

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

# **Jurors, Social Media and the Right of an Accused to a Fair Trial**

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## Glossary and abbreviations

Term	Definition
#	See ‘hashtag’.
<i>#nofilter</i>	A common handle on social media platforms such as <i>Instagram</i> to attach to photographs to indicate that no photographic editing filter has been applied to the image.
<i>AMA</i>	Acronym for ‘Ask me Anything’. A common post on social networking site ‘Reddit’, whereby the user encourages and then answers questions posed by the Reddit community at large.
<i>Back-up</i>	A copy of computer data (such as a file or the contents of a hard drive). Also, the act or instance of making a back-up.
<i>Bio</i>	A short text portion of any digital profile designed to explain who the user is. It is common to all social media platforms.
<i>Block</i>	Users of most social media networks can unrestrictedly block other users, typically by preventing them from sending messages or viewing the blocker’s information or profile.
<i>Blog</i>	A website that contains online personal reflections, comments, and often hyperlinks, videos, and photographs provided by the writer. Also refers to a feature appearing as part of an online publication that typically relates to a particular topic and consists of articles and personal commentary by one or more authors.
<i>Check-in</i>	In 2010, Facebook introduced a ‘Check-In’ feature on the social media platform that allowed users to use the GPS on their mobile phone to let their ‘friends’ know exactly where they are and to comment upon what they might be doing at that location.
<i>Clickbait</i>	Something designed to make readers want to click on a hyperlink, especially when the link leads to content of dubious value or interest.
<i>Click-through rate</i>	Common metric for reporting on the number of people who viewed a piece of content then took an action, such as clicking on an advertisement or link (used in ‘pay-per-click’ advertising).
<i>Dropping the pin</i>	The act of letting other users know your particular location in <i>Google Maps</i> or any other application that shows your location on a map.

<b><i>EOT</i></b>	Acronym for ‘End of Thread’. A thread is an online discussion where a series of responses have been posted as replies to each other. ‘End of Thread’ refers to the end of such an online discussion.
<b><i>Follow</i></b>	To subscribe to the feed of (someone or something) especially on social media.
<b><i>FOMO</i></b>	Acronym for ‘Fear of Missing Out’.
<b><i>Handle</i></b>	User name on <i>Twitter</i> .
<b><i>Hashtag</i></b>	A word or phrase preceded by the symbol ‘#’ that classifies or categorises the accompanying text (such as a tweet).
<b><i>In 140 characters or less</i></b>	Traditionally the character limit for individual text entries – ‘tweets’ – published on social media platform, <i>Twitter</i> .
<b><i>Influencer</i></b>	A person with the ability to influence potential buyers of a product or service by promoting or recommending the items on social media.
<b><i>Listserv</i></b>	Email mailing list software that distributes emails to subscribers on an electronic mailing list.
<b><i>LOL</i></b>	Acronym for ‘Laughing Out Loud’.
<b><i>News feed</i></b>	News Feed is the constantly updating list of stories in the middle of a <i>Facebook</i> homepage. News Feed includes status updates, photos, videos, links, app activity and likes from people, pages and groups that the user follows on <i>Facebook</i> .
<b><i>Notifications</i></b>	Notifications are updates about <i>Facebook</i> activity.
<b><i>Phishing</i></b>	The practice of sending fraudulent electronic communications, commonly emails and electronic messages, purporting to be from reputable companies in an attempt to induce individuals to reveal sensitive personal information such as usernames, passwords and credit card details.
<b><i>Pop-up Notification</i></b>	<i>Facebook</i> users receive notifications which alert them about <i>Facebook</i> activity. These notifications pop-up on the user’s desktop computer and/or their mobile phone. <i>Facebook</i> notifications cannot be turned off completely, however, they can be adjusted in the user’s <i>Facebook</i> settings.
<b><i>Privacy settings</i></b>	Privacy settings on <i>Facebook</i> are settings available to a user to restrict what content is visible and available to other users.
<b><i>Reach</i></b>	A data metric that determines the maximum potential audience for any given message.

<b><i>Screenshot</i></b>	The action of capturing what is shown on the screen of a device to a static image file; taking a snapshot or picture of whatever is showing on the screen of a computer, mobile, or tablet screen.
<b><i>Share</i></b>	The act of sending photos, videos and other content to ‘friends’ with social media accounts.
<b><i>Status update</i></b>	A <i>Facebook</i> ‘status’ is an update feature which allows users to share a small amount of content on their profile, their friends’ walls and in <i>Facebook</i> news feeds. A ‘status update’ is the act of a user updating this content.
<b><i>Tag</i></b>	Tagging is a social media functionality commonly used on <i>Facebook</i> and <i>Instagram</i> that allows users to create a link back to the profile of the person shown in the picture or targeted by the update.
<b><i>TBH</i></b>	Acronym for ‘To Be Honest’ used widely in communications on social media and other internet platforms.
<b><i>Timeline</i></b>	<i>Facebook</i> Timeline is a social media feature introduced by <i>Facebook</i> in 2012. It combines a user’s <i>Facebook</i> wall and profile into one page.  It includes reverse-chronological details, by year, of a user’s <i>Facebook</i> history. It reorganises <i>all</i> stored user information for display, rather than archival. It was previously more difficult or impossible to view outdated events, photos and comments.

## **Information about the Tasmania Law Reform Institute – ‘Bio’**

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the government, the community, the University and the Institute itself.

The work of the Institute involves the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other States and the Commonwealth.

The Institute’s Director is Associate Professor Terese Henning. The members of the Board of the Institute are Associate Professor Terese Henning (Chair), Professor Tim McCormack (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Ms Kristy Bourne (appointed by the Attorney-General), Associate Professor Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (appointed by the Tasmanian Bar Association), Ms Ann Hughes (appointed at the invitation of the Institute Board), Mr Rohan Foon (appointed by the Law Society of Tasmania), Ms Kim Baumeler (appointed at the invitation of the Institute Board) and Ms Rosie Smith (appointed at the invitation of the Institute Board as a member of the Tasmanian Aboriginal community).

The Board oversees the Institute’s research, considering each reference before it is accepted, and approving publications before their release.

## **Acknowledgments – ‘Tag’**

This Issues Paper was prepared for the Board by Jemma Holt. It is the result of joint research and collaboration between the Tasmania Law Reform Institute (TLRI) and the South Australian Law Reform Institute (SALRI). The TLRI and SALRI share unique challenges and opportunities associated with undertaking effective modern law reform in smaller jurisdictions such as Tasmania and South Australia and they are committed to working together on contemporary and topical law reform projects of common interest such as this project. This is a credit to the TLRI Director, Associate Professor Terese Henning, the SALRI Director, Professor John Williams and the SALRI Deputy Director, Dr David Plater.

The TLRI acknowledges the erudite contribution to the project by Dr David Plater. Dr Plater, together with Victoria Geason, Isabel Dayman, Lucy Line, Rachael Ingleton, Zoe Underwood and Danielle Chiarolli produced literature reviews and/or research papers which provided the foundation for this Issues Paper.

This project was funded by a grant from the Law Foundation of Tasmania.

## How to respond – ‘*User-generated content*’

The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. **Respondents can choose to address all, some or none of these questions in their submissions.**

There are a number of ways to respond:

- **By filling in the Submission Template**

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted to the Institute. The Submission Template can be accessed at the Institute’s webpage: <http://www.utas.edu.au/law-reform/>.

- **By providing a more detailed response to the Issues Paper**

The Issues Paper poses a series of questions to guide your response — you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible.

- **By requesting a meeting**

Any person who does not wish to respond in writing can arrange to speak with a researcher instead. This may be undertaken by phone or in person, individually or as part of a group consultation.

The Institute uses all submissions received to inform its research. Submissions may be referred to or quoted from in a TLRI final report which will be printed, provided to the Tasmanian Government and also published on the Institute’s website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

Therefore, when making a submission to the Institute, please identify how you would like it to be treated based on the following categories:

1. Public submission – the Institute may refer to or quote directly from the submission, and name you as the source of the submission in relevant publications.
2. Anonymous submission – the Institute may refer to or quote directly from the submission in relevant publications, but will not identify you as the source of the submission.
3. Confidential submission – the Institute will not refer to or quote directly from the submission, but may aggregate information in your submission with other submissions for inclusion in any report or publication. Confidential submissions will only be used to inform the Institute generally in their deliberations of the particular issue under investigation, and/or provide publishable aggregated statistical data.

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time up to the time it is sent for publication, by contacting Kira White on (03) 6226 2069 or email: [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au). You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure,

regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, they will be shredded and securely disposed of, in the case of electronic submissions, they will be deleted from the server.

Electronic submissions should be emailed to: [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au)

Submissions in paper form should be posted to:

Tasmania Law Reform Institute

Private Bag 89

Hobart, TAS 7001

Inquiries about the study should be directed to Ms Jemma Holt at the above address, or by telephoning (03) 6226 2069, or by email to [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au).

**CLOSING DATE FOR RESPONSES: 4 October 2019**

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email [human.ethics@utas.edu.au](mailto:human.ethics@utas.edu.au). The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752].

## **Executive summary – ‘In 140 characters or less’**

This Issues Paper follows a reference provided to the TLRI by Ms Kim Baumeler, a TLRI Board member and barrister with extensive criminal jury trial experience in the Tasmanian jurisdiction. The reference raises the topical concern of jurors using social media and other internet platforms inappropriately during criminal trials. This issue is a modern concern in Tasmania and elsewhere.

It is a central tenet of the common law criminal justice system that accused persons have the crucial right to receive a fair trial before an impartial jury. A fundamental principle that underpins this right is that jury verdicts must be determined solely upon evidence presented and tested within the courtroom, such that both parties to a criminal trial are aware of and have the opportunity to address any material that may influence the verdict.

A current concern is how to preserve an accused’s right to a fair trial at a time when social media and other internet platforms are omnipresent in our everyday lives. We (the majority of Australians) are continuously online and engaged; at home, at work and in-between, on our smartphones. Search engines such as *Google* are new tools in our problem-solving toolkits. We use them so routinely that they are viewed as mere extensions of our own investigative, analytic and decision-making ability. We utilise social media platforms such as *Facebook*, *Instagram* and *Twitter* as second nature to find out more about people who interest us and to communicate with those who are interested in us. If individuals continue this instinctual behaviour when they are jurors sitting in a criminal trial, they thereby risk adversely affecting the accused’s right to a fair trial.

This Issues Paper seeks to elicit open discussion on juror misconduct in this contemporary context. Whilst it is acknowledged that the extent of juror misconduct of this kind is largely unknown and unknowable, Part 1 of this Issues Paper seeks to assess, as far as is possible, the nature and gravity of this phenomenon. Part 2 explores how and why juror misconduct of this kind occurs and the causes and/or motivations that underlie juror misconduct of this kind. Part 3 canvasses the laws and practices which currently exist to safeguard against juror misconduct of this kind as well as those that exist to remedy and/or otherwise deal with such misconduct after it occurs. It examines the operation and efficacy of these measures as well as the possible alternatives. Part 4 begins the discussion of where to from here: whether reform of the current laws and practices is justified and, if so, what form that should take.

## Questions – ‘AMA’ (‘Ask me anything’)

The Institute welcomes your response to any individual question or to all questions contained within this Issues Paper. A full list of the consultation questions is contained below with page references for questions that relate to different parts of the Issues Paper.

<b>Part 1 – ‘Checking-In’: What is the Problem?</b>	
Q 1. (Page 14)	What is your experience of jurors using social media and/or other internet platforms during a criminal trial?
Q 2. (Page 28)	Based on your experience, what is your assessment of the prevalence of jurors’ inappropriate use of social media and/or other internet platforms during criminal jury trials?
Q 3. (Page 28)	Do you think that such conduct is confined largely to high profile cases which have a high level of media coverage and community interest? Or does it also present in a wider range of criminal trials?
<b>Part 2 – ‘Decoding’: Why?</b>	
Q 4. (Page 37)	Based on your experience, what do you think causes and/or motivates jurors to use social media and/or other internet platforms inappropriately during a criminal trial?
<b>Part 3 – ‘Screenshot’: Current Laws and Practices</b>	
Q 5. (Page 41)	<i>Preventative: Pre-trial control of prejudicial material</i> (a) What can and should be done by way of controlling prejudicial material that is potentially available to jurors on the internet and social media platforms at the pre-trial stage? (b) Whose obligation should it be to attend to these pre-emptive and precautionary pre-trial measures?
Q 6. (Page 44)	<i>Preventative: Pre-empanelment juror information/training</i> (a) How can pre-empanelment juror information/training be improved in Tasmania? (b) What can be learned from other jurisdictions? (c) Should pre-empanelment juror information/training expressly address social media? (d) Should pre-empanelment juror information/training specifically cover both ‘information in’ and ‘information out’ uses of the internet/social media? (e) Should pre-empanelment juror information/training provide an explanation of the rationale behind the restrictions in social media/internet use?
Q 7. (Page 46)	<i>Preventative: Juror oath/affirmation</i> (a) Could/should the juror oath/affirmation and its surrounding procedure be employed to assist in preventing jurors inappropriately using social media and other internet platforms during trials? (b) If so, how might this be achieved?

<p>Q 8. (Page 53)</p>	<p><i>Preventative: Judicial Directions</i></p> <p>(a) Should ‘standard’ directions to jurors, similar to those used in New South Wales and Victoria, regarding the internet and social media be adopted in Tasmania?</p> <p>(b) What should these directions include?</p> <p>(i) Specific mention of social media;</p> <p>(ii) A comprehensive list of prohibited internet and social media platforms as well as prohibited activity (‘<i>information in</i>’ and ‘<i>information out</i>’);</p> <p>(iii) Explanations for the internet/social media restrictions;</p> <p>(iv) Warnings about personal consequences for juror misconduct;</p> <p>(v) Reminders to jurors of their obligation to report irregularities;</p> <p>(vi) Repetition; and/or</p> <p>(vii) Written directions?</p> <p>Could/should the underlying knowledge and understanding of the internet and social media on the part of the judiciary be improved? If so, how?</p>
<p>Q 9. (Page 55)</p>	<p><i>Preventative: ‘Virtual sequestration’/‘E-sequestration’</i></p> <p>(a) How effective is the practice of taking mobile phones and other electronic devices away from jurors during the trial and deliberations?</p> <p>(b) Is it a practice that should continue?</p>
<p>Q 10. (Page 58)</p>	<p><i>Preventative – Juror Self-reporting</i></p> <p>(a) Should juror assurances regarding their impartiality and compliance with judicial directions be accepted at face value?</p> <p>(b) Should counsel make pre-trial enquiries of jurors’ internet and social media presence and/or monitor jurors’ internet and social media activity during the course of a trial to ensure the veracity of juror assurances in this respect?</p>
<p>Q 11. (Page 59)</p>	<p><i>Preventative: ‘Influencers’</i></p> <p>(a) When jurors sit in more than one trial during their summonsed period, does such ‘experience’ make them better jurors? If so, how?</p> <p>(b) Are jurors who are empanelled for a second and/or subsequent time less likely to engage in juror misconduct by inappropriately using the internet/social media? If so, why?</p> <p>(c) What influence, if any, do you think that jurors who sit in second and/or subsequent trials have on their fellow first-time jurors?</p>
<p>Q 12. (Page 60)</p>	<p><i>Consequential: Reporting of Juror Misconduct</i></p> <p>(a) How can the efficacy of juror reporting of fellow juror misconduct be supported and/or improved?</p> <p>(b) Is public awareness of juror misconduct a viable option for increasing juror accountability (ie enlisting jurors’ online ‘friends’ to report juror misconduct they observe on the internet/social media)?</p>
<p>Q.13 (Page 67)</p>	<p><i>Consequential: Punishment (Deterrence)</i></p> <p>(a) Should jurors be punished for using social media and other internet platforms inappropriately during criminal trials?</p> <p>(b) If so, would legislative codification of applicable common law contempt laws assist in dealing with jurors for misconduct of this kind?</p>

## Scope of the reference – ‘Reach’

This reference focuses on juries in criminal trials. This is despite the fact that civil trials may also be heard before a jury in Tasmania<sup>1</sup> and other Australian jurisdictions<sup>2</sup> and a coronial jury is still available in New South Wales.<sup>3</sup> It also assumes that, in light of their fundamental and integral role in Australia,<sup>4</sup> trial by jury will continue in all Australian criminal jurisdictions for the foreseeable future (with or without the election for trial by judge alone).<sup>5</sup> It focuses on Tasmania, but draws upon case examples, research and laws and practices from other Australian jurisdictions, as well as New Zealand, the UK, and the US.

In the course of examining why juror misconduct of this kind might occur, this Issues Paper explores whether judicial directions may cause confusion and/or frustration on the part of jurors that may, in turn, form the underlying motivation for such misconduct. This discussion is directed at the potential shortcomings of judicial directions in equipping lay members of the public for jury service. It ranges from post empanelment to summing up and encompasses housekeeping matters, courtroom procedure, and matters of substantive law. Any critique of judicial directions in this context, particularly with regard to possible misunderstanding and misconceptions by jurors of matters of substantive law, are limited to deficiencies in form and content, and do not purport to disturb the fundamental premise that jurors are *capable* of understanding judicial directions.<sup>6</sup>

This Issues Paper also explores the role and efficacy of judicial directions as a preventative measure available to safeguard against juror misconduct of this kind and as a consequential measure available to remedy such misconduct after it has been discovered. Similarly, the discussion of judicial directions in this context proceeds on the premise that jurors are *capable* of understanding judicial directions.

This Issues Paper touches upon suppression orders (and *sub judice* contempt) in the context of existing preventative measures which may reduce the adverse effects of juror misconduct of this kind. Suppression orders (and take-down orders) are measures that may assist in controlling potentially prejudicial material on social media and/or other internet platforms at the pre-trial stage, as a precautionary safeguard against errant jurors. Suppression orders (and *sub judice* contempt) have

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<sup>1</sup> *Supreme Court Civil Procedure Act 1932* (Tas) s 29; *Supreme Court Rules 2000* rr 556, 557. However, no civil jury trials were conducted in 2016–17 or 2017–18: see ‘Supreme Court of Tasmania: Annual Report 2016–2017’ (Report, Supreme Court of Tasmania, November 2017) 32 <[https://www.supremecourt.tas.gov.au/wp-content/uploads/2018/11/SCoT\\_AnRpt\\_1617.pdf](https://www.supremecourt.tas.gov.au/wp-content/uploads/2018/11/SCoT_AnRpt_1617.pdf)> and ‘Supreme Court of Tasmania: Annual Report 2017–2018’ (Report, Supreme Court of Tasmania, November 2018) 31 <<https://www.supremecourt.tas.gov.au/wp-content/uploads/2019/02/Supreme-Court-Annual-Report-2017-2018-for-web.pdf>>.

<sup>2</sup> Except for SA and ACT. NSW: *Supreme Court Act 1970* (NSW) s 85; *District Court Act 1973* (NSW) s 76A; NT: *Supreme Court Rules 1987* (NT) r 47.02; *Juries Act 1962* (NT) ss 6A, 7–8; Qld: *Supreme Court Act 1995* (Qld), *District Court of Queensland Act 1967* (Qld) s 75, UPCR rr 472, 474–475; Vic: *Supreme Court (General Civil Procedure) Rules 2015* rr 47.02, 47.04; *Juries Act 2000* (Vic) s 22(1); WA: *Supreme Court Act 1935* (WA) SCR, O 32; *District Court of Western Australian Act 1969* (WA) s 52; *Juries Act 1957* (WA) s 19.

<sup>3</sup> *Coroners Act 2009* (NSW) s 48.

<sup>4</sup> See, eg, *Kingswell v R* (1985) 159 CLR 264, 298–303 (Deane J); *Cheng v The Queen* (2000) 203 CLR 248, 277–278 [80]–[82] (Gaudron J); *Alduksi v The Queen* (2016) 90 ALJR 711, [127]–[141] (Gaegeler J).

<sup>5</sup> There is no option for trial by judge alone in Tasmania, Northern Territory, and Victoria. The relevant provisions in the remaining jurisdictions are as follows: ACT: *Supreme Court Act 1933* (ACT) s 68B; NSW: *Criminal Procedure Act 1986* (NSW) ss 132, 132A; NT: *Juries Act 1962* (NT) s 7; Qld: *Criminal Code 1899* (Qld) div 9A; SA: *Juries Act 1927* (SA) s 7; WA: *Criminal Procedure Act 2004* (WA) div 7.

<sup>6</sup> As McHugh J has noted: ‘Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials’: *Gilbert v The Queen* (2000) 201 CLR 414, 425, [31].

proved especially topical of late, particularly as a result of the *Pell* trial in Victoria, the suppression orders made in the course of that matter, and the associated reporting by both local and international media.<sup>7</sup> The fundamental issue of whether suppression orders (and *sub judice* contempt) have any role in the global digital world and their interaction with the case for open justice are separate complex issues that warrant substantial examination in their own right. The control of pre-trial prejudicial media is *but one* preventative measure which may reduce the adverse effects of jurors using social media and other internet platforms inappropriately during criminal trials. The efficacy of suppression orders (and *sub judice* contempt) is considered in this limited respect.

It is acknowledged that most jurors approach their role seriously and conscientiously<sup>8</sup> and this Issues Paper adopts a practical and realistic approach. It does not purport to advocate for fundamental change to the criminal justice system in Tasmania, such as the discarding of trial by jury for serious offences and/or the introduction of trial by judge alone as a rational response to juror misconduct of this kind. Nor does it contemplate the reintroduction of the expensive and disruptive practice of jury sequestration in routine criminal trials. Any such option is unrealistic in a contemporary context.

### ***‘Privacy settings’/‘blocked’***

This Issues Paper respects the confidentiality of jury deliberations and does not seek to gain impermissible entry into the jury room.

In Tasmania, jury deliberations are confidential, as is the situation in other Australian jurisdictions. It is an offence to publish, cause to be published, solicit or obtain the disclosure of ‘any statement made, opinion expressed, argument advanced or vote cast in the course of the deliberations of a jury’.<sup>9</sup> Similar offences exist in all other Australian jurisdictions.<sup>10</sup>

This Issues Paper does not seek to undermine or breach these rules of confidentiality.

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<sup>7</sup> See, eg, Emma Younger, ‘George Pell media contempt case could have “chilling effect” on open justice, court hears’, *ABC News* (online, 15 April 2019) <<https://www.abc.net.au/news/2019-04-15/george-pell-guilty-verdict-coverage-media-contempt-case/11002760>>.

<sup>8</sup> See Kate Warner, Julia Davis and Peter Underwood, ‘The Jury Experience: Insights from the Tasmanian Jury Study’ (2011) 10(3) *The Judicial Review* 333.

<sup>9</sup> *Juries Act 2003* (Tas) ss 3, 58.

<sup>10</sup> ACT: *Juries Act 1967* (ACT) s 42C; NSW: *Jury Act 1977* (NSW) ss 68A–68B; NT: *Juries Act 1962* (NT) s 49A; Qld: *Jury Act 1995* (Qld) s 70; SA: *Criminal Law Consolidation Act 1935* (SA) s 246; Vic: *Juries Act 2000* (Vic) s 78; WA: *Juries Act 1957* (WA) ss 56A, 56B, 56C, 56D.



## Part 1

# ‘Checking-in’: What is the Problem?

### 1.1 Getting a ‘handle’ on the problem

1.1.1 The right to a fair trial is a ‘central pillar of our criminal justice system’.<sup>11</sup> An accused is entitled to a trial before an impartial jury that makes its determination in accordance with evidence that has been properly admitted and tested during the course of the trial.<sup>12</sup> There exists a ‘long held belief that justice requires both sides in a criminal trial to know and to be able to address or answer any material (particularly material which appears adverse to them) which may influence the verdict’.<sup>13</sup> The introduction of any extraneous information or influence constitutes an irregularity and undermines the fairness of any trial.

1.1.2 Commentators have coined many terms which refer to the phenomena of jurors inappropriately using the internet and/or social media platforms during a criminal trial and the ensuing effect on the accused’s right to a fair trial: ‘googling jurors’;<sup>14</sup> ‘internet-surfing jurors’;<sup>15</sup> ‘trial by google’;<sup>16</sup> ‘google mistrials’;<sup>17</sup> ‘E-jurors’;<sup>18</sup> ‘do-it-yourself or “DIY” jurors’;<sup>19</sup> ‘the twitter effect’;<sup>20</sup> ‘internet-tainted

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<sup>11</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

<sup>12</sup> See *Murphy v R* (1989) 167 CLR 94, 98–99 (Mason CJ and Toohey J).

<sup>13</sup> *A-G v Fraill* [2011] EWCA Crim 1570, [30].

<sup>14</sup> 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) *University of New South Wales Law Journal* 1634; David Harvey, ‘The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm’ [2014] *New Zealand Law Review* 203; J C Lundberg, ‘Googling Jurors to Conduct Voir Dire’ (2012) 8 *Washington Journal of Law, Technology and Arts* 123.

<sup>15</sup> Brian Grow, ‘As jurors go online, US trial go off track’, *Reuters*, (8 December 2010) <<https://www.reuters.com/article/us-internet-jurors/as-jurors-go-online-u-s-trials-go-off-track-idUSTRE6B74Z820101208>>.

<sup>16</sup> Braun (n 14); Owen Bowcott, ‘“Trial by Google” a Risk to Jury System, Says Attorney General’, *The Guardian* (online, 7 February 2013) <<http://www.theguardian.com/law/2013/feb/06/trial-by-google-risk-jury-system>>.

<sup>17</sup> Thaddeus Hoffmeister, ‘Google, Gadgets and Guilt: Juror Misconduct in the Digital Age’ (2012) 83 *University of Colorado Law Journal* 102, 409–420, citing John Schwartz, ‘As Jurors Turn to Google and Twitter, Mistrials Are Popping Up’, *New York Times* (online, 17 March 2009) A1, <<http://www.nytimes.com/2009/03/18/us/18juries.html>>.

<sup>18</sup> Meghan Dunn, *Jurors’ and Attorneys’ Use of Social Media During Voir Dire, Trials and Deliberations* (A Report to the Judicial Conference Committee on Court Administration and Case Management, Federal Judicial Center, 1 May 2014) <<https://www.fjc.gov/sites/default/files/2014/Jurors-Attorneys-Social-Media-Trial-Dunn-FJC-2014.pdf>>.

<sup>19</sup> ‘Protect Our Jury System’, *The Herald Sun* (online, 9 May 2010) <<https://www.heraldsun.com.au/news/opinion/protect-our-jury-system/news-story/16189364d06bea263e0b1dc08d2df5cf>>.

<sup>20</sup> Hoffmeister (n 17).

jurors’;<sup>21</sup> ‘digital injustice’;<sup>22</sup> ‘wired jurors’;<sup>23</sup> ‘sleuthing jurors’<sup>24</sup> and ‘rogue jurors’.<sup>25</sup> There is no single expression that encapsulates the full range of possible juror misconduct of this kind.

1.1.3 Essentially, the relevant conduct falls within two main categories that may be described simply as: ‘*information in*’ and ‘*information out*’.<sup>26</sup> ‘*Information in*’ denotes jurors using the internet and/or social media platforms and accessing information relevant to the trial, either intentionally or inadvertently. ‘*Information out*’ denotes jurors using the internet and/or social media platforms to publish information about the trial.

1.1.4 Of course, it is not always as simple as the misconduct being either ‘*information in*’ or ‘*information out*’. Apposite are the observations of the Chief Justice of New South Wales, the Hon Tom Bathurst: ‘with social media, content is not merely consumed by users, it is also created, organised and distributed by them’.<sup>27</sup>

1.1.5 There have been documented cases of:

- Jurors using the internet to research legal terms or concepts or other information relevant to the trial (‘*information in*’);
- Jurors using the internet and social media to search the accused, witnesses, victims, lawyers or the judge (‘*information in*’);
- Jurors using the internet and social media to communicate with individuals involved in the trial (‘*information in*’ and ‘*information out*’);
- Jurors publishing material about the trial on the internet or social media, which may disclose impermissible bias, prejudice, predetermination or other irregularity in the deliberation process (‘*information out*’); and
- Jurors publishing material about the trial on the internet or social media, which may elicit impermissible information by way of a response (‘*information out*’ and ‘*information in*’).

1.1.6 Particular examples of the above misconduct are explored in turn below, including the impacts of the juror’s misconduct on the trial process. The ultimate ramifications of such misconduct are largely determined on a case-by-case basis. There are many variables including the jurisdiction in which it occurs, the extent of the ‘contamination’ caused by the misconduct, and the stage at which the misconduct is discovered.

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<sup>21</sup> Ibid, citing Daniel A Ross, ‘Juror Abuse of the Internet’, *New York Law Journal* (8 September 2009).

<sup>22</sup> Peter Lowe, ‘Problems faced by modern juries’ (2012 Winter) *Bar News: Journal of the NSW Bar Association* 46, 48.

<sup>23</sup> Eric Robinson, ‘The Wired Jury: An Early Examination of Courts’ Reactions to Jurors’ Use of Electronic Extrinsic Evidence’ (2013) 14 *Florida Coastal Law Review* 131.

<sup>24</sup> Jill Hunter, *UNSW Jury Study: Jurors’ Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Directions* (2013) 2  
<[http://www.lawfoundation.net.au/ljf/site/templates/grants/\\$file/UNSW\\_Jury\\_Study\\_Hunter\\_2013.pdf](http://www.lawfoundation.net.au/ljf/site/templates/grants/$file/UNSW_Jury_Study_Hunter_2013.pdf)>.

<sup>25</sup> Mark Pearson, ‘When Jurors Go ‘Rogue’ on the Internet and Social Media ...’, *Journlaw*, 30 May 2013  
<<https://journlaw.com/2013/05/30/when-jurors-go-rogue-on-the-internet-and-social-media/>>.

<sup>26</sup> Harvey (n 14).

<sup>27</sup> Jane Johnston et al, ‘Juries and Social Media’, 1–29 <<https://www.ncsc.org>>.

## 1.2 Examples – ‘clickbait’

### *Jurors using the internet to research legal terms or concepts or other information relevant to the trial (‘information in’)*

1.2.1 Jurors have been found to have used the internet to obtain information about charging and sentencing.<sup>28</sup> They have taken it upon themselves to source information about legislative schemes and legislative amendments that were raised in the course of evidence, but were not directly relevant to the trial issues (eg a juror on a child sexual assault trial conducted an internet search on the requirements for a working with children clearance and came across relevant legislation in this respect that was introduced in 2013).<sup>29</sup> They have also been found to conduct internet searches on unfamiliar subject matter peculiar to the factual circumstances of the particular trial (eg the ‘Fa-Long Gong movement’).<sup>30</sup> When jurors conduct online research on trial-related matters that pique their curiosity, they undermine the primary rule of admissibility of evidence; that it is relevant. At best, it can cause great distraction to jurors to detract from the trial issues. At worst, it can introduce inadmissible and/or prejudicial material into the jury room.

1.2.2 There appears to be a high rate of jurors turning to the internet in relation to legal terminology and legal principles; both actual and imagined (eg ‘obligations of law’).<sup>31</sup> Jurors have conducted searches of fundamental terms such as ‘murder’ and ‘manslaughter’, and unashamedly admitted to fellow jurors, whilst reading the material from an iPhone, ‘I’m having trouble determining the difference between murder and manslaughter’.<sup>32</sup> A popular search term of jurors is, somewhat unsurprisingly, ‘beyond reasonable doubt’.<sup>33</sup> One jury was found to have sourced information on ‘what is meant by beyond reasonable doubt’ from five different websites.<sup>34</sup> A Tasmanian jury obtained information from a US online legal dictionary website in relation to ‘beyond reasonable doubt’ and ‘circumstantial evidence’.<sup>35</sup> Jurors also tend to resort to the internet in relation to the key terms which

<sup>28</sup> In the UK in 2007, following a jury verdict in a trial for charges of manslaughter and possession of a firearm with the intent to endanger life, printed materials were discovered in the jury room that related to charging and sentencing for firearms cases and sentencing for robbery, homicide and manslaughter. The dates on the documents indicated that they were sourced on the first day of deliberations. See *R v Marshall* [2007] EWCA Crim 35. The trial judge dismissed the juror and proceeded to verdict. The subsequent appeal found that the juror should not have been discharged, but the appeal was ultimately dismissed.

<sup>29</sup> See *Hoang v R* [2018] NSWCCA 166.

<sup>30</sup> See *Smith v R* (2010) 79 NSWLR 675. The juror was not dismissed, and the trial proceeded to a verdict. The convictions were overturned on appeal as the errant juror should have been dismissed.

<sup>31</sup> In NSW in 2010, a juror sitting in a murder and armed robbery trial conducted online research at home relating to ‘obligations of law’. The juror took home the indictment and the written directions as to law to ‘study and make notes’ without discussion with the rest of the jury. See *R v Sio (No 3)* [2013] NSWSC 1414; *R v Sio (No 4)* [2013] NSWSC 1415. The juror was discharged, and the trial proceeded to a verdict.

<sup>32</sup> The juror later told fellow jurors that, based on her research, the difference between the two involved ‘malice’: *R v JP (No 1)* [2013] NSWSC 1678; *R v JP (No 2)* [2013] NSWSC 1679. The juror was discharged, and the trial proceeded to verdict.

<sup>33</sup> This deceptively simple term has occasioned the courts great difficulty. The High Court has insisted that it cannot be defined any further. See, eg, *Green v R* (1971) 126 CLR 28.

<sup>34</sup> In Victoria in 2008, a jury sitting in an armed robbery and drug trial were discovered to have printed seven pages from the internet which contained material from five different sites, addressing: ‘what is meant by beyond reasonable doubt’. This material was discovered by court staff after the verdict had been delivered and the jury discharged. See *Martin v R* (2010) 28 VR 579, [57]–[90]. Appeal dismissed.

<sup>35</sup> In Tasmania in 2015, following a jury verdict convicting two defendants of aggravated assault and wounding in Launceston, court staff discovered three pages of computer printed material in the jury room. The material was sourced on the internet from a US online legal dictionary website and it included information relevant to

make up the elements of an offence (eg ‘sponsor’,<sup>36</sup> and ‘organisation’, ‘intention/al’ and ‘member/ship’).<sup>37</sup> However, it also extends to the definition of plain English terms (eg ‘prudent’).<sup>38</sup> It is solely for the trial judge to direct jurors on matters of law. When jurors go online to conduct enquiries on legal terms and concepts, the reliability and accuracy of the source is unknown. There is also the risk of obtaining information from another jurisdiction on a jurisdiction-specific matter. Further, it relies on the juror correctly identifying the legal term/concept in the first place and, thereafter, not straying once online.

1.2.3 It appears that jurors are particularly prone to conducting internet searches when it comes to expert evidence. That is, regardless of whether an expert witness has given evidence in the trial or not. Jurors have conducted searches on the retention of body heat in an infant,<sup>39</sup> ‘retinal detachment’<sup>40</sup> and on scientific terms related to how blood flows after death (‘*livor mortis*’ and ‘*algor mortis*’).<sup>41</sup> They have also been found to have searched ‘rape trauma syndrome’ and sexual assault;<sup>42</sup> ‘The Feminist Position on Rape’ and ‘Rape and the Criminal Justice System’;<sup>43</sup> as well as information about the types

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‘beyond reasonable doubt’ and ‘circumstantial evidence’. See *Marshall and Richardson v Tasmania* [2016] TASCCA 21. On appeal, the court confirmed that a procedural irregularity had occurred, but the appeal was ultimately dismissed.

<sup>36</sup> In South Carolina in 2012, a juror sitting in a trial concerning violations of animal fighting provisions by participating in ‘game-fowl derbies’ and ‘cockfighting’ performed research on *Wikipedia* regarding the definition of an element of the offence (‘sponsor’). See *United States v Lawson*, 677 F 3d 629, 633–34 (4<sup>th</sup> Cir 2012); 133 S Ct 393 (2012). On appeal a retrial was granted.

<sup>37</sup> In Victoria in 2010, multiple jurors on a terrorism trial used the internet to conduct searches on *Wikipedia* (for definitions of ‘organisation’, ‘intention’, and ‘member’) and *Reference.com* (for definitions of ‘membership’, ‘intentional’ and ‘organisation’). See *R v Benbrika* [2009] VSC 142, [53]–[75]; *Benbrika v The Queen* [2010] VSCA 281. Jury not dismissed.

<sup>38</sup> In the US in 2010, a jury foreperson in Florida on a murder/manslaughter trial used his iPhone to ascertain the definition of ‘prudent’ in an online dictionary and shared the definition with other jurors during deliberations. See *Tapanes v State*, 43 So 3d 159, 162–63 (Fla Dist Ct App 2010). Conviction overturned on appeal.

<sup>39</sup> See *R v Folbigg* [2007] NSWCCA 371. The misconduct was discovered after the jury had been discharged. On appeal, it was held that irregularities had occurred, but the appeal was dismissed.

<sup>40</sup> In Pennsylvania in 2011, a juror on a murder trial used the internet to research ‘retinal detachment’. The juror conducted the research during an overnight break and printed material which she attempted to share with her fellow jurors during deliberations. See Michael Sisak, ‘Judge Orders Dismissed Cherry Juror to Turn Over Research’, *Citizens’ Voice* (29 January 2011) <<https://citizensvoice.pressreader.com/the-citizens-voice/20110129>>. Juror dismissed, and the jury discharged.

<sup>41</sup> In Maryland in 2009, a juror sitting in a murder trial conducted online research of scientific terms related to how blood flows after death (‘*livor mortis*’ and ‘*algor mortis*’). See *Allan Jake Clark v State of Maryland*, No 0953/08 (Md Ct Special App, Dec 3 2009). See also Steve Lash, ‘Md. Jury’s Wikipedia search voids murder conviction’ *The Daily Record* (online, 7 December 2009) <<https://www.correctionsone.com/ethics/articles/1974049-Md-jurys-Wikipedia-search-voids-murder-conviction/>>. Conviction overturned on appeal.

<sup>42</sup> In Florida in 2010, a jury foreperson on a trial involving drug and rape charges conducted internet searches on ‘rape trauma syndrome’ and sexual assault. She printed material from *Wikipedia* and shared the material with her fellow jurors on the same day that the verdict was delivered. See Susannah Bryan, ‘Davie police officer convicted of drugging, raping family member to get new trial’, *Sun Sentinel* (online, 16 December 2010) <<https://www.sun-sentinel.com/news/fl-xpm-2010-12-16-fl-davie-cop-jurors-query-20101215-story.html>>.

<sup>43</sup> In the UK in 2005, after a jury had delivered its verdict in a sexual assault case, the jury bailiff discovered several printed documents sourced from the internet in the jury room. The documents were entitled ‘The Feminist Position on Rape’ and ‘Rape and the Criminal Justice System’ and additionally contained handwritten notes. *R v Karakaya* [2005] 2 Cr App R 5; [2005] EWCA Crim 346. Appeal allowed.

of physical injuries typically suffered by young sexual assault victims.<sup>44</sup> Jurors have also conducted online research on methylamphetamine production,<sup>45</sup> ‘generalities on drug addiction and usage’,<sup>46</sup> information about different types of prescription medications,<sup>47</sup> and mobile phone records.<sup>48</sup> In California in 2007, a juror who was sitting in a murder trial, after hearing expert medical evidence in the trial, posted on his blog (under the pseudonym, ‘*The Misanthrope*’) information obtained from internet research about the difference between a medical examiner and a coroner.<sup>49</sup> Obvious issues arise as to the accuracy and reliability of such technical information that is sourced by jurors from unknown online sources. Moreover, the use that an unskilled and unassisted juror makes of such information in the context of the trial is completely unknown, including whether the juror disseminates the information to fellow jurors as an in-house jury room ‘expert’.

1.2.4 Despite the ease with which such online information may be viewed on the screen, it is significant the frequency with which such misconduct is detected as a result of a paper trail.<sup>50</sup> This is perhaps an indication of the degree to which jurors rely on such information once it is sourced and/or the compulsion to share such information with fellow jurors.

1.2.5 It appears that jurors accessing the internet for the purpose of *general* trial related enquiries may be a precursor for more targeted online enquiries to follow. In a 2012 English case, a juror conducted an internet search for the meaning of ‘grievous’. On her account, she then conducted a search including the terms ‘Luton’ and ‘crime’, ‘apparently because of her personal concerns about problems with crime in the town’. As a result of this search, the juror came across a Luton newspaper article that revealed the accused’s prior conviction.<sup>51</sup>

<sup>44</sup> In Nevada in 2010, a jury foreperson in a sexual assault of a minor trial searched online for information about the types of physical injuries suffered by young sexual assault victims. See Grow (n 15). New trial granted on appeal.

<sup>45</sup> In Western Australia in 2016, a juror in a drug-related trial researched methylamphetamine production online. See Heather McNeill, ‘Calls to Overhaul WA Jury System After Juror Dismissed for Facebook Post’. *WA Today* (online, 13 October 2016) <<https://www.watoday.com.au/national/western-australia/calls-to-overhaul-wa-jury-system-after-juror-dismissed-for-facebook-post-20161012-gs0wwa.html>>.

<sup>46</sup> In the UK in 2005, the judge in a drug trial received a jury note stating that a juror had ‘used the internet to research some generalities on drug addiction and usage and visited the arrest site.’ The jury asked whether this was ‘okay’?: *R v Hawkins* [2005] EWCA Crim 2842.

<sup>47</sup> In Florida in 2009, a jury in a multiple defendant drug trial was discovered to be conducting extensive internet enquiries about types of medications mentioned in the trial. Eight of the twelve jurors admitted to conducting online enquiries relevant to the trial, including of medical terms as well as the defendants’ names. One alternate juror admitted to using his mobile phone for this purpose during court breaks. See Deirdra Funcheon, ‘Jurors Gone Wild’, *Miami New Times* (online, 23 April 2009) <<https://www.miaminewtimes.com/news/jurors-gone-wild-6332969>>. A mistrial was, unsurprisingly, declared.

<sup>48</sup> In California in 2012, a juror on a murder and home invasion robbery trial conducted internet research over a weekend adjournment on the topic of cellular phone records. The juror printed out an article, brought it into the jury room and discussed it with fellow jurors. *Hill v Gipson*, No 12-CV-00504-AWI-DLB (HC), 2012 WL 3645337 (ED Cal Aug 22, 2012) 2. An appeal against conviction was dismissed.

<sup>49</sup> *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also Pamela MacLean, ‘Jurors Gone Wild!’, *The Rosenfeld Law Firm*, April 2011 <<http://www.therosenfeldlawfirm.com/article-7/>>. An appeal was dismissed, although the court was satisfied that juror misconduct had occurred.

<sup>50</sup> *R v Marshall* [2007] EWCA Crim 35; *Martin v R* (2010) 28 VR 579, [57]–[90]; *R v Benbrika* [2009] VSC 142, [53]–[55]; *R v Karakaya* [2005] 2 Cr App R 5; [2005] EWCA Crim 346. See also Sisak (n 40).

<sup>51</sup> *Attorney-General v Dallas* [2012] EWHC 156, [17]. The juror was discharged along with the remaining balance of the jury. The matter was retried. The juror was convicted of contempt and sentenced to six months imprisonment (three months to serve).

***Jurors using the internet and social media to search the accused, witnesses, victims, lawyers or the judge ('information in')***

1.2.6 Jurors have been found to have used the internet to *Google* victims and find out more information about them.<sup>52</sup> They have also been found to conduct similar searches of social media to locate the information-rich 'profile' pages of victims for the same purpose.<sup>53</sup> Jurors' curiosities regarding victims include searching online for photographs of deceased victims. One juror explained: 'I just wanted to see his [the deceased's] face ... that poor boy and I just wanted to see his face without any injuries, anything, just see him ... put a face to the name.'<sup>54</sup>

1.2.7 It appears that jurors have a particular penchant for using the internet to conduct searches on the accused. Jurors have obtained information via the internet on an accused's prior convictions and previous allegations against an accused, including those for which the accused was acquitted.<sup>55</sup> In many cases, the previous allegations unearthed by jurors are legally irrelevant and highly prejudicial to the case being tried. For example, in New South Wales in 2002, multiple jurors in a murder trial, alleging the accused had murdered his first wife, were discovered to have conducted internet searches to obtain information about previous allegations that the same accused had murdered his second wife (for which he was previously tried and acquitted).<sup>56</sup> Further, in Florida in 2009, a juror in a multiple defendant drug trial discovered via the internet that one of the defendants had once been implicated in prescribing medication that was used in a double suicide; information that had been specifically ruled inadmissible in pre-trial proceedings.<sup>57</sup> Jurors have also obtained information via the internet about prejudicial matters such as unrelated criminal charges that are pending against the accused,<sup>58</sup> as well as an accused's past outlaw motorcycle gang affiliations.<sup>59</sup>

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<sup>52</sup> In the UK in 2012, a juror sitting in a fraud trial used *Google* to search further information about the victims and he shared this information with his fellow jurors. See Owen Bowcott, 'Two jurors jailed for contempt of court after misusing internet during trials' *The Guardian* (online, 30 July 2013) <<https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>>. Jury discharged. Juror convicted of contempt, imprisoned for two months.

<sup>53</sup> In the US, jurors on a sexual abuse trial looked up the *Myspace* profiles of two victims who had given evidence. See Lowe (n 22) 48.

<sup>54</sup> In NSW in 2014, a juror on a murder trial conducted searches on the internet for a photograph of the deceased. The juror saw an image of the deceased's parents holding a framed photograph of the deceased (which formed part of a media report). See *R v JH (No 3)* 2014 NSWSC 1966, [8]. Juror dismissed, trial proceeded to verdict. See *Attorney-General v Dallas* [2012] EWHC 156. The juror was discharged along with the remaining balance of the jury. The matter was retried. The juror was convicted of contempt and sentenced to six months imprisonment (three months to serve).

<sup>55</sup> In the UK in 2012, a juror on an assault trial conducted an internet search into the accused's prior acquittal of sexual assault and communicated the information to her fellow jurors.

<sup>56</sup> See *R v K* (2003) 59 NSWLR 431.

<sup>57</sup> See Funcheon (n 47). Mistrial.

<sup>58</sup> In New York in February 2019, a juror who sat on the high-profile murder, conspiracy and drug offence trial of Joaquin Guzman ('*El Chapo*') spoke anonymously with the media just days after the verdicts were delivered. He alleged that at least five jurors were aware of prejudicial inadmissible evidence against Guzman that was published by the media, namely allegations of drugging and sexually assaulting complainants as young as 13 years old. See Keegan Hamilton, 'Inside El Chapo's Jury: A Juror Speaks For First Time About Convicting the Kingpin', *VICE News* (21 February 2019) <<https://news.vice.com>>. As at 1 May 2019, appeal proceedings were in preliminary filing stages: See Keegan Hamilton, 'El Chapo's prosecutors say our interview with a juror isn't enough to get him a new trial', *VICE News* (1 May 2019) <<https://news.vice.com/>>.

<sup>59</sup> In South Australia in 2016, two jurors sitting in a blackmail trial against multiple defendants were discovered to have conducted online research relevant to the trial. One juror had googled a defendant because 'he had remembered the name ... from an incident when he was a bikie club member'. The juror conducted a *Google*

1.2.8 Jurors have also obtained information about an accused’s incriminating post offence conduct. A juror on a murder trial in Florida *Googled* the accused and told his fellow jurors, ‘[t]his is a bad guy. He ran away to Nicaragua after the murder.’<sup>60</sup>

1.2.9 Some jurors do not discriminate and have been found to have undertaken *Facebook* searches into both the accused and the victim.<sup>61</sup> Jurors have also conducted online searches on an accused’s alleged accomplice to learn that the accomplice had pleaded guilty to the offending at an earlier stage.<sup>62</sup> Jurors’ online searches have also located information about the history of the particular prosecution, including the fact that the present trial is a retrial and the reasons behind this, such as a hung jury or a successful appeal against conviction.<sup>63</sup>

1.2.10 It is not always the jurors themselves who are undertaking the online research. In a 2014 West Australian murder trial, a juror’s girlfriend conducted online searches in relation to the accused and located information about the history of two previous trials, which she then passed onto her partner, who, in turn, shared the information with his fellow jurors.<sup>64</sup>

1.2.11 A juror’s online inquisitiveness about the parties within the courtroom is not confined to accessing information that pre-dates the relevant trial. Indeed, other parties in the courtroom invariably have active online presences themselves, which includes, in some circumstances, comment about the trial itself.

1.2.12 Even the lawyers involved are not immune. In 2010 in Florida, the prosecutor in a felony trial posted on *Facebook* a ‘poem’ he composed about the trial ‘to be read to the tune of the TV show *Gilligan’s Island*’:

Just sit back and you’ll hear a tale, a tale of a fateful trial that started from this court in St. Lucie County. The lead prosecutor was a good woman, the 2<sup>nd</sup> chair was totally awesome ... Six jurors were ready for trial that day for a four-hour trial, a four-hour trial ... The trial started easy enough but then became rough. The judge and jury confused, if not for the courage of the fearless prosecutors, the trial would be lost, the trial would be lost. The trial started Tuesday,

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search which led him to a news website that confirmed his recollection. The juror shared this information with two other jurors by telling them ‘he thought one of them was a bikie and was in gaol for a ‘club incident’’. A second juror conducted online searches on one of the defendants because she recognised him from ‘the news and all over the papers’: *Registrar of the Supreme Court of South Australia v S; Registrar of the Supreme Court of South Australia v C* [2016] SASC 93. Both jurors were dismissed and the balance of then jury discharged. Both jurors were subsequently convicted of contempt, had convictions recorded and were fined \$3000 each.

<sup>60</sup> See Jane Musgrave, ‘Juror Mischief a Growing Concern’, *Palm Beach Post* (online, 13 May 2012) <<http://www.palmbeachpost.com/news/juror-mischief-a-growing-concern-2353256.html>>. Juror discharged.

<sup>61</sup> In Queensland in 2014, a juror in a murder trial conducted searches on *Facebook* on the accused and the victim. The juror admitted this conduct to a fellow juror. See Tony Keim, ‘Queensland Murder Trial Aborted as Juror Researches Case on “Facebook”’, *The Courier Mail* (online, 8 August 2014) <<https://www.couriermail.com.au/>>. Trial was aborted, juror referred to A-G (re potential prosecution).

<sup>62</sup> See Hardeep Matharu, ‘Professor who caused trial collapse claims he did not understand what the phrase “in hot water” meant’ *The Independent* (online, 23 December 2015) <<https://www.independent.co.uk/>>.

<sup>63</sup> See Joanne Menagh, ‘Judge “almost speechless with rage” after third Ronald Pennington trial for 1992 murder aborted’, *ABC News* (online, 31 July 2014) <<https://www.abc.net.au/>>. See also *R v K* (2003) 59 NSWLR 431.

<sup>64</sup> *Ibid.*

continued til Wednesday and then Thursday With Robyn and Brandon too, the weasel face, the gang banger defendant, the Judge, clerk, and Ritzline here in St. Lucie.<sup>65</sup>

1.2.13 Whilst this post was made by the prosecutor on the evening after the trial was aborted (due to misconduct by other court staff), it serves as an example of material that may be accessible to an errant juror in this context, or a juror sitting in a subsequent trial with that prosecutor. It also highlights the ease with which prohibited communications may occur between jurors and other individuals involved in the trial.

***Jurors using the internet and social media to communicate with individuals involved in the trial ('information in' and 'information out')***

1.2.14 There have been instances of jurors communicating with fellow jurors over social media during the course of a trial, including becoming *Facebook* friends.<sup>66</sup> An issue arises when a small number of jurors communicate via social media about the trial to the exclusion of other jurors. There have also been examples of jurors who have been discharged from a jury continuing to communicate with the balance of the jury and thereby seeking to have an input in deliberations.

1.2.15 In Pennsylvania in 2011, a juror was dismissed from the jury due to work commitments. That evening she emailed two other jurors:

[I]t was great meeting you and working with you these past few days. If I was so fortunate to have finished the jury assignment, I would have found [the accused] guilty on all 4 counts based on the facts as I heard them. There was a lot of speculation and innuendo, but that is the case as I saw it. How wonderful it would have been to see how others saw it. Please fill me in as you can ... I feel like I was robbed. After four days, I should have been able to contribute in some way ... I want to wish you and the rest of the jurors very clear thinking and the will to do the right thing ...<sup>67</sup>

One of the jurors replied:

Thank you for sharing your thoughts. I am of the same mind and have great doubt that the defense can produce anything new today that will change my thinking. It disturbs me greatly to know that people lie ... Anyway I will share your message with the gang.<sup>68</sup>

1.2.16 Jurors' communications via social media are also capable of derogating from the trial process itself. In New South Wales in 2013, multiple jurors on a long-running fraud trial became *Facebook* friends. The jurors communicated with each other, including publication of material about the case. Material included 'a digitally altered photo of one of the jurors wearing a judge's wig', messages about 'the type of ... proceedings, the unusual nature of the proceedings' and messages about 'people in wigs

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<sup>65</sup> Melissa Holsman, 'Facebook poem gets prosecutor in hot water; St. Lucie deputy under investigation in same case' *Sun Sentinel* (online, 22 April 2010) <<https://www.sun-sentinel.com>>.

<sup>66</sup> In Maryland in 2009, five jurors became *Facebook* friends and were found to be discussing the trial to the exclusion of the other jurors. After the presiding judge made enquiries into the matter, one of the jurors posted on his *Facebook* page, 'F--- the Judge': Lowe (n 22) 49; Grow (n 15).

<sup>67</sup> *United States v Juror No One*, No 10-703, 2011 WL 6412039, 444-5; 866 F Supp 2d 442 (ED Pa 2011). The initiating juror was convicted of contempt and fined \$1000.

<sup>68</sup> *Ibid*.

and gowns, the length of the proceedings, joy at having a weekend off and concern at how long the trial might last’.<sup>69</sup>

1.2.17 Jurors have also been found to have contacted the accused via social media, both in circumstances where there was an existing social media connection as well as in circumstances where there was not.

1.2.18 In Tennessee in 2014, a juror in an aggravated robbery trial was *Facebook* friends with the accused before the trial and exchanged private communications with the accused via *Facebook* during deliberations. The juror posted: ‘It’s looking good.’ A post that was subsequently ‘liked’ by the accused. The accused then posted to the juror: ‘I got a Lil girl to live for ...’<sup>70</sup> In 2010, an English juror contacted one of the accused in a multiple accused drug trial via *Facebook*. During the trial, the juror and the accused exchanged up to 50 messages via *Facebook*, including details regarding jury deliberations and updates on the jury’s position. This contact occurred after the accused had been acquitted of all charges relevant to her, but the trial was not yet complete in relation to the other remaining co-accused. The juror told the accused, ‘you should know me I cried with you enough’ and ‘awe fuck nos hw a didnt get caught wiv my nods and blinks hand signals ... [sic]’ The juror also made mention of criminal assets confiscation proceedings against the accused by saying, ‘get all your property back too ...’, to which the accused replied, ‘I will be doin ha ha and trying for compo’ and ‘keep in touch Ill get you a nice pressie if I get anything out of um ...’ The juror was fully aware that the communications were prohibited, telling the accused, ‘pleeeeeeese don’t say anything cause ... they could call mmisrial and I will get 4cked toO [sic]’.<sup>71</sup> In a similar vein, one juror in a 2011 civil trial in Florida, sent a *Facebook* friend request to the defendant. When he was subsequently discharged as a juror he posted: ‘Score ... I got dismissed!! Apparently they frown upon sending a friend request to the defendant ... hahaha.’<sup>72</sup>

1.2.19 Jurors have also contacted witnesses who have given evidence in the trial, again, including circumstances where there was a pre-existing social media connection as well as in circumstances where there was not. In New York in 2010, a juror sitting in a negligent homicide and reckless endangerment trial, searched two or three witnesses on *Facebook*. She located the *Facebook* page of a firefighter witness who had given evidence in the trial and sent him a friend request.<sup>73</sup> In Tennessee in 2013, a

<sup>69</sup> Brenden Hills, ‘Jury Getting off Their Facebooks’, *The Daily Telegraph* (online, 12 May 2013) <<https://www.dailytelegraph.com.au/jury-getting-off-their-facebooks/news-story/26e2549a7d9063ae9dae0e2a27683dce>>. The judge became aware of this conduct two months into the trial after being alerted by the trial prosecutor. The judge ordered a court officer to examine the material to see if it included any prejudicial material. It was ultimately concluded that the material was not such so as to warrant the jury being discharged.

<sup>70</sup> Yolanda Jones, ‘Juror who communicated via Facebook sentenced’, *Commercial Appeal* (5 February 2015) <<https://www.commercialappeal.com/errors/404/>>. Juror convicted of contempt, sentenced to 10 days imprisonment, nine days suspended (one day to serve); accused indicted on improper influence of a juror charge.

<sup>71</sup> *A-G v Fraill* [2011] EWCA Crim 1570, [2011] 2 Cr App R 21. When the misconduct was discovered, some verdicts remained outstanding (for some defendants). The jury were discharged, and those pending matters were the subject of a retrial. The juror was convicted of contempt and sentenced to eight months imprisonment.

<sup>72</sup> Ben Zimmer, ‘Juror could face jail time for ‘friending’ defendant’, *USA Today* (online, 7 February 2012) <<https://usatoday30.usatoday.com/news/nation/story/2012-%2002-07/juror-facebook-friend-defendant/53000186/1>>; Katie Wiggin, ‘Judge sentences juror to 3 days in jail for “friending” defendant on Facebook’, *CBS News* (online, 17 February 2012) <<https://www.cbsnews.com/news/judge-sentences-juror-to-3-days-in-jail-for-friending-defendant-on-facebook/>>. Juror convicted of contempt, sentenced to three days imprisonment.

<sup>73</sup> *People v Rios*, No 1200/06, 2010 WL 625221, (NY Sup Ct Feb 23, 2010). Appeal grounds relating to juror misconduct dismissed.

juror in a murder trial contacted an expert medical witness via *Facebook* after the jury retired to commence deliberations: ‘A-dele!! I thought you did a great job today on the witness stand ... I was in the jury ... not sure if you recognized me or not!! You really explained things so great!!’ The witness responded: ‘I was thinking that was you. There is a risk of a mistrial if that gets out.’ The juror replied: ‘I know ... I didn’t say anything about you...there are 3 of us in the jury from Vandy and one is a physician (cardiologist) so you may know him as well. It has been an interesting case to say the least.’<sup>74</sup>

***Jurors publishing material about the trial on the internet or social media, which may disclose impermissible bias, prejudice, predetermination or other irregularity in the deliberation process (‘information out’)***

1.2.20 Jurors have been found to publish material on the internet and social media platforms which suggests that they may have already made their mind up about the guilt of the accused, including in circumstances where they are yet to even be empanelled on a particular trial. In 2010, a juror in Victoria posted on his *Facebook* page, ‘everyone’s guilty’;<sup>75</sup> a juror in the US posted on *Twitter*, ‘Guilty! He’s guilty! I can tell!’;<sup>76</sup> in Washington DC in 2010, a juror empanelled on a kidnapping and murder trial tweeted: ‘Guilty Guilty ... I will not be swayed. Practicing for jury duty’;<sup>77</sup> in 2011 in Mississippi, a juror sitting in an aggravated assault and felony malicious mischief trial posted on his *Facebook* page during the trial, ‘I guess all I need to know is GUILTY. Lol’;<sup>78</sup> in Detroit in 2011, a juror sitting in a resist arrest trial posted on her *Facebook* page before the close of the prosecution case, ‘actually excited for duty tomorrow. It’s gonna be fun to tell the defendant they’re GUILTY’;<sup>79</sup> in California in 2011, a juror posted on *Facebook*, that she thought the accused was ‘presumed guilty’;<sup>80</sup> in Michigan in 2014 a juror in a murder trial posted on *Facebook*: ‘Not cool that a young man is dead another young man will be in prison for long time maybe’;<sup>81</sup> and in 2016 a juror in a West Australian murder trial posted on *Facebook* the day the trial was due to commence, ‘At Perth District Court, guilty!’<sup>82</sup>

1.2.21 Jurors have also published material about the lawyers involved in the trial which might suggest that they are approaching their task as a popularity contest between the lawyers. In Seattle in 2010, a

<sup>74</sup> *State v Smith*, No M2010-01384, 2013 WL 4804845 (Tenn Sept 10, 2013) 2. No mistrial, verdict reversed on appeal.

<sup>75</sup> Andrea Petrie, ‘No-show juror in hot water over “stupid” action’, *The Sydney Morning Herald* (online, 17 April 2010) <<https://www.smh.com.au/national/noshow-juror-in-hot-water-over-stupid-actions-20100416-skli.html>>. The juror was referred for potential prosecution.

<sup>76</sup> Harriet Alexander, ‘Trial via social media a problem for courts’, *Sydney Morning Herald* (online, 17 April 2013) <<https://www.smh.com.au/technology/trial-via-social-media-a-problem-for-courts-20130416-2hygz.html>>.

<sup>77</sup> ‘Prospective Juror Tweets Self Out of Levy Murder Trial’, *NBC4 Washington* (online, 22 October 2010) <<https://www.nbcwashington.com/news/local/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253.html>>.

<sup>78</sup> *Shaw v Mississippi*, No 2011-KA-01536-COA, 2013 WL 5533080, 14–15.

<sup>79</sup> ‘Facebook post gets Detroit-area juror in hot water’ *News.com.au* (online, 31 August 2010) <<https://www.news.com.au/breaking-news/facebook-post-gets-detroit-area-juror-in-hot-water/news-story/42a3af4b3746d502cc382772b7e5219f>>. Juror found guilty of contempt of court and fined \$250.

<sup>80</sup> ‘Facebooking juror kicked off murder trial’ *The OC Register* (online, 2 December 2011) <<https://www.ocregister.com/2011/12/02/facebooking-juror-kicked-off-murder-trial/>>. Juror discharged.

<sup>81</sup> Frederick Reese, ‘ABA Says Lawyers Can Track Jurors’ Social Media Activity’ *Mint Press News* (24 June 2014) <<https://www.mintpressnews.com/aba-says-lawyers-can-track-jurors-social-media-activity/192917/>>. No mistrial.

<sup>82</sup> McNeill (n 45).

juror in a robbery trial posted on her blog that the prosecutor was ‘Mr Cheap Suit’ and ‘annoying’, whereas defence counsel, ‘just exudes friendly ... I want to go to lunch with him ... And he’s cute.’<sup>83</sup>

1.2.22 In 2007 in California, ‘*The Misanthrope*’ (see [1.2.3] above), described defence counsel on his blog as ‘whacked out’ and as having:

a Colombo detective-style of acting stupid and asking questions in the most condescending and convoluted way that makes many completely confused and not knowing what the hell the question was ... we are not getting the eloquence of the attorneys in the movie *Inherit the Wind*.<sup>84</sup>

1.2.23 Jurors have also published material that discloses prejudice in relation to certain types of offending. In London in 2013, a juror in a child sex trial posted on *Facebook*: ‘Wooooo I wasn’t expected to be in a jury Deciding a paedophile’s fate, I’ve always wanted to Fuck up a paedophile & now I’m within the Law!’<sup>85</sup> In New South Wales in 2016, a juror sitting in a trial in Broken Hill, considering the offence of sexual intercourse taking advantage of a person’s cognitive impairment, posted on *Facebook* the day before the guilty verdict was returned: ‘When a dog attacks a child it is put down. Shouldn’t we do the same with sex predators?’ This post was accompanied with a photograph that showed images of ‘rooms and implements by which lawful executions are carried out’.<sup>86</sup>

1.2.24 It should be noted that whether or not the material published by a juror is representative of genuine bias, prejudice, and/or predetermination is not the entirety of the matter. The requirement of impartiality on the part of jurors may be adversely affected by both *actual* and *perceived* irregularities.

1.2.25 Jurors have also been found to publish material on the internet and social media that raise grievances about their fellow jurors. In California in 2007, ‘*The Misanthrope*’ (see [1.2.3] and [1.2.22] above), described his fellow jurors as ‘liars and bozos’ and that he volunteered to be the foreperson to ‘expedite matters’.<sup>87</sup> Another juror in California in 2011 who was sitting in a murder trial posted on *Facebook* that a fellow juror annoyed her so much by cracking her knuckles that she ‘wanted to punch her ...’ She also took photographs of her fellow jurors’ shoes and posted comments such as ‘clunky running shoes which I am pretty sure are not used for their intended purpose’.<sup>88</sup> Such ‘venting’ by jurors may seem petty but otherwise harmless. However, it may cause doubt as to whether the jury are capable of deliberating together and impartially and effectively performing their role. Further, a juror’s airing of grievances about fellow jurors gets more complicated when it involves sharing confidential details about jury deliberations. In New York in 2015, a juror in a robbery trial posted on *Facebook*: ‘God help

<sup>83</sup> Grow (n 15). The juror was dismissed.

<sup>84</sup> *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 49). The appeal was dismissed, though the court was satisfied that juror misconduct had occurred.

<sup>85</sup> ‘Jurors jailed for contempt of court over internet use’, *BBC News* (online, 29 July 2013) <<https://www.bbc.com/news/uk-23495785>>. Juror discharged; trial proceeded to verdict. Juror convicted of contempt, imprisoned for two months.

<sup>86</sup> Michaela Whitcourne, ‘Social media post sparks probe into jury conduct in sex crime trial’ *The Sydney Morning Herald* (online, 15 April 2019) <<https://www.smh.com.au/national/nsw/facebook-post-sparks-probe-into-jury-conduct-in-sex-crime-trial-20190414-p51dz4.html>>. See also *Agelakis v R* [2019] NSWCCA 71: On 29 March 2019, the NSW Court of Criminal Appeal ordered an investigation into the alleged juror misconduct, pursuant to s 73A of the *Jury Act 1977* (NSW).

<sup>87</sup> *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 49). Appeal dismissed, albeit the court was satisfied that juror misconduct had occurred.

<sup>88</sup> *The OC Register* (n 80). Juror discharged.

me ... The other jurors don't trust the police and want to outright dismiss the confessions as well as the majority of the rest of the evidence. Tomorrow is going to be a very difficult day.'<sup>89</sup> In 2011, an English juror posted on *Facebook* that the accused was innocent and that her fellow jurors were 'scum bags' for convicting him.<sup>90</sup>

1.2.26 Jurors have otherwise turned to the internet and social media to express frustration and/or disinterest at the trial process. Similarly, such material may raise concerns about a juror's ability to perform his/her role. In 2007 in California, '*The Misanthrope*' (see [1.2.3], [1.2.22] and [1.2.25] above), posted on his blog comparing court staff to 'freeway workers ... picnicking alongside the freeway'.<sup>91</sup> In 2011, a juror sitting in a tax evasion trial in Connecticut took to *Facebook* to complain: 'Shit just told this case could last 2 weeks. Jury duty sucks!', 'Your honor I object! This is way too boring. somebody get me outta here' and 'Guinness for lunch break. Jury duty ok today'.<sup>92</sup> In 2013, a juror in a wrongful death civil trial in Missouri posted on *Facebook*: 'Got picked for jury duty ... Most importantly ... the 3:00pm Cocktail hour is not observed!' The juror continued: 'Drunk and having great food at our fav neighbourhood hang out', to which a 'friend' replied, 'I'm still amazed they allow jurors to nip from a flask all day'.<sup>93</sup> In 2014, a juror in Arkansas in a rape and murder trial published multiple *Facebook* posts including: 'Still in the courtroom. Lord I'm ready to go home. I'm sleepy and tired and my red wine is calling my name' and 'irritated as hell'.<sup>94</sup> In 2015 in New York, a juror in a robbery trial posted on *Facebook*: 'Everything about this process is inefficient' and 'I'm trying to remain positive and centered [sic] but, truthfully, I'm dying from boredom.'<sup>95</sup>

1.2.27 Jurors have otherwise published material that alludes to the fact that the jury has reached a verdict (and, in some cases, what that verdict is) before the verdict has been announced and/or delivered in court. In California in 2007, '*The Misanthrope*' (see [1.2.3], [1.2.22], [1.2.25] and [1.2.26] above), posted on his blog '[t]he first day of deliberation was a productive one ... we left with a possible verdict, but we are going to discuss again in the morning to finalize. It's possible that by afternoon we will give our verdict to the judge.'<sup>96</sup> In 2009, a juror in Arkansas sitting in a civil trial posted on *Twitter* under the name '*Juror Jonathan*': 'I just gave away TWELVE MILLION DOLLARS of somebody else's money'. Another post read: 'oh and nobody buy Stoam. Its [sic] bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter' (accompanied by the company's website address). The

<sup>89</sup> Christina Carrega-Woodby, Chelsia Rose Marcius and Corky Siemazko, 'Exclusive: Queens Juror Fined for Facebook Blabbing' *New York Daily News*, (online, 3 November 2015) <<https://www.nydailynews.com/new-york/queens/exclusive-queens-juror-fined-facebook-blabbing-article-1.2421830>>. Jury discharged. Juror convicted of contempt of court, fined \$1000.

<sup>90</sup> Lowe (n 22) 49.

<sup>91</sup> *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 49). Appeal dismissed, albeit the court was satisfied that juror misconduct had occurred.

<sup>92</sup> *United States v Ganius* 755 F 3d 125 (2d Cir 2014).

<sup>93</sup> Amy St Eve, Charles Burns and Michael Zuckerman, 'More from the #jurybox: The latest on juries and social media' (2014) 12(1) *Duke Law and Technology Review* 64, 70–1.

<sup>94</sup> *State of Arkansas v Quinton Riley*, 4 46 SW 3d 187 (Ark, 2014); Elicia Dover, 'Juror's Facebook Posts Could Cause Mistrial', *KATV.com* (online, 9 January 2014) <<https://katv.com/archive/jurors-facebook-posts-could-cause-mistrial>>. Retrial.

<sup>95</sup> Carrega-Woodby, Marcius and Siemazko (n 89).

<sup>96</sup> *People v Ortiz*, Crim No B205674, 2009 WL 3211030 (Cal App, 2d Dist 2009). See also MacLean (n 49). The appeal was dismissed, though the court was satisfied that juror misconduct had occurred. This post followed a photograph of an exhibit, a 15-inch knife that was the alleged murder weapon, that the juror had taken a photograph of during deliberations and uploaded to his blog.

posts were made before the verdict on sentence was delivered.<sup>97</sup> In Pennsylvania in 2012, a juror sitting in a high-profile corruption trial posted on *Facebook* and *Twitter* during the trial, including a running commentary on deliberations, ‘today was much better than expected and tomorrow looks promising too!’; ‘[s]tay tuned for the big announcement on Monday everyone!’ and ‘[t]his is it ... no looking back now’.<sup>98</sup> In 2011 in Arkansas, a juror sitting in a murder and aggravated robbery trial posted on *Twitter* while the jury was deliberating: ‘If its [sic] wisdom we seek ... We should run to the strong tower’ and ‘[i]ts over’ (an hour before the jury announced it had reached a verdict).<sup>99</sup>

***Jurors publishing material about the trial on the internet or social media, which may elicit impermissible information by way of a response (‘information out’ and ‘information in’)***

1.2.28 When jurors publish material about jury service on the internet or social media, they have no control over what material they may receive by way of a response. In some instances, the tenor of the material originally posted by the juror is an accurate predictor of the type of responses that will likely be received. For example, in 2011 in Connecticut a juror in a conspiracy and tax evasion trial posted on *Facebook*: ‘Jury duty 2morrow. I may get to hang someone ... can’t wait.’ By way of responses, the juror received, ‘gettem while they’re young!!! lol’ and ‘let’s not be to hasty. Torcher first, then hang! Lol [sic].’<sup>100</sup>

1.2.29 In some cases, jurors post material online about their jury service with the sole intention to elicit impermissible responses: in the UK in 2008, a juror on a child abduction sexual assault trial posted on *Facebook*, ‘I don’t know which way to go, so I’m holding a poll ...’<sup>101</sup>

1.2.30 However, in other cases, apparently innocuous material posted by jurors may elicit unsolicited and inordinate replies capable of interfering with the juror’s impartiality (or being perceived as capable of doing so). In Florida in 2012, a juror sitting in an armed robbery trial posted multiple tweets and comments on *Facebook*. The posts included comments about the courthouse, the poor internet access and bad food. Whilst the posts did not contain any trial-specific information, one reply on *Facebook* wrote: ‘Well make sure you put the bad guy away!’<sup>102</sup> In 2013, a juror in Missouri sitting in a wrongful death civil trial posted on *Facebook*: ‘Got picked for jury duty’, ‘Sworn to secrecy as to details of this case’. A ‘friend’ replied: ‘If he’s cute and he has a nice butt, he’s innocent!’ The juror further posted: ‘Starting day 8 of jury service’ and the ‘friend’ replied ‘Remember nice ass = innocent’.<sup>103</sup> In 2017, a juror in Virginia in a murder trial posted on *Facebook* that she was selected to be a juror. Her stepfather commented: ‘guilty, guilty, guilty,’ to which she replied, ‘[a]t least they give us coffee’.<sup>104</sup>

<sup>97</sup> ‘Juror reportedly sends “tweets” during trial’, *NBC NEWS.com* (online, 13 March 2009) <[http://www.nbcnews.com/id/29683897/ns/us\\_news-crime\\_and\\_courts/t/juror-reportedly-sends-tweets-during-trial/#.XN5b0I4zaUk](http://www.nbcnews.com/id/29683897/ns/us_news-crime_and_courts/t/juror-reportedly-sends-tweets-during-trial/#.XN5b0I4zaUk)>.

<sup>98</sup> *United States v Fumo*, 655 F 3d 288 (3d Cir 2011), 296–8. Appeal dismissed.

<sup>99</sup> *Dimas-Martinez v Arkansas*, 2011 Ark 515 (Dec 8, 2011), 11–15. Convictions reversed on appeal.

<sup>100</sup> *United States v Ganas* 755 F 3d 125 (2d Cir 2014).

<sup>101</sup> Alexander (n 76). See also Lowe (n 22) 48.

<sup>102</sup> David Ovalle, ‘Florida City Man Wants New Trial Because of Filmmaker Juror’s Tweets’, *Miami Herald* (online, 23 April 2012) <<http://www.miamiherald.com/2012/04/23/2764287/florida-city-man-wants-new-trial.html>>.

<sup>103</sup> St Eve, Burns and Zuckerman (n 93) 70–1.

<sup>104</sup> Scott Shenk, ‘Facebook Post Leads to Mistrial’, *Fredericksburg.com* (4 January 2017) <[http://www.fredericksburg.com/news/crime\\_courts/facebook-post-leads-to-mistrial/article\\_11b6041e-5c28-527c-b1d1-94564834972c.html](http://www.fredericksburg.com/news/crime_courts/facebook-post-leads-to-mistrial/article_11b6041e-5c28-527c-b1d1-94564834972c.html)>.

1.2.31 In this way, a juror (or jurors) can easily get caught up in online banter. In the US in 2012, three jurors became friends on *Facebook* and two of those jurors published material about the trial on their ‘open’ *Facebook* pages. Juror A wrote: ‘[I] had jury duty today and was selected for the jury ... Bleh! Stupid jury duty!’, and received responses, one of which stated: ‘Throw the book at ‘em’. Juror A also posted material about long sitting hours and the expected duration of the trial, to which Juror C responded: ‘[H]opefully it will end on [M]onday ...’ Juror B posted the following during empanelment: ‘Waiting to be selected for jury duty. I don’t feel impartial’, which received a response of: ‘Tell them “BOY HOWDIE, I KNOW THEM GUILTY ONES!”’ Juror B later posted: ‘Superior Court in Brockton picks me ... for the trail [sic]. The[y] tell us the case could go at least 1 week. OUCH OUCH OUCH.’ Juror B received a response from his wife: ‘Nothing like sticking it to the jury confidentiality clause on Facebook ... Anyway, just send her to Framingham quickly so you can be home for dinner on time.’ Juror B also received a response from another friend: ‘I’m with [Juror B’s wife] ... tell them that you asked all your FB friends and they think GUILTY.’<sup>105</sup>

1.2.32 The ways in which a juror might inadvertently elicit unsolicited responses via the internet or social media are extensive. In the UK in 2015, a juror in a murder trial ‘favourited’ a local newspaper report on the trial on his *Twitter* account. In discharging the jury, Davies J commented on the potential significance of such a simple online gesture in the social media realm:

This is a professional man and he should have known better. I warned this man twice not to access social media before the trial. Before we even got to social media, there was a warning not to discuss this case with anyone at all. This man with 400 followers ... by favouriting a tweet, either if you like it or you want to save it, *you are inviting a discussion with these 400 people*.<sup>106</sup>

### Question 1

What is your experience of jurors using social media and/or other internet platforms during a criminal trial?

## 1.3 ‘Trending’: use of social media and other internet platforms

1.3.1 Australia’s current population is approximately 25.3 million.<sup>107</sup> Recent Australian survey results<sup>108</sup> indicate that approximately 87% of Australians use the internet at least once per day; 60% of Australians use the internet more than five times per day;<sup>109</sup> and Australians own, on average, 3.5 internet-enabled devices.<sup>110</sup>

<sup>105</sup> *Commonwealth v Warner*, 81 Mass App Ct 689 (2012), 1 February 2012. See <<http://masscases.com/cases/app/81/81massappct689.html>>.

<sup>106</sup> ‘Tweet from doctor on jury derails murder trial for a second time: Man ignored warnings to “favourite” local newspaper report about the case’, *Daily Mail Australia* (online, 29 October 2015) <<https://www.dailymail.co.uk/news/article-3294330/Tweet-doctor-jury-derails-murder-trial-second-time-Man-ignored-warnings-favourite-local-newspaper-report-case.html>>.

<sup>107</sup> Figures projected for May 2019, based on estimations from September 2018: see Australian Bureau of Statistics (‘ABS’), *Population Clock* (May 2019) <<http://www.abs.gov.au/ausstats/abs@.nsf/0/1647509ef7e25faaca2568a900154b63?opendocument>>.

<sup>108</sup> Yellow, *Yellow Social Media Report 2018, Part One – Consumers* (Report, June 2018) 4, 9.

<sup>109</sup> *Ibid* 4.

<sup>110</sup> *Ibid*.

1.3.2 It is estimated that 88% of internet users have a social media profile,<sup>111</sup> and as of January 2019:

- 15 million Australians are active *Facebook* users;
- 9 million Australians are active *Instagram* users;
- 7 million Australians are active *WhatsApp* users;
- 6.4 million Australians are active *Snapchat* users;
- 4.7 million Australians are active *Twitter* users; and
- 4.5 million Australians are active *LinkedIn* users.<sup>112</sup>

1.3.3 *Facebook* is the most widely used social media platform in Australia, with 60% of Australians being considered ‘active users’.<sup>113</sup>

1.3.4 Aside from the sheer volume of users of the leading social media platforms in Australia, the frequency with which such platforms are used is astounding. Survey results indicate that 62% of internet users access social media daily;<sup>114</sup> and 34% do so more than five times per day.<sup>115</sup> Over the relevant age groups:

- 81% of internet users aged 18–29 use social media at least once per day (55% do so more than five times per day);
- 79% of internet users aged 30–39 use social media at least once per day (52% do so more than five times per day);
- 69% of internet users aged 40–49 use social media at least once per day (38% do so more than five times per day);
- 49% of internet users aged 50–64 use social media at least once per day (19% do so more than five times per day); and
- 30% of internet users aged 65+ use social media at least once per day (6% do so more than five times per day).<sup>116</sup>

1.3.5 Whilst social media use and frequency of use is lower in older age groups, surprisingly, it remains quite common.<sup>117</sup>

1.3.6 Survey results suggest that, on average, *Facebook* users log on 37 times per week; *Instagram* users 33 times per week; *Snapchat* users 36 times per week; and *Twitter* users 23 times per week.<sup>118</sup> The

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<sup>111</sup> Ibid.

<sup>112</sup> David Cowling, ‘Social Media Statistics Australia – March 2019’, *Social Media News* (15 May 2019) <<https://www.socialmedianews.com.au/social-media-statistics-australia-april-2019/>>. ‘Active users’ means users who are active on the relevant social media platform within a one-month period, namely, April 2019).

<sup>113</sup> Ibid.

<sup>114</sup> Yellow (n 108) 10.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid 18.

average time spent on *Facebook* per visit is 16 minutes<sup>119</sup> and, it is estimated that the typical *Facebook* user is spending almost 10 hours per week on *Facebook*.<sup>120</sup> The average number of *Facebook* friends is 239; the average number of *Instagram* followers is 241; the average number of *Twitter* followers is 187; and the average number of *Snapchat* friends is 93.

1.3.7 Curiously, across all Australian states and territories, the frequency of social media use is greatest in Tasmania with 42% of internet users in Tasmania accessing social media more than five times per day.<sup>121</sup> Further, the frequency of *Facebook* use is also highest in Tasmania, with *Facebook* users in Tasmania logging on an average of 52 times per week (compared to the national average of 37 times per week).<sup>122</sup>

1.3.8 All these figures encompass desktop computer as well as mobile device access, namely smartphones. It is estimated that 87% of Australians own and use a smartphone.<sup>123</sup> As at 30 June 2018, there were approximately 27 million mobile phone subscribers in Australia.<sup>124</sup>

1.3.9 Social media has also changed the way that the majority of Australians now consume news and current affairs. As of 2018, 88% of Australian news consumers were ‘digital news consumers’<sup>125</sup> and 36% of Australian news consumers say they access online news mainly through mobile phones (‘mobile news consumers’).<sup>126</sup> More than half of Australian news consumers specifically use social media to access news (52%); 17% use social media as their main source of news;<sup>127</sup> and social media is the main source of news for those aged between 18–24 years (36%).<sup>128</sup> The role and impact of traditional media outlets have diminished.

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<sup>119</sup> Ibid 20.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid 19.

<sup>123</sup> Ibid 4.

<sup>124</sup> ABS, *Internet Activity, Australia, June 2018 – Type of Access Connection* (Catalogue No 8153.0, 2 October 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/0/00FD2E732C939C06CA257E19000FB410?Opendocument>>.

<sup>125</sup> ‘Digital news consumers’ refers to those who used the following devices to access online news in the last week: smartphone, tablet/e-book, computer/laptop, connected/smart TV, wearable (smartwatch), or voice activated speaker: Sora Park et al, ‘Digital News Report: Australia 2018’ (Report, News and Media Research Centre University of Canberra, June 2018), 63 <<http://www.canberra.edu.au/research/faculty-research-centres/nmrc/digital-news-report-australia-2018>>.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid 14.

<sup>128</sup> Ibid 9.

## 1.4 Juror ‘profile’

1.4.1 In Tasmania in 2017–2018: 12,366 jurors were summonsed; 3,305 jurors attended for jury service and 1,213 jurors were empanelled. A total of 107 criminal jury trials took place.<sup>129</sup> It is estimated that across Australia over 45,000 persons perform jury service each year.<sup>130</sup>

1.4.2 The jury system is designed to be representative of the community such that a trial by jury is a trial by ‘one’s peers’.<sup>131</sup> The random nature of the jury selection process is essential to achieving this end.

1.4.3 Tasmanians are liable for jury service if they are enrolled on the State electoral roll<sup>132</sup> and they are not disqualified<sup>133</sup> or ineligible.<sup>134</sup> From this ‘list’ of individuals, the court randomly<sup>135</sup> selects a sufficient number of individuals who are issued a summons requiring their attendance for jury service.<sup>136</sup> Bar those individuals who are summoned but who are subsequently excused,<sup>137</sup> exempt,<sup>138</sup> or deferred,<sup>139</sup> the individuals who attend court in response to their summons form a ‘panel’<sup>140</sup> from which individuals are randomly selected<sup>141</sup> and, subject to their being excused,<sup>142</sup> stood aside,<sup>143</sup> or challenged<sup>144</sup> as part of that process, they are empanelled as jurors. The jury selection process in other Australian jurisdictions is similar.<sup>145</sup>

1.4.4 Whilst early Australian studies showed significant disparity between the age and gender of jurors and that of the general population,<sup>146</sup> more recent studies indicate that juries are now a fair and

<sup>129</sup> Supreme Court of Tasmania, *Annual Report 2017–2018* (Report, 2018) 31 <<https://www.supremecourt.tas.gov.au/publications/annual-reports/>>. This encompasses Hobart, Launceston and Burnie. No civil jury trials took place in Tasmania in 2017–2018. Similar figures were recorded in 2016–2017: 12,130; 2,891 jurors attended; 1,0612 jurors empanelled; and 88 criminal jury trials conducted. No civil jury trials were conducted in Tasmania in 2016–2017. See Supreme Court of Tasmania, *Annual Report 2016–2017* (Report, 2017) 32 <<https://www.supremecourt.tas.gov.au/publications/annual-reports/>>.

<sup>130</sup> Lorana Bartels, ‘Jurors and Social Media: is there a solution?’, *The Conversation* 31 July 2013 <<https://theconversation.com/jurors-and-social-media-is-there-a-solution-15921>>.

<sup>131</sup> Anthony Dickey, ‘The Jury and Trial by One’s Peers’ (1974) 11 *University of Western Australia Law Review* 205.

<sup>132</sup> *Juries Act 2003* (Tas) ss 3, 6(1), 19; *Electoral Act 2004* (Tas) ss 3, 30, 32.

<sup>133</sup> *Juries Act 2003* (Tas) s 6(2) and sch 1.

<sup>134</sup> *Ibid* s 6(3) and sch 2.

<sup>135</sup> *Ibid* s 4.

<sup>136</sup> *Ibid* s 27.

<sup>137</sup> *Ibid* ss 9, 10, 11, 12.

<sup>138</sup> *Ibid* s 14.

<sup>139</sup> *Ibid* s 8.

<sup>140</sup> *Ibid* s 28(4)(a).

<sup>141</sup> *Ibid* s 4.

<sup>142</sup> *Ibid* ss 39(2)–(3).

<sup>143</sup> *Ibid* ss 29(8)(a)–(b), 34.

<sup>144</sup> *Ibid* ss 28(8)(a)–(b), 32, 33, 35, 36.

<sup>145</sup> See *Juries Act 1967* (ACT); *Jury Act 1977* (NSW); *Jury Act 1995* (Qld); *Juries Act 1927* (SA); *Juries Act 2000* (Vic); and *Juries Act 1957* (WA). See also: *Judiciary Act 1903* (Cth) s 68(1) (which applies the procedures of the state or territory to the trial a federal offence).

<sup>146</sup> Kate Warner et al, ‘Gauging public opinion on sentencing: can asking jurors help?’ (2009) 371 *Trends and Issues in Crime and Criminal Justice* 1, 3, citing P Wilson and J W Brown, *Crime and the Community* (University of Queensland Press, 1973).

representative cross-section of the community in terms of gender and age.<sup>147</sup> Although there are no studies of the representativeness of Tasmanian juries and the Supreme Court does not collect data on this aspect of jury service, a 2007–2009 survey of Tasmanian jurors for the purposes of sentencing research, indicates that they are roughly similar in age, gender and country of birth distribution to the general Tasmanian population.<sup>148</sup> Jurors are, indeed, the person on the street.<sup>149</sup> It follows that they tweet, blog, post, share, message, chat, like, follow, and comment like everyone else.

## 1.5 Prevalence – ‘click-through rate’

1.5.1 The studies, surveys and other avenues of inquiry that have been pursued on this topic represent attempts to examine this difficult issue from a wide range of perspectives and using a variety of data sources: by asking jurors themselves; by asking judges; by asking other key stakeholders in the criminal justice system; by considering reported judgments that deal with the issue; by monitoring social media platforms for material posted by jurors; and by monitoring social media platforms for material posted by the world-at-large, which may be seen by jurors.

1.5.2 Sections [1.5.3]–[1.5.39] below examine some of the inquiries that have been conducted in various jurisdictions concerning jurors and social media.

### *United Kingdom – 2010*

1.5.3 In 2010, a study was conducted in the UK with 643 jurors from 62 trials.<sup>150</sup> The trials took place in three different locations (London, Nottingham and Winchester). The trials included both ‘standard’ trials (less than two weeks in duration, with little media coverage) and ‘high-profile’ trials (more than two weeks in duration, with substantial media coverage before and during the trial). The jurors were asked, inter alia, about accessing information relevant to the trial on the internet.<sup>151</sup>

1.5.4 Of 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, compared to 18% of jurors who served on standard trials.<sup>152</sup> In terms of the circumstances in which this occurred, 26% of jurors on high-profile trials admitted they ‘saw’ material online relevant to the trial they were sitting in and 12% admitted to actively seeking out such information.<sup>153</sup> In the standard trials, 13% of jurors admitted they ‘saw’ material online relevant to the trial they were sitting in and 5% admitted to actively seeking out such information.<sup>154</sup>

1.5.5 The results indicate that jurors on high-profile trials were more likely to seek out information online, compared to the jurors on standard cases. Surprisingly, the results also suggest that it was not

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<sup>147</sup> Ibid.

<sup>148</sup> The *Tasmanian Jury Sentencing Study* took place between September 2007 and October 2009. Jurors from the first 51 trials were asked to partake in a questionnaire after serving as a juror. Demographic information collected from 257 jurors who completed the questionnaire was compared with ABS 2006 census data for Tasmania. See Warner, Davis and Underwood (n 8) 337.

<sup>149</sup> Patrick Devlin, *Trial by Jury* (Stevens & Sons, 1956) 29.

<sup>150</sup> Cheryl Thomas, ‘Are Juries Fair?’ (Research Paper No 1/10, Ministry of Justice, February 2010) <<http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>>.

<sup>151</sup> Ibid 42.

<sup>152</sup> Ibid 43.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

the younger jurors who were more likely to seek out material online: 68% of the jurors who admitted to this conduct were over 30 years old, and 81% of jurors on high-profile cases who admitted to this conduct were over 30 years old.<sup>155</sup>

1.5.6 Whilst all jurors in this study were guaranteed anonymity, it is to be noted that they were being asked to admit to conduct that was expressly prohibited by the trial judge as recently as a few days before the survey was completed.<sup>156</sup> Participating jurors were also given the option of admitting only to the lesser option of merely having *seen* relevant information on the internet, as opposed to having actively sought out such information. As a result, it is likely that the results reflect the minimum number of jurors who actively sought out information on the internet.<sup>157</sup>

#### *United States – 2010*

1.5.7 In 2010, Reuters Legal conducted a review of the data from the *Westlaw* online research database and compiled a list of all reported cases in the US in which internet-related conduct of jurors was the subject of judicial discussion. From these cases, the following data was derived:

- between 1999 and 2010, at least 90 verdicts were the subject of challenges because of alleged internet-related juror conduct;
- more than half of those cases occurred between 2008 and 2010;
- between 21 January 2009 and 9 December 2010, there were 28 cases (both criminal and civil) in which first instance verdicts were overturned and/or retrials were ordered; and
- of the cases in which judges declined to declare mistrials, they nevertheless found internet-related misconduct on the part of the juror/s.<sup>158</sup>

1.5.8 Commentators have put these figures into perspective as approximately 450,000 jury trials were conducted in the US during the three-year period between 2008 and 2010 alone.<sup>159</sup>

1.5.9 As part of this inquiry, Reuters Legal also ‘monitored’ the social media platform, *Twitter*, over a three-week period in November-December 2010, namely, the tweets that were returned when the term ‘jury duty’ was entered into the site’s search function (‘#juryduty’). It was observed that ‘[t]weets from people describing themselves as prospective jurors or sitting jurors popped up at the astounding rate of one nearly every three minutes ... Many appeared to be simple complaints about being called for jury duty in the first place, or about the boredom of sitting through a trial ... But a significant number included blunt statements about a defendant’s guilt or innocence’.<sup>160</sup> Tweets read, for example: ‘Looking forward to a not guilty verdict regardless of evidence’, ‘Jury duty is a blow. I’ve already made up my mind. He’s guilty. LOL.’ and ‘Guilty! He’s guilty! I can tell!’.<sup>161</sup>

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid 39.

<sup>157</sup> Ibid.

<sup>158</sup> Grow (n 15).

<sup>159</sup> 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 21<sup>st</sup> Century, 2012) 2.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

*United Kingdom – 2010*

1.5.10 In 2010, a ‘snap-shot study’<sup>162</sup> was conducted on *Twitter*. The terms ‘Jury Service’ and ‘Jury Duty’ were searched on *Twitter* over a 24-hour period. During that period, there were 260 results returned for ‘Jury Duty’ (which were linked to accounts that appeared to be predominantly US-based accounts) and 26 results for ‘Jury Service’ (which appeared to consist of predominantly UK-based accounts). Of the particular posts, ‘[n]one of the results gave any details of a given trial and the majority were complaints that they were scheduled to attend for jury selection the following day. Some were asking how to get out of jury duty, one asked whether there was wifi in a particular court waiting room and a smaller number commented on jury duty that appeared to be ongoing.’ The latter included, for example: ‘Jury duty!!! Cross your fingers I don’t get picked’, ‘Guess who has Jury Duty in the AM. Sigh. Might as well get this [expletive] over with. You only have to go 1 time, right? Not true’, ‘5 weeks of Jury Duty later and I’m back in the saddle. Bring it on, Monday!’, ‘My first day of classes starts tomorrow but I was called in for jury duty -\_- I hope I get a murder case or something lol’, ‘I have jury duty tomorrow :-()’, ‘Hoping that I won’t get called in for jury duty. Fingers crossed’, and ‘Thanks to everyone who gave advice on how to not get picked for jury duty’. Ten accounts were chosen at random to be followed for a period of seven days: six of the accounts were US-based and four were UK-based. The results were as follows:

- Juror 1, a female from Washington State, apparently aged 20 years tweeted: ‘[J]ust one more week of jury duty. cant wait to tell you all about it!!! all i can say for now is that it is very interesting!’ Previous visible tweets from the preceding week documented her attendance at the court house and comments about it being a long day and that it was going to be a long two weeks. She was not following anyone and had two followers.
- Juror 2, a female from the US, apparently aged 26 years, tweeted: ‘Ditching jury duty tomorrow. Going to work instead. Blah jury duty!’ She was following five people and had nine followers.
- Juror 3 tweeted: ‘[J]ury duty today, [expletive], just give everyone a gun instant justice’. On day six, a further tweet read: ‘JUDGE PUTS LADY IN JAIL FOR BRINGING KIDS TO JURY DUTY SHE DIDN’T HAVE DAYCARE JUDGE NEEDS TO GET HEAD OUT HIS BUTT’. The account was following 61 people and had 91 followers.
- Juror 4, a male from New England tweeted: ‘Jury Duty today. No laptop, no smartphone, T9 txtng twitters it is!’ Two further tweets the same day commented on his boredom. The following day, he posted: ‘Was 2 numbers away from possibly maybe getting an alternative seat in the jury. I kinda wanted to be picked’. He followed 98 people and had 54 followers.
- Juror 5, a male from Indiana tweeted about ‘the girl from Law & Order’, and ‘how much of a trial is fought during the jury selection phase’. Other tweets commented on mileage and reimbursement of costs before a final relevant tweet: ‘Guilty’. He was following 112 people and had 198 followers.
- Juror 6, a male from Florida tweeted: ‘Yay! Jury Duty! ... That guy looks so guilty!!’ The tweet was removed the following day. He was following 49 people and had six followers.
- Juror 7, a female from Scotland tweeted: ‘I will have to tivo I have stupid jury duty tomorrow’, ‘Morning all. I’m off to Jury duty today ... wonder what the case will be???’ She continued to tweet that same day about her boredom, the lack of refreshments, and the fact that she had

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<sup>162</sup> Michael Bromby, ‘The Temptation to Tweet – Jurors’ Activities Outside the Trial’ (Paper presented at the Jury Research Symposium, Glasgow, 25–26 March 2010).

returned home because the trial had been delayed due to new evidence. She was following 182 people and had 344 followers.

- Juror 8, a female from the midlands area in England tweeted: ‘I will have to tivo I have stupid jury duty tomorrow’, ‘About to head out and catch myself a train to [name of town]. Jury service today. Fun.’ She further tweeted about the boredom of waiting around and bringing books for something to do. Subsequent tweets stated, ‘I may be on a 4 week trial. 18 of us have been picked it’ll be narrowed down to final 12 in the morning looks juicy’, ‘I want to do this case now’ and ‘I’m on a 4+ week murder trial eeeeeek’. She thereafter tweeted about the days flying past and that there was lots of information to take in. She was following 95 people and had 23 followers.
- Juror 9, a female from London tweeted: ‘Week 8 of jury service. Now am in the not-so-fun part of returning a verdict. Are they guilty? I don’t knooooooow :(’. She was following 347 people and had 209 followers.
- Juror 10, a male from UK (London) tweeted: ‘DAY 2 – JURY SERVICE!!’, ‘DAY 3 – JURY SERVICE!’, ‘DAY 4 - JURY SERVICE!!’, ‘DAY 5 JURY SERVICE!!’, and ‘JURY SERVICE IS DONE BK 2 UNI ON MONDAY’. A follower asked him ‘what was the outcome of the case? Can you say...’, to which he responded, ‘Yep Guilty On majority Of 10:2’. During the observation period, this juror averaged 202 tweets per day (1,416 in total). He was following 112 people and had 494 followers.<sup>163</sup>

1.5.11 Whilst this study is of limited validity, it simply aimed to review whether jurors do indeed tweet about anything relating to their experience of jury service.<sup>164</sup> The results speak for themselves in this respect.

#### *Australia – 2004–2011*

1.5.12 In New South Wales in 2004, a pilot study of 10 criminal trials was conducted whereby jurors answered a questionnaire following verdict. In 2011, a follow up study of a further 10 criminal trials took place. In total, 78 jurors from 20 trials took part in the study.<sup>165</sup> The subject trials occurred in Sydney, Parramatta and Campbelltown in New South Wales.

1.5.13 Of the 78 jurors, 12 jurors indicated (including, in two cases, by their actions) the belief that juror investigation and research is ‘very acceptable’ in circumstances where a juror is frustrated with the adequacy of evidence in a trial.<sup>166</sup> An additional two jurors were neutral on this topic. These 14 jurors were spread over eight of the 20 trials.<sup>167</sup> Ten of these jurors held this view despite acknowledging that they had received clear judicial directions to the contrary. Further, six of the jurors were told in no uncertain terms that such conduct was a crime.<sup>168</sup> In the two cases where juror misconduct took place, it was not reported by fellow jurors despite the judge indicating the desirability of doing so and jurors indicating knowledge of the misconduct.<sup>169</sup>

<sup>163</sup> Ibid 2–7.

<sup>164</sup> Ibid 1.

<sup>165</sup> Hunter (n 24) 8–9.

<sup>166</sup> Ibid 5, 27. Indeed, two of these jurors ‘strongly agreed’ that such conduct was ‘very acceptable’.

<sup>167</sup> Ibid 5.

<sup>168</sup> Ibid 6.

<sup>169</sup> Ibid.

A number of jurors spoke of frustration which was linked to a perceived lack of information.<sup>170</sup> One juror stated: ‘This is not allowed but I would very much have liked to do my own research. Police and lawyers are allowed to look into things but the jury cannot. I would like to have had the reason for this explained to me.’<sup>171</sup> Another juror stated: ‘[It] is [n]ot practical to think that things like the internet would not be used.’<sup>172</sup>

#### *United States – 2012*

1.5.14 In 2012, a survey was conducted in the US with jurors from six criminal trials and seven civil trials, including the presiding judges and counsel.<sup>173</sup> Prospective jurors from 22 trials were also surveyed (ie those who remained in the jury pool after the trial jurors and alternate jurors had been selected).<sup>174</sup>

1.5.15 All of the participating judges viewed juror use of social media as a ‘moderately severe problem’. When asked to rate it on a scale from one (not at all severe) to 10 (very severe), more than half the judges rated independent research by jurors and juror communication with outsiders at either four or five. Only one judge gave a rating of seven. Counsel also rated the problem of juror use of social media as ‘moderately severe’, albeit with greater variation in their individual ratings.<sup>175</sup>

1.5.16 Of the prospective jurors, 64% had some type of social media account: *Facebook* (54%), *LinkedIn* (20%), *Twitter* (13%) and *MySpace* (11%).<sup>176</sup> The majority of jurors stated that they could refrain from all internet usage for the duration of the trial if instructed to do so by the trial judge (86%), whereas 14% stated that they would not be able to do so.<sup>177</sup>

1.5.17 No trial juror admitted to inappropriate use of the internet or social media. However, many prospective jurors were willing to admit that they would have *liked* to use the internet to obtain information about legal terms (44%), the case (26%), the parties involved (23%), the lawyers (20%), the judge (19%), the witnesses (18%), and their fellow jurors (7%). Some jurors also admitted that they would have *liked* to use the internet to communicate with family and friends about the trial (8%), connect with another juror (5%), connect with one of the trial participants (3%), tweet about the trial (3%), blog about the trial (3%), or post material about the trial on a social networking site (2%).<sup>178</sup> Similarly, trial jurors admitted they would have *liked* to use the internet for case-related research (28%) and for *ex parte* communications (29%). The level of interest was comparable between jurors sitting on criminal and civil trials. Jurors who had served on trials with relatively complex evidence expressed greater interest in using the internet to conduct case-related research.<sup>179</sup>

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<sup>170</sup> Ibid 16–17.

<sup>171</sup> Ibid 27.

<sup>172</sup> Ibid 29.

<sup>173</sup> Hannaford-Agor, Rottman and Waters (n 159). Six judges participated from California, Connecticut, Florida, Michigan and Texas. The jurors included trial jurors and ‘alternate’ jurors.

<sup>174</sup> Ibid. In total, 506 ‘prospective jurors’ were surveyed.

<sup>175</sup> Ibid 5.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid 6.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

1.5.18 Sixteen jurors from nine different trials admitted to ‘old-fashioned’ juror misconduct in the form of premature discussions with other jurors (10%) and discussing the trial with friends and/or family either face-to-face or over the telephone (6%).<sup>180</sup>

*United States – 2011 & 2013*

1.5.19 In October 2011, a survey was 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’.<sup>181</sup> Responses were received from 508 active and senior federal court judges (a response rate of 53%). The respondents represented all 94 districts and had an average of 14.6 years of judicial experience.<sup>182</sup> A near identical follow-up survey was conducted in November 2013.<sup>183</sup> On that occasion, responses were received from 494 active and senior federal judges (a response rate of 48%). The respondents represented all 94 districts, as well as the Court of International Trade and the Court of Federal Claims.<sup>184</sup> On average, the respondents had 14.8 years of judicial experience.<sup>185</sup>

1.5.20 In 2013, only 7% of judges detected instances of jurors using social media to communicate during a trial or deliberation within the previous two years.<sup>186</sup> In 2011, this figure was 6%.<sup>187</sup> Of the judges who had detected instances of juror misconduct of this kind, the vast majority had detected it in only one or two cases within the two-year period.<sup>188</sup> In both 2011 and 2013, juror misconduct of this kind was more commonly reported as occurring during trials, rather than during jury deliberations<sup>189</sup> and it was also far more common in criminal jury trials than civil jury trials.<sup>190</sup>

1.5.21 In terms of the particular social media platforms that were used by jurors, *Facebook* was the most popular in both 2011 and 2013.<sup>191</sup> In 2011, this was followed by instant messaging services, *Twitter*, internet chat rooms, internet bulletin boards and *MySpace*.<sup>192</sup> In 2013, instant messaging

<sup>180</sup> Ibid.

<sup>181</sup> Meghan Dunn, *Juror’s 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) 1 <<https://www.fjc.gov/sites/default/files/2012/DunnJuror.pdf>>.

<sup>182</sup> Ibid.

<sup>183</sup> Dunn (n 18).

<sup>184</sup> Ibid 3.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid 4: Thirty-three of 494 judges.

<sup>187</sup> Dunn (n 181) 2: Thirty of 508 judges.

<sup>188</sup> See *ibid* 2; see also Dunn (n 18) 4: In 2011, 93% of the judges who had detected instances of jurors using social media had only detected it in one or two cases; in 2013, 97% of the judges who had detected instances of jurors using social media had only detected it in one or two cases.

<sup>189</sup> Dunn (n 181) 2; Dunn (n 18) 4. In 2011, 23 judges reported at least one instance of juror misconduct during trial and 12 judges reported at least one instance during jury deliberations. In 2013, 27 judges reported at least one instance of juror misconduct during trial and seven judges reported at least one instance during jury deliberations.

<sup>190</sup> Dunn (n 181) 2; Dunn (n 18) 4. In 2011, 22 judges reported at least one instance of juror misconduct during a criminal trial and five judges reported at least one instance in a civil trial. In 2013, 21 judges reported at least one instance of juror misconduct during a criminal trial and eight judges reported at least one instance during a civil trial.

<sup>191</sup> Dunn (n 181) 2–3; Dunn (n 18) 4–5. In 2011, the judges reported nine cases of juror misconduct involving *Facebook*, compared to 17 cases in 2013.

<sup>192</sup> Dunn (n 181) 2–3; Dunn (n 18) 4–5. In 2011, there were seven cases of juror misconduct using instant messaging services; three cases involving *Twitter*; three cases involving internet chat rooms; one case involving internet bulletin boards; and one case involving *Myspace*.

services were again ranked second, followed by jurors' personal blogs, *Twitter* and internet chat rooms.<sup>193</sup>

1.5.22 The respondents were also asked about the ways in which jurors used social media. In 2011, there were three reported cases where a juror 'friended' or attempted to 'friend' participants in the case; three cases where a juror communicated or attempted to communicate directly with participants in the case; three cases where a juror revealed aspects of the deliberation process; and one case where a juror revealed identifying information about other jurors. There were no reported cases in which jurors divulged confidential information about the case. There were also 11 reported instances of 'other' uses of social media by jurors. They included: five cases of trial-related internet research; four cases of sharing general trial information such as the progress of the case; one case of allowing another person to listen live to evidence in the trial; and one case of conducting personal business.<sup>194</sup>

1.5.23 In 2013, there were six reported cases where a juror divulged confidential information about the case; three cases where a juror communicated or attempted to communicate directly with participants in the case; two cases where a juror revealed aspects of the deliberation process; and one case where a juror 'friended' or attempted to 'friend' participants in the case. There were no reported cases where a juror revealed identifying information about other jurors. There were also nine reported instances of 'other' uses of social media by jurors. They included: five cases of trial-related internet research; three cases of sharing general jury service information and one case of texting.<sup>195</sup>

1.5.24 It was concluded that the results of this study indicate that *detected* cases of juror misconduct of this kind are 'not a common occurrence'.<sup>196</sup>

#### *Australia – 2013*

1.5.25 In February 2013, a 'small research project'<sup>197</sup> was conducted in Australia to chart the view of 'key stakeholders'<sup>198</sup> on this issue. A group of 62 judges, magistrates, tribunal members, court workers court public information officers, and academics working in the field of judicial administration were asked to rank the most important challenge and/or opportunity that social media poses for the court system. 'By far, the most significant concern'<sup>199</sup> expressed by the participants was 'juror misuse of social media (and digital media) leading to aborted trials'.<sup>200</sup>

#### *United States – 2011–2014*

1.5.26 In mid-2011, a US District Court judge commenced an 'informal survey' of jurors after they had completed jury service. The jurors were from criminal and civil federal court trials heard in the District Court for the Northern District of Illinois and state criminal trials heard in the Circuit Court of Cook County. They were asked: 'were you tempted to communicate about the case through any social

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<sup>193</sup> Dunn (n 18): In 2013, there were four cases involving instant messaging services; three cases involving jurors' personal blogs; three cases involving Twitter; and two cases involving internet chat rooms.

<sup>194</sup> Dunn (n 181) 3–4.

<sup>195</sup> Dunn (n 18) 5–6.

<sup>196</sup> Dunn (n 181) 2; Dunn (n 18) 4.

<sup>197</sup> Patrick Keyzer et al, 'The Courts and Social Media: What Do Judges and Court Workers Think?' (2013) 25(6) *Judicial Officer's Bulletin*, 47, 48.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid* 49.

<sup>200</sup> *Ibid.*

networks, such as Facebook, My Space, LinkedIn, YouTube or Twitter? If so, what prevented you from doing so?’<sup>201</sup>

1.5.27 Of the total 583 respondents, 520 jurors (89%) responded that they were not so tempted and 47 jurors (8%) responded that they were.<sup>202</sup> The survey found 45 of the 47 jurors who admitted to being tempted stated that they did not succumb to the temptation, and the remaining two did not say anything either way.<sup>203</sup>

1.5.28 The vast majority of the jurors who responded that they were tempted to communicate about the case via social media said they ultimately did not do so because of the judge’s directions (41 jurors), eg ‘Judge told us not to communicate’, ‘The request of the Judge’, ‘The Judge’s orders’ (2 jurors), ‘The Judge’, ‘Direct orders’, ‘I morally thought I should obey the Judge’, ‘The Judge saying not to’, ‘The Judge’s admonishment’, ‘The Judge’s instructions’, ‘Instructions not to do it’, ‘Your instructions’, ‘Agreement with judge not to do so’, ‘ask[ed] not to’, ‘Judge’s orders and importance to the case’, ‘Nope. The judge was clear about not sharing the information’, ‘I was instructed not to, and I tend to do the right thing’, ‘I was tempted but told not to, so I follow[ed] the rules’, ‘Wanted to but knew I could not’, and ‘We were told not to’. Some referred to the repeated nature of the judge’s directions in particular (eg ‘daily warnings’, and ‘repeated directions not to’).<sup>204</sup>

1.5.29 Many of the tempted jurors referred specifically to their oath/affirmation, eg ‘I took an oath’, ‘My oath’, ‘I follow rules under the oath I made’, ‘I knew it was my duty to fulfil the oath I took before the court not to say anything’, ‘My duty as a jur[or] under oath’, ‘Took oath not to communicate’, ‘My oath not to tell’, ‘I took this very seriously and wanted to do what I swore I would’, ‘I swore not to’, and ‘I had to remind myself that this is a job and I made an oath and was going to follow rules under the oath I made’. Some jurors expressed insight into the risks of the conduct (eg ‘I did not want to sway my opinion’, ‘To keep an open mind’, ‘Afraid I would be bias[ed]’, and ‘Changing my personal opinion’) and appreciation of the potential consequences (eg ‘I didn’t want to ruin the trial or get arrested or something’ and ‘JAIL’).<sup>205</sup>

1.5.30 Of the 520 jurors (88%) who reported no temptation to communicate about the case on social media, overwhelmingly, this was attributed to judicial directions. Others referred more generally to the notion of fairness, as well as to their oath/affirmation. One juror candidly responded, ‘came home too late ... [to] think about Facebook’. Another stated that, whilst she was not tempted, ‘nothing’ could prevent her from this conduct had she been.<sup>206</sup> Twenty of the jurors who reported no temptation stated that it was due to their minimal or complete lack of social media usage.<sup>207</sup>

1.5.31 It was concluded that the survey results show that a ‘sizeable, significant minority’ of jurors reported being tempted to communicate about the case on social media,<sup>208</sup> though without doing so.

<sup>201</sup> Amy St Eve and Michael Zuckerman, ‘Ensuring an Impartial Jury in the Age of Social Media’ (2012) 11(1) *Duke Law and Technology Review* 3; St Eve, Burns and Zuckerman (n 93).

<sup>202</sup> St Eve, Burns and Zuckerman (n 93) 78. Sixteen jurors (3%) did not provide a response.

<sup>203</sup> *Ibid* 79.

<sup>204</sup> *Ibid* 80–1.

<sup>205</sup> *Ibid* 81–2.

<sup>206</sup> *Ibid* 85.

<sup>207</sup> *Ibid*.

<sup>208</sup> *Ibid* 79.

Further, it was commented that whilst the informal ‘survey data may be unscientific ... the voices of actual jurors speak volumes.’<sup>209</sup>

#### *New Zealand – 2014*

1.5.32 In 2014, the New Zealand Law Commission undertook a survey of District Court judges who regularly preside over jury trials.<sup>210</sup> Of the 94 judges, 59 participated in the survey. The survey results showed that 58% of the responding judges ‘had never had reason to believe that jurors had used the internet for information sources, and just over 29% thought it had happened once or twice. Just over 10% considered they had reason to believe or had suspected that a juror may have used the internet in some cases. Only one respondent thought it happened in the majority of cases.’<sup>211</sup>

1.5.33 Where juror misconduct of this kind had been detected, the most common reasons for detection were either from material left in the jury room or the misconduct being reported by a fellow juror.<sup>212</sup>

1.5.34 These results caused the Law Reform Commission to conclude that ‘the issue is not unduly problematic at this stage’.<sup>213</sup>

#### *Australia – 2014*

1.5.35 In 2014, a discrete case study was undertaken which considered the trial-related information that was on *Twitter* during the high-profile murder trial in Queensland of *R v Baden-Clay*.<sup>214</sup> Automated searches were conducted<sup>215</sup> on Australian *Twitter* accounts over the five-week period of the trial; from empanelment to verdict delivery. From the 33,067 tweets obtained, a sample of 7,427 tweets were randomly selected. The 7,427 tweets were then categorised as containing either ‘none’, ‘low’ or ‘high’ levels of prejudicial information. Tweets containing statements as to guilt were coded as ‘highly prejudicial’. Tweets containing statements as to innocence and content criticising or disparaging the accused (but not asserting guilt) were coded as ‘low-level prejudice’. All other tweets were coded as containing no prejudicial information. The categorisation and related coding were intentionally conservative.

1.5.36 The results showed that tweeting activity was highest at the times when the court was sitting. It peaked when key witnesses were giving evidence (including the accused) and during closing addresses. The highest level of activity was in the lead up to the verdict.<sup>216</sup> Approximately 65% of the tweets were posted by ‘professional journalists’, with the remaining 35% posted by other users. Of the 33,067 tweets that were identified as trial-related tweets, 5–7% contained prejudicial information.<sup>217</sup>

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<sup>209</sup> Ibid 90.

<sup>210</sup> New Zealand Law Commission, *Contempt in Modern New Zealand* (Issues Paper 36, May 2014) 43.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> [2014] QSC 154 (*Baden-Clay*). See also Rachael Hews and Nicolas Suzor, “‘Scum of the Earth’: An Analysis of Prejudicial Twitter conversations During the Baden-Clay Murder Trial” (2017) 40(4) *University of New South Wales Law Journal* 1604.

<sup>215</sup> Hews and Suzor (n 214). Searches for keywords such as ‘baden-clay’ and hashtags such as ‘#badenclay’ and ‘#gbc’ (including variations such as ‘badenclay’ and ‘baden clay’).

<sup>216</sup> Ibid 1620.

<sup>217</sup> Ibid 1622.

The prevalence of prejudicial material was far more common in the tweets of users who were *not* professional journalists (86%).<sup>218</sup>

1.5.37 The sample tweets that were identified as containing prejudicial material totalled 446 tweets which were attributable to 263 users. The majority of the 263 users (73%) posted just one prejudicial tweet, with the remainder of users posting between two and 14 prejudicial tweets.

1.5.38 The prevalence of tweets containing prejudicial material was described as a ‘non-negligible sum of prejudice’.<sup>219</sup> Further, it was noted that the posting of prejudicial tweets by non-journalists was in complete disproportion to the posting of prejudicial material by journalists.<sup>220</sup>

1.5.39 Significantly, analysis of the sample tweets also disclosed a ‘distinct trend’ of tweets accepting and reinforcing the prosecution case theory, resulting in a social media discourse that was one-sided and biased towards the prosecution.<sup>221</sup>

### ‘Going viral?’

1.5.40 As recent commentators have highlighted, it is not possible to extract any clear and comprehensive data from the body of research that exists to date so as to be able to determine the prevalence of jurors’ use of the internet and social media in Australia and elsewhere.<sup>222</sup>

1.5.41 It has been suggested that juror misconduct of this kind is rare and, accordingly, the media report stories of such conduct at a very high rate. As a result, the belief that juror misconduct of this kind is common is merely an erroneous assumption based on the overrepresentation of this phenomena in the media and, in reality, it is actually far less pervasive.<sup>223</sup>

1.5.42 However, it should be noted that just because the *detection* of juror misconduct of this kind may be rare, this does not necessarily mean that such misconduct is, in fact, rare.

1.5.43 In the surveys cited above of US federal court judges in 2011 and 2013, the responding judges were *ad idem* in acknowledging the difficulty in detecting jurors’ inappropriate use of social media and the fact that they rely on others to bring it to their attention.<sup>224</sup> Indeed, overwhelmingly, they conceded that they had *no way of knowing* if jurors were using the internet and social media inappropriately.<sup>225</sup>

1.5.44 Very rarely does juror misconduct of this kind involve an overt act in the courtroom that is detectable by the presiding trial judge.<sup>226</sup> Internet sources can be viewed and shared easily on a screen

<sup>218</sup> Ibid 1621–2.

<sup>219</sup> Ibid 1622.

<sup>220</sup> Ibid 1623.

<sup>221</sup> Ibid 1627.

<sup>222</sup> Braun (n 14) 1639; Bartels (n 130).

<sup>223</sup> Jacqueline Connor and Anne Endress Skove, ‘Dial “M” for Misconduct: The Effects of Mass Media and Pop Culture on Juror Expectations’ in Carol R Flango et al (eds), *Future Trends in State Courts* (National Center for State Courts, 2004) 104, cited in 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, 37. See also Brayer (n 223) 37.

<sup>224</sup> Dunn (n 181) 4; Dunn (n 18) 6.

<sup>225</sup> Dunn (n 18) 11.

<sup>226</sup> Although this is not unheard of. ‘A judge in Oregon noticed an unexpected glow on a juror’s chest while the courtroom lights were dimmed during video evidence in an armed robbery trial. The juror ... was texting’:

and there is no need to produce a hardcopy of the information and thereby create an easily detectable trace that may be discovered,<sup>227</sup> and privacy settings on social media accounts can limit those who can view and potentially discover and report relevant activity of jurors (assuming that jurors are even able to be identified by their accounts).

1.5.45 As is evident from the cases canvassed above, there are a myriad of different ways in which juror misconduct of this type may be detected. In particular, many cases appear to be discovered and reported by mere chance: court staff discovering a paper trail in the jury room;<sup>228</sup> as a result of post-trial drinks at a hotel with juror/s and defence counsel;<sup>229</sup> defence counsel's son stumbling across material published by a juror on social media;<sup>230</sup> a lawyer unrelated to the case coincidentally being a *Facebook* friend with the juror and reporting the publication;<sup>231</sup> a juror 'stalking' the accused on *Facebook* and accidentally sending a friend request.<sup>232</sup> Further, there are examples of reports which belie the extent of the conduct<sup>233</sup> and many instances that are not discovered until after a verdict has been delivered.

1.5.46 All indications are that juror misconduct of this kind is under-reported, at least to some extent; that the reported cases represent the bare minimum of cases of misconduct of this kind, and an unknown and unknowable number of instances are unreported and therefore undiscovered.

### Question 2

Based on your experience, what is your assessment of the prevalence of jurors' inappropriate use of social media and/or other internet platforms during criminal jury trials?

### Question 3

Do you think that such conduct is confined largely to high profile cases which have a high level of media coverage and community interest? Or does it also present in a wider range of criminal trials?

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'Oregon juror jailed for texting during trial' *Washington Examiner* (online, 18 April 2013) <<https://www.washingtonexaminer.com/oregon-juror-jailed-for-texting-during-trial>>.

<sup>227</sup> See the 'final comment' of Brett J in *Marshall and Richardson v Tasmania* [2016] TASCRA 21, [76].

<sup>228</sup> See, eg, *R v Karakaya* [2005] 2 Cr App R 5; [2005] EWCA Crim 346; *Martin v R* (2010) 28 VR 579, [57]–[90].

<sup>229</sup> See, eg, *R v K* (2003) 59 NSWLR 431.

<sup>230</sup> See, eg, 'Facebook post gets Detroit-area juror in hot water', *News.com.au* (online, 31 August 2010) <<https://www.news.com.au/breaking-news/facebook-post-gets-detroit-area-juror-in-hot-water/news-story/42a3af4b3746d502cc382772b7e5219f>>.

<sup>231</sup> Carrega-Woodby, Marcius and Siemazko (n 89).

<sup>232</sup> Wiggin (n 72). The juror gave evidence in his contempt proceedings that 'he looked up the defendant ... during jury selection ... he was trying to see if the two had any mutual friends when he accidentally sent her a friend request'.

<sup>233</sup> See Funcheon (n 47): where the investigation of reported misconduct by one juror resulted in the discovery of similar misconduct by seven other jurors.

## Part 2

# ‘Decoding’: How? Why?

### 2.1 The internet is not the problem

2.1.1 Juror misconduct is not new.<sup>234</sup> The internet and social media platforms have simply introduced a new means by which juror misconduct can readily occur.<sup>235</sup> The principle that a jury’s deliberations, and ultimately its verdict, must be based — and exclusively based — on the evidence given in court, applies as much to jurors engaging in ‘old fashioned’ methods of communications as it does to internet-based methods of communication. The problem therefore is not the internet, but rather the behaviour of modern jurors.<sup>236</sup>

2.1.2 Juror misconduct via the internet and social media platforms may be either intentional or unintentional, or indeed, somewhere in between. Commentators have suggested that a more holistic approach, where the underlying causes of such juror misconduct are identified and understood, would be ultimately beneficial when it comes to addressing this issue.<sup>237</sup>

### 2.2 The writing is on the ‘wall’

2.2.1 Whilst the internet and social media platforms are very effective means which errant jurors can purposely use for ‘*information in*’ purposes, jurors can also quite easily be lured unwittingly into misconduct.

2.2.2 Simply accessing social media for ‘entertainment’ purposes may be problematic for jurors, and ultimately for the criminal trials on which they sit. Passive news consumption is now considered to be a by-product of social media use. By merely logging on and gaining access to many social media platforms, the user is exposed to ‘incidental news’. For example, on *Facebook*, a ‘news feed’ is a constantly updating list in the middle of a user’s homepage. It includes some ‘news’ interspersed with all other entertainment-related updates: status updates, photos, videos, links, app activity and likes from people, pages and groups that the user follows on *Facebook*.

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<sup>234</sup> The challenge of securing a fair trial before an impartial jury and concerns over the effect of prejudicial pre-trial publicity are not new problems. Such concerns date back to the 19<sup>th</sup> century and were compounded by the 24-hour news cycle in such notorious cases as OJ Simpson and Lindy Chamberlin. See further, David Plater and Victoria Gleason, “‘The Prisoners could not have that Fair and Impartial Trial which Justice Demands’”: A Fair Criminal Trial in 19<sup>th</sup>-Century Australia’, accepted for publication in the forthcoming edition of the *Canterbury Law Review*; Michael 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.

<sup>235</sup> See, eg, Caren Morrison, ‘Can the Jury Trial Survive Google?’ (2011) 25 *Criminal Justice* 4; Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21<sup>st</sup> Century: Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 103. Indeed, more traditional forms of juror misconduct have not been replaced entirely and still occur: See, eg, *R v Catalano* [2019] SASFC 52.

<sup>236</sup> *A-G v Fraill* [2011] EWCA Crim 1570, [29].

<sup>237</sup> Braun (n 14) 1636.

2.2.3 A juror can easily be exposed to trial-related news without seeking it out, particularly in high-profile trials which attract more media coverage. However, in the midst of the current true crime boom, the ‘misery beat’ of crime reporting is experiencing a resurgence. More routine matters are being reported, particularly in smaller jurisdictions such as Tasmania, and, invariably, by reporters who publish predominantly online.<sup>238</sup>

2.2.4 Further, the ‘news’ may not even be posted in a user’s feed directly from the news source. It may appear simply because of the activity of the user’s ‘friends’. A user’s news feed can include posts about people that the user is not even ‘friends’ with and ‘groups’ that the user is not even a part of. This is because a user’s news feed includes posts about their friends’ activity on *Facebook*, including when the user’s friends comment on posts from people that the user isn’t friends with and when they comment in public groups that the user is not a member of.<sup>239</sup>

2.2.5 Of course, ‘news’ in this context is not confined to its traditional meaning. News and current affairs may be shared between users with accompanying comments or opinions and material may be created entirely by ‘citizen journalists’.<sup>240</sup> As the former Chief Justice of Victoria has noted, ‘everyone is now a journalist’.<sup>241</sup> In Tasmania, there are *Facebook* pages such as *The Vigilante News*<sup>242</sup> and *Crime Watch Tasmania*,<sup>243</sup> which pride themselves on publishing crime-related news as it is still unfolding and material that is not necessarily published by other sources. As at June 2019, *The Vigilante News* had 85,488 followers and *Crime Watch Tasmania* had 7,190 followers. Similar groups exist on *Twitter*, such as the non-jurisdiction specific *Twitter* account of *Oz Crime News*.<sup>244</sup>

### **‘Fake news’/‘#nofilter’**

2.2.6 A recent survey of Australian news consumers shows that 73% report having experienced one or more types of ‘fake news’<sup>245</sup> in the last week. Whilst 65% of news consumers are concerned about fake news they encounter online, possibly the greater worry is the fact that 12% didn’t know if they had

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<sup>238</sup> Marilyn Warren, ‘Open Justice in the Technological Age’ (2014) 40 *Monash Law Review* 45, 48.

<sup>239</sup> ‘Why am I seeing posts in my News Feed about people I’m not friends with or groups I’m not in?’ *Facebook Help Centre*, <<https://www.facebook.com/help/132021603539177?helpref=related>>.

<sup>240</sup> Keyzer et al (n 197) 4.

<sup>241</sup> Warren (n 238) 48.

<sup>242</sup> *The Vigilante News* <<https://www.facebook.com/thevigilantenews/>>. (See also: *The Vigilante News* <<http://www.thevigilantenews.com.au/home.html>>.) ‘Our stories are obtained through many hours of research, investigations, and subscribers sending tip-offs in and of course going out in the field. The majority are exclusives by us, and we are very proud to be able to provide these stories to you, and indeed before other media does if at all. Included in these stories are topics such as Police reporting, crimes often as they unfold and naming offenders when charges, crimes including, rapes, wounding, arson, murders, fatal accidents, inquests court lists and sex offenders named where possible. The point is that if you are offended or simply don’t like our page, then don’t read it! People who continually criticize will be banned ...’

<sup>243</sup> *Crime Watch Tasmania* <<https://www.facebook.com/Crime-Watch-Tasmania-945220472156416/>>. ‘We are not affiliated with the police or government, just passing on information for people to watch out for.’

<sup>244</sup> *Oz Crime News* <<https://twitter.com/ozcrimenews>>. The *Oz Crime News* bio states: ‘Somali/Sth Sudanese gangs are growing in AUSTRALIA like other countries. Police/Media censor/downplay gang violence. You’re being played Australia.’ As at June 2019, *Oz Crime news* had 5,469 followers.

<sup>245</sup> Park et al (n 125). For the purposes of the survey, six types of *fake news* were identified as follows: (1) poor journalism (factual mistakes, dumbed down stories, misleading headlines/clickbait); (2) stories where facts are spun or twisted to push a particular agenda; (3) stories that are completely made up for political or commercial reasons; (4) headlines that look like news stories but turn out to be advertisements; (5) stories that are completely made up to make people laugh (satire); and (6) the use of the term fake news (eg by politicians, others) to discredit news media they don’t like).

encountered any fake news or not.<sup>246</sup> Further, it is estimated that there are 83 million ‘fake’ profiles on *Facebook*.<sup>247</sup>

2.2.7 There is relatively little that can be done to determine the source of much material that is published on the internet and social media platforms, let alone its accuracy and/or reliability. Courts have repeatedly warned about the sources of content for widely trusted supposed ‘reference’ sources on the internet such as *Wikipedia*.<sup>248</sup>

2.2.8 There is also content on the internet and social media with far more sinister intentions. Commentators have identified the prospect of material being put online by an accused, or through an agent,<sup>249</sup> which is *targeted* to interfere with the trial process. In November 2010, Lord Judge, the then Lord Chief Justice of England and Wales, made the point that ‘Twitter could be used by campaigners in a bid to influence the outcome of a trial.’<sup>250</sup> The same applies to any other popular social media platform.

2.2.9 The New South Wales Court of Criminal Appeal decision in *Hughes v R*<sup>251</sup> (commonly known as the ‘*Hey Dad!*’ case) highlights the potential power of social media to focus public bias and prejudice in a targeted fashion. The fact that Hughes faced serious sexual offences does not diminish his vital right to a fair trial. On appeal, Hughes’ lawyer described the case as follows:

This was a case where there was ... poisonous vilification of [Hughes] not by mainstream media, but by social media that involved the most poisonous and vile publicity from which no one could ever recover ... There was a deliberate attempt made by people on social media to poison the well.<sup>252</sup>

Hughes’ counsel further noted that, for example, some of the posts on social media were, ‘lock the pedo up’ and ‘Innocent men don’t hide out in Asia’. Some of the posts received ‘millions and millions’ of hits.<sup>253</sup> One post, which stated, ‘hang the pedo’ received more than 220,000 likes alone.<sup>254</sup> On appeal, Hughes’ lawyer contended that ‘[t]his was a malicious campaign by people to create an unfair trial for the accused, and it was done deliberately’.<sup>255</sup> Further, it was revealed that the material ‘included

<sup>246</sup> Ibid.

<sup>247</sup> Dan Noyes, *The Top 20 Valuable Facebook Statistics* (Updated May 2019) Zephoria Digital Marketing <<http://zephoria.com/top-15-valuable-facebook-statistics/>>.

<sup>248</sup> See, eg, *United States v Lawson*, 677 F 3d 629, 633–34 (4<sup>th</sup> Cir 2012); 133 S Ct 393 (2012): ‘Anyone with Web access can edit Wikipedia ... About 91,000 editors from expert scholars to casual readers regularly edit Wikipedia. Given the open-access nature of Wikipedia, the danger in relying on a Wikipedia entry is obvious and real. As the “About Wikipedia” material aptly observes, allowing anyone to edit Wikipedia means that it is more easily vandalized or susceptible to unchecked information. Further, Wikipedia aptly recognizes that it is written largely by amateurs ... [any given] entry could be in the middle of a large edit or it could have been recently vandalized.’

<sup>249</sup> Lowe (n 22) 48.

<sup>250</sup> Ibid.

<sup>251</sup> [2015] NSWCCA 330.

<sup>252</sup> Stephanie Gardiner, ‘Hey Dad! actor Robert Hughes’ trial unfair due to ‘putrid’ social media: appeal told’, *The Sydney Morning Herald* (online, 28 September 2015) <<https://www.smh.com.au/national/nsw/hey-dad-actor-robert-hughes-trial-unfair-due-to-putrid-social-media-appeal-told-20150928-gjwdu3.html>>.

<sup>253</sup> Ibid.

<sup>254</sup> ‘Hey Dad! star Robert Hughes appeals conviction “poisoned” by social media’ *The Guardian* (online, 28 September 2015) <<https://www.theguardian.com/australia-news/2015/sep/28/hey-dad-star-robert-hughes-appeals-conviction-poisoned-by-social-media>>.

<sup>255</sup> Gardiner (n 252).

comments by one of the complainants ... She was an active part of it ... She ran a running commentary ... We now know she did that using a pseudonym so she could not be identified.’<sup>256</sup>

2.2.10 In Massachusetts in 2017, an accused faced fraud charges in relation to a company purporting to assist international students gain admission to prestigious American boarding schools. Before the accused was even indicted, a blog about him and his alleged conduct was thriving online. It continued for over two years, until the accused was convicted. It contained highly prejudicial content about the accused, his alleged conduct and his upcoming trial, including, ‘I have no doubt that any jury with an IQ above body temperature will convict ... [the accused] ... I only fear that his defense undoubtedly tried to seat as many morons as possible in order to confuse them ...’<sup>257</sup> During the trial, it became apparent that the jury who were hearing the trial were not only privy to the information contained in the blog, but were also contributing to the blog. One commentator purporting to be a juror wrote: ‘It’s gone a week longer than the judge has hoped ... When I left the jury last week due to an illness they were 50/50 ... half saw him guilty and the others didn’t’. This was brought to the Court’s attention and it was confirmed that the comment was posted by a juror after she was discharged. Four days later, a further comment was posted by a second juror: ‘Boy this is getting comical. I’ve been following it on and off, and was also on the jury ... [the juror who previously posted] was sprouting about the ... blog since day one. Its [sic] why she conveniently got “sick” and didn’t finish her service. Idiot doesn’t describe the half of it.’<sup>258</sup>

2.2.11 Targeted attempts to interfere with the trial process are not new, nor are they unheard of in the Tasmanian jurisdiction.<sup>259</sup> Indeed, the effects of targeted social media activity in smaller jurisdictions such as Tasmania can be especially effective and are of particular concern.<sup>260</sup> The internet and social media platforms make jurors, and the trial process generally, far more vulnerable to such interference.

2.2.12 The following incident illustrates just how little control a juror has over avoiding prejudicial material on social media. In Ohio in 2011, a juror’s sister ‘liked’ a *Facebook* page which supported the conviction of the murder accused whose trial the juror was sitting in. This caused this material to appear in the news feed on the homepage of the juror’s *Facebook* account without the juror doing anything.<sup>261</sup>

2.2.13 It remains, however, that the source of some of the most prejudicial material available on social media in relation to an accused in routine matters may simply be the accused’s own social media presence; material which may be sourced by jurors or, as identified above, sourced for them by others. By way of an example, following a civil personal injury and wrongful death trial in Maine in 2009,

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<sup>256</sup> ‘Hey Dad! star Robert Hughes appeals conviction “poisoned” by social media’ (n 254).

<sup>257</sup> *United States v Zimny* 846 F 3d 458 (1<sup>st</sup> Cir 2017), 462–463 <<https://casetext.com/case/united-states-v-zimny-8>>.

<sup>258</sup> *Ibid.* Court ordered investigation on appeal.

<sup>259</sup> See, eg, *R v Durovic* (unreported, Supreme Court of Tasmania, Slicer J, 12 February 1993). In this case, the prosecution and several jurors anonymously received copies of the accused’s prior convictions. The material was posted to the jurors at their home addresses.

<sup>260</sup> See Justice Stephen Estcourt, ‘Around the Nation: Tasmania – Social Media and Sentencing’ (2017) 91 *Australian Law Journal* 266, 266: ‘In August 2016, a Hobart newspaper quoted the Tasmanian Premier as saying in relation to a convicted double murderer who was wheelchair-bound with serious brain damage: ‘We confirm that a person was indeed moved from the Roy Fagan Centre yesterday due to threats made against him on social media.’ That move was ‘forced’ upon the Government, notwithstanding the fact that the Roy Fagan Centre was approved for use as a hospital or institution for the purposes of the *Corrections Act 1997* (Tas).’

<sup>261</sup> *Robinson* (n 23) 180–1.

which resulted in a verdict in the defendant’s favour, a juror emailed counsel for the plaintiffs. The juror stated:

Did you know your plaintiff[s] advocated the use of mushrooms and weed smoking, and binge drinking all over the internet? ... It[’s] really sad what happened but with all the work going into this don[’t] you think you should have address[ed] this issue and known such things so they could clean up their acts before court? I’m just trying to help. [I]f you want more info and insight [i] will help you.<sup>262</sup>

## 2.3 ‘Embedded’ behaviour

2.3.1 A juror’s habitual use of social media should not be downplayed as a significant contributing factor to misconduct of this kind. In 2009, a prospective juror in the US tweeted: ‘Wow. Jury duty. First time ever. Can I be excused because I can’t be offline for that long?’<sup>263</sup> The desire to share continuously and to be connected constantly is the ‘new normal’<sup>264</sup> for many social media users and it does not stop just because they commence jury service. In 2003, the New South Wales Court of Criminal Appeal pertinently predicted: ‘It may well become the case, as a matter of habit arising out of the way that ordinary affairs are conducted, that the inevitable reaction of any person who is summonsed as a juror, will be to undertake an online search in relation to the case, to ascertain what it may involve.’<sup>265</sup>

2.3.2 Many offending jurors have been unable to explain their misconduct in any other terms. One US juror explained that one evening after deliberations had begun, she went home and logged onto *Facebook*, as was her ‘normal practice’. She ‘impulsively’ typed in one of the names of the witnesses as well as one or two other names of witnesses from the trial. She sent one of the witnesses a friend request. As soon as she had done so, she knew she had made a mistake.<sup>266</sup> Another US juror explained:

I continued my personal life as if I was not there to judge a trial ... It was my first time as a juror, and I was naïve ... I failed to make the necessary changes in my daily life ... I feel terrible. I never meant to hurt anyone. I wasted a lot of people’s time and money, and I deeply regret what I did ... sometimes — I suppose I forget it’s so public and it’s Facebook and it’s something that I use a lot ... I’m pretty quiet in my day-to-day dealings with people, so it’s just a way for me to, you know, express myself.<sup>267</sup>

2.3.3 Interestingly, the habitual social media user who falls into misconduct as a juror is not confined to a particular stereotype. There are documented examples of ‘*information out*’ blunders in the US

<sup>262</sup> *Wilgus v F/V SIRIUS, INC*, 665 F Supp 2d 23 (D Me 2009) 24.

<sup>263</sup> Laura Whitney Lee, ‘Comment: Silencing the “Twittering Juror”: The Need to Modernize Patter Cautionary Jury Instructions to Reflect the Realities of the Electronic Age’ (2010) 60 *De Paul Law Review* 181, 189.

<sup>264</sup> Brayer (n 223) 28.

<sup>265</sup> *R v K* (2003) 59 NSWLR 431, [81].

<sup>266</sup> *People v Rios*, No 1200/06, 2010 WL 625221 (NY Sup Ct Feb 23, 2010).

<sup>267</sup> Carrega-Woodby, Marcus and Siemazko (n 89).

involving variously a judge,<sup>268</sup> a lawyer,<sup>269</sup> a doctor,<sup>270</sup> a teacher,<sup>271</sup> a newspaper editor,<sup>272</sup> and a television personality.<sup>273</sup>

## 2.4 ‘#motivation’

2.4.1 Whilst social media poses inherent dangers for unsuspecting jurors, there remains the intentional misuse of social media by errant jurors. In the course of a 2007–2009 survey of Tasmanian jurors for the purposes of sentencing research, a sub-set of respondents participated in face-to-face interviews. In addition to sentencing related enquiries, jurors were also invited to share their views of the jury experience. Content that was reported by these Tasmanian jurors provides a valuable insight when it comes to understanding juror behaviour in this respect. Subsequent discussion draws heavily upon this content.

### *I don't follow*

2.4.2 As previously highlighted, trial by jury brings members of the public into the courtroom in circumstances where they have little to no firsthand experience of the criminal courtroom and are likely

<sup>268</sup> Debra Cassens Weiss, ‘Lawyer May Cite Judge-Juror’s ‘Livin’ the Dream’ E-mails in New Trial Bid’, *ABA Journal* <[http://www.abajournal.com/news/article/lawyer\\_may\\_cite\\_judge-jurors\\_livin\\_the\\_dream\\_e-mails\\_in\\_a\\_new\\_trial\\_request/](http://www.abajournal.com/news/article/lawyer_may_cite_judge-jurors_livin_the_dream_e-mails_in_a_new_trial_request/)>. A Californian judge who was selected as a juror on a murder trial, sent four emails about his jury service to a group of more than 20 judges. His comments included, ‘Here I am livin’ the dream, jury duty with Mugridge and Jenkins! [the two counsel]’ One of the judges who received the emails was the judge presiding over the trial.

<sup>269</sup> *California Bar v Wilson*, 23 January 2009. See also ‘California Bar v Wilson’, *Digital Media Law Project* (31 August 2009) <<http://www.dmlp.org/threats/california-bar-v-wilson>>; Robert J Ambrogi, ‘Lawyer Disciplined Over Blog Posts’, *LAW.COM Legal Blog Watch* (4 August 2009) <[https://legalblogwatch.typepad.com/legal\\_blog\\_watch/2009/08/lawyer-disciplined-over-blog-posts.html](https://legalblogwatch.typepad.com/legal_blog_watch/2009/08/lawyer-disciplined-over-blog-posts.html)>. A juror who had previously worked as a lawyer sat on a burglary trial in California and blogged about his experience. He posted an entry on his blog that identified the first name of the defendant, the alleged charges and the name of the judge. He wrote: ‘Nowhere do I recall the jury instructions mandating I can’t post comments in my blog about the trial. (Ha. Sorry, will do.) So, being careful to not prejudice the rights of the defendant -- a stout, unhappy man by the first name of Donald ...’ and described the judge as ‘a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn’t want snapped at you’.

<sup>270</sup> ‘Tweet from doctor on jury derails murder trial for a second time: Man ignored warnings to “favourite” local newspaper report about the case’ (n 106).

<sup>271</sup> ‘Juror under investigation for friending, chatting with defendant on Facebook’, *WMC Action News 5* (online, 5 August 2014) <<https://www.wmcactionnews5.com/story/26205295/juror-under-investigation-for-friending-chatting-with-defendant-on-facebook/>>.

<sup>272</sup> Seth Rogovoy, ‘Twitter Rubs Up Against the Judicial System’, *Rogovoy Report* (10 February 2011) <<http://rogovoy.com/news1824.html>>. In 2011 a juror on a rape trial in Massachusetts was discharged after tweeting: ‘Sucks that you can’t tweet from the jury box. What’s the fun in that?’ The juror later blogged about the experience: ‘The judicial system – at least as represented by the Berkshire Superior Court in Pittsfield Mass. – is light years behind the curve when it comes to the role of social media in fomenting and perpetuating democracy’. She was an editor at the local newspaper.

<sup>273</sup> Dareh Gregorian, ‘Oh, What a Twit’, *New York Post* (online, 29 May 2009) <<https://nypost.com/2009/05/29/oh-what-a-twit/>>. In 2009, American television personality, Al Roker, attended for jury duty. He took photographs on his phone of the jury assembly room, which showed the face of one prospective juror and other prospective jurors from behind. He posted the photographs on Twitter to over 20,000 of his followers. He later acknowledged that he made a ‘mistake’ and that the posting was ‘inadvertent’. He later posted: ‘Folks need to lighten up ... I’m not breaking any laws ... just trying to share the experience of jury duty. One that I think is important and everyone should take part in’. He later tweeted: ‘Going back into the courtroom. iPhone buried deep in my bag’.

to feel ‘lost’.<sup>274</sup> For most of the Tasmanian jurors who were interviewed in 2007–2009, their experience of jury service was the first time that they had been in a courtroom. They did not understand the reasons behind many of the formal court procedures and were acutely aware that they were amateurs in a world dominated by professionals.<sup>275</sup>

2.4.3 This sense of bewilderment and intimidation was coupled with the jurors’ feeling a great sense of responsibility and taking their task very seriously.<sup>276</sup> Jurors spoke of the ensuing pressure and stress that they experienced. Jurors described a ‘pressure-cooker environment’<sup>277</sup> and their experience as ‘very emotional’, ‘traumatis[ing]’, ‘overwhelming’, ‘exhausting’, ‘nerve-racking’, ‘devastating’, ‘daunting’, ‘mortifying’, ‘horrendous’, ‘very intimidating’, ‘very draining’, and ‘painful’.<sup>278</sup> Many jurors identified the responsibility of reaching a decision of guilt or innocence as extremely stressful. Many spoke of taking the stress home with them<sup>279</sup> and losing sleep.<sup>280</sup>

2.4.4 The questions and comments of responding jurors made it very apparent that they suffered misunderstandings and/or misperceptions throughout the trial process. In relation to basic legal principles: they reported struggling with the meaning of ‘beyond reasonable doubt’<sup>281</sup> and the meaning of ‘forensic disadvantage’ when applying the *Longman* direction.<sup>282</sup> Jurors also perceived defence counsel’s compliance with the rule in *Browne v Dunn* as unnecessarily bullying behaviour of prosecution witnesses (ie counsel repeatedly suggesting that witnesses were lying).<sup>283</sup> Jurors also reported confusion about basic procedural matters such as when the Court of Petty Sessions was mentioned in evidence in connection to the procedural history of the matter, jurors then speculated that the accused had been found not guilty in some other court.<sup>284</sup>

2.4.5 Juror bewilderment even extended to housekeeping and scheduling matters. In one juror’s trial, they unexpectedly adjourned to allow the Court of Criminal Appeal to hand down a judgment: ‘suddenly at four, we were ... marched out of the room and there were all these extra judges there and I thought, Hello ... Why is this happening? Are we taking too long? Are we going to be locked up?’<sup>285</sup> Jurors also reported that they did not understand what would happen to them if they could not agree and whether they would have to stay overnight in a hotel if the deliberations lasted longer than the sitting day.<sup>286</sup> Indeed, a juror sitting in a 2012 English fraud trial purported to explain his *Googling* of further

<sup>274</sup> In NSW in 2013, a juror on a murder trial conducted internet research on the legal definitions of ‘murder’ and ‘manslaughter’. She obtained material from the New South Wales Law Society website. When questioned by the judge she explained, ‘I just needed to clarify manslaughter murder, murder manslaughter. I’m lost...’: *R v JP (No 2)* [2013] NSWSC 1679, [13].

<sup>275</sup> Warner, Davis and Underwood (n 8) 337.

<sup>276</sup> *Ibid* 355, 358: the jurors ‘reiterated how seriously their fellow jurors had taken their task’; ‘they were very thoughtful ... very responsible ... [and] ... felt a great responsibility, a burden of responsibility, about what was going on ...’

<sup>277</sup> *Ibid* 359.

<sup>278</sup> *Ibid* 338.

<sup>279</sup> *Ibid*. See also, ‘A Citizens Duty: Jury Service’, *Overnights* (ABC Radio National, 1 May 2019) <<https://www.abc.net.au/radio/programs/overnights/jury-duty/11063800>>.

<sup>280</sup> *Ibid*.

<sup>281</sup> Warner, Davis and Underwood (n 8) 345–7.

<sup>282</sup> *Ibid* 349.

<sup>283</sup> *Ibid* 350–1. See also *Brown v Dunn* (1893) 6 R 67. The ‘rule’ from *Browne v Dunn* requires counsel to put any matters concerning his or her own case that are inconsistent with a witnesses’ evidence to that witness.

<sup>284</sup> Warner, Davis and Underwood (n 8).

<sup>285</sup> *Ibid*.

<sup>286</sup> *Ibid*.

information in relation to the complainants because he ‘only wanted to find out how long the trial would take as he was worried that it might drag on, affecting his job and family life’.<sup>287</sup>

2.4.6 Significantly, one juror also explained how isolated she felt because she was unable to talk to any friends or family, ‘the only people you can talk to about it are each other [fellow jurors]. You can’t even get somebody else’s point of view that you know. Usually we [friends and/or family] discuss everything’.<sup>288</sup> Similarly, a juror sitting in a high-profile corruption trial in Pennsylvania in 2012 posted extensively during the trial on *Facebook* and *Twitter*, including a running commentary on deliberations. The juror explained to the court, when called upon to do so, that the postings were ‘for my benefit to just get it out of my head, similar to a blog posting or somebody journaling something’.<sup>289</sup>

2.4.7 It is these circumstances that may prompt even well-intentioned jurors to explore other ‘*information in*’ options in order to keep up.

### **‘FOMO’ (‘Fear of missing out’)**

2.4.8 Many of the Tasmanian jurors who were interviewed also found the experience of being under the control of the court to be disempowering and frustrating. Jurors described feeling ‘like naughty, ignorant children who were sent to their room for punishment or excluded from conversations between the professionals who talked about important matters behind closed doors.’<sup>290</sup> Jurors complained of ‘being sent back to the jury room every five minutes’<sup>291</sup> and the fact that they hadn’t been ‘given the whole story ... we all knew that something had happened that night, but we didn’t know exactly what ... [we felt we were] denied the truth’.<sup>292</sup>

2.4.9 Tasmanian jurors also reported:

[the judge] was just bossing us around the whole time ... We were being led through a maze by the judge and told what to do and what to think all the time. Anytime [the unrepresented] opened his mouth it was something we had to disregard or we were sent in the room ... It took a lot of our autonomy away from us.<sup>293</sup>

2.4.10 This accords with jurors’ feelings elsewhere. For example, a juror in New Hampshire in 2009 conducted internet research during a sexual assault trial. He informed fellow jurors about the accused’s prior convictions for child molestation. After the juror was convicted of contempt and fined \$1200, he stated defiantly to the media: ‘If it’s someone’s third offense for driving while intoxicated, shouldn’t you know ... If it’s a fourth theft charge, shouldn’t you know? Everybody should (be concerned) that jurors are not told everything.’<sup>294</sup>

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<sup>287</sup> Bowcott (n 52).

<sup>288</sup> Warner, Davis and Underwood (n 8) 357.

<sup>289</sup> *United States v Fumo*, 655 F 3d 288 (3d Cir 2011), 296–8. The court held, that the material published was ‘nothing more than harmless ramblings with no prejudicial effect ... [the comments] were so vague as to be virtually meaningless’. The appeal was dismissed.

<sup>290</sup> *Ibid* 338–9.

<sup>291</sup> *Ibid* 339.

<sup>292</sup> *Ibid* 346.

<sup>293</sup> *Ibid* 339.

<sup>294</sup> AnnMarie Timmins, ‘Juror Behind Mistrial Pleads, Pays \$1,200’, *Concord Monitor* (10 October 2009); AnnMarie Timmins, ‘Juror Becomes a Defendant’, *Concord Monitor* (26 March 2009).

2.4.11 It is clear how such frustration could manifest itself as juror misconduct. If jurors perceive that they are being denied relevant material, without an explanation as to why, they may carry out impermissible research to ‘fill in the gaps’ pursuant to a misplaced sense of responsibility to render the ‘right’ decision.<sup>295</sup> Commentators have highlighted the fact that criminal trials are often unhelpfully portrayed in media and in fiction as a pursuit of objective or factual truth, which inevitably gives rise to a ‘clash’ between jurors’ notions of justice and the *actual* fundamental premise of a common law criminal trial.<sup>296</sup>

**Question 4**

Based on your experience, what do you think causes and/or motivates jurors to use social media and/or other internet platforms inappropriately during a criminal trial?

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<sup>295</sup> Caren Morrison, ‘Jury 2.0’ (2011) 62(6) *Hastings Law Journal* 1579, 1581.

<sup>296</sup> Hunter (n 24) 3.

## Part 3

# ‘Screenshot’: Current Laws and Practices

3.1.1 There are various laws and practices that currently exist to safeguard against juror misconduct of this kind (*‘preventative’*) as well as those that exist to remedy and/or otherwise deal with such misconduct after the fact (*‘consequential’*). Their operation and impact range from well before a jury is empanelled to well after a jury is discharged.

### 3.1 Pre-trial control of prejudicial material

#### *Suppression orders*

3.1.1 In Tasmania, the courts have the power to prohibit or restrict the publication of material if it is necessary to do so in the interests of the administration of justice. This common law power exists in the inherent jurisdiction of the Supreme Court and as an implied power of the Magistrates Court.<sup>297</sup> It is not enshrined in statute as it is in other Australian jurisdictions.<sup>298</sup>

3.1.2 Such orders are referred to as ‘suppression orders’ or ‘non-publication orders’. They are exceptions to the ‘open-court’ principle whereby court proceedings are generally held in public and fair and accurate reporting of proceedings is encouraged.<sup>299</sup> Suppression orders are *sub judice* laws, designed to operate while a matter is pending.<sup>300</sup> A criminal case is said to be pending from the moment that the criminal law is ‘set in motion’,<sup>301</sup> either at the time of arrest<sup>302</sup> or when a warrant is issued for arrest,<sup>303</sup> and it remains pending until the accused is acquitted, all avenues of appeal are exhausted or the time to lodge an appeal has lapsed.<sup>304</sup> Suppression orders are not granted in Tasmania with the frequency with which they are in some other Australian jurisdictions.<sup>305</sup>

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<sup>297</sup> See *Brooks v Easther* [2017] TASSC 44, [7]; see also *Brooks v Easther (No 2)* [2017] TASSC 47, [19] (Blow CJ). See also *Hogan v Hinch* (2011) 243 CLR 506, [26].

<sup>298</sup> See, eg, *Evidence Act 1929* (SA) s 69A; *Court Suppression and Non-publication Orders Act 2010* (NSW); *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth); and *Open Courts Act 2013* (Vic).

<sup>299</sup> See, eg, *Scott v Scott* [1913] AC 417; *Russell v Russell* (1976) 134 CLR 495.

<sup>300</sup> *James v Robinson* (1963) 109 CLR 593, 606, 615.

<sup>301</sup> *Packer v Peacock* (1912) 13 CLR 577, 586.

<sup>302</sup> *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368, 374–5.

<sup>303</sup> *R v Clarke* [1908]–[1910] All ER 915.

<sup>304</sup> *Ex parte A-G; Re Truth and Sportsman Ltd* (1961) 61 SR (NSW) 484; *A-G (Qld) v Win Television Qld Pty Ltd* [2003] QSC 157.

<sup>305</sup> ‘Victoria and South Australia continue to be the two legal jurisdictions with a remarkable propensity to make suppression orders ...’: Mike Dobbie (ed), *Criminalising Journalism: The MEAA Report into the State of Press Freedom in Australia in 2018* (Report, MEAA, 3 May 2018) 13. ‘In South Australia, 206 suppression orders were made in 2014–2015 (an increase of 50%)’: Sean Fenster, ‘Full Court of SA Supreme Court to Determine Value, Power of Suppression Orders in Digital Age’, *The Advertiser* (online, 10 November 2017)

3.1.3 Suppression orders are essentially directed at the mainstream traditional media. Indeed, the list of active suppression orders published on the Supreme Court of Tasmania website is exclusively entitled, ‘*For Media*’.<sup>306</sup> Professional and/or experienced journalists have knowledge and training in this area, they are bound by in-house and/or industry wide ethical standards,<sup>307</sup> and their publishing practices typically have inbuilt protections to avoid falling foul of court orders.<sup>308</sup>

3.1.4 The observation of suppression orders in the ‘new world’ of social media and other internet platforms, however, is a different story.<sup>309</sup> For example, in 2012, following the arrest of a high-profile ‘one-punch’ manslaughter suspect in Sydney, traditional media organisations were required to obscure any photographs of the accused that they published while the case was *sub judice*. Either undeterred or unaware, social media users began posting unobscured photographs of the accused captioned with ‘murderer’ and ‘monster’. Further, one anonymous *Twitter* user opened an account in the name of the accused and used it to disseminate unobscured photographs of him to journalists and mainstream media organisations.<sup>310</sup>

3.1.5 Whilst non-compliance with suppression orders can amount to *sub judice* contempt, there are inherent problems with the enforcement and prosecution of *sub judice* contempt cases which involve the internet and, especially, social media. It can be difficult to identify those responsible when the offending publications are published anonymously, the authors may be outside the jurisdiction, and the sheer number of offending publications can prevent full investigation and prosecution.

### **Take-down orders**

3.1.6 The common law power which gives rise to the making of suppression orders also provides for the making of ‘take-down’ orders in relation to material that has already been published. This includes

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<<https://www.adelaidenow.com.au/>>. ‘In Victoria, 1594 suppression orders were made in 2014–2016’: Farrah Tomatina, ‘Open Justice or the Suppression State?’, *The Age* (online, 24 June 2018) <<https://www.theage.com.au/national/victoria/open-justice-or-the-suppression-state-20180624-p4znd4.html>>.

<sup>306</sup> ‘For the Media’, *Supreme Court of Tasmania* <<https://www.supremecourt.tas.gov.au/the-court/media/>>.

<sup>307</sup> For example, see Australian Press Council, *Standards of Practice* <<https://www.presscouncil.org.au/standards-of-practice/>>; and Australian Press Council, *Standards* <<https://www.presscouncil.org.au/standards/>>.

<sup>308</sup> ‘In a professional media system, checking takes place at multiple levels, eg sub-editors, production editors and lawyers are often involved’: Keyzer et al (n 197) 4. However, mainstream media does not *always* live up to this standard. By way of a recent example where mainstream media recklessly published inaccurate information and inadmissible evidence during television coverage of a murder trial in Victoria see: Bridget Rollason, ‘Ballarat murder trial aborted, jury dismissed after “reckless” TV report on Karen Ashcroft case’, *ABC News* (online, 7 June 2019) <<https://www.abc.net.au/news/2019-06-07/jury-dismissed-in-karen-ashcroft-murder-trial/11190536>>.

<sup>309</sup> “‘Trial by social media’ in Australia prompts clash over accused murderer”, *TimeBase* (12 October 2012) <<https://www.timebase.com.au/news/2012/AT368-article.html>>.

<sup>310</sup> Matthew Bevan, ‘Kieren Loveridge: trial by social media’, *ABC News* (online, 20 July 2012) <<http://www.abc.net.au/local/stories/2012/07/20/3549930.htm>>.

material that is available online.<sup>311</sup> The same test of it being ‘necessary for the administration of justice’ applies.<sup>312</sup>

3.1.7 However, the potential utility of take-down orders in the context of material published on the internet and, specifically, social media platforms is also problematic. Take-down orders can quickly be rendered otiose when the offending information has been widely published and/or disseminated<sup>313</sup> and it thereafter remains accessible in meticulous archived form.

### ***Pre-trial ‘searches’***

3.1.8 It has been suggested by commentators that searches should be conducted of the internet and social media platforms ahead of *every* trial in order to identify any prejudicial material that may exist that is potentially accessible by errant jurors. Some commentators suggest that this precautionary measure should be performed by the prosecution;<sup>314</sup> others believe it should be performed by the Court.<sup>315</sup> Some believe that a cursory check of *Facebook* should be one of the first things that counsel do upon being briefed in any matter simply because it is potentially such a valuable source of evidence.<sup>316</sup>

3.1.9 In practice, however, in some cases it has fallen to others involved and invested in the upcoming trial process to do something about online prejudicial material. Ahead of a murder trial in Victoria, social media was flooded with messages following the disappearance of the victim, which then turned to ‘vitriolic abuse’ upon the accused’s arrest. Following a preliminary court hearing, the victim’s husband spoke to media outside the court and declared: ‘And while I really appreciate all the support, I just would like to mention that negative comments on social media may hurt legal proceedings, so please be mindful of that.’<sup>317</sup>

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<sup>311</sup> *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, [61]. To demonstrate the point, the court explained: ‘[if] a library holding of a past issue of a newspaper, book or magazine (perhaps containing a prejudicial story about the accused) were thought to be a threat to a fair trial, a superior court would have jurisdiction to order that there be no public access to that material until the conclusion of the trial. An order preventing access to a publication on a website is no different in kind ...’

<sup>312</sup> See [3.1.1] above.

<sup>313</sup> Globally on *Facebook* there are 4.75 billion pieces of content shared daily. Further, every 60 seconds: 510,000 comments are posted, 293,000 statuses are updated, and 136,000 photos are uploaded. See Noyes (n 247).

<sup>314</sup> Virginia Bell, ‘How to preserve the integrity of jury trials in a mass media age’ (2006) 7(3) *Judicial Review* 311, 319; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 361 (Spigelman CJ): ‘it may be desirable for the Crown to conduct searches in advance of a trial and, where necessary, request Australian-based websites to remove references to an accused for the period of a trial.’

<sup>315</sup> See Steven Price, ‘Upcoming Seminar on the Internet and Suppression Issues’, *Media Law Journal* (10 November 2009) <<http://www.medialawjournal.co.nz/?p=309>>: ‘[A]n official should be tasked with sitting down before each trial (and periodically during it) and Googling the defendant’s name. If there’s prejudicial material out there, steps should be quickly taken to have it temporarily taken down.’ See also *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344. The publication of prejudicial information relating to the pending trial of a prominent business identity was removed from the website Crikey.com.au at the request of the Supreme Court’s Public Information Officer: at [11].

<sup>316</sup> The Hon Justice Stephen Estcourt AM, ‘Social Media as Evidence’ (Speech, New Technology and Trial Practice Workshop, 18–20 March 2019) <<https://www.supremecourt.tas.gov.au/publications/speeches-articles/social-media-as-evidence/>>.

<sup>317</sup> See James Farrell, ‘Social Media and the Law’ (2012) 37(4) *Alternative Law Journal* 282, 282 <<https://www.altlj.org/news-and-views/downunderallover/duao-vol-37-4/448-social-media-and-the-law>>.

**Question 5**

- (a) What can and should be done by way of controlling prejudicial material that is potentially available to jurors on the internet and social media platforms at the pre-trial stage?
- (b) Whose obligation should it be to attend to these pre-emptive and precautionary pre-trial measures?

**3.2 ‘Friending’ – Pre-empanelment information/training of jurors*****Material available to prospective jurors before attending court***

3.2.1 In Tasmania, when jurors receive a summons for jury service in the post, they also receive a pamphlet that includes some basic facts about jury duty.<sup>318</sup> Information about jury service is also available to prospective jurors in Tasmania on the internet.<sup>319</sup> This includes three videos entitled, *Coming to Court for Jury Duty – How it Works* (04:31),<sup>320</sup> *Being Selected and Serving on a Jury* (08:09),<sup>321</sup> and *Payments of Expenses* (02:15),<sup>322</sup> as well as the following information: *Are you Eligible?*, *You’ve Received a Jury Summons, I can’t attend Jury Duty*, *For Employers, Work & Reimbursements*, *Jury Selection*, *First Day of Trial*, and *At the Trial*.<sup>323</sup> Similar online materials for prospective jurors are available in other Australian jurisdictions.<sup>324</sup>

<sup>318</sup> Warner, Davis and Underwood (n 8) 352.

<sup>319</sup> ‘Jurors’, *The Supreme Court of Tasmania*, (10 December 2017) <<https://www.supremecourt.tas.gov.au/jurors/>>.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> ‘Jurors’, *The Supreme Court of Tasmania*, (10–18 December 2017) <<https://www.supremecourt.tas.gov.au/jurors/>>.

<sup>324</sup> ACT: a ‘*Jury Handbook*’ is available online, as well as two videos, ‘*Coming to Court*’ and ‘*Jury Administration*’. See ‘Jury Service in the Australian Capital Territory’, *Supreme Court of the Australian Capital Territory* <[https://courts.act.gov.au/supreme/public/jury\\_service\\_in\\_the\\_australian\\_capital\\_territory](https://courts.act.gov.au/supreme/public/jury_service_in_the_australian_capital_territory)>. NSW: two publications are available online, ‘*Welcome to jury service: a guide for jurors*’ and ‘*Jury Service: a rewarding responsibility*’. There is also information available on ‘*Role of a jury*’, ‘*Sent a Notice of inclusion*’, ‘*How a jury is selected*’, ‘*Who can and cannot serve*’, ‘*Applying to be excused*’, ‘*Payment for jury service*’, ‘*Jury summons court checklist*’, ‘*Jury trial and verdict*’, ‘*After the trial*’ and ‘*What employers need to know*’. See ‘Jury Service in New South Wales’ *Courts and Tribunal Services NSW* <[http://www.courts.justice.nsw.gov.au/Pages/cats/jury\\_service/jury\\_service.aspx](http://www.courts.justice.nsw.gov.au/Pages/cats/jury_service/jury_service.aspx)>. NT: a pamphlet is available online, ‘*Jury Service Information*’. See ‘For Jurors’, *Supreme Court of the Northern Territory* (2008) <<http://www.supremecourt.nt.gov.au/jurors/index.htm#q17>>. Qld: several publications and videos are available online, including a ‘*Juror’s Handbook*’ and a ‘*Guide to Deliberations*’. See Queensland Courts, *Videos and Resources for Jurors* <<https://www.courts.qld.gov.au/jury-service/about-jury-service/videos-and-resources-for-jurors>>. SA: two brochures are available online, ‘*Jury Information*’ and ‘*Employer Obligations*’. There are also six videos available: ‘*I’ve been selected*’, ‘*Do I get paid*’, ‘*How long will I be needed*’, ‘*My employee has been selected*’, ‘*Where do I go for jury service in Adelaide*’ and ‘*Introduction to jury service*’. See ‘For Jurors’, *Courts Administration Authority of South Australia* <<http://www.courts.sa.gov.au/ForJurors/Pages/default.aspx>>. Vic: information is available online: ‘*What is jury Service*’, ‘*Notice of Selection*’, ‘*Jury Summons*’, ‘*Attending for jury service*’, ‘*Serving on a jury*’, ‘*Work and payment*’, ‘*Support for Jurors*’. See Juries Victoria <<https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service>>. WA: information is available online, including a video ‘*A Fair Trial – Jury Duty in Western Australia*’. See Department of Justice Court and Tribunal Services, *Jury Duty* <[https://www.courts.justice.wa.gov.au/J/jury\\_duty.aspx](https://www.courts.justice.wa.gov.au/J/jury_duty.aspx)>.

3.2.2 There is no express mention of ‘social media’ in the online materials that are available for prospective jurors in Tasmania. However, the *Being Selected and Serving on a Jury* online video refers to jurors discussing the case outside the courtroom,<sup>325</sup> and conducting their own research, including via the internet.<sup>326</sup>

3.2.3 In Queensland, both the *Jury Handbook*<sup>327</sup> and the *Guide to Jury Deliberations*<sup>328</sup> specifically mention social media. In the Australian Capital Territory *Jury Handbook*, social media is mentioned on several occasions, significantly, covering both ‘information in’ and ‘information out’ scenarios.<sup>329</sup> It is also expressly mentioned in the New South Wales online materials, specifically in relation to ‘information out’.<sup>330</sup> In an induction video for prospective jurors in Western Australia, the restrictions on social media use are explicitly discussed in both ‘information in’ and ‘information out’ contexts, including an explanation of the rationale behind the restrictions.<sup>331</sup>

### ***First Day – Induction/Orientation***

3.2.4 Most Australian jurisdictions provide introductory orientation material to jurors by way of a video on their first day of service.<sup>332</sup> Most supplement this with written material, such as a booklet or a handbook.<sup>333</sup>

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<sup>325</sup> ‘Jurors are only permitted to discuss the case with other jurors on the same case ... jurors must not discuss the case with any of the people involved in the case ... You must not even talk about the case to your friends and family. That is because it is very important that you make up your own mind about your verdict following your own conscience without the input of people who haven’t been in court and heard all of the evidence.’

<sup>326</sup> ‘So can I do my own research on my case when I’m a juror? No, it is crucial that the only evidence that jurors rely on is evidence that is presented in court that the judge has ruled is fair to rely on. You can’t use information from sources outside the courtroom. If you use information that hasn’t been presented in court, the person on trial won’t know about that information, the lawyers won’t know about that information, they won’t be able to contradict the information or explain anything and that would mean it would not be a fair trial. You must not carry out your own investigations. That means you can’t visit the scene of the crime, make enquiries about what occurred or about the people involved in the case, Jurors must also avoid obtaining information about the case from sources such as the internet, newspapers or television.’

<sup>327</sup> ‘Do not make your own inquiries about the case. It would be unfair for you to act on information that is not part of the evidence and which the parties have not had the opportunity to test. For that reason, you must not use the internet or other material to conduct research about the case or seek or receive information about the accused person or about other witnesses or other people associated with the case. Keep this in mind when using social media, the internet or talking with anyone.’

<sup>328</sup> ‘Do not make your own inquiries about the case or defendant (do not use Google; the internet; Facebook; Twitter or any social media of any sort).’

<sup>329</sup> See Appendix A.

<sup>330</sup> Department of Justice (NSW), Courts and Tribunal Services, *Jury summons checklist* <[http://www.courts.justice.nsw.gov.au/Pages/cats/jury\\_service/catscorporate\\_jurysummons-court\\_checklist.aspx](http://www.courts.justice.nsw.gov.au/Pages/cats/jury_service/catscorporate_jurysummons-court_checklist.aspx)>: ‘Publishing juror details and sensitive court materials are not permitted, including on social media’. See also Department of Justice (NSW) Courts and Tribunal Services, *Jury Trial and Verdict* <[http://www.courts.justice.nsw.gov.au/Pages/cats/jury\\_service/trial\\_verdict.aspx](http://www.courts.justice.nsw.gov.au/Pages/cats/jury_service/trial_verdict.aspx)>: ‘Do not post any discussion or materials from jury service on social media’.

<sup>331</sup> ‘A Fair Trial – Jury Duty in Western Australia’ (video) *Department of Justice Court and Tribunal Services* <<https://vimeo.com/325575587>>. ‘In particular, it is essential that you do not Google or search the internet about anything or anyone connected with the trial before you. It is vitally important that you resist the temptation to do so. Please keep in mind that you must not post any information about your involvement in jury service, or your location, online, including social media such as Facebook, Instagram, and Twitter. These restrictions are to protect you as a juror and to protect the integrity of the court process.’

<sup>332</sup> Warner, Davis and Underwood (n 8) 352.

<sup>333</sup> *Ibid* 352.

3.2.5 In South Australia, jurors’ induction takes up to four hours,<sup>334</sup> this includes a video entitled, *Introduction to Jury Service (26:25)*.<sup>335</sup> In New South Wales, the Sheriff’s Officers have standing orders at all court houses to screen a DVD entitled *Welcome to Jury Service* to prospective jurors prior to their empanelment. There is also a booklet, *Welcome to Jury Service* that is available at all court houses in New South Wales. Sherriff’s officers have standing orders to distribute this booklet to jurors after empanelment only with the concurrence of the presiding judge.<sup>336</sup> In Queensland, jurors view an eight-part video series.<sup>337</sup>

3.2.6 In some jurisdictions, this information is also presented orally.<sup>338</sup>

3.2.7 Whilst juror induction/orientation differs between jurisdictions (eg people with a summons for jury duty at the County Court of Victoria in Melbourne can play pool while they wait),<sup>339</sup> it can also differ between metropolitan and regional court locations within jurisdictions. This is largely due to resources, or rather, a lack thereof. In some regional areas, there is nowhere for jury pools to congregate and assemble inside the courthouse and they are left to wait outside the courthouse.<sup>340</sup> This affects the consistency of juror induction and orientation across metropolitan and regional locations.

3.2.8 When enquiries were made of Tasmanian jurors, in 2007–2009,<sup>341</sup> some insight was obtained into the deficiencies in the induction and orientation of jurors in Tasmania. There was a common complaint from many jurors that they would have liked more information. Specifically, they expressed a desire to be informed early of the need to appoint a foreperson and on how to get started with their deliberations.<sup>342</sup> Indeed, there is a dearth of information about the deliberation process in the juror induction materials across most jurisdictions.<sup>343</sup> Jurors commented that they were ‘floundering along ... not guided enough ... There’s nobody in the court that you can ask questions [of]’<sup>344</sup> and ‘a little booklet would be helpful ... A bit more, yes, sort of discussion with the people, prospective jurors about how it works’.<sup>345</sup> Jurors also found that their induction and orientation did not sufficiently explain the juror selection process, including what personal information about each prospective juror is available to counsel for the purposes of the selection process.<sup>346</sup>

<sup>334</sup> Courts Administration Authority, ‘Jury Service Helpful Information’ <[http://www.courts.sa.gov.au/ForJurors/Brochures/Jury\\_service.pdf](http://www.courts.sa.gov.au/ForJurors/Brochures/Jury_service.pdf)>.

<sup>335</sup> ‘Introduction to Jury Service’ *YouTube* <<https://www.youtube.com/watch?v=Okc8iEgfF4Y&feature=youtu.be>>.

<sup>336</sup> Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book – Trial Procedure* (Updated April 2019) [1–475] <[https://www.judcom.nsw.gov.au/publications/benchbks/criminal/the\\_jury.html#p1-470](https://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html#p1-470)>.

<sup>337</sup> Queensland Courts (n 324).

<sup>338</sup> Warner, Davis and Underwood (n 8) 352.

<sup>339</sup> Michael Dulaney and Damien Carrick, ‘Despite bias and bigotry, the jury system can still deliver justice, experts say’, *ABC News* (online, 17 May 2018) <<https://www.abc.net.au/news/2018-05-16/how-jury-system-accounts-for-prejudice-and-bias-among-jurors/9763178>>.

<sup>340</sup> ‘A Citizens Duty: Jury Service’ (n 279). Eg, courthouses in regional Queensland and Victoria.

<sup>341</sup> It is to be noted that all online juror related material is dated December 2017.

<sup>342</sup> Warner, Davis and Underwood (n 8) 342.

<sup>343</sup> The exceptions being the *Juror’s Handbook* in Victoria and the *Guide to Jury Deliberations* in Queensland.

<sup>344</sup> Warner, Davis and Underwood (n 8) 342.

<sup>345</sup> *Ibid* 343.

<sup>346</sup> *Ibid* 351–2.

3.2.9 The importance of juror induction and orientation cannot be overstated. One in twenty Australians have little or no first-hand experience of a criminal courtroom.<sup>347</sup> The knowledge and understanding that jurors gain as prospective jurors sets the foundation for their level of engagement as jurors. It is a valuable first opportunity to define their obligations and to set the parameters of what they can and cannot do.

#### Question 6

- (a) How can pre-empanelment juror information/training be improved in Tasmania?
- (b) What can be learned from other jurisdictions?
- (c) Should pre-empanelment juror information/training expressly address social media?
- (d) Should pre-empanelment juror information/training specifically cover both ‘*information in*’ and ‘*information out*’ uses of the internet/social media?
- (e) Should pre-empanelment juror information/training provide an explanation of the rationale behind the restrictions in social media/internet use?

### 3.3 Juror oath/affirmation

3.3.1 In Tasmania, after all jurors are selected and empanelled, jurors *must* take an oath or make an affirmation.<sup>348</sup> The oath/affirmation states: ‘*[You and each of you swear by Almighty God/You and each of you affirm] ... that you will faithfully and impartially try the issues between the Crown and [name of the accused] in this trial and give a true verdict according to the evidence.*’<sup>349</sup> To which a juror answers ‘I swear’ or ‘I affirm’.<sup>350</sup> Near identical oath/affirmations exist in all Australian jurisdictions.<sup>351</sup>

3.3.2 It has been suggested that the juror oath/affirmation could provide assistance when it comes to deterring jurors from inappropriately using social media and the internet during trial. This could be achieved by increasing the formality of the taking of the oath/affirmation and thereby instilling in jurors the gravity and solemnity of their role as jurors. A juror, who is in a courtroom for the first time, engrossed in the unfamiliar spectacle that is jury empanelment, and eagerly awaiting the upcoming main event of a criminal trial, could be forgiven for mistaking the jury oath/affirmation for a mere administrative process.

<sup>347</sup> Ibid 337.

<sup>348</sup> *Juries Act 2003* (Tas) s 38(1). This procedure is common to the majority of other Australian jurisdictions except South Australia, where jurors are sworn ahead of empanelment, upon attending for jury service, and in New South Wales, where there are no specific procedural provisions for the juror oath/affirmation.

<sup>349</sup> Ibid sch 3.

<sup>350</sup> Ibid s 38(2).

<sup>351</sup> ACT: *Juries Act 1967* (ACT) s 45, sch 1: ‘true verdict *according to the evidence*’. NSW: *Jury Act 1977* (NSW) s 72A: ‘true verdict *according to the evidence*’. NT: *Juries Act 1962* (NT) s 58, sch 6: ‘true verdict *according to the evidence*’. Qld: *Jury Act 1995* (Qld) s 50: ‘a true verdict, *according to the evidence*’. SA: *Juries Act 1927* (SA) s 33, sch 6: ‘true and honest verdict in accordance with the evidence.’ Vic: *Juries Act 2000* (Vic) s 42, sch 3: ‘true verdict *according to the evidence*.’ WA: *Juries Act 1957* (WA) s 36, see also ‘A Fair Trial Jury Duty in Western Australia’, (video) Department of Justice Court and Tribunal Services <[https://www.courts.justice.wa.gov.au/J/jury\\_duty.aspx](https://www.courts.justice.wa.gov.au/J/jury_duty.aspx)>: ‘true verdict *on the evidence that you hear in court*’.

3.3.3 The oath/affirmation is likely to be viewed as less than an empty legal adage if it is, for example, taken individually by jurors<sup>352</sup> in open court.<sup>353</sup> It has also been proposed that the oath/affirmation could have a written component, which may have a greater effect on jurors appreciating the content of the oath/affirmation as well as its binding nature, if it is required to be signed and is available to be reviewed after the fact.<sup>354</sup>

3.3.4 In some US jurisdictions, judges require jurors to sign a ‘statement of compliance’ or a ‘written pledge’ in which jurors agree to refrain from using social media/the internet while serving as jurors.<sup>355</sup> By way of an example of what this might look like, below is a ‘Statement of Compliance’ endorsed by the American College of Trial Lawyers:<sup>356</sup>

I agree that during the duration of the trial in \_\_\_\_\_, I will not conduct any independent research into any of the issues or parties involved in this trial. I will not communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate with me. I further agree that I will report any violations of the court’s instructions immediately.

\_\_\_\_\_  
 JUROR No. \_\_\_\_\_

3.3.5 It has also been suggested that upon a juror being sworn/affirmed, the judge/court could provide jurors with a pro forma outgoing message that jurors could use as a ‘status update’ of sorts to inform and explain changes and/or absences from their usual social media presence. For example:

I am sending this note to you as instructed by Judge \_\_\_\_\_. I am now a sworn juror in a trial. I am sequestered. This means I am not allowed to read or comment upon anything having to do with the subject of the trial, the parties involved, the attorneys, or anything else related to my service as a juror. Please do not send me any materials; don’t e-mail, text, or tweet me any questions or comments about this case or my service as a juror. Please do not text or e-mail me during the course of this trial except in an emergency. I will send you a note when I am released from my duty as a juror.<sup>357</sup>

<sup>352</sup> In Tasmania, there is provision for all jurors taking an oath to do so at the same time and all jurors taking an affirmation to do so at the same time. See *Juries Act 2003* (Tas) s 38(4A).

<sup>353</sup> See, eg, in South Australia, where all prospective jurors are required to take the oath/affirmation when they attend in obedience of their summons, before they are empanelled: *Juries Act 1927* (SA) s 33.

<sup>354</sup> See, eg, Dunn (n 181) 8–9; Dunn (n 18) 9.

<sup>355</sup> See Hannaford-Agor, Rottman and Waters (n 159) 8. See also Dunn (n 18) 9: Of the 494 US federal court judges who participated in the survey, 456 judges had taken ‘preventative measures’ regarding jurors’ use of the internet and social media. Of those judges, 10 had required jurors to sign a ‘statement of compliance’ or a ‘written pledge’ agreeing to refrain from using social media while serving as a juror.

<sup>356</sup> St Eve and Zuckerman (n 201) citing Jury Committee, American College of Trial Lawyers, ‘Jury Instructions Cautioning Against Use of the Internet and Social Networking’ 1, 6 (September 2010). By way of a further example of a written pledge used by a US District Court Judge (Scheindlin) in 2011: ‘I agree to follow all of the Court’s preliminary instructions, including the Court’s specific instructions relating to Internet use and communication with others about the case ... I agree not to communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate with me.’

<sup>357</sup> Ralph Artigliere, Jim Barton and Bill Hahn, ‘Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers’ (2010) 84(1) *Florida Bar Journal* 8, 16.

3.3.6 In Tasmania, sworn jurors *must* also take a ‘supplementary’ oath/affirmation before leaving court on each occasion when the trial is adjourned.<sup>358</sup> This oath/affirmation serves as a reminder against ‘old fashioned’ means of ‘*information in*’ and ‘*information out*’. It states:

[You and each of you swear by Almighty God/You and each of you affirm] that you will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations.<sup>359</sup>

#### Question 7

- (a) Could/should the juror oath/affirmation and its surrounding procedure be employed to assist in preventing jurors inappropriately using social media and other internet platforms during trials?
- (b) If so, how might this be achieved?

### 3.4 Judicial directions

3.4.1 Once a jury is empanelled, in the usual course, they receive introductory directions from the trial judge. These ‘opening directions’ usually encompass information about the jury’s role, including what they can and cannot do during a criminal trial. Juries are thereafter directed by the trial judge on an as-needs basis throughout the course of the trial, up until the judge’s final directions in the form of a summing up, before the jury retires to commence deliberations.

3.4.2 In Tasmania, there are no ‘model’ directions such as they exist in New South Wales<sup>360</sup> and Victoria,<sup>361</sup> as well as in many US jurisdictions. See Appendix B for an example of opening directions in the Tasmanian jurisdiction, regarding jurors’ use of the internet, as well as corresponding excerpts from the summing up in the same case: *Marshall and Richardson v Tasmania*.<sup>362</sup>

#### *Directions about social media specifically – ‘DM’ (‘Direct message’)*

3.4.3 Commentators have stressed the importance of judicial directions, particularly opening directions that specifically address the use of the internet and social media. In particular, the importance of jurors being informed from an early stage about exactly what is permitted and what constitutes misconduct in this respect.

3.4.4 In *Marshall and Richardson v Tasmania*, the jury directions specifically mention the internet and demonstrate a particular prohibited ‘*information in*’ example involving the internet platform, *Google Maps*.<sup>363</sup> However, there is no express mention of social media, nor do the directions address ‘*information out*’ uses of the internet/social media.

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<sup>358</sup> *Juries Act 2003* (Tas) s 47(6).

<sup>359</sup> *Ibid* sch 5.

<sup>360</sup> Judicial Commission of New South Wales (n 336). See Appendix C for relevant excerpts.

<sup>361</sup> Judicial College of Victoria, *Victorian Criminal Charge Book* (updated 17 April 2019) <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1262.htm>>. See Appendix D for relevant excerpts.

<sup>362</sup> (2016) 264 A Crim R 448. This case is put forward merely as an example of such directions in the Tasmanian jurisdiction. It is not purported to be any authoritative statement of such directions. However, pertinently, it is also a case involving juror misconduct in Tasmania, which relates to the use of the internet.

<sup>363</sup> *Ibid*. See also Appendix A.

3.4.5 Both the New South Wales and Victorian model opening directions are far more comprehensive in this regard. They both include mention of the internet and, specifically social media, as well as covering both ‘*information in*’ and ‘*information out*’ types of misconduct.

3.4.6 The New South Wales model directions warns against ‘conducting any research using the internet’, it continues in more detail:

You should keep away from the internet and the other communication sources which may pass comment upon the issues in this trial. You may not communicate with anyone about the case on your mobile phone, smart phone, through email, text messaging, or on Twitter, through any blog or website, any internet chatroom, or by way of any other social networking websites including Facebook, MySpace, LinkedIn and YouTube. You should avoid any communication which may expose you to other people’s opinions or views.<sup>364</sup>

3.4.7 The Victorian model directions similarly state:

Most importantly, you must not make any investigations or enquiries, or conduct independent research, concerning any aspect of the case or any person connected with it. That includes research about the law that applies to the case. You must not use the internet to access legal databases, legal dictionaries, legal texts, earlier decisions of this or other courts, or other material of any kind relating to the matters in the trial. You must not search for information about the case on Google or conduct similar searches. You also must not discuss the case on Facebook, Twitter or blogs, or look at such sites for more information about the case. ...

You must not discuss the case on social media sites, such as Facebook, Myspace, Twitter, blogs or anything else like that.<sup>365</sup>

3.4.8 It is accepted that jurors in a criminal trial are out of their comfort zone<sup>366</sup> and, without a greater understanding of the criminal trial process, they may be prone to a literal interpretation of directions. By way of illustrative US examples, a juror who searched terms on the internet and circulated printed material from *Wikipedia* to fellow jurors didn’t think she was doing anything wrong. She explained: ‘I didn’t read about it in the newspaper or watch anything on TV’.<sup>367</sup> A juror in Seattle sitting in a robbery trial posted on her blog that the judge had instructed jurors not to tweet but had ‘made no mention’ of blogging.<sup>368</sup> Further, a juror sitting in a murder trial who searched scientific terms related to how blood flows after death on *Wikipedia*, explained, ‘to me it wasn’t research. It was a definition’.<sup>369</sup>

3.4.9 In a 2009 Victorian high-profile terrorism case where juror/s conducted internet searches of various definitions on *Wikipedia* and *Reference.com*, the trial judge acknowledged shortcomings in the directions given to the jury. The trial judge commented: ‘it is ... possible that [the] direction[s] ... were interpreted by the jury as meaning that they must not seek any information about *this* case. That is to

<sup>364</sup> Judicial Commission of New South Wales (n 336). See [1-490] Suggested (oral) directions for the opening of the trial following empanelment. See Appendix C.

<sup>365</sup> Judicial College of Victoria (n 361) [1.11], Consolidated preliminary directions – No Outside Information, Warnings About Discussing the Case. See Appendix D.

<sup>366</sup> Warner, Davis and Underwood (n 8) 340.

<sup>367</sup> Bryan (n 42).

<sup>368</sup> Grow (n 15). Juror dismissed.

<sup>369</sup> Lash (n 41).

say, it is possible that they thought they were being warned not to seek from the internet or elsewhere information about the accused, or what they were accused of having done.<sup>370</sup>

3.4.10 It has been suggested that the directions that jurors receive from the outset should aim to ‘itemise’ particular social media/internet platforms as well as particular uses and activities to provide jurors with a more comprehensive list of what they cannot do.<sup>371</sup>

### ***Providing explanation***

3.4.11 In response to juror misconduct of this kind, judicial officers have adopted a range of techniques to increase the effectiveness of their directions on this topic. They include explaining in plain English the reason/s behind the social media/internet restrictions.<sup>372</sup> It has been said that by providing explanations and encouraging juror understanding of the rationale behind the internet/social media restrictions, they will be less susceptible to what is called the ‘reactance effect’ where jurors are compelled to seek additional information simply because they are aware that forbidden information has been withheld.<sup>373</sup>

3.4.12 The New South Wales model directions provide extensive explanations on the rationale behind the ‘*information in*’ restrictions on jurors:

the result of your inquiries could be to obtain information that was misleading or entirely wrong. For example, you may come across a statement of the law or of some legal principle that is incorrect or not applicable in New South Wales. The criminal law is not the same throughout Australian jurisdictions and even in this State it can change rapidly from time to time. It is part of my function to tell you so much of the law as you need to apply in order to decide the issues before you. ...

a person with whom you might speak who is not a fellow juror would, perhaps unintentionally make some comment or offer some opinion on the nature of the charge or the evidence which is of no value whatever. That person would not have the advantage that you have of hearing

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<sup>370</sup> *R v Benbrika* [2009] VSC 142, [66]–[67] (Bongiorno J); *Benbrika v R* (2010) 29 VR 593, [192]–[216] (Maxwell P, Nettle and Weinberg JJA). In this case, members of the jury were given a number of directions as to not consulting outside sources, including: ‘you should be wary of any newspaper reports concerning this case, television reports, or reports of similar cases here or anywhere else in the world. You have to decide this case on the evidence that is led in this courtroom. It is important that you do not do or attempt to do any research of your own. The evidence that will be given in this courtroom is the evidence you will decide the case on. You must not start reading about Islam or Muslims or terrorism or anything of that nature. You must not go to the internet and seek any information. The information that you have to decide this case will be given to you in this courtroom. I can’t emphasise this more strongly. It is extremely important. The reason for that is obvious.’

<sup>371</sup> Hannaford-Agor, Rottman and Waters (n 159) 8. However, it is impossible for judicial directions to include an exhaustive list of prohibited internet/social media platforms, let alone an exhaustive list of possible ways they can be misused. For example, in the US, in the context of questioning jurors ahead of empanelment, the ‘Ultimate Social Media Website Interrogatory’ has identified 154 individual internet and social media platforms: discussed in the Hon Justice Stephen Estcourt QC, ‘Using Social Media in Civil Litigation’ *Law Letter* (2016) Spring/Summer 10, 10.

<sup>372</sup> See Dunn (n 18) 8–9: Of the 494 US federal court judges who participated in the survey, 456 judges had taken ‘preventative measures’ regarding jurors’ use of the internet and social media. Of those judges, 74% responded that they had adopted the specific preventative measure of ‘[e]xplain[ing], in plain language, the reason behind the social media ban.’ See also Hunter (n 24) 36.

<sup>373</sup> See, eg, Artigliere, Barton and Hahn (n 357) 8.

the evidence first-hand, the addresses of counsel on that evidence and the directions of law from me.

Any comment or opinion that might be offered to you by anyone who is not a fellow juror might influence your thinking about the case, perhaps not consciously but subconsciously. Such a comment or opinion cannot assist you but can only distract you from your proper task.

3.4.13 Further, the New South Wales directions also address some of the underlying motives that have been identified for juror misconduct of this kind and explains how jurors should navigate such situations:

you are not here to determine where the truth lies. You are not simply deciding which version you prefer: that offered by the Crown or that from the defence. You are not investigating the incident giving rise to the charge(s). You are being asked to make a judgment or decision based upon the evidence that is placed before you. Jurors might in a particular case feel frustrated by what they see as a lack of evidence or information about some particular aspect of the case before them. In some rare cases this has led jurors to make inquiries themselves to try to fill in the gaps that they perceive in the evidence. But that is not your function, nor is it mine ... If you felt that there was some evidence or information missing, then you simply take that fact into account in deciding whether on the evidence that is before you the Crown have proved the guilt of the accused beyond reasonable doubt.<sup>374</sup>

3.4.14 The Victorian model directions provides the following by way of explanation of the ‘*information in*’ and ‘*information out*’ restrictions:

You may ask yourself the question: what is wrong with looking for more information? Seeking out information, or discussing a matter with friends, may be a natural part of life for you when making an important decision. As conscientious jurors, you may think that conducting your own research will help you reach the right result. However, there are three important reasons why using outside information, or researching the case on the internet, would be wrong.

First, media reports, or claims made outside court may be wrong or inaccurate. The prosecution and defence will not have a chance to test the information. Similarly, I will not know if you need any directions on how to use such material.

Second, deciding a case on outside information, which is not known to the parties, is unfair to both the prosecution and the defence. The trial is conducted according to well established legal principles and it’s not for you to go looking for other information or to add to the evidence.

Third, acting on outside information would be false to the oath or affirmation you took as jurors to give a true verdict according to the evidence. You would cease being a juror, that is, a judge of the facts, and have instead taken on the role of an investigator.<sup>375</sup>

3.4.15 Whilst plain English is favourable for jury directions, there are cases which highlight the opposite result; directions which cause confusion on account of their being too casual and colloquial. A juror who was a German national who was working as an academic in the UK conducted internet searches which revealed the guilty plea of an alleged co-accused. When the judge enquired about his conduct, the juror said that ‘he did not understand what the judge meant by saying that the jurors would be “in hot water” if they researched the defendant’. He continued, ‘I have written many journals so I am used to writing in proper English and proper sentences and wouldn’t use words and phrases like being “in hot water” to describe being in trouble because it is not correct. ... They don’t mean anything,

<sup>374</sup> Judicial Commission of New South Wales (n 336), see [1-490] Suggested (oral) directions for the opening of the trial following empanelment. See Appendix C.

<sup>375</sup> Judicial College of Victoria (n 361), [1.11] Consolidated preliminary directions – No Outside Information. See Appendix D.

definitely not in the context of looking on the internet ... You would say someone is “in trouble” and the judge should have said that.’<sup>376</sup>

### ***Personal consequences***

3.4.16 Courts have also included directions which alert jurors to the personal consequences of misconduct of this kind (including mentioning any relevant offence provisions).<sup>377</sup>

3.4.17 In *Marshall and Richardson v Tasmania*, the relevant directions were ‘emphasise[d]’ and described as ‘important’ and ‘absolutely critical’, and the general consequences of causing a mistrial are conveyed. However, there is no warning given routinely to jurors about the potential *personal* consequences for a juror that might engage in such misconduct.<sup>378</sup>

3.4.18 In the New South Wales model directions, specific and repeated mention is made of juror misconduct of this kind being a ‘criminal offence’ and ‘so serious that it can be punishable by imprisonment’.<sup>379</sup>

3.4.19 In Victoria, the model directions explicitly address the consequences of breaching instructions:

You may have a question about what could happen if you acted on outside information or conducted your own research.

The immediate outcome is that the jury may need to be discharged and the trial may have to start again. This would cause stress and expense to the witnesses, the prosecution and the accused. It would also cause stress and inconvenience to the other jurors, who will have wasted their time sitting on a case which must be restarted.

Second, it is a criminal offence for a juror to discuss the case with others or to conduct research on the case. You could therefore be fined and receive a criminal conviction, which may affect your ability to travel to some countries. Jurors have even been sent to jail for discussing a case on Facebook.

More broadly, jurors’ conducting their own research undermines public confidence in the jury system. The jury system has been a fundamental feature of our criminal justice system for centuries.<sup>380</sup>

3.4.20 In cases where errant jurors had to explain their misconduct, explanations have been proffered that suggest jurors might mistake judicial directions on social media and internet as *advice* rather than *orders*.<sup>381</sup> The incorporation of potential personal circumstances would rectify any such confusion by making it abundantly apparent that compliance is not optional and, further, that there are consequences for non-compliance.

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<sup>376</sup> Matharu (n 62).

<sup>377</sup> Ibid. See also Dunn (n 18): Of the 494 US federal court judges who participated in the survey, 456 judges had taken ‘preventative measures’ regarding jurors’ use of the internet and social media. Of those judges, 25% responded that they had adopted the specific preventative measure of ‘[a]lert[ing] the jury about the personal consequences.’ See also Hunter (n 24) 37, 41.

<sup>378</sup> (2016) 264 A Crim R 448. See Appendix B.

<sup>379</sup> Judicial Commission of New South Wales (n 336). See [1-490] Suggested (oral) directions for the opening of the trial following empanelment. See Appendix C. See also, [1-480] Written directions for the jury at the opening of the trial, which explains in some detail the specific offence provisions which may apply to jurors as well as some explanation as to relevant definitions and applicable maximum penalties — Appendix E.

<sup>380</sup> Judicial College of Victoria (n 361), [1.11] Consolidated preliminary directions – Consequences of breaching instructions. See Appendix D.

<sup>381</sup> See *Attorney-General v Dallas* [2012] EWHC 156, 15.

### ***Obligation to report juror irregularities/misconduct***

3.4.21 Judicial officers have also incorporated into their directions reminders to jurors that it is their responsibility to report any juror misconduct to the court (preferably before the trial is completed).<sup>382</sup>

3.4.22 The Victorian model directions state: ‘If one of your fellow jurors breaches these instructions, then the duty falls on the rest of you to inform me or a member of my staff, either in writing or otherwise, without delay. These rules are so important that you must report your fellow juror.’<sup>383</sup> There are further, more detailed directions about ‘Notifying the Judge About Irregularities’.

3.4.23 Similarly, the New South Wales model directions state:

If any of you learn that an impermissible enquiry had been made by another juror or that another juror had engaged in discussions with any person outside the jury room, you must bring it to my attention. Similarly, if at any stage you find material in the jury room that is not an exhibit in the case, you should notify me immediately.

The reason for bringing it to my attention as soon as possible is that, unless it is known before the conclusion of the trial, there is no opportunity to fix the problem if it is possible to do so. If the problem is not immediately addressed, it might cause the trial to miscarry and result in the discharge of the jury in order to avoid any real or apparent injustice.

If any of you in the course of the trial suspect any irregularity in relation to another juror’s membership of the jury, or in relation to the performance of another juror’s functions as a juror you should tell me about your suspicions.

This might include:

- the refusal of a juror to take part in the jury’s deliberations, or
- a juror’s lack of capacity to take part in the trial (including an inability to speak or comprehend English), or
- any misconduct as a juror, or
- a juror’s inability to be impartial because of the juror’s familiarity with the witnesses or legal representatives in the trial, or
- a juror becoming disqualified from serving, or being ineligible to serve, as a juror.

You also may tell the sheriff after the trial if you have suspicions about any of the matters I have just described.

### ***Repetition***

3.4.24 Judicial officers have also favoured repeating the social media/internet related directions at multiple points throughout the trial, including before lengthy adjournments and before the commencement of jury deliberations.<sup>384</sup>

<sup>382</sup> See, eg, United Kingdom Ministry of Justice, *The Consolidated Criminal Practice Direction* (28 March 2006); *R v Lambeth* [2011] EWCA Crim 157, [7] (Re Practice Direction 55a). See also Ministry of Justice (NZ), *Jury Service* (Courts 099, September 2010) <www.justice.govt.nz> 6, 7.

<sup>383</sup> Judicial College of Victoria (n 361), [1.11] Consolidated preliminary directions – No Outside Information. See Appendix D.

<sup>384</sup> See Dunn (n 18) 8–9: Of the 494 US federal court judges who participated in the survey, 456 judges had taken ‘preventative measures’ regarding jurors’ use of the internet and social media. Of those judges, 70% responded

### ***Written directions***

3.4.25 Judges are increasingly choosing to provide jurors with copies of written directions, which either reproduce oral directions, or are provided to supplement oral directions.

3.4.26 It has been suggested that judges provide social media/internet related directions to jurors in writing so that they can be referred to as ‘guidelines’ for their social media/internet use throughout the trial. Commentators have lauded written directions in this context as being twice as effective as oral directions.<sup>385</sup>

3.4.27 The New South Wales model directions recommend that each member of the jury be provided with a written document which can be referred to by the jury in the course of opening directions and thereafter left with the jury.<sup>386</sup>

3.4.28 In the UK, ‘unequivocal’ written notices are posted in the jury room and the jury waiting room, which reiterate the written directions regarding use of the internet, eg ‘[y]ou may also be in contempt of court if you use the internet to research details about any cases you hear’.<sup>387</sup>

### ***Knowledge/understanding on the part of the judiciary***

3.4.29 A further factor that has been raised as potentially limiting the effectiveness of jury directions on social media and the internet is a deficiency of knowledge in these areas on the part of the judiciary. If such directions are given by judicial officers who do not have the underlying knowledge and understanding of social media and other internet platforms, it is easy to see how the directions may not be relevant and may not resonate with the jury.

3.4.30 There are obvious difficulties in becoming familiar with fundamentally unfamiliar technology and behaviours, not least the difficulty in recognising the need in the first place. In the words of the then Chief Justice of Canada, the Hon Beverley McLachlin, ‘[i]n facing the reality of modern communications revolution, it is crucial that we understand the technology and how it is being used — something lawyers and judges, often castigated as Luddites, may not find easy.’<sup>388</sup>

3.4.31 Survey results from the US in 2012 (of jurors from six criminal trials and seven civil trials, as well as the presiding judges and counsel), relevantly showed that most judges rated their own technological knowledge as fairly strong (5.4 average); only one judge gave a self-rating lower than a 4; and on average, the lawyers viewed themselves as less technologically knowledgeable than the judges (4.4 on a scale of 1–7).<sup>389</sup>

3.4.32 In the course of enquiring about alleged juror misconduct in a trial in the US in 2011, a judge asked a juror, ‘[n]ow, it has been brought to my attention that during — during the course of the trial

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that they had adopted the specific preventative measure of ‘[i]nstruct[ing] jurors at multiple points throughout the trial.’ See also Hannaford-Agor, Rottman and Waters (n 159) 8.

<sup>385</sup> See Thomas (n 150). See also Hunter (n 24) 44.

<sup>386</sup> Judicial Commission of New South Wales (n 336). See [1–470] Opening to the jury. See also [1–480] Written directions for the jury at the opening of the trial, Appendix E.

<sup>387</sup> *Attorney-General v Dallas* [2012] EWHC 156, 13.

<sup>388</sup> Honourable Beverley McLachlin, PC, Chief Justice of Canada, ‘The Relationship Between the Courts and the Media’ (Speech delivered at Carleton University, Ottawa, 15 September 2011) <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2012-01-31-eng.aspx?pedisable=true>>.

<sup>389</sup> Hannaford-Agor, Rottman and Waters (n 159) 5.

that you have from time to time, uh, twittered, whatever that is. Have you?’<sup>390</sup> Further, in 2011, a survey of federal court judges in the US enquired about misconduct on the part of jurors and sought responses about the forms of social media platforms used in those detected cases. The then-new social networking service *Google+*<sup>391</sup> was included as an option and, surprisingly, it was ranked highly by the responding judges, indeed, on equal footing with *Facebook*. From subsequent comments it became apparent that the respondents had mistaken *Google+* with the *Google* internet search engine, which projects a widespread lack of knowledge of social media platforms and social media generally amongst the participating judges (such that they could mistake a social networking application for an internet search engine).<sup>392</sup>

3.4.33 It is easy to see how confusion may reign on the part of jurors when judicial officers are drafting and delivering directions on social media and the internet without requisite underlying knowledge. Further, even in circumstances where the directions are given and understood, it is conceivable that jurors might use social media and other internet platforms inappropriately during the trial because they think that their conduct is beyond the purview of the court.

#### Question 8

- (a) Should ‘standard’ directions to jurors, similar to those used in New South Wales and Victoria, regarding the internet and social media be adopted in Tasmania?
- (b) What should these directions include?
  - (i) Specific mention of social media;
  - (ii) A comprehensive list of prohibited internet and social media platforms as well as prohibited activity (‘information in’ and ‘information out’);
  - (iii) Explanations for the internet/social media restrictions;
  - (iv) Warnings about personal consequences for juror misconduct;
  - (v) Reminders to jurors of their obligation to report irregularities;
  - (vi) Repetition; and/or
  - (vii) Written directions?
- (c) Could/should the underlying knowledge and understanding of the internet and social media on the part of the judiciary be improved. If so, how?

<sup>390</sup> *Dimas-Martinez v Arkansas* 2011 Ark 515 (Dec 8, 2011), 12.

<sup>391</sup> *Google+* (‘*Goggle Plus*’) was an internet based social network owned by Google Inc. It was launched in June 2011 as a competitor to other networking sites. It experienced some popularity in its early years, but it was ultimately shutdown in early 2019 due to low user engagement and software design flaws that potentially allowed outside access to user data.

<sup>392</sup> *Dunn* (n 181) 3.

### 3.5 ‘Virtual sequestration’/‘E-sequestration’

3.5.1 Whilst the traditional sequestration of juries is essentially a ‘past practice’<sup>393</sup> in Australia, a new form of ‘*virtual sequestration*’<sup>394</sup> or ‘*e-sequestration*’<sup>395</sup> is widely adopted as a preventative measure to control jurors’ use of the internet and social media.

3.5.2 In Tasmania, jurors are not permitted to have their phones with them during the trial or deliberations. As explained in the online juror induction materials:

Can I bring a mobile phone or pager?

Yes, but you will have to turn it off during the empanelling process. If you are empanelled — that is chosen to serve on a jury — in Hobart, you will need to leave your mobile phone and other electronic devices such as E Readers, iPads or laptops with the receptionist for safe keeping before entering the courtroom or jury room each day.

Arrangements for safe keeping of your phones and other electronic devices vary in the different court locations.

The officer in charge of the juries in each location will advise you where to deposit your phones and other devices.<sup>396</sup>

3.5.3 The same information is included in the *Being selected and serving on a jury* video available online.<sup>397</sup>

3.5.4 Similar practices are adopted in the Australian Capital Territory,<sup>398</sup> New South Wales,<sup>399</sup>

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<sup>393</sup> *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, [65].

<sup>394</sup> Braun (n 14) 1635.

<sup>395</sup> Ibid 1658.

<sup>396</sup> ‘First Day of Trial’, *The Supreme Court of Tasmania*, (18 December 2017) <<https://www.supremecourt.tas.gov.au/jurors/first-day-trial/>>.

<sup>397</sup> ‘All mobile phones must be turned off prior to entering the courtroom. If you’re selected on a jury, you must hand in your mobile phone and other electronic devices to reception at the earliest opportunity and prior to entering court each day of the trial. You are free to use them, other than for research on the case, during any break in proceedings.’

<sup>398</sup> Supreme Court of the Australian Capital Territory, *Jury Handbook*, (27 April 2018) <[https://courts.act.gov.au/\\_\\_data/assets/pdf\\_file/0011/967646/Jury-Handbook-27-April-2018.pdf](https://courts.act.gov.au/__data/assets/pdf_file/0011/967646/Jury-Handbook-27-April-2018.pdf)> 9: ‘You are not allowed to take electronic devices such as mobile phones, laptop computers, tablets, beepers and buzzers into the court room or into the jury deliberation room ... Such devices must be handed to the Sheriff’s officers, who will arrange for their safekeeping and for their return, either at the end of the day or (sometimes) during an adjournment.’

<sup>399</sup> Department of Justice (NSW), Office of the Sheriff, *Jury Service: A rewarding responsibility*, (September 2014) <[http://www.courts.justice.nsw.gov.au/Documents/j000320\\_juror\\_rewarding%20responsibility\\_20pp\\_dl\\_aw\\_lores.pdf](http://www.courts.justice.nsw.gov.au/Documents/j000320_juror_rewarding%20responsibility_20pp_dl_aw_lores.pdf)> 16: ‘Mobile Phones: If you are empanelled as a juror, access to your mobile phone during court hours may be restricted.’ See also Department of Justice (NSW), Courts and Tribunal Services, *Jury summons court check* (n 330): ‘mobile phones may not be used in the courtroom’.

Victoria,<sup>400</sup> and Queensland,<sup>401</sup> as well as in New Zealand,<sup>402</sup> and many US states.<sup>403</sup>

3.5.5 It is suggested that such measures be coupled with low cost and low interference measures such as signs/posters/visual aids in the jury room and/or court precinct.<sup>404</sup>

3.5.6 Whilst the taking away of jurors’ mobile phones introduces an immediate inhibitory step to juror misconduct of this kind, it only takes away the means on a temporary basis. It has also been queried whether the taking away of jurors’ phones is akin to ‘treating jurors like misbehaving children’<sup>405</sup> which may foster jurors’ frustrations and alienation from the trial process.

#### Question 9

- (a) How effective is the practice of taking mobile phones and other electronic devices away from jurors during the trial and deliberations?
- (b) Is it a practice that should continue?

### 3.6 ‘Faith’ in the jury system

3.6.1 Aside from the abovementioned specific preventative measures employed to address the inappropriate use of the internet and/or social media by jurors during criminal trials, the criminal justice system otherwise imparts a great deal of ‘*faith*’ in the jury system and its ‘*in-built*’ protections.

3.6.2 The criminal justice system assumes the efficacy of juries.<sup>406</sup> In the absence of any evidence to the contrary,<sup>407</sup> it is assumed that jurors, ‘when properly instructed, will accept and conform to the direction of the trial judge to decide the case solely on the evidence placed before them in the court ...’<sup>408</sup> Such is ‘the experience and wisdom of the law ... that, almost universally, jurors approach their task

<sup>400</sup> Juries Victoria, *Serving on a Jury* <<https://www.juriesvictoria.vic.gov.au/individuals/serving-on-a-jury>>: ‘While you are serving as a juror, you will not be able to have your phone or other device on you’. See also ‘A Citizens Duty: Jury Service’ (n 279): ‘when they are deliberating which means at the end of the trial when they are in the deliberation room considering their verdict in Vic their phones are actually removed from them so literally a judges staff will pass around a box they will throw their phones in the box in the morning they pick them up in the afternoon when they go home. That’s to discourage people from doing their own research about the trial ...’

<sup>401</sup> Queensland Courts, *Juror’s Handbook* <[https://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0007/93814/sd-brochure-jurors-handbook.pdf](https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/93814/sd-brochure-jurors-handbook.pdf)> 5: ‘Can I bring a mobile phone? Yes, but you will have to turn it off while in courtrooms. If you are empanelled – that is, chosen to serve on a jury, you will need to leave it with the Bailiff or Registrar before entering the courtroom or jury room each day.’

<sup>402</sup> Ministry of Justice (NZ) (n 382) 9.

<sup>403</sup> See, eg, Brayer (n 223) 37–39. See also Dunn (n 18) 3: In a 2013 survey of federal judges, 30.1% of respondents indicated that they had confiscated jurors’ phones and other devices as a way to prevent juror misconduct during deliberations.

<sup>404</sup> See Dunn (n 18) 10; Marilyn Krawitz, ‘Guilty As Tweeted: Jurors Using Social Media Inappropriately During the Trial Process’ (Research Paper No 2012-02, Faculty of Law, University of Western Australia, 2012) 35.

<sup>405</sup> Brayer (n 223) 48.

<sup>406</sup> *Dupas v The Queen* (2010) 241 CLR 237, [29].

<sup>407</sup> *R v Fuller-Love* [2007] EWCA Crim 3414, [16].

<sup>408</sup> *R v Yuill* (1993) 69 A Crim R 450, 453–4 (Kirby ACJ).

conscientiously<sup>409</sup> and are ‘faithful to their duty’.<sup>410</sup> Indeed, in 2012, the High Court of Australia went as far as to declare it is a ‘constitutional fact’ that, even in the most sensational and highly publicised of criminal cases, jurors can be relied upon to act only on the evidence presented at trial and act in accordance with the trial judge’s instructions.<sup>411</sup> Though this proposition is often questioned by commentators, the jury system ultimately depends on this premise.<sup>412</sup>

### **‘TBH’ – ‘To be honest’**

3.6.3 Essentially, these assumptions are based solely on the jurors’ *own* assurances of their *own* impartiality and ability and/or willingness to adhere to judicial directions throughout the trial process. It has been queried whether enquiries should be made into the veracity of such matters both at the outset of a trial and on an ongoing basis throughout the trial.

3.6.4 The New South Wales Court of Criminal Appeal has recently ordered an investigation into juror misconduct in relation to a 2016 trial in Broken Hill of a charge of sexual intercourse taking advantage of a person’s cognitive impairment. The alleged juror misconduct includes a juror being related by marriage to a complainant in a separate trial who had alleged the same defendant sexually assaulted her (the accused was acquitted in that matter six months earlier). A second juror is also alleged to have been well acquainted with and to have ‘socialised regularly’ with a key prosecution witness. Neither of these matters were disclosed by the jurors at the time of the trial.<sup>413</sup>

3.6.5 Unconscious bias/prejudice is another matter entirely and is far more elusive.

### **Going ‘phishing’ – Questioning of jurors**

3.6.6 In the US, jurors are subject to extensive *voir dire* examinations, or ‘interrogations’, before being empanelled. In Australia, the right to question prospective jurors has long existed as an incident of challenge for cause,<sup>414</sup> but it has often been described as a right that is more apparent than real because it can be exercised only after first establishing a foundation for the need for a challenge.<sup>415</sup> The idea of prospective jurors being subject to the American *voir dire* process has not found favour in Australian courts:

It is not appropriate for this jurisdiction to adopt the practice followed in some other countries of permitting in effect a fishing expedition with each prospective juror. There must be a sound

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<sup>409</sup> *Dupas v The Queen* (2010) 241 CLR 237, [26].

<sup>410</sup> *Gilbert v The Queen* (2000) 201 CLR 414, 440.

<sup>411</sup> *Dupas v The Queen* (2010) 241 CLR 237, [28].

<sup>412</sup> *Gilbert v The Queen* (2000) 201 CLR 414, 425 [31] (McHugh J): ‘Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.’

<sup>413</sup> *Whitcourne* (n 86). See also *Agelakis v R* [2019] NSWCCA 71: On 29 March 2019, the NSW Court of Criminal Appeal ordered an investigation into the alleged juror misconduct, pursuant to s 73A of the *Jury Act 1977* (NSW).

<sup>414</sup> Challenge for cause provisions: *Juries Act 1967* (ACT) ss 34(1)(b), (2)(b), 36A; *Jury Act 1977* (NSW) ss 43, 44, 46; *Juries Act 1962* (NT) s 44; *Jury Act 1995* (Qld) s 43; *Juries Act 1927* (SA) ss 67, 68; *Juries Act 2003* (Tas) ss 33, 36; *Juries Act 2000* (Vic) ss 37, 40; *Juries Act 1957* (WA) s 40 and *Criminal Procedure Act 2004* (WA) s 104(5).

<sup>415</sup> *Murphy v The Queen* (1989) 167 CLR 94, 102–4 (Mason CJ and Toohey J). See also at 123–4 (Brennan J): ‘[challenge for cause] has more attraction in theory than in practice.’

basis made out on a prima facie footing to anticipate the probability of prejudice on the part of the individual juror...<sup>416</sup>

[Challenge for cause] has more attraction in theory than in practice. In theory, one might think that bias can be detected by questioning jurors and disqualifying those who admit bias. In practice, the efficacy of the procedure in detecting bias is doubtful. If the procedure is adopted, it may lead the jurors to think that the community’s confidence in their impartiality and sense of responsibility is heavily qualified. A juror who would not voluntarily seek to be excused because of bias would not readily confess that bias under questioning if he [or she] were challenged for cause. Though the procedure is available, the practice of Australian courts has been against its adoption. In the Australian community of today, I think that approach is generally right.<sup>417</sup>

3.6.7 There is, however, a rarely invoked power available in Queensland to make inquiries of jurors ahead of their selection if ‘special reasons’ exist.<sup>418</sup> Prejudicial pre-trial publicity may amount to such special reasons. This power was exercised for the first time in 2013 in the high-profile trial of *R v Patel [No 4]*<sup>419</sup> (‘*Dr Death*’) and in the subsequent high-profile trial of *R v Bayden-Clay*<sup>420</sup> in 2014 (although, there have been other unsuccessful applications).<sup>421</sup> There is no equivalent provision in any other Australian jurisdiction.<sup>422</sup>

3.6.8 Regardless of any express power to question jurors, jurisdictions such as New Zealand have, more recently, adopted a ‘more interventionist approach to jury empanelling.’<sup>423</sup> Particularly in cases where there has been significant pre-trial publicity. For example, the Court of Criminal Appeal describes the proactive role of the court at first instance in the ‘Rūātoki raid’ case:

Before the jury was empanelled, we understand they were told of the subject matter of the trial and directed to advise the Judge if as a result of what they had read or heard or opinions they had formed, they doubted their ability to try the case fairly on the evidence. We accept that not all potential jurors may have recognised what may well be unconscious prejudice. However, significant numbers did. We were told that about 60 persons sought to be, and were, excused. Even after the panel was selected and retired, we understand that at least one more came forward and withdrew.<sup>424</sup>

<sup>416</sup> Ibid 98–99 (Mason CJ and Toohey J).

<sup>417</sup> Ibid 123–4 (Brennan J). The option of allowing counsel to question potential jurors about potential bias remains a ‘wholly exceptional’ remedy: *R v Kray* (1969) 53 Cr App R 412, 416 (Lawton J). See also *R v Andrews* [1999] Crim LR 156; *R v Bunting and Wagner* [2003] SASC 257, [14]. The contrast with the approach in the US where such questioning is routine, and often time consuming is ‘very striking’: Michael Chesterman, ‘Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy’ (1999) 62 *Law and Contemporary Problems* 69, 91. See also Jay Spears, ‘Voiur Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges’ (1975) 27 *Stanford Law Review* 1493. As noted in *Murphy v The Queen* (1989) 167 CLR 94, the effectiveness of such questioning to detect juror prejudice has been doubted: at 123–4 (Brennan J).

<sup>418</sup> *Jury Act 1995* (Qld) s 47(1).

<sup>419</sup> (2013) 2 Qd R 544.

<sup>420</sup> [2014] QCS 154.

<sup>421</sup> See *R v D’Arcy* [2005] QCA 292; *R v Amundsen* [2016] QCA 177.

<sup>422</sup> However, it is to be noted that provision exists in New South Wales for the judge to examine a juror on oath in relation to his or her possible exposure to prejudicial material: *Jury Act 1977* (NSW) s 55D.

<sup>423</sup> New Zealand Law Commission (n 210) 39.

<sup>424</sup> *Iti v R* [2012] NZCA 492, [55].

3.6.9 In the absence of any formal ‘screening’ of jurors in the courtroom, it remains possible for counsel to make their own enquiries of jurors’ publicly available social media presence. Indeed, in April 2014, the American Bar Association issued a formal ruling, which approves the ethics of counsel viewing jurors’ publicly available social media profiles and histories during juried proceedings.<sup>425</sup>

**Question 10**

- (a) Should juror assurances regarding their impartiality and compliance with judicial directions be accepted at face value?
- (b) Should counsel make pre-trial enquiries of jurors’ internet and social media presence and/or monitor jurors’ internet and social media activity during the course of a trial to ensure the veracity of juror assurances in this respect?

**‘Influencers’**

3.6.10 In Tasmania, jurors are summonsed for a specified period of time. During that period, they may be selected and empanelled as a juror for a trial, or they may not. They may also be selected and empanelled on multiple trials during that specified period.

3.6.11 In Tasmania, the Sherriff is tasked with selecting a sufficient number of jurors to form a jury panel.<sup>426</sup> The number of jurors is determined by the number of trials that are listed. The intake of new jury panels is determined by the court sittings.<sup>427</sup> In other Australian jurisdictions, where jury trials are heard continuously throughout the year, rather than during intermittent ‘sittings’, jury panel intakes are scheduled largely by the calendar month.<sup>428</sup>

3.6.12 The result of this system is that upon the intake of each new jury panel, all jurors have been freshly summonsed for that panel and they have not yet served as a juror on a criminal trial, unless it has been on a previous occasion as part of a different jury panel. It follows that the trials listed at the beginning of each sitting will have juries that are comprised of a high proportion of jurors who have been empanelled for the first time. As the summons period for a particular jury panel proceeds, an empanelled jury may thereafter be comprised of both jurors who have previously sat on a trial as well as jurors who have not (ie as jurors finish serving on trials and are empanelled on second and/or subsequent trials).

3.6.13 In circumstances where jurors are caused to sit on second and/or subsequent trials during their summonsed period, they are taking the juror oath/affirmation for a second/subsequent time, they are being exposed to criminal trial procedure and legal concepts and principles for the second/subsequent time, and they are being subject to judicial directions for a second/subsequent time.

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<sup>425</sup> Reese (n 81).

<sup>426</sup> *Juries Act 2003* (Tas) s 27(1).

<sup>427</sup> See, eg, J A Connolly, *Supreme Court of Tasmania Calendar 2019* <<https://www.supremecourt.tas.gov.au/wp-content/uploads/2018/12/2019-Calendar-for-Web..pdf>>.

<sup>428</sup> See, eg, South Australia.

**Question 11**

- (a) When jurors sit in more than one trial during their summonsed period, does such ‘experience’ make them better jurors? If so, how?
- (b) Are jurors who are empanelled for a second and/or subsequent time less likely to engage in juror misconduct by inappropriately using the internet/social media? If so, why?
- (c) What influence, if any, do you think that jurors who sit in second and/or subsequent trials have on their fellow first-time jurors?

**‘Back-up’ – In-built protections**

3.6.14 According to a survey of US judges in 2011 and 2013, the single most effective means of detecting juror misconduct of this kind is the misconduct being reported by one or more fellow jurors.<sup>429</sup> This self-regulating function of juries is two-fold: deterring jurors from engaging in misconduct in the first place by risk of detection by fellow jurors and, failing that, deterring errant jurors from sharing the fruits of any misconduct with fellow jurors by risk of certain detection by fellow jurors. If juror misconduct of this kind occurs, the fact that the misconduct is prevented from wider contamination of the jury is significant when it comes to the tiered options by way of remedial measures (ie discharging a single juror as opposed to discharging an entire jury and declaring a mistrial).

3.6.15 Integral to the efficacy of these in-built protections is that jurors are aware of their obligation to report the misconduct of fellow jurors.<sup>430</sup> A 2010 survey of UK jurors asked whether ‘they would know what to do if something improper occurred during jury deliberations’. Almost half (48%) said they either would not know what to do or were uncertain.<sup>431</sup>

3.6.16 It has been suggested that the effectiveness of such in-built protections may be improved. At present, the avenues for juror communications with the judge and/or the court is regimented and, generally speaking, is very public in the sense that it necessarily involves a juror making this communication in the presence of other jurors. It is thought these circumstances may dissuade jurors from reporting the misconduct of fellow jurors.

3.6.17 For example, a juror who sat on the recent high-profile ‘*El Chapo*’ murder trial in New York, spoke to media after the completion of the trial and, by way of an explanation for not reporting misconduct during the trial, stated: ‘I thought we would get arrested’, ‘I thought they were going to hold me in contempt ... I didn’t want to say anything or rat out my fellow jurors. I didn’t want to be that person.’<sup>432</sup>

3.6.18 Some commentators have suggested that the introduction of ‘anonymous’ reporting could improve the likelihood that jurors would report the misconduct of fellow jurors. An anonymous hotline/call centre or email service have been proffered as possible options.<sup>433</sup>

<sup>429</sup> See Dunn (n 18) 6. See also Dunn (n 181) 4.

<sup>430</sup> See discussion above at [3.4.21] of the desirability of incorporating into judicial directions reminders to jurors of their obligation to report juror irregularities/misconduct.

<sup>431</sup> Thomas (n 150) 39.

<sup>432</sup> Hamilton (21 February 2019) (n 58).

<sup>433</sup> See Krawitz (n 404) 38.

3.6.19 In a 2011 murder trial in California, the court received an anonymous call reporting juror misconduct, namely, the fact that a juror had published material on *Facebook*.<sup>434</sup> This call could have been made by a fellow juror or, equally, a member of the public who observed the published material. In any event, it illustrates the value in having an anonymous or confidential means for reporting juror misconduct.

3.6.20 The possibility for members of the public to report online misconduct illustrates that the in-built protections of the jury system may operate by extension if the public is aware of what is, and, what is not, appropriate juror conduct. In forums such as internet and social media platforms which are often closed to the public at large by privacy settings, juror misconduct may only be detectable by jurors' existing 'friends'. In a high-profile murder trial in Queensland in 2016, a juror's online trial-related *Instagram* posts were admonished: 'I can't believe you posted this on Instagram during deliberations. Do you know how much court time/money will be wasted if the jury gets dismissed over this?', 'Brainless', and 'You are an absolute idiot. I cannot believe you could be stupid enough to do this'.<sup>435</sup>

3.6.21 Similarly, during a rape trial in Massachusetts in 2001, a juror sent multiple trial-related messages via an internet Listserv.<sup>436</sup> She received responses from two members; one was a lawyer in New York who replied that the message was inappropriate and recommended that the juror inform the judge of the situation. Whilst the juror did not do so, the lawyer contacted defence counsel in the trial and informed them of the juror's posts.<sup>437</sup>

3.6.22 However, whilst the public may be of assistance in holding errant jurors accountable, they may equally be encouraging of the misconduct. A juror sitting in a multiple accused murder and attempted murder trial in California in 2013 posted: 'This is my secret blog. I don't know how secret it is though. I want to tell secret jury things.' A comment from a family member: 'loved[d] ... [the] hypothetical question to a case that you can not [sic] talk about.'<sup>438</sup>

3.6.23 New South Wales has codified the obligation of jurors to report misconduct of fellow jurors.<sup>439</sup>

#### Question 12

- (a) How can the efficacy of juror reporting of fellow juror misconduct be supported and/or improved?
- (b) Is public awareness of juror misconduct a viable option for increasing juror accountability (ie enlisting jurors' online 'friends' to report juror misconduct they observe on the internet/social media)?

<sup>434</sup> *The OC Register* (n 80).

<sup>435</sup> Alexandra Blucher, 'Gable Tostee juror's Instagram posts a sign Jury Act must roll with the times, legal experts say', *ABC News* (online, 21 October 2016) <<https://www.abc.net.au/news/2016-10-21/tostee-juror-instagram-posts-sign-jury-act-needs-review/7952550>>; Talia Shadwell, 'Gable Tostee: How an Instagramming juror nearly jeopardised trial over Warriena Wright's death', *Stuff* <<https://www.stuff.co.nz/world/australia/85627461/gable-tostee-how-an-instagramming-juror-nearly-jeopardised-trial-over-warriena-wrights-death>>. No action against juror, no mistrial.

<sup>436</sup> See *Glossary* above.

<sup>437</sup> *Commonwealth v Guisti*, 434 Mass 245 (2001), 250. See also *Commonwealth v Guisti*, 449 Mass 1018 (2007).

<sup>438</sup> *People v Johnson*, No F057736, 2013 WL 5366390 (Cal Ct App Sept 25, 2013), 246. This juror was sitting in a multiple accused murder and attempted murder trial in California. She was also carpooling with two fellow jurors and directed one fellow juror to her blog to look at a photograph of a rainbow that she had taken.

<sup>439</sup> *Jury Act 1977* (NSW) s 75C.

### 3.7 ‘Pop-up notification’ – Investigation/Inquiry

3.7.1 When the court becomes aware of juror misconduct, it is necessary for it to discern exactly what has occurred. The nature and extent of the ‘irregularity’ will determine how the court responds.

3.7.2 The test to be applied in determining whether an irregular incident involving a juror warrants the discharge of the juror/s or, in some cases, the jury, is whether the incident is such that, notwithstanding any proposed or actual warning of the judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror or jury has not discharged or will not discharge their task impartially.<sup>440</sup> The appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties in the case and the community must be satisfied that justice has not only been done but that it has been seen to be done.<sup>441</sup>

3.7.3 To this end, the court has powers to conduct investigations and/or inquiries into the irregularity. Such powers exist in the court’s inherent powers to control the trial process. This includes asking questions of jurors.<sup>442</sup> A statutory power also exists which allows for the Director of Public Prosecutions to request the Commissioner of Police to investigate a complaint about the deliberations of a jury.<sup>443</sup> The key matters relevant to the court are confirming the exact conduct that occurred, determining the extent of the conduct (that is, how many jurors are directly and/or indirectly involved), and exploring the impact on the affected juror’s/s’ ability to continue to sit as a juror on the trial.

3.7.4 This judicial exercise is a difficult one. To use the simple example of a juror conducting research online during a trial, whilst the online enquiries might be on subject matter that was raised in the course of the trial, it may otherwise not be strictly relevant to the determination of the trial issues. The enquiries may be conducted purely for the sake of satisfying a personal curiosity, rather than conducting trial-related research. The information obtained online by that juror might already be known by other jurors (as general knowledge), but had not been the subject of discussion in the jury room in the context of the trial.<sup>444</sup>

3.7.5 Lines of judicial inquiry in this respect are further complicated when they enter the social media realm where traditional notions of communication and interaction are not necessarily applicable.<sup>445</sup>

<sup>440</sup> *Webb v The Queen* (1993–1994) 181 CLR 41, 42.

<sup>441</sup> *Ibid* 50.

<sup>442</sup> There is an exception to the statutory requirement that jury deliberations are kept confidential that allows for jurors to disclose information about the deliberations of a jury in this context. See *Juries Act 2003* (Tas) s 58(6)(a)(i).

<sup>443</sup> *Juries Act 2003* (Tas) s 59.

<sup>444</sup> See *Hoang v R* [2018] NSWCCA 116. The jury foreperson sent the following note to the judge: ‘Good morning. This morning a juror disclosed that yesterday evening they google/looked up on the internet the requirements for a working with children check. The juror had previously been a teacher and was curious as to why they themselves did not have a check. They discovered the legislation, which was only introduced in 2013. I myself have completed a working with children course and so already know this information but it had not been discussed in the jury room.’

<sup>445</sup> See [3.4.29]–[3.4.33] above for a discussion of the importance of underlying knowledge and understanding of social media and other internet platforms on the part of the judiciary in the context of judicial directions on social media.

### **‘JJ’ – ‘Just joking’**

3.7.6 In 2011, a juror sitting in a murder and aggravated robbery trial in Arkansas posted on *Twitter*, ‘Choices to be made. Hearts to be broken. We each define the great line.’ Whilst the juror’s tweet appeared to contemplate and comment on the inevitable divisiveness of the verdict, both for the jury and the wider public, the juror’s comment, at least in part, was found to be far less controversial. As the juror explained when he was called upon to do so by the trial judge, “‘Define the Great Line’ was an Underoath [band] album, and I thought I’d throw that in there along with my tweet’.<sup>446</sup>

3.7.7 A juror who was sitting in a tax evasion trial in Connecticut in 2011 and posted on *Facebook* comments about ‘hang[ing]’ someone ahead of jury service, explained his online comments to the court as ‘a joke, all friend stuff’ and that he was ‘[j]ust joking, joking around’.<sup>447</sup>

3.7.8 During a rape trial in Massachusetts in 2001, a juror sent multiple trial-related messages via an internet Listserv.<sup>448</sup> The messages were sent via email to a distribution list with over 900 subscribers. One of the juror’s initial messages read, ‘stuck in a 7 day-long Jury Duty rape/assault case ... missing important time in the gym ... Just say he’s guilty and lets [sic] get on with our lives!’ Following the responses received, the juror circulated a subsequent message which sought to clarify those earlier comments, ‘[p]lease understand I was joking ... and do not take my quote “Just call him guilty so I can get back in the gym” (or something like that) seriously ... I should really watch it next time, I got a 2 page letter from “Ann” because she took me toooooo seriously.’<sup>449</sup>

3.7.9 In Western Australia in 2012, the trial judge on an upcoming manslaughter trial in Bunbury considered trial-related material that had been published on social media in the context of an application to relocate the trial. The court described the online material as:

us[ing] strong and expletive-filled language to refer to the accused and to express views regarding her guilt. Some of them also express negative views about lawyers and the justice system. One of the postings expresses a wish to do physical harm to the accused and another expresses a similar view in regards to defence counsel.<sup>450</sup>

3.7.10 Despite this characterisation, the court held:

The nature of the Internet is that it now records indefinitely what might once have been transient and ill-considered statements said in the heat of the moment. Such statements should not necessarily be seen as any expression of real intent. The postings were made on personal Facebook pages and were clearly intended for a group of friends and not as public statements. Foolish, exaggerated or emotional comments made between friends should not be taken out of context.<sup>451</sup>

3.7.11 A vivid example of just how detached the social media realm is from traditional notions of communications and interactions, was presented in 2009 in Maryland when five jurors became *Facebook* ‘friends’ and were discussing the trial on *Facebook* excluding the other jurors. After the

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<sup>446</sup> *Dimas-Martinez v Arkansas*, 2011 Ark 515 (Dec 8, 2011), 11–15, 18.

<sup>447</sup> *United States v Ganius* 755 F 3d 125, 131 (2d Cir 2014).

<sup>448</sup> See *Glossary* above.

<sup>449</sup> *Commonwealth v Guisti*, 434 Mass 245 (2001) 249–250. See also *Commonwealth v Guisti*, 449 Mass 1018 (2007).

<sup>450</sup> *Boyd v The State of Western Australia* [2012] WASC 388 (19 October 2012) [23]–[24] (Hall J).

<sup>451</sup> *Ibid.*

presiding judge made enquiries into the matter, one of the jurors posted on his *Facebook* page, ‘F--- the Judge’. When the judge asked the juror about this post, the juror simply replied: ‘Hey Judge, that’s just Facebook stuff’.<sup>452</sup>

### ***Friends or ‘friends’?***

3.7.12 Courts have considered the significance of *Facebook* friendships when it comes to jurors. In Kentucky in 2012, two jurors sitting in a murder trial were found to be *Facebook* friends with the deceased’s mother, whose *Facebook* page contained information about her daughter’s death.<sup>453</sup> The court held that *Facebook* friendships ‘do not necessarily carry the same weight as true friendships or relationships in the community ... [s]ome people, like the victim’s mother, have thousands of Facebook friends, and the nature of each friendship varies greatly, from passing acquaintanceships ... to close friends and family’. The Court continued: ‘Facebook allows only one binary choice between two individuals where they either are “friends” or are not “friends”, with no status in between’; what matters is the actual nature of the friendship.<sup>454</sup>

### ***Jurors are not judges***

3.7.13 A juror who sat on the recent high profile ‘*El Chapo*’ murder trial in New York, spoke to media after the completion of the trial and, in the course of alleging that at least five jurors were aware of prejudicial inadmissible evidence against Guzman that was published by the media, namely allegations of drugging and sexually assaulting complainants as young as 13 years old, he stated, ‘[t]hat didn’t change nobody’s mind for sure. We weren’t really hung up on that. It was like a five-minute talk and that’s it, no more talking about that.’<sup>455</sup>

3.7.14 The fact that jurors are likely to have an inflated belief about their own abilities to dismiss prejudicial information from consideration further highlights the difficulties which bedevil judicial inquiry into juror misconduct.

3.7.15 The recent South Australian Court of Criminal Appeal case of *R v Catalano*<sup>456</sup> considered the approach of the trial judge upon discovering juror misconduct in the ‘old fashioned’ form of a juror attending at a crime scene to take photographs of lighting and then discussing his findings with three fellow jurors. After dismissing the offending juror, the trial judge asked the other jurors whether ‘they would be able to put the information ... out of their mind and remove it from [their] subconscious.’<sup>457</sup> The jurors answered that they could and the trial judge was satisfied to continue with them as jurors. Upon appeal, the Court stated:

The jurors’ commitment to their duty can only be commended and it could not be doubted that they would have tried their level best. However, unlike the judge, I am not satisfied that when discussion in the jury room turned to ... [lighting at the scene] ... they could have exercised such discipline over their minds so as to stop their thoughts turning to the conversation with [the offending juror]. The human mind has no inherent capacity to compartmentalise

<sup>452</sup> Lowe (n 22) 49; Grow (n 15).

<sup>453</sup> *Sluss v Commonwealth* 381 S W 3d 215 (Ky 2012), 221–2.

<sup>454</sup> *Ibid* 222.

<sup>455</sup> Hamilton (21 February 2019) (n 58).

<sup>456</sup> [2019] SASFC 52.

<sup>457</sup> *Ibid* [16].

information according to its source. When viewing exhibit[s] ..., when listening to, or joining in, [relevant] discussion in the jury room ... the conversations with ... [the offending juror] will in all likelihood have crossed their minds. Unlike judges, jurors do not have written reasons for their verdicts. They are not practiced in the discipline of ensuring that a factual finding is supported by, and only by, admissible evidence.<sup>458</sup>

### 3.8 ‘Unfriend’ – dismiss juror/s

3.8.1 In Tasmania, the court has the power to discharge a juror during a trial if the court suspects on reasonable grounds that the juror may not be able to consider the case impartially.<sup>459</sup> A criminal trial may continue to verdict with a minimum of 10 jurors.<sup>460</sup> Similar provisions exist in other Australian jurisdictions.<sup>461</sup>

### 3.9 Discharge jury (mistrial) – ‘:(’

3.9.1 In Tasmania, there is also the option for the court to discharge a jury without giving a verdict if it is expedient to do so in the interests of justice.<sup>462</sup> The option of discharging a jury and thereby declaring a mistrial is an option of last resort. It is described as a ‘nuclear option’.<sup>463</sup> A mistrial is a very costly exercise in both time and money, not to mention the effect on the complainant/s and other civilian witnesses, whose involvement in the trial can be a particularly traumatic experience.

### 3.10 After the trial has completed – ‘EOT’ (‘End of thread’)

3.10.1 When juror misconduct is alleged for the first time once a verdict has been delivered and the jury discharged, the avenue for investigation/inquiry and redress, if need be, exists in the criminal appeal jurisdiction.

3.10.2 The Court of Criminal Appeal has a statutory power to authorise an investigation or inquiry into the deliberations of a jury and to receive evidence in relation to their conduct, including by disclosures from one of their number.<sup>464</sup> However, traditionally, courts have been reluctant to exercise this power or to receive such evidence. This is because of the principle that jury deliberations should, as far as possible, remain confidential. The exception is evidence of ‘extrinsic’ matters, that is, evidence that may prove juror misconduct without revealing jury deliberations.

3.10.3 The appeal court will view juror misconduct in the context of a procedural irregularity at first instance. A finding on appeal that there has been an irregularity in the form of juror misconduct will

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<sup>458</sup> Ibid [18].

<sup>459</sup> *Juries Act 2003* (Tas) s 40(a).

<sup>460</sup> Ibid ss 42(1), (3). Bearing in mind that not every trial empanels the minimum 12 jurors to start with. In Tasmania, the court may empanel up to two reserve jurors (a total of 14 jurors): s 26(1).

<sup>461</sup> ACT: *Juries Act 1967* (ACT) s 8; NSW: *Jury Act 1977* (NSW) pt 7A, s 22; Qld: *Jury Act 1995* (Qld) ss 56, 57; SA: *Juries Act 1927* (SA) s 56; VIC: *Juries Act 2000* (Vic) ss 43, 44. In New South Wales, there are model judicial directions to explain the discharge of one or more juror/s to the balance of the jury: See Appendix E.

<sup>462</sup> *Juries Act 2003* (Tas) s 41(1).

<sup>463</sup> Robbie Manhus, ‘Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanism’ (2014) 112(5) *Michigan Law Review* 809, 823.

<sup>464</sup> See *Criminal Code 1924* (Tas) s 409; *Juries Act 2003* (Tas) s 58(6)(c).

not necessarily lead to a verdict of guilt being set aside. The court must be satisfied that there has been a miscarriage of justice before an appeal is allowed and a verdict is set aside.<sup>465</sup> For an irregularity to constitute a miscarriage of justice, it must comprise a ‘material irregularity’. This means that it must have an impact upon the trial process of such an order that it results in the accused being deprived of a fair trial.<sup>466</sup>

3.10.4 In the usual course, an appeal court will not inquire into the *actual* effect of the irregularity upon the jury’s verdict but will determine the materiality of the influence according to whether the court considers it was objectively capable of affecting the verdict. Generally, the verdict *will* be set aside *unless* the court is satisfied that the same verdict would have been returned had the irregularity not been present.<sup>467</sup>

### 3.11 Punishment (deterrence)

#### *Contempt of court*

3.11.1 At common law, the law of contempt has developed to prevent and/or punish conduct that interferes with the administration of justice.<sup>468</sup> Juror misconduct that compromises an accused’s right to a fair trial will interfere with the proper administration of justice.

3.11.2 There has been a recent movement in Australia to codify the law of contempt as it applies to jurors, with a focus on creating specific offence provisions. These provisions identify problematic juror conduct, which would constitute contempt at common law, and make it the subject of a stand-alone statutory offence.<sup>469</sup>

#### *Specific offence provisions*

3.11.3 In Tasmania, it is an offence for:

- A person to publish, or cause to be published, any statement made, opinion expressed, argument advanced or vote cast in the course of the deliberations of a jury;<sup>470</sup> and
- A juror to disclose any statement made, opinion expressed, argument advanced or vote cast in the course of the deliberations of a jury during the course of a trial (except in the course of deliberations with another juror in that trial).<sup>471</sup>

<sup>465</sup> *Criminal Code 1924* (Tas) s 402(1).

<sup>466</sup> *Marshall and Richardson v Tasmania* (2016) 264 A Crim R 448, [49] (Brett J), citing *R v Brown* [2012] QCA 155 and *R v Forbes* (2005) 160 A Crim R 1.

<sup>467</sup> *Ibid* [51]–[52] (Brett J).

<sup>468</sup> See *Supreme Court Rules 2000* (Tas) div 3.

<sup>469</sup> Without curtailing the court’s common law powers to deal with a contempt of court summarily of its own motion.

<sup>470</sup> *Juries Act 2003* (Tas) s 58(1).

<sup>471</sup> *Ibid* s 58(2).

3.11.4 Similar specific offence provisions exist in other Australian jurisdictions.<sup>472</sup> Such provisions are potentially applicable to jurors' 'information out' uses of the internet/social media, if the content makes express mention of jury deliberations.

3.11.5 However, there is no legislation in Tasmania proscribing juror misuse of social media and other internet platforms during criminal trials, contrary to judicial directions. Instead, this is dealt with by the law of contempt.

3.11.6 In contrast, in New South Wales, Queensland and Victoria, specific statutory offences target 'information in' juror misconduct, making particular mention of use of the internet.

### **New South Wales**

3.11.7 New South Wales has enacted legislation that prohibits jurors making inquiries 'for the purpose of obtaining information about the accused or any matters relevant to the trial'.<sup>473</sup> The definition of 'making an inquiry' includes: 'conducting any research, for example, by searching an electronic database for information (such as by using the internet)'.<sup>474</sup> The offence is punishable by a maximum penalty of 50 penalty units or imprisonment for two years, or both.<sup>475</sup>

3.11.8 Significantly, juror misconduct under these provisions triggers mandatory discharge of the offending jurors.<sup>476</sup>

### **Queensland**

3.11.9 In Queensland, there is a similar statutory provision which makes it an offence for 'a juror ... [to] inquire about the defendant in the trial'.<sup>477</sup> This provision defines 'inquire' as including: 'search of an electronic database for information, for example, by using the internet' and 'cause someone else to inquire'.<sup>478</sup> The maximum penalty for this offence is two years imprisonment.

### **Victoria**

3.11.10 Similarly, in Victoria, legislation prohibits a juror or a member of a jury panel from making 'an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial'.<sup>479</sup> This prohibition includes 'using the internet to search an electronic database for information'.<sup>480</sup> The offence is punishable by 120 penalty units.<sup>481</sup>

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<sup>472</sup> ACT: *Jury Act 1967* (ACT) s 42C; NSW: *Jury Act 1977* (NSW) s 68B; NT: *Juries Act 1962* (NT) s 49A; Qld: *Jury Act 1995* (Qld) s 70(4); Vic: *Juries Act 2000* (Vic) s 7.

<sup>473</sup> *Jury Act 1977* (NSW) s 68C.

<sup>474</sup> *Ibid.*

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid* s 53A(1)(c).

<sup>477</sup> *Jury Act 1995* (Qld) s 69A(1).

<sup>478</sup> *Ibid* s 69A(3).

<sup>479</sup> *Juries Act 2000* (Vic) s 78A.

<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid.*

***In practice***

3.11.11 In practice, very few cases of juror misconduct are prosecuted, either under the common law of contempt or under legislated offences. Commentators have identified an apparent ‘reluctance’ on the part of the courts to refer cases of juror misconduct for potential prosecution.<sup>482</sup> Possible explanations for this approach include:

- a hesitation to punish jurors in circumstances where they are genuinely attempting to fulfil their duties as a juror to the best of their ability (ie, in cases of ‘inadvertent’ misconduct);
- the fact that jury service is a civic responsibility and jurors should be encouraged and supported in this role;
- juror misconduct of this kind may, in fact, reflect shortcomings on the part of the court and the trial judge (by, for example, failing to equip lay persons adequately for jury service);
- a perception that if jurors are liable to punishment for misconduct of this kind, they might be less likely to report misconduct on the part of their fellow jurors, and/or they may be less likely to self-report misconduct;
- the prospect of liability to criminal punishment may deter members of the public from undertaking jury service.

**Question 13**

- (a) Should jurors be punished for using social media and other internet platforms inappropriately during criminal trials?
- (b) If so, would legislative codification of applicable common law contempt laws assist in dealing with jurors for misconduct of this kind?

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<sup>482</sup> Johnston et al (n 27) 19.

## Part 4

# ‘*Status Update*’: Recommendations/Reform?

### 4.1 What can be learned from the humble dictionary?

4.1.1 In *R v Benbrika*,<sup>483</sup> the 2010 Victorian terrorism trial that involved juror/s searching definitions of legal terms on *Wikipedia* and *Reference.com*, a hard copy dictionary was also found in the jury room. The jury had used the dictionary to look up the definition of ‘foster’. The trial judge dismissed the incident, stating:

Having told the jury that the word ‘fostering’ was an ordinary English word upon which they needed little or no assistance from the court, it is hardly surprising that they resorted to a standard English dictionary. There is something faintly ridiculous about criticising lay people who go to a *standard reference source* for assistance on a question of fact such as the meaning of an ordinary English word *when that is exactly what any reasonable person would expect them to do* — perhaps especially after the Judge has told them they would need no assistance from him!<sup>484</sup> [emphasis added]

4.1.2 On appeal, the Victorian Court of Criminal Appeal agreed that there was ‘*something odd*’ about the suggestion that it is inappropriate or improper for a jury to consult the Concise Oxford Dictionary on the meaning of an ordinary English word which they are told is a question for them.’<sup>485</sup> [emphasis added].

4.1.3 The Court went on to consider the earlier Victorian case of *R v Chatzidimitriou*,<sup>486</sup> which also involved a jury’s use of a hard copy dictionary, given to them by the presiding judge. On appeal, Cummins AJA of the Court of Criminal Appeal commented:

Responsible citizens have been consulting the Oxford English Dictionary since 1933 (and the New English Dictionary on Historical Principles since 1884), if not the dictionary of Dr Samuel Johnson (A Dictionary of the English Language) since 1755 or that of Robert Cawdrey (A Table Alphabetical) since 1604. The two volume Shorter Oxford English Dictionary held in the Bendigo Court and provided to this jury was published in 1959 under the general editorship of the distinguished C T Onions. It is an authoritative work. Responsible citizens *would be affronted to be told that, in the information age, the law forbids them* doing as jurors what persons have done since 1933 (or 1884 or earlier) as an aid to understanding language.<sup>487</sup> [emphasis added]

4.1.4 It must be acknowledged that social media and other internet platforms are a ‘*standard reference source*’ for the vast majority of Australians who are continuously online and engaged; at

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<sup>483</sup> [2009] VSC 142.

<sup>484</sup> Ibid [114] (Bongiorno J).

<sup>485</sup> *Benbrika v R* (2010) 29 VR 593, [226].

<sup>486</sup> (2000) 1 VR 493.

<sup>487</sup> Ibid [42] (Cummins AJA).

home, at work and in-between on their smartphones. It is ‘*exactly what any reasonable person would expect*’ to be the first port of call when tasked with an unfamiliar problem-solving, investigative, analytic and/or decision-making function. Indeed, that same majority are likely to find ‘*something odd*’ about the suggestion that they might not be able to have such recourse and, moreover, ‘*affronted to be told that in the information age, the law forbids them as jurors*’ from using social media and/or other internet platforms as they are accustomed.

4.1.5 Jurors enter the courtroom in circumstances where they have little or no firsthand experience of the criminal courtroom. Indeed, for many it is the first time they have set foot into a courtroom. They experience bewilderment and intimidation in this setting, which is coupled with the stress and responsibility of their role as jurors. It is well documented that jurors suffer misunderstandings and/or misperceptions about matters of procedure and substantive law.<sup>488</sup>

4.1.6 Accordingly, it is understandable how juror misconduct in using social media and the internet occurs, even with preventative measures such as pre-emplanelment information and training, judicial direction and ‘virtual sequestration’ during sitting hours; whether it be out of habit, inadvertence, frustration or defiance (or all of the above).

## 4.2 ‘Dropping the pin’: Where to from here?

4.2.1 Part 1 of this Issues Paper notes that there is no clear and comprehensive data on the prevalence of juror misconduct in inappropriately using social media and the internet. It is apparent from the reported cases that this kind of juror misconduct is under reported, at least to some extent, and that the reported cases represent the bare minimum of cases of misconduct of this kind.

4.2.2 The Institute seeks, insofar as possible, to gauge the nature and gravity of this phenomenon. For this reason, the Institute seeks information about the experiences of respondents to this Issues Paper of juror misconduct of this kind.

### Question 1

What is your experience of jurors using social media and/or other internet platforms during a criminal trial?

### Question 2

Based on your experience, what is your assessment of the prevalence of jurors’ inappropriate use of social media and/or other internet platforms during criminal jury trials?

### Question 3

Do you think that such conduct is confined largely to high profile cases which have a high level of media coverage and community interest? Or does it also present in a wider range of criminal trials?

4.2.3 In order to address this issue, the Institute seeks to gain an understanding of the motivations for and the causes of juror misconduct of this kind.

<sup>488</sup> See above [2.4.4]–[2.4.5].

**Question 4**

Based on your experience, what do you think causes and/or motivates jurors to use social media and/or other internet platforms inappropriately during a criminal trial?

4.2.4 There are various laws and practices whose purpose is to safeguard against juror misconduct of this kind (*'preventative'*) as well as those that exist to remedy and/or otherwise deal with such misconduct after the fact (*'consequential'*). They are explored in Part 3 of this Issues Paper.

4.2.5 This Issues Paper seeks to adopt a practicable and realistic approach to the problem it identifies. For this reason, it does not explore fundamental change to the criminal justice system in Tasmania as a possible response to the juror misconduct considered here. It does not propose discarding trial by jury given its fundamental nature. Accordingly, the introduction of trial by judge alone is not considered. Nor does it consider the reintroduction of the expensive and disruptive practice of jury sequestration in routine trials.

4.2.6 The Institute seeks to assess the efficacy of existing measures, with a particular focus on how they might be improved. The Institute therefore requests feedback in this regard.

4.2.7 Preventative: Pretrial control of prejudicial material:

**Question 5**

- (a) What can and should be done by way of controlling prejudicial material that is potentially available to jurors on the internet and social media platforms at the pre-trial stage?
- (b) Whose obligation should it be to attend to these pre-emptive and precautionary pre-trial measures?

4.2.8 Preventative: Pre-empanelment juror information/training:

**Question 6**

- (a) How can pre-empanelment juror information/training be improved in Tasmania?
- (b) What can be learned from other jurisdictions?
- (c) Should pre-empanelment juror information/training expressly address social media?
- (d) Should pre-empanelment juror information/training specifically cover both 'information in' and 'information out' uses of the internet/social media?
- (e) Should pre-empanelment juror information/training provide an explanation of the rationale behind the restrictions in social media/internet use?

4.2.9 Preventative: Juror oath/affirmation:

**Question 7**

- (a) Could/should the juror oath/affirmation and its surrounding procedure be employed to assist in preventing jurors inappropriately using social media during trials?
- (b) If so, how might this be achieved?

4.2.10 Preventative: Judicial directions:

**Question 8**

- (a) Should ‘standard’ directions to jurors, similar to those used in New South Wales and Victoria, regarding the internet and social media be adopted in Tasmania as a matter of course?
- (b) What should these directions include?
  - (i) Specific mention of social media;
  - (ii) A comprehensive list of prohibited internet and social media platforms as well as prohibited activity (‘*information in*’ and ‘*information out*’);
  - (iii) Explanations for the internet/social media restrictions;
  - (iv) Warnings about personal consequences for juror misconduct;
  - (v) Reminders to jurors of their obligation to report irregularities;
  - (vi) Repetition; and/or
  - (vii) Written directions.
- (c) Could/should the underlying knowledge and understanding of the internet and social media on the part of the judiciary be improved? If so, how?

4.2.11 Preventative: ‘*Virtual sequestration*’/‘*E-sequestration*’:

**Question 9**

- (a) How effective is the practice of taking mobile phones and other electronic devices away from jurors during the trial and deliberations?
- (b) Is it a practice that should continue?

4.2.12 Preventative: Juror self-reporting:

**Question 10**

- (a) Should juror assurances regarding their impartiality and compliance with judicial directions be accepted at face value?
- (b) Should counsel make pre-trial enquiries of jurors’ internet and social media presence and/or monitor jurors’ internet and social media activity during the course of a trial to ensure the veracity of juror assurances in this respect?

4.2.13 Preventative: ‘*Influencers*’:

**Question 11**

- (a) When jurors sit in more than one trial during their summonsed period, does such ‘experience’ make them better jurors? If so, how?
- (b) Are jurors who are empanelled for a second and/or subsequent time less likely to engage in juror misconduct by inappropriately using the internet/social media? If so, why?
- (c) What influence, if any, do you think that jurors who sit in second and/or subsequent trials have on their fellow first-time jurors?

4.2.14 Consequential: Reporting of juror misconduct:

**Question 12**

- (a) How can the efficacy of juror reporting of fellow juror misconduct be supported and/or improved?
- (b) Is public awareness of juror misconduct a viable option for increasing juror accountability (ie enlisting jurors' online 'friends' to report juror misconduct they observe on the internet/social media)?

4.2.15 Consequential: Punishment (deterrence):

**Question 13**

- (a) Should jurors be punished for using social media and other internet platforms inappropriately during criminal trials?
- (b) If so, would legislative codification of applicable common law contempt laws assist in dealing with jurors for misconduct of this kind?

## Appendix A

*Excerpts from the ACT ‘Jury Handbook’<sup>489</sup>*

### **NOW YOU ARE ON THE JURY**

#### ***Evidence***

...

Jurors promise to give their verdict/s according to the evidence. This means that you should not discuss the case with anyone, even with members of your family, and you should not allow anyone to discuss the case with you, except fellow members of the jury.

Also, you must not make any enquiries or conduct any research of your own on matters relating to the trial. Do not make searches on line or visit any place relevant to the case.

While you are on the jury, you should minimise your use of social media such as Facebook and, if you are using social media, you must avoid any mention of the trial.

If another member of the jury indicates that he or she has information about the case obtained in breach of these rules, you should make a note and hand it to the Sheriff’s officer, who will refer the issue to the judge. ...

### **CONFIDENTIALITY AND SOCIAL MEDIA**

#### ***Juror Privacy***

It is an offence to reveal information that identifies, or is likely to identify a person as a juror in a particular trial. This includes identifying yourself as a juror in a trial.

The *ACT Juries Act 1967*, at section 42C, states that you must not disclose this sort of information if you are aware that, as a consequence of your disclosure, “the information will, or is likely to be, published”. In this situation, ‘published’ means communicated or disseminated “in such a way or to such an extent that it is available to, or likely to come to the notice of, the public or a section of the public”. In other words, no one, including the media, is allowed to broadcast or print information about the identity of jurors during the trial.

If you are asked to provide that sort of information to anyone whom you suspect may want to broadcast or print it, or disseminate it in any other way to the public, or a sector of the public, you should not provide that information to them, or you will have committed an offence.

If you are approached in such a way, you should report the matter immediately to one of the Sheriff’s officers because whoever asked you for that information under those circumstances may have committed an offence.

#### ***Jury Deliberations***

The law on revealing jury deliberations is also strict. Both during and after the trial, it is an offence to disclose the deliberations of the jury to anyone whom you think may want to broadcast or print that information.

‘Deliberations’ includes any statements made, any opinions expressed, any arguments advanced, or any votes cast by members of the jury in the course of their deliberations.

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<sup>489</sup> Supreme Court of the Australian Capital Territory, *Jury Handbook* (n 398).

***Exceptions***

There are some exceptions to this. The main exception is where something is said by a juror or jurors in open court. That information can be disclosed, subject to any other non-disclosure orders in place regarding that information.

You are also allowed to disclose jury deliberations and identities to a Commission of Inquiry or the Director of Public Prosecutions, in the unlikely event that there is an inquiry into the conduct of a juror or jurors in that trial, or if someone is authorised by the Attorney-General of the ACT to carry out legitimate research into jury matters.

***The Use of Social Media***

Both during the trial and afterwards, care must be taken when using social media sites such as Facebook and Twitter.

If you have any concerns regarding the use of social media in the context of a jury trial, please speak with a Sheriff's officer or to the Jury Management Unit who will be able to assist you.

## Appendix B

*Excerpts from opening directions in Marshall and Richardson v Tasmania (2016) 264 A Crim R 448, [71].*

‘Now, at this stage you have heard me emphasise a number of times to you that your verdict must be based on the evidence and what the evidence is and the sort of evidence that you might hear whether it’s sworn evidence or items the witnesses may produce. I want to elaborate on that just a little further. A jury’s verdict must be based on the evidence and nothing else.

This means no other information source. Of course in our day-to-day lives we are all used to having access to a range of information sources such as the internet. Juries must not have access to any other information source other than the evidence on the trial. There have been cases where there has been a mistrial because a member of the jury has accessed the internet for example or another information source.

I’ll pause to give you an example of what would be impermissible. Let’s say it was a dangerous driving case and there was a question which came up in the trial about whether a particular street intersected with another street, say, Russell Street or whatever the case may be. The jury’s decision in that particular trial would have to be based on the evidence and nothing else.

The jury in that case would not be permitted to undertake any of their own inquiries. So for example they couldn’t go to the scene or ask someone about whether that street intersected with such and such street. They could not access Google maps for example to do that. That’s the case no matter how unimportant it may seem. It’s absolutely critical that the jury’s verdicts in every case are based on the evidence and nothing else.

So important to avoid any other information source and effectively quarantine yourselves so that your verdict, your consideration of this matter is based just on the evidence in this trial.’

*Excerpt from summing up in Marshall and Richardson v Tasmania (2016) 264 A Crim R 448, [70].*

‘As I’ve said to you during the course of the trial, if anyone makes a comment to you about the case outside the courtroom then you must completely disregard that, completely ignore that, and any media reporting must also be ignored by you.’

## Appendix C

*Excerpts from the NSW Judicial Commission's 'Criminal Trial Courts Bench Book'*<sup>490</sup>

### [1-490] Suggested (oral) directions for the opening of the trial following empanelment

Serving on a jury may be a completely new experience for some, if not all, of you. It is therefore appropriate for me to explain a number of matters to you. During the course of the trial I will remind you of some of these matters if they assume particular importance and I will give you further information if necessary.

#### ***Other sources of information for jurors***

Some of what I am about to say to you may sound familiar because it was referred to in the DVD that you were shown earlier by the sheriff's officers. Some of it will also appear in [a booklet/a document] that you will receive a little later.

There is a great deal of material that you are being asked to digest in a short period but the more you hear it the more likely you are to understand it and retain it.

#### ***The charge(s)***

It is alleged by the Crown that [the accused] committed the offence of ... [give details of offence]. [Name of the accused] will be referred to throughout the trial as 'the accused' as a matter of convenience and only because [he/she] has been accused of committing an offence. [He/she] has pleaded 'not guilty', that is [the accused] has denied the allegation made by the Crown and it becomes your responsibility, as the jury, to decide whether the Crown is able to prove [that charge/those charges] beyond reasonable doubt.

#### ***[Where there are multiple charges, add***

It is alleged by the Crown that [the accused] committed a number of offences. Those charges are being tried together as a matter of convenience. However, you will, in due course, be required to return a verdict in relation to each of them. You will need to consider each charge separately. There is no legal requirement that the verdicts must all be the same but this will become more apparent when you and I are aware of the issues that you have to determine.]

#### ***[Where appropriate, add***

You must not be prejudiced against the accused because [he/she] is facing a number of charges. [The accused] is to be treated as being not guilty of any offence, unless and until [he/she] is proved guilty by your evaluation of the evidence and applying the law that I will explain to you. The charges are being tried together merely because it is convenient to do so because there is a connection between them. But that does not relieve you of considering the charges separately or the Crown of proving each of them beyond reasonable doubt.]

#### ***[If there are any alternative charges, add***

The charges in counts [indicate counts in indictment] are said to be in the alternative. What that means is that, if you find the accused to be not guilty of the first of those charges, you will then be asked to consider whether [he/she] is guilty or not guilty of the alternative charge. If you find [the accused] to be guilty of the first of those charges then you will not be required to make a decision and return a

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<sup>490</sup> Judicial Commission of New South Wales (n 336).

verdict on the alternative charge. I will say something more about this after the evidence has concluded.]

### ***Roles and functions***

Later in the proceedings I will have more to say to you about our respective roles and functions. From the outset, however, you should understand that you are the sole judges of the facts. In respect of all disputes about matters of fact in this case, it will be you and not I who will have to resolve them. In part, that means that it is entirely up to you to decide what evidence is to be accepted and what evidence is to be rejected. For that reason you will need to pay careful attention to each witness as he or she gives their evidence. You should not only listen to what the witnesses say but also watch them as they are giving their evidence. How a witness presents to you and how he or she responds to questioning, especially in cross-examination, may assist you in deciding whether or not you accept what that witness was saying as truthful and reliable. You are entitled to accept part of what a witness says and reject other parts of the evidence.

Each of you is to perform the function of a judge. You are the judges of the facts and that means the verdict(s) will ultimately be your decision. I have no say in what evidence you accept or reject or what arguments and submissions of counsel you find persuasive. Nor do I decide what verdict or verdicts you give in respect of the [charge/ charges] before you. That is your responsibility and you make that decision by determining what facts you find proved and by applying the law that I will explain.

Of course I also have a role as a judge but, as you would probably have assumed, I am the judge of the law. During the trial I am required to ensure that all the rules of procedure and evidence are followed. During the trial and at the end of the evidence, I will give you directions about the legal principles that are relevant to the case and I will explain how they should be applied by you to the issues which you have to decide. I may be required by law to warn you as to how you must approach certain types of evidence. In performing your function you must accept and apply the law that comes from me.

### ***Legal argument***

It may occur that during the trial a question of law or evidence will arise for me to decide. I may need to hear submissions from the lawyers representing the parties before I make a decision. If that occurs, it is usually necessary for the matter to be debated in your absence. If that occurs you will be asked to retire to the jury room. You should not think that this is so that information can be hidden from you. I assure you that any material that the parties believe is necessary for you to reach your verdict(s) will be placed before you. The reason you are asked to leave the courtroom is simply to ensure that counsel can be free to make submissions to me on issues of law that do not concern you. It is also to ensure that you are not distracted by legal issues so that you can concentrate on the evidence once I have made my ruling. It only complicates your task if, for example, you were to hear about some item of evidence that I ultimately decide is not relevant to the case. So, if a matter of law does arise during the course of the evidence, I ask for your patience and understanding. I assure you that your absence from the courtroom will be kept to the minimum time necessary.

### ***Introduction of lawyers***

Let me introduce the lawyers to you. The barrister sitting [.....] is the Crown Prosecutor. In a criminal case, the Prosecutor presents the charge(s) in the name of the State, and on behalf of the community. That does not mean that the prosecutor should be treated any differently than defence counsel, simply because of [his/her] function. The Crown's arguments and submissions made to you at the end of the trial should not be treated as more persuasive simply because they are made on behalf of the State or the community. They are no more than arguments presented to you by one of the parties in these proceedings and you can accept them or reject them based upon your evaluation of their merit and how they accord with your findings of fact based upon the evidence. By tradition, the Crown

Prosecutor is not referred to by *[his/her]* personal name but as, in this case, *[Mr/Ms]* Crown. This is to signify that the prosecutor is not acting in a personal capacity.

The barrister sitting *[.....]* is *[name of defence counsel]* and *[he/she]* appears for *[the accused]*, and will represent *[him/her]* throughout the trial. Defence counsel will also ultimately put arguments and submissions to you. Just as with the prosecutor you should decide them on their merits and as they accord with your view of the evidence.

### ***Selection of foreperson/representative***

*[You have been told by my associate that]* you are required to choose a *[foreperson/representative]*. That person's role will simply be to speak for all of you whenever you need to communicate with me. If your *[foreperson/representative]* raises a question with me on the jury's behalf, it helps to maintain the anonymity of individual jurors. But any one of you is entitled to communicate with me in writing if necessary. The *[foreperson/representative]* also announces your verdict(s) on behalf of the jury as a whole. We do not require each juror to each give his or her verdict(s). But bear in mind that the *[foreperson/representative]* does not have any more functions or responsibilities than these. You are all equals in the jury room. You all have the same entitlement and responsibility in discussing the evidence and ultimately deciding upon your verdict(s).

How you choose your *[foreperson/representative]* is entirely up to you. There is no urgency to reach a final decision on that matter, and you can feel free to change your *[foreperson/representative]* if you wish to do so at any time. When you have chosen your *[foreperson/representative]*, he or she should sit in the front row of the jury box in the seat nearest to me and that way I will know who you have chosen.

### ***Queries about evidence or procedure***

If you have any questions about the evidence or the procedure during the trial, or you have any concerns whatsoever about the course of the trial or what is taking place, you should direct those questions or concerns to me, and only to me. The Court officers attending on you are there to provide for your general needs, but are not there to answer questions about the trial itself. Should you have anything you wish to raise with me, or to ask me, please write a note and give it to the officer. The note will be given to me and, after I have discussed it with counsel, I shall deal with the matter.

### ***Note taking***

You are perfectly entitled to make notes as the case progresses. Writing materials will be made available to you. If you decide to take notes, may I suggest that you be careful not to allow note taking to distract you from your primary task of absorbing the evidence and assessing the witnesses. Do not try to take down everything a witness says. It may be more significant to note your reaction to a particular witness as that may be significant in your later assessment of the evidence. It may be important, for example, to note the reaction of a witness in cross-examination. A note of how you found the witness, for example whether you thought the witness was trying to tell you the truth, or was on the other hand being evasive, might be more important to recall during your deliberations than actually what the witness said.

This is because everything that is said in this courtroom is being recorded so there is the facility to check any of the evidence that you would like to be reminded about. You should also bear in mind that after the evidence has been presented you will hear closing addresses from the lawyers and a summing-up from me in which at least what the parties believe to be the more significant aspects of the evidence will be reviewed. In that way you will be reminded of particular parts of the evidence.

A transcript of the evidence of every witness will become available only a daily basis. If you would like to have a copy of the transcript, either of all of the evidence, or just of the evidence of a particular witness, then you only need to ask.

***[Where appropriate — prior media publicity]***

If you have read or heard or have otherwise become aware of any publicity about the events with which this trial is concerned, or about the accused, it is of fundamental importance that you put any such publicity right out of your minds. Remember that you have each sworn an oath, or made an affirmation, to decide this case solely upon the evidence presented here in this courtroom and upon the basis of the legal directions I give to you. Before you were empanelled I asked that any person who could not be objective in their assessment of the evidence to ask to be excused. None of you indicated that you had a problem in that regard. You would be disobeying your oath or affirmation if you were to take into account, or allowed yourself to be influenced by, information that has come to you from something you have read, seen or heard outside the courtroom.]

***Media publicity during the trial***

It may be that during the trial some report may appear in either the newspapers or on the radio or television. You should pay no regard to those reports whatsoever. They will obviously be limited to some particular matter that is thought to be newsworthy by the journalist or editor. It may be a matter which is of little significance in light of the whole of the evidence and it may have no importance whatsoever in your ultimate deliberations. Often you will find that these reports occur at the start of the trial and often refer to the opening address of the prosecutor. They then tend to evaporate until the closing addresses or the jury retires to deliberate. Do not let any media reports influence your view as to what is important or significant in the trial. Further do not allow them to lead you into a conversation with a friend or member of your family about the trial.

***The nature of a criminal trial***

There are some directions I am required to give to you concerning your duties and obligations as jurors but first let me explain a little about a criminal trial.

The overall issue is whether the Crown can prove the charge(s) alleged against [*the accused*]. The evidence placed before you on that issue is under the control of the counsel of both parties. In our system of justice the parties place evidence before the jury provided that it is relevant to the questions of fact that you have to determine. The parties decide what issues or what facts are in dispute. I play no part in which witnesses are called. My task is only to ensure that the evidence is relevant: that is, to ensure that the evidence is of some significance to the issues raised and the ultimate question whether the Crown has proved the guilt of the accused. Usually there will be no issue as to whether evidence is relevant but if a dispute arises about it, that is a matter I must determine as a question of law. Otherwise I have no part to play in how the trial is conducted, what evidence is placed before you or what issues you are asked to resolve on the way to reaching a verdict.

***Onus and standard of proof***

The obligation is on the Crown to put evidence before a jury in order to prove beyond reasonable doubt that [*the accused*] is guilty of the [*charge/charges*] alleged against him/her. It is important that you bear in mind throughout the trial and during the course of your deliberations this fundamental aspect of a criminal trial. The Crown must prove [*the accused's*] guilt based upon the evidence it places before the jury. [*The accused*] has no obligation to produce any evidence or to prove anything at all at any stage in the trial. In particular [*the accused*] does not have to prove that [*he/she*] did not commit the offence. [*The accused*] is presumed to be innocent of any wrongdoing until a jury is satisfied beyond reasonable doubt that [*his/her*] guilt has been established according to law. This does not mean that the Crown has to satisfy you of its version of the facts wherever some dispute arises. What is required is that the Crown proves those facts that are essential to make out the charge(s) and proves those facts beyond reasonable doubt. These are sometimes referred to as the essential facts or ingredients of the offence. You will be told shortly what the essential facts are in this particular case.

[*If known, note the particular issue(s) in dispute and what the Crown has to prove.*]

The expression ‘proved beyond reasonable doubt’ is ancient and has been deeply ingrained in the criminal law of this State for a very long time. You have probably heard this expression before and the words mean exactly what they say – proof beyond reasonable doubt. This is the highest standard of proof known to the law. It is not an expression that is usually explained by trial judges but it can be compared with the lower standard of proof required in civil cases where matters need only be proved on what is called the balance of probabilities. The test in a criminal case is not whether the accused is probably guilty. In a criminal trial the Crown must prove the accused’s guilt beyond reasonable doubt. Obviously a suspicion, even a strong suspicion, that [*the accused*] may be guilty is not enough. A decision that [*the accused*] has probably committed the offence(s) also falls short of what is required. Before you can find [*the accused*] guilty you must consider all the evidence placed before you, and ask yourself whether you are satisfied beyond a reasonable doubt that the Crown has made out its case. [*The accused*] is entitled by law to the benefit of any reasonable doubt that is left in your mind at the end of your deliberations.

### ***Deciding the case only on the evidence***

It should be obvious from what I have just said that you are not here to determine where the truth lies. You are not simply deciding which version you prefer: that offered by the Crown or that from the defence. You are not investigating the incident giving rise to the charge(s). You are being asked to make a judgment or decision based upon the evidence that is placed before you. Jurors might in a particular case feel frustrated by what they see as a lack of evidence or information about some particular aspect of the case before them. In some rare cases this has led jurors to make inquiries themselves to try and fill in the gaps that they perceive in the evidence. But that is not your function, nor is it mine. If you or I did our own investigations that would result in a miscarriage of justice. Any verdict given, even if it was not actually affected by those investigations, would be set aside by an appeal court. That would result in a waste of your time and that of your fellow jurors, and lead to a considerable expense to the community and the parties.

You are judges deciding facts and ultimately whether [*the accused’s*] guilt has been proved beyond reasonable doubt based upon what material is placed before you during the trial. You must understand that it is absolutely forbidden that you make any inquiries on any subject matter arising in the trial outside the courtroom. To do so would be a breach of your oath or affirmation, it would be unfair to both the Crown and the defence and you would have committed a criminal offence. If you felt that there was some evidence or information missing, then you simply take that fact into account in deciding whether on the evidence that is before you the Crown have proved the guilt of the accused beyond reasonable doubt.

### ***Prohibition against making enquiries outside the courtroom***

It is of fundamental importance that your decision in this trial is based only upon what you hear and see in this courtroom: that is; the evidence, the addresses of counsel and what I say to you about the law. You must not, during the course of the trial, make any inquiries of your own or ask some other person to make them on your behalf. In particular you are not to use any aid, such as legal textbooks, to research any matter in connection with your role as a juror.

It is a serious criminal offence for a member of the jury to make any inquiry for the purpose of obtaining information about the accused, or any other matter relevant to the trial. It is so serious that it can be punished by imprisonment. This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person other than a fellow juror or me. It includes conducting any research using the internet.

*[If the judge considers it appropriate add*

You should keep away from the internet and the other communication sources which may pass comment upon the issues in this trial. You may not communicate with anyone about the case on your mobile phone, smart phone, through email, text messaging, or on Twitter, through any blog or website, any internet chatroom, or by way of any other social networking websites including Facebook,

MySpace, LinkedIn and YouTube. You should avoid any communication which may expose you to other people's opinions or views.]

You are not permitted to visit or inspect any place connected with the incidents giving rise to the charge(s). You cannot conduct any experiments. You are not permitted to have someone else make those enquiries on your behalf.

Always keep steadily in your mind your function as a judge of the facts as I have explained it to you. If you undertake any activity in connection with your role as a juror outside the court house, then you are performing a different role. You have stopped being an impartial judge and have become an investigator. That is not a role that you are permitted to undertake. It would be unfair to both the Crown and [*the accused*] to use any material obtained outside the courtroom because the parties would not be aware of it and, therefore, would be unable to test it or make submissions to you about it.

Further, the result of your inquiries could be to obtain information that was misleading or entirely wrong. For example, you may come across a statement of the law or of some legal principle that is incorrect or not applicable in New South Wales. The criminal law is not the same throughout Australian jurisdictions and even in this State it can change rapidly from time to time. It is part of my function to tell you so much of the law as you need to apply in order to decide the issues before you.

### ***Discussing the case with others***

You should not discuss the case with anyone except your fellow jurors and only when you are all together in the jury room. This is because a person with whom you might speak to who is not a fellow juror would, perhaps unintentionally make some comment or offer some opinion on the nature of the charge or the evidence which is of no value whatever. That person would not have the advantage that you have of hearing the evidence first-hand, the addresses of counsel on that evidence and the directions of law from me.

Any comment or opinion that might be offered to you by anyone who is not a fellow juror might influence your thinking about the case, perhaps not consciously but subconsciously. Such a comment or opinion cannot assist you but can only distract you from your proper task.

If anyone attempts to speak to you about the case at any stage of the trial it is your duty to report that fact to me as soon as possible, and you should not mention it to any other member of the jury. I am not suggesting that this is even remotely likely to happen in this case but I mention it simply as a precaution and it is a direction given to all jurors whatever the nature of the trial.

I must bring to your attention that it is an offence for a juror during the course of the trial to disclose to any person outside the jury room information about the deliberations of the jury or how the jury came to form an opinion or conclusion on any issue raised at the trial.

### ***Bringing irregularities to the judge's attention***

If any of you learn that an impermissible enquiry had been made by another juror or that another juror had engaged in discussions with any person outside the jury room, you must bring it to my attention. Similarly, if at any stage you find material in the jury room that is not an exhibit in the case, you should notify me immediately.

The reason for bringing it to my attention as soon as possible is that, unless it is known before the conclusion of the trial, there is no opportunity to fix the problem if it is possible to do so. If the problem is not immediately addressed, it might cause the trial to miscarry and result in the discharge of the jury in order to avoid any real or apparent injustice.

### ***Reporting other misconduct and irregularities — s 75C Jury Act***

If any of you in the course of the trial suspect any irregularity in relation to another juror's membership of the jury, or in relation to the performance of another juror's functions as a juror you should tell me about your suspicions. This might include:

- the refusal of a juror to take part in the jury's deliberations, or
- a juror's lack of capacity to take part in the trial (including an inability to speak or comprehend English), or
- any misconduct as a juror, or
- a juror's inability to be impartial because of the juror's familiarity with the witnesses or legal representatives in the trial, or
- a juror becoming disqualified from serving, or being ineligible to serve, as a juror.

You also may tell the sheriff after the trial if you have suspicions about any of the matters I have just described.

### ***Breaks/personal issues/daily attendance***

It is not easy sitting there listening all day, so if at any stage you feel like having a short break of say five minutes or so, then let me know. Remember, I do not want you to be distracted from your important job of listening to the evidence. If you feel your attention wandering and you are having trouble focusing on what is happening in court then just raise your hand and ask me for a short break. I can guarantee that if you feel like a break out of the courtroom, then others in the courtroom will too. So please don't be reluctant to ask for a break if you want one.

If you are too hot or too cold, or you cannot hear or understand a witness or if you face any other distraction while in the courtroom let me know so that I can try to attend to the problem.

If any other difficulty of a personal nature arises then bring it to my attention so that I can see if there is some solution. If it is absolutely necessary, the trial can be adjourned for a short time, so that a personal problem can be addressed.

However, it is important that you understand the obligation to attend every day the trial proceedings at the time indicated to you. If a juror cannot attend for whatever reason then the trial cannot proceed. We do not sit with a juror missing because of illness or misadventure. Of course there is no point attending if you are too ill to be able to sit and concentrate on the evidence or if there is an important matter that arises in your personal life. But you should understand that by not attending the whole trial stops for the time you are absent, which will result in a significant cost and inconvenience to the parties and your fellow jurors.

### ***Outline of the trial***

Shortly I will ask the Crown Prosecutor to outline the prosecution case by indicating the facts that the Crown has to prove and the evidence that will be called on behalf of the Crown for that purpose. This is simply so that you have some understanding of the evidence as it is called in the context of the Crown case as a whole. What the Crown says is not evidence and is merely an indication of what it is anticipated the evidence will establish.

*[If there is to be a defence opening add*

*I shall then ask [defence counsel] to respond to the matters raised by the Crown opening. The purpose of this address is to indicate what issues are in dispute and briefly the defence answer to the prosecution's allegations. Neither counsel will be placing any arguments before you at this stage of the trial.]*

Then the evidence will be led by way of witnesses giving testimony in the witness box. There may also be documents, photographs and other material that become exhibits in the trial.

At the end of all of the evidence both counsel will address you by way of argument and submissions based upon the evidence. You will hear from the Crown first and then the defence.

I will then sum up to you by reminding you of the law that you have to apply during your deliberations and setting out the issues that you will need to consider before you can reach your verdict(s).

You will then be asked to retire to consider your verdict(s). You will be left alone in the jury room with the exhibits to go about your deliberations in any way you choose to do so. If your deliberations last for more than a day then you will be allowed to go home overnight and return the next day. We no longer require jurors to be kept together throughout their deliberations by placing them in a hotel as used to be the case some time ago.

When you have reached your verdict(s) you will let me know. You will then be brought into the courtroom and your [*foreperson/representative*] will give the verdict(s) on behalf of the whole jury. That will complete your functions and you will then be excused from further attendance.

## Appendix D

*Excerpts from the Judicial College of Victoria's 'Criminal Charge Book'*<sup>491</sup>

### 1.1 – Introductory Remarks

1. A number of studies into the jury system have suggested that it is highly beneficial for the judge to provide the jury with information at the beginning of a trial, to assist them in performing their role.[1]
2. It is suggested that “the process of being empanelled as a member of the jury can be a thoroughly confusing experience”, and that the provision of basic information by the judge at the beginning of the trial can help jurors to “settle into their task”. [2]
3. The following types of information have been seen to be of assistance to jurors:
  - Information about the importance of jury duty;
  - Information about the roles of the judge, jury and counsel;
  - Information about the nature of the trial process and about the characteristics of the adversary system;
  - Instructions concerning the onus and standard of proof and the right of each accused to separate consideration of his or her case;
  - An introduction to other common concepts that will be used throughout the trial, such as inferences;
  - Guidance about how to assess witnesses and evidence;
  - Information about matters such as note-taking and asking questions;
  - Procedural suggestions about matters such as electing a foreperson, arranging a discussion format and deliberation procedures;
  - Information about the secrecy and anonymity of jury deliberations;
  - Information about the court and about any local facilities available to jurors.
4. While the Juries Commissioner provides some of this information to jurors prior to the trial, it has been suggested that it is also advantageous for the judge to address these matters when jurors are beginning to focus more clearly on their jury service.[3]
5. Studies have shown that jurors who are given such information by the judge at the beginning of a trial are better able to follow the evidence presented in court, and to apply the law to the facts of the case during deliberations.[4]
6. This is supported by research in cognitive psychology, which has shown that the more information a person has, the better able that person is to frame the information that he or she is about to receive. This enhances recall and aids in the interpretation of ambiguous material. It also leads to greater levels of juror satisfaction.[5]
7. One study has even shown that a judge’s instructions may only have an effect on the jury’s decision when delivered at the commencement of the trial.[6] It is suggested that this is because jurors will usually have already assessed the evidence by the time the judge delivers his or her final charge, and will not be able to retrospectively evaluate and judge the evidence in accordance with instructions which are first given at that late stage.[7]
8. It is therefore desirable to provide the jury with information such as that outlined above at the outset of the trial, and again in summary form during the judge’s final charge (see, e.g., *R v PZG* [2007]

<sup>491</sup> Judicial College of Victoria, *Victorian Criminal Charge Book* (n 361).

VSCA 54). Judges may also wish to give a charge welcoming potential jurors prior to empanelment. Part 1 of this Book contains a number of suggested directions for use at the beginning of a trial.

9. It is also desirable to give the jury a short break immediately after they have been empanelled and charged, to allow them to orient themselves as a group and familiarise themselves with their surroundings.

10. If a judge is concerned about addressing matters that may not arise during the trial, he or she should warn the jury that the preliminary instructions may touch on issues which are not essential to their decision. In the judge's final charge, he or she should deliver revised instructions, advising the jury of any changes that have occurred since giving the preliminary instructions.[8]

**Notes:**

[1] See, e.g., Parliament of Victoria Law Reform Committee, *Jury Service in Victoria*, Final Report (1991); New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986); New Zealand Law Commission, *Juries in Criminal Trials*, Report 69 (2001); Law Reform Commission of Canada, *The Jury*, Report 16 (1982); *Report of The Royal Commission on Criminal Justice* (1993); Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001). See also *R v PZG* [2007] VSCA 54.

[2] Parliament of Victoria Law Reform Committee, *Jury Service in Victoria*, Final Report (1991).

[3] Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (2001).

[4] Parliament of Victoria Law Reform Committee, *Jury Service in Victoria*, Final Report (1991).

[5] *Ibid.*

[6] S.M. Kassin and L.S. Wrightsman, "On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts" (1979) 17 *Journal of Personality and Social Psychology* 1877.

[7] New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Discussion Paper 12 (1985).

[8] *Ibid.*

## 1.5 – Decide Solely on the Evidence

1. The jury must be directed to base their verdict solely on the evidence given before them in the trial. In reaching their verdict they must disregard any knowledge they may otherwise have acquired about the case (*Glennon v R* (1992) 173 CLR 592; *Murphy v R* (1989) 167 CLR 94; *R v VPH* 4/3/94 NSW CCA; *R v Vjestica* [2008] VSCA 47).

2. The jury should be told that the following matters constitute evidence:

- The answers to questions asked in court;
- Documents and exhibits admitted into evidence;
- Formal Admissions.

3. The jury should also be directed that the following matters do *not* constitute evidence:

- Questions asked of witnesses (unless the witness agrees with the proposition) (*R v Johnston* [2004] NSWCCA 58; *R v Lowe* (1997) 98 A Crim R 300; *Lander v R* (1989) 52 SASR 424; *R v Robinson* [1977] Qd R 387);
- Counsels' addresses and arguments (*R v Parsons* [2004] VSCA 92; *R v Lowe* (1997) 98 A Crim R 300)[1];
- The judge's addresses and comments (*R v Boykovski and Atanasovski* (1991) A Crim R 436. See Judge's Summing Up on Evidence and Issues for further information).

4. It may be desirable to tell the jury that if they disbelieve the answer of a witness, that does not amount to positive evidence of the opposite of that answer. Disbelief of a denial provides no evidence of the fact denied. For a matter to be sufficiently proven, there needs to be independent, positive evidence (*Scott Fell v Lloyd* (1911) 13 CLR 230; *Edmunds v Edmunds* [1935] VLR 177; *Gauci v Cmr of Taxation (Cth)* (1975) 135 CLR 81; *Steinberg v FCT* (1975) 134 CLR 640; *R v Lowe* (1997) 98 A Crim R 300).

5. The judge should tell the jury that if they are aware of any publicity concerning the case or the accused, this must be placed out of their minds. They must focus only on the evidence led in court (*R v Skaf* (2004) 60 NSWLR 86; *R v Vjestica* [2008] VSCA 47. See ‘Pre-trial Publicity’ below for further information concerning pre-trial publicity).

6. The judge should also tell the jury to disregard any feelings of prejudice or sympathy they may have in relation to the accused (*Glennon v R* (1992) 173 CLR 592).

### **External Communications**

7. The jury should be told to avoid speaking to any people in the precincts of the court (*R v Skaf* (2004) 60 NSWLR 86).

8. The jury should also be told not to discuss the case with anyone other than their fellow jurors, and to do that only in the privacy of the jury room (*R v Skaf* (2004) 60 NSWLR 86).

9. This includes communicating about the case with court officials.[2] All questions about the case should be directed to the judge (*R v Stretton* [1982] VR 251; *R v Emmett* (1988) 14 NSWLR 327; *Jackson & Le Gros v R* [1995] 1 Qd R 547; *R v Briffa & Portillo* 21/4/96 Vic CCA; *R v GAE* (2000) 1 VR 198. See Trial Procedure for further information about juror questions).

10. Jurors should be told not to bring mobile telephones or computers into the jury room (*R v Skaf* (2004) 60 NSWLR 86; *R v McCluskey* (1994) 98 Cr App R 216; *R v Evans* (1995) 79 A Crim R 66).

11. It is useful to explain to the jury that one of the reasons for the prohibition against discussing the case is that most people will want to make observations about the case. Such observations will be of no value, since these people will not have heard or seen the evidence, or received directions which are binding upon them, and they will not be subject to the same oath or affirmation as the jurors (*R v Skaf* (2004) 60 NSWLR 86).

### **Juror Enquiries**

12. It is an offence for a juror to ‘make an enquiry’ for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror (*Juries Act 2000* (Vic) s78A(1)).

13. ‘Making an enquiry’ is defined to include:

- Consulting with another person or requesting another person to make an enquiry;
- Conducting research by any means (including using the internet) (see ‘Independent Research’ below); or
- Viewing or inspecting a place or object that is relevant to the trial, or conducting an experiment (see ‘Private Views and Experiments’ below) (*Juries Act 2000* (Vic) s78A(5)).

14. This offence applies to all jurors from the time they are selected or allocated as part of the jury panel, until they are either excused from jury service, returned to the jury pool or discharged by the trial judge (*Juries Act 2000* (Vic) s78A(2)).

15. Jurors are not prohibited from making an enquiry of the court, or another member of the jury, in the proper exercise of their functions as a juror (*Juries Act 2000* (Vic) s78A(3)).

16. Although the *Juries Act 2000* does not specify that judges must direct the jury about s78A, this provision should be drawn to their attention (see, e.g., *Martin v R* [2010] VSCA 153; *DPP v Dupas* [2010] VSC 409; *R v Rich (Ruling No 7)* [2008] VSC 437).

### Independent Research

17. It is highly desirable for judges routinely to instruct the jury not to undertake any independent research (by internet or otherwise) concerning:

- The parties to the trial;
- Any other matter relevant to the trial; or
- The law applicable to the case (*Martin v R* [2010] VSCA 153; *R v K* (2003) 59 NSWLR 431. See also *Juries Act 2000* (Vic) s78A; *Benbrika v R* [2010] VSCA 281).

18. Judges should not avoid giving such a warning merely because they fear that it might place the idea in the mind of an inquisitive juror, and result in them conducting the kind of research the warning is intended to prevent (*R v K* (2003) 59 NSWLR 431).

19. It is not sufficient to merely direct the jury that they must be true to their oath, to decide the case on the evidence and to identify the sanctions which apply to jurors who disobey the instructions. The judge must explain the reasons for the prohibition and how such conduct risks injustice and an unfair trial (*SD v R* [2013] VSCA 133; *R v Skaf* (2004) 60 NSWLR 86; *R v K* (2003) 59 NSWLR 431).

20. The main reasons for the prohibition are that:

- Independent research may involve acting on information that is not tested and may be wrong or inaccurate;
- Independent research will involve acting on information which is unknown to the parties, which would be unfair. It is not for the jury to add to the evidence called by the parties;
- Independent research may lead the jury to take into account legal principles that do not apply in the jurisdiction.

21. It is not inappropriate or improper for a jury to consult a dictionary about the meaning of an ordinary English word which they are told is a question for them (*Benbrika v R* [2010] VSCA 281. See also *R v Chatzidimitriou* (2000) 1 VR 493 per Cummins AJA).

...

### Pre-Trial Publicity

36. Where there has been pre-trial publicity about a case, or the people involved in a case, the judge has a responsibility to avoid unfairness to either party (*Glennon v R* (1992) 173 CLR 592; *R v Vjestica* [2008] VSCA 47; *R v Dupas* [2009] VSCA 202).

37. In most cases, it will be possible to overcome any potential prejudice the accused might suffer due to pre-trial publicity by giving the jury appropriate and thorough directions designed to counteract such prejudice (*Dupas v R* [2010] HCA 20; *Glennon v R* (1992) 173 CLR 592; *R v Vjestica* [2008] VSCA 47; *R v Dupas* [2009] VSCA 202). See *Dupas v R* [2010] HCA 20 for an example of such directions.

38. In determining whether such a direction will be sufficient to counter the effects of pre-trial publicity, jurors should not be regarded as exceptionally fragile and prone to prejudice. It should be assumed that they approach their task in accordance with the oath they take to listen to the directions that they are given, and to determine guilt only on the evidence before them (*Dupas v R* [2010] HCA 20; *Glennon v R* (1992) 173 CLR 592; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; *R v Vjestica* [2008] VSCA 47; *R v Dupas* [2009] VSCA 202).

39. It is not necessary for a judge to be sure that any possible prejudice will be remediable by a warning, so long as they take all appropriate steps available to secure a fair trial (*Glennon v R* (1992) 173 CLR 592; *Murphy v R* (1989) 167 CLR 94).

40. If a judge determines that a warning alone will be insufficient to counter the effects of pre-trial publicity, they may conduct the trial in whatever manner is appropriate to counter those effects, within the ordinary procedural constraints. This includes adjourning the trial until the influence of prejudicial publicity subsides (*Glennon v R* (1992) 173 CLR 592; *R v Dupas* [2009] VSCA 202. See also *DPP v Dupas* [2010] VSC 409).

41. The balancing of the legitimate interests of the accused and the prosecution will, in almost every case, mean that if the proceedings are to be stayed at all, they should only be stayed temporarily and for the minimum period necessary (*Glennon v R* (1992) 173 CLR 592; *R v VPH*, 4/3/94 NSWCCA; *R v Dupas* [2009] VSCA 202).

42. However, there may be extreme cases in which a permanent stay may be granted (*Dupas v R* [2010] HCA 20; *Glennon v R* (1992) 173 CLR 592).

43. A permanent stay will only be necessary if there is a fundamental defect going to the root of the trial of such a nature that there is nothing the judge can do in the conduct of the trial to relieve against its unfair consequences (*Dupas v R* [2010] HCA 20; *Glennon v R* (1992) 173 CLR 592).

44. A permanent stay should not be granted simply because there has been extensive adverse pre-trial publicity about the accused. Any unfair consequences of prejudice or prejudgment arising out of such publicity can be protected against by thorough and appropriate directions to the jury (*Dupas v R* [2010] HCA 20).

45. In considering whether to grant a permanent stay, judges should take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial. Fairness to the accused is not the only consideration bearing on a court's decision as to whether a trial should proceed (*Dupas v R* [2010] HCA 20).

#### **Notifying the Judge About Irregularities**

46. The jury should be directed that if it becomes apparent to any of them, in the course of the trial, that another juror has made an independent inquiry in relation to any aspect of the case, that should be brought immediately to the attention of the judge. This includes discovering that a juror has:

- Made an inquiry about the accused or the background to the offence, or caused someone else to do so;
- Made a private inspection of a relevant site, conducted a private experiment, or caused someone else to do one of these things; or
- Discussed the case with anyone other than the remaining members of the jury (*R v Skaf* (2004) 60 NSWLR 86).

47. The jury should also be instructed that if it becomes apparent to any juror, in the course of the trial, that any matter which is not in evidence has found its way into the jury room, that should similarly be brought immediately to the attention of the trial judge (*R v Skaf* (2004) 60 NSWLR 86).

48. The jury should be told that the reason why it is necessary for such matters to be brought to the immediate attention of the judge is that, unless it is known before the end of the trial, it may not be possible to put matters right. This may either lead to an injustice occurring or a retrial becoming necessary (*R v Skaf* (2004) 60 NSWLR 86).

49. These directions should be expressed in specific terms, rather than simply instructing the jury to bring to the judge's attention any behaviour among the jurors that causes concern (cf. *R v Mirza* [2004] 1 WLR 665). Such a general direction may lead to matters being brought to the judge's attention which would involve inappropriate criticism of fellow jurors, or lead to the disclosure of jury deliberations (*R v Skaf* (2004) 60 NSWLR 86).

**Notes:**

[1] If the accused is self represented, the jury should be told that his or her addresses and arguments are also not evidence.

[2] Jurors may communicate with court officials about administrative or technical matters (such as setting up equipment) (*Dempster* (1980) 71 Cr App R 302; *R v Barnowski* [1969] SASR 386).

## 1.11 – Consolidated preliminary directions

### **No Outside Information**

When you retire to consider your verdict, you will have heard or received in court, or otherwise under my supervision, all the information that you need to make your decision.

Unless I tell you otherwise, you must not base your decision on any information you obtain outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case or the people involved in it, or which you may see or hear. You must consider only the evidence presented to you here in court [*if a view may be conducted add: 'or otherwise under my supervision'*].

Most importantly, you must not make any investigations or enquiries, or conduct independent research, concerning any aspect of the case or any person connected with it. That includes research about the law that applies to the case. You must not use the internet to access legal databases, legal dictionaries, legal texts, earlier decisions of this or other courts, or other material of any kind relating to the matters in the trial. You must not search for information about the case on Google or conduct similar searches. You also must not discuss the case on Facebook, Twitter or blogs, or look at such sites for more information about the case.

You may ask yourself the question: what is wrong with looking for more information? Seeking out information, or discussing a matter with friends, may be a natural part of life for you when making an important decision. As conscientious jurors, you may think that conducting your own research will help you reach the right result. However, there are three important reasons why using outside information, or researching the case on the internet, would be wrong.

First, media reports, or claims made outside court may be wrong or inaccurate. The prosecution and defence will not have a chance to test the information. Similarly, I will not know if you need any directions on how to use such material.

Second, deciding a case on outside information, which is not known to the parties, is unfair to both the prosecution and the defence. The trial is conducted according to well established legal principles and its not for you to go looking for other information or to add to the evidence.

Third, acting on outside information would be false to the oath or affirmation you took as jurors to give a true verdict according to the evidence. You would cease being a juror, that is, a judge of the facts, and have instead taken on the role of an investigator.

If one of your fellow jurors breaches these instructions, then the duty falls on the rest of you to inform me or a member of my staff, either in writing or otherwise, without delay. These rules are so important that you must report your fellow juror.

*[Add the following shaded section if there is a risk that a juror may visit the crime scene or attempt a private experiment.]*

For similar reasons, unless I tell you otherwise, you must not visit the scene of the alleged offence. You also must not attempt any private experiments concerning any aspect of the case. As I have explained, you are jurors assessing the evidence which is led in the case. You are not investigators, and must not take into account material that has not been properly presented to you as evidence.

### **Consequences of breaching instructions**

You may have a question about what could happen if you acted on outside information or conducted your own research.

The immediate outcome is that the jury may need to be discharged and the trial may have to start again. This would cause stress and expense to the witnesses, the prosecution and the accused. It would also cause stress and inconvenience to the other jurors, who will have wasted their time sitting on a case which must be restarted.

Second, it is a criminal offence for a juror to discuss the case with others or to conduct research on the case. You could therefore be fined and receive a criminal conviction, which may affect your ability to travel to some countries. Jurors have even been sent to jail for discussing a case on Facebook.

More broadly, jurors conducting their own research undermines public confidence in the jury system. The jury system has been a fundamental feature of our criminal justice system for centuries.

For all these reasons, it is essential that you decide the case solely on the evidence presented in court, without feelings of sympathy or prejudice. You must not conduct your own research into the case or discuss the case with others who are not on the jury.

*[Judges may describe a specific example of the consequences of breaching instructions]*

### **Warnings About Discussing the Case**

As judges of the facts, it is also important that you are careful to avoid any situations that could interfere with your ability to be impartial, or that could make you appear to be biased towards one side or the other.

You must therefore be careful not to get into conversation with anyone you do not know, who you might meet around or near the court building. Otherwise you may find yourself talking to someone who turns out to have a special interest in the case.

You must also avoid talking to anyone other than your fellow jurors about the case. This includes your family and friends. You must not discuss the case on social media sites, such as Facebook, Myspace, Twitter, blogs or anything else like that. Of course, you can tell your family and friends that you are on a jury, and about general matters such as when the trial is expected to finish. But do not discuss the case itself. It is your judgment, not theirs, that is sought. You should not risk that judgment being influenced by their views – which will necessarily be uninformed, because they will not have seen the witnesses or heard the evidence.

You are free to discuss the case amongst yourselves as it continues, although you should only do this in the jury room. However, you should form no conclusive views about the case until you have heard all of the evidence, listened to counsel on both sides, and received my instructions about the law. Keep an open mind.

### **Consequences of breaching instructions revisited**

You have already heard what can happen when jurors disregard the instruction not to conduct their own research. Similar consequences can follow if you discuss the case with others.

You must therefore also let me know if someone tries to discuss the case with you, or if you learn that one of your fellow jurors has been discussing the case with someone outside the jury.

### 3.16 – Consolidated final directions

#### **Review of the Need to Decide Solely on the Evidence**

I have told you that it is your task to determine the facts in this case. In determining the facts, you must consider all of the evidence that you heard from the witness box. Remember, it is the answers the witnesses gave that are the evidence, not the questions they were asked.

You must also take into account the exhibits that were tendered. These include *[insert examples]*. When you go to the jury room to decide this case, [most of/some of] the exhibits will go with you, where you may examine them. Consider them along with the rest of the evidence and in exactly the same way. [However, the following exhibits will not go with you to the jury room *[insert exhibits]*].

*[If any formal admissions were put to the jury, add the following shaded section.]*

In addition, in this case the following admissions were made: *[insert admissions]*. You must accept these admissions as established facts.

Nothing else is evidence in this case. As I have told you, this includes any comments counsel make about the facts. It also includes:

*[Identify other relevant matters which do not constitute evidence in the case, such as transcripts.*

*It may be appropriate to insert charges relating to these matters here.]*

It your duty to decide this case only on the basis of the witnesses' testimony, [the admissions] and the exhibits. You should consider the evidence which is relevant to a particular matter in its individual parts and as a whole, and come to a decision one way or another about the facts.

As I have told you, in doing this you must ignore all other considerations, such as any feelings of sympathy or prejudice you may have for anyone involved in the case. You should not, for example, be influenced by *[insert case specific examples]*. Such emotions have no part to play in your decision.

Remember, you are the judges of the facts. That means that in relation to all of the issues in this case, you must act like judges. You must dispassionately weigh the evidence logically and with an open-mind, not according to your passion or feelings.

#### **Outside Information**

At the start of the trial I also told you that you must not base your decision on any information you may have obtained outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case, or about the people involved in it. You must consider only the evidence that has been presented to you here in court.

## Appendix E

*Excerpts from the NSW Judicial Commission's 'Criminal Trial Courts Bench Book'*<sup>492</sup>

### [1-480] Written directions for the jury at the opening of the trial

#### *Nature of a criminal trial*

A criminal trial occurs when the Crown alleges that a member of the community has committed a crime and the accused denies the allegation. The trial is conducted on the basis that the parties determine the evidence to be placed before the jury and identify the issues that the jury needs to consider. The jury resolves the dispute by giving a verdict of guilty or not guilty of the crime or crimes charged. A criminal trial is not an investigation into the incidents surrounding the allegation made by the Crown and is not a search for the truth. Therefore neither the judge nor the jury has any right to make investigations or inquiries of any kind outside the courtroom and independent of the parties. The verdict must be based only upon an assessment of the evidence produced by the parties. That evidence is to be considered dispassionately, fairly and without showing favour or prejudice to either party. The verdict based upon the evidence must be in accordance with the law as explained by the judge.

#### *Role of judge and jury*

The jury as a whole is to decide facts and issues arising from the evidence and ultimately to determine whether the accused is guilty of the crime or crimes charged in the indictment. These decisions are based upon the evidence presented at the trial and the directions of law given by the judge. Before the jury is asked to deliberate on their verdict counsel will make their own submissions and arguments based upon the evidence. The jury must follow directions of law stated by the judge and take into account any warning given as to particular aspects of the evidence. Each juror is to act in accordance with the oath or affirmation made at the start of the trial to give 'a true verdict in accordance with the evidence'. A true verdict is not one based upon sympathy or prejudice or material obtained from outside the courtroom.

The judge is responsible for the conduct of the trial by the parties. The judge may be required to make decisions on questions of law throughout the trial including whether evidence sought to be led by a party is relevant. The judge must ensure that the trial is fair and conducted in accordance with the law. The judge will give directions of law to the jury as to how they approach their task during their deliberations in a summing up before the jury commences its deliberations. The judge does not determine any facts, resolve any issues raised by the evidence or decide the verdict.

#### *Jury foreperson*

The jury foreperson is the representative or spokesperson for the jury. He or she can be chosen in any way the jury thinks appropriate. The main function of the foreperson is to deliver the verdict on behalf of the jury. Sometimes the jury chooses to communicate with the judge through a note from the foreperson. The foreperson has no greater importance or responsibility than any other member of the jury in its deliberations. The foreperson can be changed at any time.

#### *Onus and standard of proof*

The Crown has the obligation of proving the guilt of the accused based upon the evidence placed before the jury. This obligation continues throughout the whole of the trial. The accused is not required to prove any fact or to meet any argument or submission made by the Crown. The accused is to be presumed innocent of any wrongdoing until a jury finds his or her guilt proved by the evidence in accordance with the law.

The Crown has to prove the essential facts or elements that go to make up the charge alleged against the accused. Each of the essential facts must be proved beyond reasonable doubt before the accused can be found guilty. Suspicion cannot be the basis of a guilty verdict nor can a finding that the accused

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<sup>492</sup> Judicial Commission of New South Wales (n 336).

probably committed the offence. The accused must be given the benefit of any reasonable doubt arising about his or her guilt.

### ***No discussions outside jury room***

A juror should not discuss the case or any aspect of it with any person other than a fellow juror. Any discussion by the jury about the evidence or the law should be confined to the jury room and only when all jurors are present. This is because each member of the jury is entitled to know the views and opinions of every other member of the jury about the evidence and the law as the trial proceeds.

Any discussion with a person other than a juror risks the opinions of a person, who has not heard the evidence, who has not heard arguments or submissions by counsel or who may not understand the applicable law, influencing the jury's deliberations and perhaps ultimately the verdict given. The opinions of a person who is not a juror are not only irrelevant but they are unreliable as they may depend upon prejudice or ignorance.

### ***Duties of a juror to report irregularities***

It is the duty of a juror to bring to the attention of the judge any irregularity that has occurred because of the conduct of fellow jurors during the course of the trial. This should occur immediately the juror learns of the misconduct. The matters to be raised include:

- the fact that a juror has been discussing the matter with a person who is not a juror or making inquiries outside the jury room
- that a juror is refusing to participate in the jury's functions
- that a juror is not apparently able to comprehend the English language
- that a juror appears to lack the ability to be impartial.

### ***Criminal conduct by a juror during and after the trial***

1. It is a criminal offence for a juror to make any inquiry during the course of a trial for the purpose of obtaining information about the accused or any matters relevant to the trial. The offence is punishable by a maximum of 2 years imprisonment.

For this offence, 'making any inquiry' includes:

- asking a question of any person
- conducting any research including the use of the internet
- viewing or inspecting any place or object
- conducting an experiment
- causing another person to make an inquiry.

2. It is a criminal offence for a juror to disclose to persons other than fellow jury members any information about the jury's deliberations or how a juror or the jury formed any opinion or conclusion in relation to an issue arising in the trial, including any statements made, opinions expressed, arguments advanced or votes cast during the course of the jury's deliberations. The offence is punishable by a fine.

3. It is a criminal offence for a juror or former juror, for a reward, to disclose or offer to disclose to any person information about the jury's deliberations or how a juror or the jury formed any opinion or conclusion in relation to an issue arising in the trial, including any statements made, opinions expressed, arguments advanced or votes cast during the course of the jury's deliberations. The offence is punishable by a fine.

### ***Media reports***

Members of the jury should ignore any reports of the proceedings of the trial by the media. The report will obviously be a summary of the proceedings or some particular aspect of the evidence or arguments made by counsel. No importance should be attributed to that part of the evidence or any argument

made simply because it happens to be reported in the media. Sometimes the material reported will be taken out of the context of the trial as a whole and may not be fair or accurate.

**[1-535] Written directions**

Section 55 of the Act provides that a direction in law may be given in writing. Such a direction can be given at any stage in the trial: *R v Elomar* [2008] NSWSC 1442 at [27]–[30]. It is matter for the exercise of discretion as to whether and when to give written directions.

It is suggested that in an appropriate case written directions on the elements of the offences and available verdicts and any other relevant matter be given to the jury before counsel address but with a short oral explanation of the directions.

Any document can be provided to the jury with the consent of counsel, such as a chronology, or a ‘road-map’ to aid the jury in understanding the evidence, especially in complicated factual matters: see *R v Elomar*, above, as an example.

## Appendix F

*Excerpts from the NSW Judicial Commission's 'Criminal Trial Courts Bench Book'*<sup>493</sup>

### [1-515] Suggested direction following discharge of juror

In criminal trials, justice must not only be done, but it must appear to be done. That means that nothing should be allowed to happen which might cause any concern or give the appearance that the case is not being tried with complete fairness and impartiality. Because of this great concern which the law has about the appearance of justice, even the most innocent of misadventures, such as a juror talking to someone who, as it turns out, is a potential witness in the case or is associated in some way with the prosecution or any one in the defence, can make it necessary for the whole jury to be discharged.

Fortunately, what has happened in the present case does not make it necessary for me to do that. It suffices that I have discharged as members of the jury the ... [*give number: for example, two*] person(s) who, no doubt, you have noticed are no longer with you. In fairness to [*this/these*] person(s), I should indicate that no personal blameworthiness of any sort attaches to them. Nevertheless, the appearance of justice being done must be maintained. What now will happen is that the trial will continue with the ... [*give number: for example, 10*] of you who remain, constituting the jury. [*It will be necessary, of course, for you to choose a new foreperson.*]

It is very easy for misadventures to occur. But I do ask you to please be careful to use your common sense and discretion to avoid any situation that might give rise to some concern as to the impartiality of the remaining members of the jury.

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<sup>493</sup> Judicial Commission of New South Wales (n 336).