Q42. What messages about that type of victim did those media reports convey?

Q43. Was general media publicity about similar crimes, offenders or victims discussed in the jury room?

1 Yes 2 No [go to Q45]

Q44. What was the discussion about?

Q45. Did general media publicity about similar crimes, offenders or victims influence your conclusion about the appropriate verdict?

1 Yes 2 No [go to Q47]

Q46. In what way did that general media publicity influence your conclusion?

Q47. Was the general media publicity

- 1 no influence at all on your conclusion about the appropriate verdict
- 2 a weak influence
- 3 a moderate influence
- 4 a strong influence

Q48. In your opinion, did general media publicity about similar crimes, offenders or victims influence other jurors' conclusions about the appropriate verdict?

- 1 Yes 2 No [go to Q51]

Q49. In what way did the general media publicity about similar crimes, offenders or victims influence their conclusions?

Q50. Was the general media publicity

- 1 no influence at all on your fellow jurors' conclusions about the appropriate verdict
- 2 a weak influence
- 3 a moderate influence
- 4 a strong influence

Q51. Did the judge say or do anything about the general media publicity about similar crimes, offenders or victims?

- 1 Yes 2 No [go to Q53]

Q52. What did the judge say or do and at what stage of the trial?

Possible impact of media publicity revisited

Q53. At the beginning of the trial, did you form any opinion about whether the accused person was guilty or not guilty?

- 1 Yes 2 No [go to Q57]

Q54. At that stage, did you think that the accused person

- 1 definitely guilty
2 probably guilty
3 probably not guilty
4 definitely not guilty
5 other (please specify) _____

Q55. What led you to form that opinion early in the trial?

Q56. If opinion originally was [definitely/probably opposite of final verdict]: What made you change your opinion about the accused person's [guilt/innocence]?

Juror's role

This is the second last set of questions in the interview. The questions deal with what you recall to have been your role as a juror on this case.

Q57. Was your role as a juror explained to you?

- 1 Yes 2 No [go to Q59]

Q58. Who explained your role as a juror?

Q59. In light of the advice that you received and/or from what you already knew, what did you understand to be your role as a juror?

Juror's characteristics

In this last brief set of questions we are seeking general demographic information about jurors; eg. age, occupation. The answers to these questions will greatly enhance our understanding of the survey results. However, if you do not want to answer a particular question, please feel free to say so.

IDQ1. *[Respondent is]*

- 1 Female 2 Male

IDQ2. What was your residential postcode at the time of the trial?

IDQ3. To which of these age groups did you belong at the time of the trial?

- 1 18–25 years old
2 26–35 years old
3 36–45 years old
4 46–55 years old
5 56–65 years old
6 66 years old or older

IDQ4. What is the highest level of education you had achieved at the time of the trial?

- 1 Primary school
2 Leaving certificate (Year 10/Form 4)
3 High school certificate (Year 12/Form 6)
4 TAFE certificate/diploma
5 Undergraduate university degree
6 Postgraduate university degree
7 Other (please specify) _____

IDQ5. Were you employed at the time of the trial?

1 Yes 2 No [go to IDQ8]

IDQ6. Were you employed...

1 Full-time 2 Part-time

IDQ7. What was your occupation at the time of the trial?

IDQ8. To which of the following income groups (before tax) did you belong at the time of the trial?

- 1 \$25 000 or less per year
- 2 \$25 001–\$49 999 per year
- 3 \$50 000–\$99 999 per year
- 4 \$100 000 or more per year

IDQ9. Do you identify as belonging to any particular ethnic group?

- 1 Yes (specify) _____
- 2 No

Closing statement

That is the end of the survey. Thank you very much for assisting us today. As mentioned in our initial letter inviting you to take part in this project, would you be willing to participate in a follow-up interview?

No

Yes

Don't know

Contact details: _____

Please call to let us know if you decide you are willing to be included on a list of possible interview subjects.

Appendix B

Judge Survey

Jury characteristics

Q1. As far as you can recall, were there any features that were peculiar to either the jury selection process of the jurors themselves in this case?

Factors affecting verdict

Q2. In your view, what factors should have been important in determining the jury's verdict?

Q3. Could you form any impression as to whether the jury did in fact attach due weight to these factors? If so, what impression did you form?

Awareness of media publicity

Q4. At the time of the trial, were you aware of any media publicity relating specifically to the case or the accused before or during the trial?

Q5. If so, what do you remember about it?

Prompt the respondent to obtain his/her recollection of as many as possible of the following matters:

- (a) Was the publicity mainly negative, positive or neutral towards the accused?
- (b) What media were used (TV, radio, newspaper)?
- (c) Whether the publicity occurred before and/or during the trial [if before, how long before]?
- (d) Whether the media stories were long, of average length or short?
- (e) how prominent and how prolific was the publicity?

(f) What the publicity contained — in particular, did it include: the name of, or background information about, the accused; details of the crimes committed; material about crimes, offenders or victims similar to those involved in this case?

Q6. Were you aware of any relevant ‘generic’ publicity: ie. contemporaneous publicity which, without specifically mentioning the trial or the accused, expressed strong views about general issues directly raised in the trial (eg. publicity referring to the ‘scourge’ of hard drugs or paedophilia)?

Possible influence of media publicity

Q7. Did you take any remedial action in response to media publicity — eg. warning jurors about it, suggesting that contempt proceedings should be given consideration, etc?

Q8. If no to Q7, was media publicity nonetheless raised as an issue by you or by counsel during the trial?

Q9. If it was not raised, did you think that it should have been and, if so, why?

Q10. Did you think that the media publicity (specific and/or generic) may have had any effect on the verdict or on the jurors’ perception of the case?

Jurors’ role

Q11. Did the jury ask for help or advice during the trial?

Q12. In your opinion, how well did the jurors understand the nature of their role?

General comments on managing the impact of media publicity

- Q13.** In your view, how effective are trial management techniques for dealing with the possibility of undue influence being exerted by media publicity (eg. warnings to jurors, discharge jury, delay start of trial, change venue, etc)?
- Q14.** In your view, how effective are the legal restrictions on publicity (eg. *sub judice* rules) in preventing juries from being unduly influenced?
- Q15.** Are you ever concerned that a jury may be unduly influenced by generic publicity?

Appendix C

Lawyer Survey

Jury characteristics

Q1. As far as you can recall, were there any features that were peculiar to either the jury selection process of the jurors themselves in this case?

Factors affecting verdict

Q2. In your view, what factors should have been important in determining the jury's verdict?

Q3. Could you form any impression as to whether the jury did in fact attach due weight to these factors? If so, what impression did you form?

Awareness of media publicity

Q4. At the time of the trial, were you aware of any media publicity relating specifically to the case or the accused before or during the trial?

Q5. If so, what do you remember about it?

Prompt the respondent to obtain his/her recollection of as many as possible of the following matters:

- (a) Was the publicity mainly negative, positive or neutral towards the accused?
- (b) What media were used (TV, radio, newspaper)?
- (c) Whether the publicity occurred before and/or during the trial [if before, how long before]?
- (d) whether the media stories were long, of average length or short?
- (e) how prominent and how prolific was the publicity?

(f) What the publicity contained — in particular, did it include: the name of, or background information about, the accused; details of the crimes committed; material about crimes, offenders or victims similar to those involved in this case?

Q6. Were you aware of any relevant ‘generic’ publicity: ie. contemporaneous publicity which, without specifically mentioning the trial or the accused, expressed strong views about general issues directly raised in the trial (eg. publicity referring to the ‘scourge’ of hard drugs or paedophilia)?

Possible influence of media publicity

Q7. Did you seek to have any remedial action taken in response to media publicity — eg. ask the judge to warn jurors about it, suggesting that contempt proceedings should be given consideration, etc?

Q8. If yes to Q7, what did you do and when? Was any remedial action in fact taken? If so, how effective do you think this remedial action was?

Q9. If no to Q7, why did you decide not to raise the issue of media publicity?

Q10. Did you think that the media publicity (specific and/or generic) may have had any effect on the verdict or on the juror’s perception of the case?

Jurors’ role

Q11. Did the jury ask for help or advice during the trial?

Q12. In your opinion, how well did the jurors understand the nature of their role?

General comments on managing the impact of media publicity

Q13. In your view, how effective are trial management techniques for dealing with the possibility of undue influence being exerted by media publicity (eg. warnings to jurors, discharge jury, delay start of trial, change venue, etc)?

Q14. In your view, how effective are the legal restrictions on publicity (eg. *sub judice* rules) in preventing juries from being unduly influenced?

Q15. Are you ever concerned that a jury may be unduly influenced by generic publicity?

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