

**Inquiry into the *Criminal Procedure*
*Amendment (Trial by Judge Alone) Bill 2017***

Supplementary submission to the Western Australian
Legislative Council Standing Committee on Legislation

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au

Introduction

1. These submissions are made in addition to the Australian Lawyers Alliance ('ALA') submission to the Inquiry into the *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017*. The legislation proposed by the aforesaid bill proposes that an accused should have a right to a trial by judge alone unless the Court determines that it is not in the interests of justice to do so.
2. In addition to the relevant arguments put forward by the ALA in their original submissions, there are several additional factors pertaining to the prevalence of internet research/social media, the rise of 'call-out culture' exacerbated by the use of social media, and, the ease at which information/misinformation is now available to the wider community.
3. The abovementioned factors provide an additional risk to an accused person where a trial by judge alone is refused and the possibility of a fair trial is significantly diminished.

The case for trial by judge alone

4. In a society that is dominated by online information technology, and an inability of lawmakers to effectively regulate the publishing of articles and information relating to an accused person, a trial by judge alone seeks to rectify these matters which can result in an unfair trial.

Internet research/social media

5. Social media is defined as a 'group of internet-based applications that build on the ideological and technological foundations of the worldwide web which allows the creation and exchange of user-generated content'.² The Honourable Tom Bathurst CJ has stated that social media content is not only consumed by its users, but is created and distributed by them.³
6. Internet research/social media use by jurors can damage the integrity of the criminal trial process, and further inhibit the ability of the Courts to adequately prevent prejudicial content

² Andreas M Kaplan and Michael Haenlein, 'Users of the world, unite! The challenges and opportunities of social media' (2010) 53(1) *Business Horizons* 61.

³ Thomas F Bathurst CJ, 'Social Media: The End of Civilization?' The Warrane Lecture, University of New South Wales, 21 November 2012 7.

from poisoning the minds of the jurors. At the beginning of all criminal trials, an unequivocal warning should be issued to the jury, that they should not discuss the case with anyone outside their own number.⁴ If a juror speaks to an individual whose thoughts and comments may influence the judgment of a juror and the outcome of a case, it would have happened in the absence of the Prosecution, Defence and trial Judge, without any knowledge of same being known. No party would be able to call evidence to deal with the point or direct arguments on the particular issue.⁵

7. Social media provides the opportunity for anyone to publish information/misinformation or an opinion. The ability to publish is therefore readily available to those who do not have a professional background in respect of the matters that are communicating, and the information being provided is not fact-checked by anyone. It is further unlikely that an individual that is posting the content is aware of the legal constraints sub judice contempt places upon oneself. This results in an additional likelihood that sub judice contempt will be committed via social media, rather than through traditional media outlets.⁶
8. The use of social media by jurors to conduct their own enquiries into aspects of the case is well documented. In 2014, a Queensland murder trial was aborted on its tenth day due to a juror conducting research on Facebook to learn more about the accused and his alleged victim.⁷ In 2016, a jury for a criminal trial was discharged after two jurors googled the names and background of the accused.⁸
9. The primary issue with the use of internet research/social media and its prevalence in influencing the minds of a jury, is that its use is difficult to detect. Except for any formal admission by a juror concerning to the use of internet research/social media during a trial,

⁴ *R v Karakaya* [2005] Cr App R 5 at [25].

⁵ *Ibid.*

⁶ Andrew Heslop, 'Ignorance Isn't a Defence Against Sub Judice'
<<http://www.abc.net.au/unleashed/4285856.html>>

⁷ 'Social Media and its Impact on Trials' (2018) < <https://lawcpd.com.au/blog/social-media-and-its-impact-trials/>>

⁸ *Registrar of the Supreme Court of South Australia v S* [2016] SASC 93

there is little a Court can do to recognise when a juror has taken it upon themselves to conduct further research.

10. The use of an internet search on legal terms or trial-related information is a significant area of concern which cannot be mitigated by a direction.⁹ By simply accessing social network profiles, jurors are at risk of being exposed to potentially prejudicial news, blog posts or opinions posted by other users.¹⁰ A US study claims that jurors' communication over any social media site leaves open the possibility of an unsolicited response by other users which potentially could highlight information which was purposely excluded at trial, or give rise to opinions on the outcome of a trial by a person that has not viewed the evidence.¹¹
11. Even if a juror may not access social media for the purpose of soliciting further information regarding an ongoing trial, simply accessing the internet/social media for non-news purposes can expose jurors to potentially prejudicial information appearing in their newsfeed/content.
12. The increasing predominance of social media can no longer be ignored as a vital source of information for its users. It is estimated that 88% of internet users have a social media profile,¹² with 15 million Australians having an active Facebook profile, 9 million Australians having an Instagram profile, and 4.7 million Australians having a Twitter profile.

United Kingdom study (2010)

13. In 2010, a study was conducted in the UK with 643 jurors from 62 trials.¹³ Each juror was asked, inter alia, about accessing information relevant to the trial on the internet. The jurors were selected from trials which were considered standard and high profile, depending on the length and seriousness of the trial, as well as the media coverage that covered each trial. Of

⁹ Douglas L. Keene and Rita R Handrich, 'Online and Wired for Justice: Why Jurors Turn to the Internet (the 'Google Mistrial') (2009) 21(4) *The Jury Expert* 14.

¹⁰ Kerstin Braun, 'Yesterday is History, Tomorrow is a Mystery – The Fate of the Australian Jury System in the Age of Social Media Dependency' (2017) 40(4) *UNSW Law Journal*.

¹¹ Marcy Zora, 'The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights' (2012) *University of Illinois Law Review*.

¹² Yellow, *Yellow Social Media Report 2018, Part one – Consumers* (Report, June 2018).

¹³ Cheryl Thomas, 'Are Juries Fair?' (Research Paper No 1/10, Ministry of Justice, February 2010)

the jurors who served on high profile trials, 38% admitted they came across material online that was relevant to the trial they were sitting in. In terms of the circumstances in which this occurred, 26% admitted that they merely came across material online relevant to the trial, and 12% admitted to actively seeking out such information. In contrast, instances of this occurring by jurors serving on standard trials was lower, with only 5% admitting to actively seeking out such information.

14. It should be noted that this conduct was expressly prohibited by the trial Judge. As jurors were afforded anonymity in the survey, and the option to admit to the less serious breach of only viewing relevant information rather than actively seeking such, it could be argued that this number only reflects the minimum number of jurors who engaged in such conduct.

United States Twitter study (2010)

15. In 2010, Reuters Legal conducted a review of the social media platform 'Twitter' over a three-week period. The review monitored tweets which included the term 'jury duty' as a relevant hashtag, a hashtag being the basis of the sites search function.¹⁴ Although a large portion of updates appeared to be complaints of having to serve on jury duty, which were not seen as prejudicial, there was a significant number which included statements regarding an accused person's guilt or innocence. One status update contained the following, 'Jury duty is a blow, I've already made up my mind. He's guilty. LOL'.¹⁵
16. It should be noted that these two studies were conducted in 2010. The prevalence of social media since this time has not only increased, but the average citizen's ability to access such sites through advanced smart phones and internet-abled devices has also increased markedly.

Australian Twitter study 2014

17. In 2014, a case study was undertaken in relation to the high-profile Queensland murder trial of *R v Baden-Clay* [2014] QSC 154. An automated search was conducted on Australian Twitter accounts. Tweets posted were classified by the prejudicial content that they contained. The

¹⁴ Paula Hannaford-Agor, David Rottman and Nicole Waters, *Juror and Jury Use of New Media: A Baseline Exploration* (Report, National Center for State Courts for the Executive Session for the State Court Leaders in the 21st Century, 2012).

¹⁵ *Ibid* 2.

study showed that tweeting activity was highest in the lead up to the verdict, with several other high-volume periods taking place when key witnesses were giving evidence and during Counsel's closing addresses.¹⁶

18. It was found that 65% of the status updates were posted by 'professional journalists', with the remaining 35% posted by other users. Of the 33,067 tweets studied, it was identified that 5–7% contained prejudicial information.¹⁷ The prevalence of prejudicial material was more common in the tweets of users who were not professional journalists, making up 86% of prejudicial tweets. The analysis also found that of the sample tweets, a distinct trend towards the acceptance of the prosecution case theory was evident, resulting in a discourse that was biased towards the Prosecution.¹⁸

19. It is accepted that it is not possible to ascertain any clear and comprehensive data from the body of research that exists to date, so as to determine the prevalence of jurors' use of internet and social media in Australia.¹⁹ While it has been suggested that juror misconduct of this kind is rare, accordingly, the coverage involved with stories of this conduct will usually saturate the media, giving an impression that the frequency of such misconduct is far greater than in reality.²⁰

20. We submit that even though the detection of juror misconduct of this kind is rare, this does not necessarily mean that such misconduct is, in fact itself, uncommon. In a survey conducted of federal district court Judges in the US, to assess the frequency with which jurors use social media to communicate during trials and deliberations,²¹ the responding Judges were in agreeance in acknowledging the difficulty in detecting juror misconduct relating to social

¹⁶ Rachel Hews and Nicolas Suzor, 'Scum of the Earth': An Analysis of Prejudicial Twitter Conversation During the Baden-Clay Murder Trial' (2017) 40(4) *University of New South Wales Law Journal* 1604.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Kerstin Braun, 'Yesterday is History, Tomorrow is Mystery – The Fate of the Australian Jury System in the Age of Social media Dependency' (2017) 40(4) *University of New South Wales Law Journal* 1634.

²⁰ Patrick C Brayer, 'The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation' (2016) 30 *Notre Dame Journal of Law, Ethics and Public Policy Online* 25.

²¹ Meghan Dunn, *Jurors' Use of Social Media During Trials and Deliberations* (A Report to the Judicial Conference Committee on Court Administration and case Management, Federal Judicial Center, 22 November 2011)

media, and they would have to rely on fellow jurors to bring it to their attention.²² It was further conceded that they would have no way of knowing if jurors were using social media for inappropriate ancillary purposes. This indicates that juror misconduct of this scope is under-reported to some extent, and that the reported cases only represent the bare minimum cases of misconduct of this kind, with any number of instances remaining undiscovered.

Jurors accessing information

21. The use of internet research/social media can be an efficient means for wayward jurors to purposely gather information, however, the more likely use of social media for entertainment purposes could also result in misconduct. A by-product of social media use is passive news consumption, whereby a user will access a social media platform and inadvertently view relevant news articles that appear on their newsfeed. While in high-profile trials this is far more expected, a resurgence in the reporting of the criminal process in smaller jurisdictions through the means of predominantly online publishing has surfaced in recent years.²³
22. Despite the obvious issues involved with the mass publishing of information online, there is relatively little that can be done to determine the source of such material, including its accuracy and reliability. Further to this, the possibility of material being published online by an accused, which is targeted to interfere with the trial process, is not out of the question.²⁴
23. One of the more recent high-profile decisions in *Hughes v R* [2015] NSWCCA 330 emphasised the potential influence of social media to focus public bias and prejudice in a targeted fashion. Counsel for Hughes' rightly described the online vilification of Hughes through the use of social media as 'poisoning the well'.²⁵ One post relating to the matter stated 'hang the pedo' which received more than 220,000 'likes' (post engagements) alone.²⁶ It was further divulged that the material included comments by one of the complainants using a pseudonym so that she

²² *Ibid* 4.

²³ Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40 *Monash Law Review* 45.

²⁴ Peter Lowe, 'Problems Faced by Modern Juries' (2012) (Winter) *Bar News: journal of the NSW Bar Association* 46.

²⁵ *Hughes v R* [2015] NSWCCA 330.

²⁶ Stephanie Gardiner, 'Hey Dad! Actor Robert Hughes' trial unfair due to 'putrid' social media: appeal told' *The Sydney Morning Herald* (online, 28 September 2015).

could not be identified.²⁷ Despite the appeal being dismissed and this decision later being affirmed in the High Court, this matter demonstrates an instance of ‘trial by social media’ whereby the community at large will have a predetermined view of the outcome prior to a trial even commencing.

24. Of course, searches on Google are capable of manipulation. We know that individuals with the financial resources have been able to make search results favourable to themselves appear on earlier pages, whilst pushing results unfavourable to themselves onto the latter pages.

25. In recent years, a number of lawyers in Western Australia have been told by members of the community that have previously sat on a jury, that they had conducted some form of internet research on an accused or witness during the trial, and if they had not done so themselves, they knew that one of their fellow jurors had done so.



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²⁷ *Ibid.*