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# MEDIATION AND ITS USES IN THE LEGAL PROCESS

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## Introduction

The universal presence of conflict is indisputable. Conflict forms part of the human condition. Conflicts that are communicated are called disputes. There are different ways of dealing with disputes. Traditionally, the Australian legal system’s approach relied on court-based processes and a ‘win/lose’ or distributive model. Over the last few decades, integrative, collaborative, ‘win/win’ paradigms of dispute resolution have gained traction in most Australian jurisdictions. Theoretically, an essential feature of non-determinative processes is a collaborative, problem-solving dynamic between stakeholders. This article considers one such non-adversarial approach, mediation, and its uses in the Australian legal process. The article focuses on two applications of mediation, that is, family dispute resolution and civil disputes in the Magistrates’ Court.

## Traditional justice

The model of justice based on legal rights, entitlements and remedies, the adversarial process, is enshrined in the Australian Constitution. The court system is based on the rule of law and principles of natural justice. The paradigm encourages a ‘sporting theory’ of justice that has pervaded the culture of both disputing and lawyering within the family law and the criminal and civil justice systems in Australia. Traditionally, the parties to a dispute engage in a competitive struggle to persuade a court or tribunal about the merits of their position. The neutral arbiter then makes a determination based on the evidence presented in the context of procedural requirements and the doctrine of precedent. The parties to the dispute are bound by the decision that is externally imposed upon them. The outcome may define obligations, liabilities, and compensation. Our courts are open and public. The Australian common law system is highly technical, professionalised, and complex. Legally trained personnel are its gatekeepers.

## Transforming justice

Although the court system has long been the method of dispute resolution in Australia, alternate ways of dealing with conflict, outside the court system, have been described since biblical times. What we now label as alternative dispute resolution (ADR) has for a long time been the dominant method of resolving disputes worldwide, originating as a tribal customary method of resolving conflict. ADR is ‘an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’. ADR processes are used in a variety of contexts: community dispute resolution; family mediation services; courts and tribunals; statutory agencies; industry schemes; public policy dispute resolution; commercial ADR; and internal organisation ADR.

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Mediation is a form of ADR. It is a process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.

Mediators facilitate discussions and negotiations between disputants. Mediators control the process but the parties have responsibility for the process. Mediators encourage informal, flexible, respectful and cordial discussions between the parties in a private and confidential environment. Unlike judges, mediators do not make decisions or impose solutions on disputants.

Why change?

Over the last twenty years, dissatisfaction with the adjudication model has been voiced by many, including litigants, legal practitioners, the judiciary, government agencies and policy makers. Determinative processes are increasingly criticised for their associated costs, stress, delays and unsatisfactory results. Although courts may determine legally satisfactory outcomes, critics point to the narrowness of court determinations, where a range of interests including relationship matters, are not taken into account. Growing criticisms have led to the emergence and rapid rise of ADR. Non-determinative processes based on collaborative problem solving models of justice have either been grafted onto mainstream adjudicative methods, or are stand-alone replacements for adversarial processes in many jurisdictions. There is now a coexistence of both determinative and non-determinative processes within the Australian legal system.

Mediation

The last two decades have witnessed the rapid and sustained growth and institutionalisation of ADR, and mediation in particular. The entrenched and accepted nature of ADR processes such as mediation within Australian courts is indisputable leading to the ‘vanishing trial’ phenomenon. Nowadays, disputants are diverted from determinative processes to mediation.

Mediation arose in the context of community and neighbourhood disputes, outside formal justice processes, and away from courts and litigation. Whilst mediation developed as a user-friendly, informal, voluntary, co-operative model for dispute resolution, growing social trends, including no-fault divorce and different forms of family relationships rendered existing legal frameworks unsatisfactory forums to deal with social constructs of many disputes. Boule adopts a useful ‘models’ framework defining various mediation practices. He describes four genres, which are settlement, facilitative, transformative and evaluative. The wide ranging application of mediation fosters ‘diversity’ in practice, allowing for wide discretion to be exercised by mediators.

The rise of mediation confirms a ‘deep disenchantment with the traditional, confrontational techniques that are inherent in the common law adversarial system’. Some attribute the ascendancy of mediation to its powerful characteristic of addressing the human condition – it’s ‘satisfaction story’.

Student activities

5. Define ADR and give two examples of typical disputes that may use ADR.
6. What occurs during the mediation process?
7. Explain how mediation differs from judicial-based resolution.
8. Why do you think there has been a growth in non-determinative processes based on collaborative problem solving models of justice?

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5 Joe Harman ‘From Alternative to Primary Dispute Resolution: The pivotal role of mediation in (and in avoiding) litigation’ paper presented at National Mediation Conference Melbourne Australia 2014.
6 See David Spencer ‘The Phenomenon of the Vanishing Civil Trial’ (2005) 8 (2) ADR Bulletin 1, 2.
7 Joe Harman ‘From Alternative to Primary Dispute Resolution: The pivotal role of mediation in (and in avoiding) litigation’ paper presented at National mediation Conference Melbourne Australia 2014.
13 Arie Freiberg, ‘Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penologial
Processes include court connected mediation in the Magistrates’ Court and Family Dispute Resolution (FDR)\(^5\) which is mediation translated into a specific family law context\(^6\). These two mediation processes and their connection to the legal system are discussed below.

**Mediation in the legal process**

The civil claims mediation program (the Program) of the Dispute Settlement Centre of Victoria (DSCV), is a free dispute resolution service funded by the Victorian Government. It provides mediation services at several Magistrates’ Courts in metropolitan Melbourne and Victorian regional locations, as well as training and accrediting mediators to national standards\(^7\).

Case management results are positive. The number of matters going to trial has reduced, thereby decreasing court waiting lists. The Program boasts an 85 per cent resolution statistic, meaning that the litigants reach agreement during mediation. The matter is not set down for trial and does not proceed to a hearing before the Magistrates’ Court\(^8\).

The Program is branded ‘facilitative’. However, anecdotal evidence suggests that the practice model closely resembles the settlement mediation paradigm described by Boulle\(^9\). Mediators encourage parties to compromise by engaging in ‘incremental bargaining’\(^10\). The shadow of the law, including the exercise of wide judicial discretion in decision making\(^11\) is often used as a mediator tool to encourage parties to settle. Mediators often refer to the expense and vagaries of contested hearings to promote agreement.

The second example is FDR which acts as an entry point to the Family Law system for parenting matters\(^12\).

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\(^5\) See Section 10F of the Family Law Act 1975 (Cth) (FLA) defines FDR as “a process (other than a judicial process)...in which a Family Dispute Resolution Practitioner helps people to resolve some or all of their disputes with each other; and in which the practitioner is independent of all of the parties involved in the process”.

\(^6\) Tania Sourdin, Alternative Dispute Resolution 5th ed 2016

\(^7\) See http://www.disputes.vic.gov.au/about-us

\(^8\) See https://intranet.disputes.vic.gov.au/programs-and-projects/magistrates-court-civil-program


\(^10\) Adele Carr ‘Broadening the traditional use of mediation to resolve interlocutory issues arising in matters before the courts’ (2016) 27 Australasian Dispute Resolution Journal 10.


\(^12\) FDR operates separately from and independently to the Family Court and Federal Circuit Court.

Mediation is a term that covers a range of practices\(^23\). Despite the different process characteristics inherent in various models, Boulle states that there is a ‘standard mediation process’\(^24\). Further, mediation frameworks are often ‘aspirational’\(^25\). They seek to mimic the classic model of mediation. Yet, the reality of practice does not always match with purist desires.

Both processes focus on ‘managing the docket’ because case managements drives much of the court annexed efficiency agenda\(^26\). Court back logs are assisted by matters being settled through mediation before a hearing\(^27\). The approaches also value the needs and interests of people and endeavour to repair relationships and prevent conflict, rather than emphasise who is right or wrong\(^28\). They seek to promote a consensus based approach\(^29\), aspiring to encourage open and respectful communication\(^30\) and striving to achieve ‘connection rather than separation’\(^31\). Both processes ‘are built on a premise that seeks to harness the ‘rights plus’ potential of law and law’s inherent ability to act as an agent for constructive change, both for individuals and the community\(^32\).

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\(^27\) This position has been judicially endorsed, see the joint judgment in Aon Risk Services Australia v Australian National University (2009) 258 ALR 14

\(^28\) Adele Carr ‘Broadening the traditional use of mediation to resolve interlocutory issues arising in matters before the courts’ (2016)


\(^31\) http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm


However, the use of mediation in the legal process presents a range of thorny issues. Several of these are identified below.

**Conundrums**

First, how can mediators honestly maintain that the process they are conducting is ‘mediation’ when that process deviates from classical repetitions of mediation? Second, how can mediators come to terms with deficiencies in the model of mediation that they practice?

A fundamental tension that may arise for mediators in the civil claims mediation program is whether they are conducting mediation at all. Bush and Folger categorise the civil claims program process as a ‘settlement conference’ which, in their view, compromises a ‘central and supreme’ value of mediation that is self-determination.

Similar issues may arise in FDR practice where a facilitative and therapeutic framework focuses on a strongly didactic approach emphasising children’s best interests. This approach can however, shift into a settlement focus. Processes are subject to the skill and discretion of the individual practitioner. If one views mediator discretion as being beneficial because it is useful in targeting party interests, how can risks, such as those associated with family violence, be mitigated?

Further conundrums arise regarding private and confidential justice. FDR processes are confidential within limits. Similarly, civil mediations are conducted confidentially, as far as the law allows. Confidentiality has long been both a hallmark and also a perceived positive of mediation processes. Parties are more likely to uncover interests by full and frank disclosure if they have no concerns about confidentiality ‘in the room’.

If party expectations are not met, the integrity of the process will most certainly be jeopardised. Mediator standards generally require mediators to maintain the confidentiality of the process, as required by the parties. This notwithstanding, the extent and nature of confidentiality in mediations is somewhat unresolved.

As FDR occurs within the private sphere and in a community setting, it is often not open to scrutiny or review. FDR practitioners may have concerns about the information provided in FDR that is not disclosed within any possible subsequent legal processes. This has given rise to challenges around confidentiality and potential disclosure around risk.

Altobelli and Bryant present confidentiality as a serious ethical concern for FDR practitioners for several reasons. First, existing confidentiality rules may not serve the child. Further, tensions arise between maintaining confidentiality in FDR and allowing the Court to have all available evidence, especially in cases of family violence and abuse.

**Student activities**

9. Why do you think mediation arose as a method of dispute resolution?

10. What body funds the civil claims dispute resolution program of the DSCV and where could a person access this program?

11. Why does the mediation process try not to promote a ‘who is right and who is wrong’ approach?

12. Do you think confidentiality could be a problem in the mediation process? Give your reasons.

13 Why do you think confidentiality may not serve the child in disputes involving children?

Other vexed issues are voluntariness and good faith. Court connected mediation is mandatory, whereas facilitative ADR processes are built on the premises of free participation by disputants, as well as their empowerment in and ownership of their dispute and, importantly, their self-determination in its resolution.

Mediation theory is based on a non-coercive discourse grounded on consensus and personal autonomy. These principles appear to conflict with the statutory imperatives that require parties to participate in mediation.


36 See Family Law Act 1975 Sections 10H and 19 N.

37 The legislative bases and relevant processes are set out in Magistrates’ Court Act 1989 (Vic), s 3; Magistrates’ Court General Civil Procedure Rules 2010 (Vic), r 22A .02; Civil Procedure Act 2010 (Vic) ss 3, 66 & 67.


40 Tom Altobelli and Diana Bryant ‘Has Confidentiality in family dispute resolution reached its use-by date?’ Chapter 20 in Families, policy and the law 195, Australian Institute of Family Studies, May 2014

Additionally, how do mediators deal with parties or their representatives who misuse mediations? Dearlove describes some situations where problems can arise with mediation. These include the failure to attend mediation; using the process to score a point in litigation, posturing and using power plays to advance ego centred directions, withholding information unnecessarily, using mediation to ramp up costs and to delay resolution of the dispute.  

Concerns have been raised about mediation and the notion of achieving procedural justice for disputants. Mediations, are not open to review. There are no clear ‘rules’ to follow. The law is not applied to the facts. The doctrine of precedent is not applied. Notably, the Australian Law Reform Commission has stated that when parties are compelled to participate in ADR, this encouragement can amount to pressure to settle.  

Conclusion  

Despite process drawbacks, the description and review of two mediation programs above, illustrate why stakeholders are more satisfied with negotiated outcomes to resolve conflict and why mediation is an integral part of the Australian legal system.

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Student activities  
14. Do you think that mandatory court-connected mediation may interfere with the mediation process, which is better performed in a voluntary atmosphere? Explain.
15. If you were a disputant, what dispute-resolution forum would you prefer, a court or mediation? Give reasons for your answer.
16. Imagine you are a disputant, highlight three problems that you could feel concerned about.
17. Do you think mediation provides second rate justice? Give reasons for your answer.
TRIAL BY JURY – ESSENTIAL PROTECTION OR RELIC OF THE PAST?

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Any person can find themselves unexpectedly appearing in court. You could be a defendant in civil court being sued for breaching a contract or causing an accident that left another person in a wheelchair. You could be a defendant in criminal court facing charges of committing an assault or importing drugs.

You could be a plaintiff in civil court alleging that you have been unfairly dismissed from a job you loved, or seeking access to your children after your marriage has ended. You could be a complainant and witness in a criminal court alleging that you are the victim of a serious crime like a robbery or a rape.

Whatever the type of case, whether you are a defendant, plaintiff or complainant, your reputation, liberty and finances can be affected by the trial, and the decision of the court needs to be fair to you, and to be seen to be fair by the rest of the community.

For many centuries, verdicts in criminal and civil courts were delivered by juries. In recent decades, the role of the jury has been reduced, which raises the question of whether the jury has outlived its usefulness. This article will consider the history and nature of the jury, and whether it is an appropriate institution for the modern Australian legal system.

Role of the jury

A criminal jury is a body of 12 ordinary citizens (although can be up to 15), drawn at random from the electoral roll and considered to be the ‘peers’ of the defendant. Jurors are expected to be representative of the general community and to make decisions that reflect broad community values. They are under the direction of professional judges, but separate from them. As expressed in R v Prasad (1979) 23 SASR 161, 162-163 ‘it is fundamental to trial by jury that the law is for the judge and the facts are for the jury.’

Jurors weigh evidence presented in court, apply the law to the facts, and then deliver a verdict. Criminal verdicts needed to be unanimous for many centuries, but there is some flexibility in most jurisdictions now to allow majority verdicts for certain offences. Where juries cannot reach a unanimous verdict (or majority verdict in some cases), the jury is considered ‘hung’ and the trial must be started again before a new jury. Juries are optional in a civil trial. If a jury is empanelled there are usually six jurors but can be up to eight.

History of the jury

The form of the jury used in modern Australia has been traced to the time of Henry II, who ruled the British Empire from 1154-1189. Kings and Queens possessed enormous personal power, as did the local nobility that supported the monarch under the feudal system. The jury brought the community into the legal process to protect people appearing in court, especially those charged with criminal offences, from arbitrary or cruel treatment by the sovereign or the aristocracy. The importance of the jury was confirmed in 1215 when the Magna Carta was signed.

As responsible government developed, parliaments and professional police forces took on more responsibility for law enforcement. By the mid-19th century, there were calls that juries had outlived their usefulness. The right to trial by jury was abolished in South Africa, India and Singapore by the 1960s, but has persisted in Britain and its other former colonies and across continental Europe.

The jury in Australia

The English tradition of jury trials was generally adopted in its colonies, but Australia was quite unique. As a penal colony, criminal matters in New South Wales were initially dealt with according to military justice. However, by 1832 there were sufficient numbers of free, eligible citizens to constitute a jury pool, and legislation was passed to provide for criminal trial by a non-military jury. As in England, membership was limited to adult males who owned a certain amount of property. Despite the restriction on eligibility for serving on the jury, the implementation of the jury system was considered to be an essential part of replacing the sometimes harsh and arbitrary military rule with democratic self-government and the rule of law.

The right to trial by jury was established in each of
the Australian colonies by the mid-19th century, and was enshrined in the Australian Constitution when the colonies became the Commonwealth of Australia in 1901. Section 80 provides a constitutional right to trial by jury, but only for serious Commonwealth criminal offences such as social security fraud, importing drugs and terrorism offences. Most criminal offences, such as murder, rape, robbery, theft and assault, are created by state or territory parliaments and so do not attract a constitutional right to trial by jury.

However, all the state and territory parliaments have passed legislation conferring on defendants the right to trial by jury for serious (indictable) criminal offences. In state matters, unlike Commonwealth matters, defendants can waive their right to a jury trial and opt to have their matter decided by judge alone. There is no right to have a minor or summary offence tried before a judge and jury.

Jury service is considered both a privilege and an obligation. The High Court confirmed in R v Baden-Clay [2016] HCA 35 [65] ‘the abiding importance of the role of the jury as representative of the community.’ Despite the historical and symbolic importance of the jury trial, in practice they play a very limited role in the Australian legal system. Over 90% of all criminal matters are dealt with by a guilty plea rather than proceeding to trial, and of the matters that proceed to trial, estimates are that between 91 per cent and 99 per cent are tried ‘summarily’ by a magistrate sitting alone. The role of the jury trial has been reduced even more in civil cases. Some Australian states have abolished civil juries completely, and others have limited the type of civil cases that are heard by a jury and have most civil cases heard by judges sitting alone.

**Strengths of the jury**

The justifications for the jury system have changed surprisingly little since their introduction, given the massive social and legal changes that have occurred in the same time period. There are benefits for individual defendants, individual jurors, and the community as a whole in having trial by jury. It ensures that the legal system is not too legalistic or elite, and defendants are judged according to the standards of the community of which they are a part. The experience of participating in a jury has been found to improve levels of satisfaction with the jury system in particular, and the criminal justice system overall, and to increase general civic pride, awareness and participation. The involvement of citizens from outside of the legal profession aids in maintaining public confidence in the criminal justice system and ensures that the system is responsive to the diverse perspectives and experiences of the whole community. It has been described as the conscience of the community and is still seen as a check on the power and influence of government and police.

**Concerns about the jury**

The questions raised in the 19th century about the need for a jury system are even more relevant today. Under the current democratic system of representative government, the electoral process provides a more effective mechanism for holding government to account than does the jury system. In individual cases, defendants have the benefit of legal representation and rules of evidence to protect their interests in court that did not exist when juries originated. Assuming there is still a role for trial by jury, there are specific concerns about the operation of juries in Australia. Some of the main concerns are discussed below.

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**Student activities**

1. What do you think was meant by the following statement? ‘It is fundamental to trial by jury that the law is for the judge and the facts are for the jury.’

2. Explain the different approaches to trial by jury taken in civil and criminal law.

3. Investigate the process by which jurors are chosen, and consider whether there are more effective methods of selection.

4. Compare and contrast the original and current role of the jury.

5. Was the English jury system implemented in Australia at the time of settlement? Explain why or why not.
Publicity and juror research

Jurors have always been required to base their decisions solely on the evidence presented in court, and have been prohibited from undertaking independent fact-finding. Traditionally, jurors could reasonably be effectively stopped from hearing damaging publicity through suppression orders which prohibited media outlets from publishing details about certain cases. However, it is increasingly difficult to control juror access to publicity in the age of social media, where members of the public can post information online and jurors can access it very readily. There is no way of preventing jurors from relying on negative or incorrect online information, and no way of knowing what decisions were made based only on evidence received in court.

Similarly, jurors have always been prohibited from undertaking their own research on a case. In the past this was enforced through the jury being supervised in the jury room, and less commonly, being sequestered, or kept together in a separate location away from their own homes. However, jurors are now able, and it would seem willing, to undertake their own online investigations. Some research has shown that jurors cannot understand the logic of being unable to undertake their own inquiries, and do visit crime scenes virtually, and look up technical and legal information on mobile electronic devices.

Complexity

The jury originated when laws were uncomplicated and trials were more likely to last for hours than days; and sometimes lasted only minutes. The substantive law and the law of evidence are much more complex than in the past, and evidence itself is more technical and voluminous. Trials frequently take weeks and even months, and often involve testimony from multiple expert witnesses. Jurors have to listen to hours of evidence from expert witnesses such as scientists, engineers, doctors and forensic accountants, then listen to the cross examination of those experts. They then have to listen to the alternate version of evidence from experts for the other party, and then the cross examination of those additional experts. All the testimony involves specialised concepts and language outside the experience of the jury members. The two areas that create the most complication are scientific evidence such as DNA, and evidence of accounting and financial techniques in complex fraud trials. There may be multiple charges and multiple defendants in a single trial, each charge involving complex evidence. The requirement of listening to and comprehending this type and amount of information for several hours per day, for several days in a row, and then remembering, discussing and analysing it in the jury room, potentially weeks after the testimony is given, is a serious challenge for even the most alert and conscientious jurors.

Jury Pool

Performing jury duty is a civic responsibility and failure to attend court when required can result in the person being fined. However, potential jurors can seek permission to be excused from jury duty on grounds such as employment, mental or physical health, family commitments, age, or undue hardship. Given the stress, possible exposure to traumatic information, and interruption to personal and professional life, it is not uncommon for people to seek to be excused from service on the jury. There is a persistent concern that people with good careers and high intellectual levels have the motivation and ability to avoid jury duty, and that the ability of those who actually do sit on juries could be below community standards. The research in the area is inconclusive, and there have been contrary studies that indicate that, in fact, jurors have a higher average level of education than the general community, and that professional and executives were well represented on juries.

Diversity

People from minority groups according to, for example, race or sexual orientation, have reported that their life experiences are not properly represented by juries, which are generally comprised of members of the majority, mainstream culture. This experience or perception can mean certain defendants believe they have not received a fair trial, and can fuel a feeling of social isolation, exclusion or discrimination on the part of minority groups more generally.

Resource intensiveness

The complexity of law and evidence has already increased the duration and expense of the trial process, and caused significant delays in matters getting to trial. These problems have been compounded by the time-consuming and resource intensive process of managing a jury. Jurors need to be summoned to appear, trained in court processes, have their role explained to them, and be supervised, paid and fed. In addition, the presence of the jury can significantly lengthen the duration of a trial, and increase the likelihood of the need for a retrial.

Lawyers need to explain difficult legal concepts such as ‘beyond reasonable doubt’, ‘burden of proof’, and ‘intent’ to jurors, whereas they do not need to explain them to judges sitting alone. Jury trials often need to be stopped so prosecution and defence lawyers can make arguments to the judge about what evidence should be put to the jury. The jury deliberation period is also getting longer because of the need to assess the greater volume
and complexity of the evidence. Jurors may also have to return to court during their deliberations to have aspects of law or process explained or clarified by the judge. There is always the possibility that jurors will not agree with one another and so be unable to return a verdict, and so the entire trial needs to be run again with a fresh jury.

**Jury tampering or intimidation**

There are concerns, especially in cases involving criminal defendants from serious crime organisations that jury members will be bribed, threatened or otherwise intimidated into making certain decisions and thereby corrupting the trial process.

**Transparency of decisions**

The jury system is underpinned by a strong commitment to 'jury room secrecy', which ensures that jurors feel free to speak frankly and do not have to be concerned about reprisals after the trial. This means that juries simply return their verdicts, and do not give reasons for those decisions. There is no way to know if juries made decisions on misunderstandings of the law or evidence, ignored significant issues, acted out of prejudice, bias or excessive sympathy toward the defendant, or whether dominant members of the jury pressured other jurors to vote in a certain way without proper discussion or against their own better judgment. By contrast, when a case is heard before a judge alone, he or she must provide detailed written reasons for their decision, which are available to the defendant and the public. This makes the whole process more transparent and allows parties unhappy with the decision to make a realistic assessment of whether they can appeal the decision. It also provides clear advice to the rest of the community about how the courts will decide certain matters and so provides certainty to people wanting to avoid clashes with the law, and also encourages public confidence in the law.

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**Student Activities**

10. What principles underpin the jury system?
11. Does the jury system achieve the principles which underpin it?
12. Do you think there are more effective ways to stop publicity corrupting trial decisions than abolishing trial by jury?
13. Do you think jurors should be stopped from undertaking their own research on cases? How do you think this could be achieved?
14. Should it be harder to avoid jury duty than it currently is in Australia? Explain why or why not.
15. What do you consider are the two most serious concerns about the jury system?
16. Do you think the concerns outweigh the benefits of the jury system? Discuss.

**Conclusion**

There is no credible evidence that juries make better decisions or fewer mistakes than judges, rather studies suggest that the decisions of judges and juries are almost identical. If there is no significant difference between the decisions of judges and juries, it is reasonable to question whether the more expensive and slow process of jury trial should be retained. Of course, the discussion about whether jury trials should be retained must consider more than mere efficiency. The concepts of justice, community involvement and confidence, and democracy are so linked to the ideal of the jury that there is little political will in Australia to remove the right to trial by jury for serious criminal offences.

17. Explain whether you think the jury system has only symbolic value in modern Australia.
18. Should concerns about cost and efficiency take precedence over concepts of justice in deciding whether to abolish the jury system in Australia?
Student Activities

19. Should courts seek to impose suppression orders to stop commentary on criminal cases by members of the public on social media sites? Explain why or why not.

20. In your opinion, are there particular cases that should always or usually be heard by judge alone? Discuss.

Further reading


